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Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases

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Abstract
So far, EU treaty law does not encapsulate any individually justiciable rights to a clean environment or to health. The article explores whether individuals can rely on the environmental duties embodied in the European Union Charter of Human Rights (EUCHR), and the European Convention on Human Rights (ECHR) in cases falling within the scope of EU environmental law. Moreover, it takes a close examination of the case law of both the Court of Justice of the European Union and the European Court of Human Rights regarding the standing of individuals whose environment is impaired.

Keywords
right to a clean environment; right to health; European Union Charter of Human Rights (EUCHR); EU environmental law; private enforcement of environmental law; access to justice; European Convention of Human Rights (ECHR); right to private and family life and the home; precautionary principle

1. Introduction

Though human rights and environmental law have developed in parallel, these subjects intersect with increasing frequency.[2] Indeed, the quality of the human environment goes hand in hand with basic human rights. What is more, human rights are at the centre of sustainable development, a core objective pursued by the EU in accordance with Article 3(3) of the Treaty on the European Union

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[2)] As Judge Weeramantry of the ICJ has stressed: "The protection of the environment is … a vital part of contemporary human rights doctrine, for it is [an indispensable requirement] … for numerous human rights such as he right to health and the right to life itself." *Gabčikovo-Nagymaros Project* (*Hungary* v. *Slovakia*) [1997] *I. V. J. Reports* 492 (Separate Opinion of Judge Weeramantry, at para. A(b)).

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(TEU). In addition to national constitutions providing for a state duty to preserve the environment or proclaiming a substantive right to the environment, both the European Union Charter of Human Rights (EUCHR) and the European Convention of Human Rights (ECHR) expressly or implicitly provide for various duties to protect the environment.

Although it was not mentioned in the 1957 Treaty of Rome, environmental concerns have, through the various treaty reforms, gradually been able to establish themselves as one of the greatest values enshrined in the treaties. Attention should be drawn to the fact that Article 3(3) of the Treaty of the European Union and Articles 11, 114(3), 191 to 193 of the Treaty on the Functioning of the European Union (TFEU) are dedicated to environmental issues. Driven by the fear of a disintegration of the internal market, concerns over portraying a less mercantile image of the EU, as well as the intention to safeguard ecosystems and species under threat, a European environmental policy has thus gradually emerged. Starting from a range of action programmes, EU secondary environmental law has progressively grown from a sparse set of directives to a vast body of regulatory measures aiming both to regulate the main forms of pollution as well as to protect the main ecosystems along with some of their composite elements. Today it is possible to count more than 300 EU regulatory measures, that is around 8 per cent of EU law.[3] Several EU agencies, 27 Member States, 3 EFTA States, hundreds of Regions and Länder, and thousands of municipalities now implement EU secondary environmental law through a complex web of regulations that affect virtually every aspect of our lives.

Thanks to EU environmental law, much has been achieved over these last 30 years: ban on lead in petroleum products, phasing out ozone depleting substances, reduction of nitrogen oxide emissions from road transport, improvement of waste water treatment, improvement of some aspects of air quality, increase of the number of protected species and habitats thanks to the Natura 2000 network.[4] These significant progresses demonstrate the key role played by environmental policy and law.

That said, the EU legal system is far from being perfect. Although numerous constitutions of the EU Member States enshrine a constitutional right to environmental protection,[5] treaty law did not contain a list of fundamental rights not to speak of a right over the environment until the Treaty of Lisbon came into

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3) L. Krämer, 'Thirty Years of EC Environmental Law: Perspectives and Prospectives', 2 *Yearbook European Environmental Law* (2002) p. 160.

4) European Environmental Agency, *The European Environment. State and Outlook* (Copenhagen, 2005), p. 19.

5) Most of the Member States' constitutions proclaim environmental protection as a fundamental subjective right. What is more, the assertion of a fundamental right is associated with a positive obligation: Belgian Constitution, Article 23; French Constitutional Chart of the Environment, Article 1; 1975 Greek Constitution, Article 24; Hungary, Article 18; Poland, Article 5; 1975 Portuguese Constitution, Article 66; Romania, Article35(1)(2); Slovakia, Article 44(1) and (4);

force in December 2009. Initially being heavily characterised by its economic objective, the EU legal order was constructed around a series of fundamental freedoms – freedom of movement of goods, services, persons and capital, freedom of competition – which may conflict with fundamental rights such as the freedom of expression[6] or the right to judicial protection. In many respects, the market integration rationale still dominates the 'genetic code' of ancillary policies, such as social and environmental policies.[7] As far as environmental issues are concerned, in contrast to undertakings which may rely on the economic "fundamental principles"[8] enshrined in the TFEU before their national courts, individuals are not in a position to invoke the provisions of treaty law dedicated to the protection of the environment.[9]

Given that the EU environmental law and policy are still facing a daunting agenda of unfinished business as well as a swathe of new challenges, the question arises as to whether individuals could rely on the implicit and explicit environmental duties embodied in the EUCHR and the ECHR in cases falling within the scope of EU law. In other words, in spite of the absence of individually justiciable rights to a clean environment in treaty law, should EU as well as national courts take into consideration EUCHR and ECHR obligations while adjudicating environmental cases?

The discussion in this article will be structured in the following manner.

Section 2 will provide an in-depth analysis of Article 37 EUCFR. Given that environmental policy is closely linked to health and consumers issues, we shall take into account similar provisions of the Charter related to health care and consumers' policies. First, the TFEU is testament to the fact that the EU environmental and health policies end up becoming entangled with one another.

Slovenia, Article 72; 1978 Spanish Constitution, Article 45; Swedish Constitution, Article 2(2). Under other constitutions that are not mentioning the existence of an individual right, the state is under a duty to adopt measures to protect the environment : Bulgarian Constitution, Articles 15 and 25; Estonia, Article 34; Finland, Article 20; Germany, Article 20; Italia, Article 117; Luxemburg, Article 11*bis*; Lithuania, Article 53; Letonia, Article 115; Dutch Constitution, Article 21; Czech Constitution, Article 7.

6) Case C-112/02 *Schmidberger* [2003] ECR I-5659.

7) M. Poiares Maduro, 'The Double Constitutional Life of the Charter of Fundamental Rights of the EU', in T. Hervey and J. Kenner (eds.), *Economic and Social Rights under the EU Charter of Fundamental Rights* (Oxford, Hart Publishing, 2003) p. 285.

8) The ECJ has defined the TFEU free movement provisions as "fundamental freedoms". *See* Case C-112/02 *Schmidberger* [2003] ECR I-5659, para. 51; and Case C-320/03 *Commission* v. *Austria* [2005] ECR I-9871, para. 63.

9) Entirely devoted to the environment, Title XX of the TFEU, which includes Articles 191 to 193 does not limit itself to confirming the EU's competence in environmental matters: it sets out goals, states principles, establishes criteria, defines international intervention. With respect to Article 191 TFEU, the ECJ judged in the *Peralta* case that that provision "confines itself to defining the general objectives of the Community in environmental matters. The responsibility for deciding upon the action to be taken is entrusted to the Council by Article 130s (new Article 192 TFEU)." Case C-379/92, *Peralta* [1994] ECR I-3453, para. 58. As a result, claimants cannot invoke the direct effect of that treaty provision.

Pursuant to Article 191(1) TFEU, environmental policy pursues different objectives, among which is the protection of human health.[10] Moreover, Article 114(3) TFEU is placing on equal footing environmental and health requirements in the functioning of the internal market. As a matter of fact, health-related problems today are no longer confined to the discreet surroundings of medical surgeries or hospitals; they also manifest themselves in the control of foodstuffs, health crises, air and water pollution, and waste management. Indeed, it is known that increases in pollution contribute to the worsening of health problems. Second, environmental protection is also linked to some extent to the consumer policy. The fact that the objective of sustainable development pursued at EU level in virtue of Article 3(3) TEU encourages EU institutions to place more emphasis on sustainable consumption reflects that trend.[11]

Given that there is an absence of directly applicable rules of primary law concerning environmental protection, it is a matter for the EU legislature to organise the protection of individuals, where appropriate, by way of sufficiently clear and precise provisions which may be directly applicable. Accordingly, section 3 will be dedicated to the issue of access to justice with respect to the implementation of EU environmental law.

Finally, the last section will explore how the ECHR could improve the implementation of EU environmental law.

2. Legal Status of Articles 35, Second Sentence, 37 and 38 EUCHR

2.1. Introductory Remarks

Since the entry into force of the Lisbon Treaty, the Charter of Fundamental Rights of the European Union of 7 December 2000 is endowed with binding

[10] The fact that environmental policy takes account of health protection raises the problem of its delineation with regard to other EU policies, given that health, alongside the environment, is a cross-cutting concern permeating in virtue of Article 168(1) TFUE and Article 35 EUCHR all other EU policies. Moreover, there are significant differences between the environmental and the health policies. First, it may be noted that on an institutional level the framers of the EC Treaty and later of the TFEU did not put environmental policy on an equal footing with health policy. In fact, the means of action differ substantially on an institutional level. On one hand, pursuant to Article 4(2)(e)–(k) TFEU, both competences as regard health aspects of the environmental policy and the "common safety concerns in public health matters" are shared. On the other, the genuine "protection and improvement of human health" is deemed to be a complementary competence in virtue of Article 6(a) TFEU. Moreover, this imbalance is accentuated where there is a need to create exceptions to rules harmonising the internal market, as new measures may be taken pursuant to Article 114(5) TFEU in order to curb an environmental risk, but not a strictly health-related concern. *See* N. de Sadeleer, 'Procedures for Derogations from the Principle of Approximation of Laws under Article 95 EC', 40 *Common Market Law Review* (2003) pp. 889–915.

[11] Communication from the Commission of 25 June 2008 on the 'Sustainable Consumption and Production and Sustainable Industrial Policy Action Plan' (COM (2008) 397 final).

authority. In virtue of Article 6(1) TEU, "the Union recognises the rights, freedoms and principles set out in the Charter … which shall have the same legal value as the treaties".

Unlike most of the other Charter provisions, Article 35, second sentence, Article 37 as well as Article 38 EUCHR – provisions dedicated to the protection of the environment, consumer protection and health care – are known to be the *parents pauvres* of the Charter[12] on the account that they are drafted as policy statements rather than as individual rights. No wonder that scant attention has been paid hitherto to their legal status.

As far as environmental protection is concerned, Article 37 EUCHR reads as follows: "A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development." That provision stands alongside the provisions of the same type in the area of consumer protection and health care. Whereas Article 35, first sentence embodies an individual entitlement to health care,[13] the second sentence of that provision is worded as follows: "[A] high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities." In much the same vein, Article 38 EUCHR states that "Union policies shall ensure a high level of consumer protection".

The wording of these three provisions calls for some clarifications as regard both their personal and material scope of ambit.

2.2. Material Scope: Rights or Principles?

As regards the material scope of Article 35, second sentence, Article 37 and Article 38 EUCHR, account must be taken to the fact that the Charter draws a distinction between rights and principles. However, the dividing line between these two concepts is a fine one.[14]

On one hand, several EUCHR provisions clearly embody rights.[15] For instance, Article 31(1) relating to working conditions states that "every worker has the

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12) A. Kiss, 'Environmental and Consumer Protection', in S. Peers and A. Ward (eds.), *The European Union Charter of Fundamental Rights* (Oxford, Hart, 2004) p. 247.

13) The rights of access to preventive health care and the right to benefit from medical treatment are deemed to be "far too general". As a result, Article 35, first sentence EUCHR "does not enshrine an individual right that could be invoked before the Court of HR". *E.g.* Network of Independent Experts on Fundamental Rights, *Commentary on the Charter of Fundamental Rights of the EU*, June 2006, 308. *See also* T. Hervey, 'The "Right to Health" in European Union Law', in Peers and Ward, *ibid.*, p. 202.

14) C. Hilson, 'Rights and Principles in EU Law: A Distinction without Foundation?', 15:2 *Maastricht Journal of European and Comparative Law* (2008) pp. 193–215.

15) *See in particular* Articles 2(1), 3(1), 6, 7, 8(1), 10(1), 11(1), 12(1), 14(1), 15(1), (2), 17(1), 24(1), 28, 29, 30, 31(1), (2), 33 (2), 35, first sentence, 39(1), 40, 41(1)–(3), 42, 43, 44, 45 and 47 EUCHR.

right to working conditions which respect his or her health, safety and dignity" whereas Article 35, first sentence concerning health care policy stipulates that "everyone has the right of access to preventive health care …".

In sharp contrast to these provisions, Article 35, second sentence, Article 37 as well as Article 38 EUCHR only assert the requirement to integrate a "high level" of health, environmental and consumers' protection into the different EU policies and actions. Whilst they emphasise the importance of these three policies as an integral part of the various EU policies, these provisions merely reiterate the programmatic statements embodied in Articles 11,[16] 12,[17] and 168(1) TFEU.[18] In so doing, they take care not to specify any beneficiary of the EU policies. Accordingly, they do not lay down any right in the sense of an individual entitlement guaranteed to the victims of pollution,[19] the consumers or the patients.

Consequently, Article 35, second sentence, Article 37 as well as Article 38 EUCHR enshrine "principles", or programmatic requirements.[20] Hence, they are

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16) Article 11 TFUE requires that: "Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities, in particular with a view to promoting sustainable development." Also known as the principle of integration, this clause is called upon to play a key role, not only due to the fact that it makes it possible to avoid interferences and contradictions between competing policies, but also because it may enhance sustainable development in favouring the implementation of more global, more coherent and more effective policies. *See* M. Wessmaier, 'The Integration of Environmental Protection as General Rule for Interpretating Law', *Common Market Law Review* (2001) pp. 159–177; N. D'Hondt, *Integration of Environmental Protection into other European EU Policies. Legal Theory and Practice* (Europa Law Publishing, Groeningen, 2003); D. Grimmeaud, 'The Integration of Environmental Concerns into EC Policies: A Genuine Policy Development?', *EELR* (2000) pp. 207–218; W. Lafferty and E. Hovden, 'Environmental Policy Integration: Towards an Analytical Framework', 3 *Environmental Politic* (2003) pp. 1–22.

17) Article 12 TFEU also proclaims the cross-cutting nature of the consumers' interests. This provision runs as follow: "Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities." In addition, pursuant to Article 114(3) TFEU, the Commission's proposals which have as their object the establishment and functioning of the internal market must pursue a high level of protection, when they concern consumer protection.

18) Pursuant to Article 168(1) TFEU, "[a] high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities". Moreover, in virtue of Article 114(3) TFEU, the Commission's proposals which have as their object the establishment and functioning of the internal market must pursue a high level of protection, when they concern health protection.

19) The drafters of Article 37 came to grips with the scope of that provision. They decided to reiterate the treaty law obligations rather than to proclaim a genuine environmental right. In addition, the drafters have been discarding any references to procedural rights such as information and participatory rights (EU Network of Independent Experts on Fundamental Rights, *Commentary on the Charter of Fundamental Rights of the EU*, 2006, 315).

20) The explanations accompanying the Charter ascertain that Article 37 contains a principle. By the same token, the European Parliament underlined that Article 37 is "a political objective, and not a legally binding right". *See* European Parliament, *Freedom, Security and Justice: an Agenda for Europe*. According to EU Network of Independent Experts on Fundamental Rights' interpretations,

not in an equivalent position to other economic rights such as the freedom to conduct a business or the right to property that can be invoked directly.[21]

Warning should be given that little guidance has been provided as to the legal status of these principles. Article 52(5) EUCHR is the key provision to distinguish the scope of these principles from the EUCHR rights. That paragraph states that principles "may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law". As regards their legal effects, paragraph 2 stresses that the principles "shall be judicially cognisable only in the interpretation" of the measures enacted with a view to fleshing them out as well as "in the ruling on their legality". The lessons that can be drawn from Article 52(5) EUCHR are twofold.

On the one hand, the EUCHR principles cannot be invoked to oblige EU or Member States' authorities to adopt an environmental or a health measure when there is none.[22] Indeed, the explanations accompanying the Charter stress that the principles "do not … give rise to direct claims for positive action by the Union's institutions or Member States authorities". [23] In other words, the EUCHR principles cannot provide a basis for claims for new EU actions. It follows that Article 265 TFEU providing for an action for failure to act is inapplicable. In this respect, the Court of Justice's case law on the enforceability of EU environmental obligations stemming from directives is more favourable to the applicants than the EUCHR principles. As will be seen, the Court of Justice has held in *Janecek* that an individual can challenge before a court his national agency for failing to draw up an air pollution action plan for the area in which he lives. The air pollution plan was compulsory pursuant to an air pollution directive.

On the other hand, though the legal force of these principles is likely to be weaker[24] than some of the rights proclaimed by the EUCHR,[25] they are still "judicially cognisable". First, these principles are likely to come in the form of a

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Article 37 enshrines "a principle and not a right" (*ibid.*, 318). However, explanations accompanying the Charter do not shed light on the legal status of Articles 35, second sentence and Article 38 (Bureau of the Convention, *Explanations relating to the Charter*, 2000).

21) Articles 16 and 17 EUCHR.

22) Hilson, *supra* note 14, p. 200.

23) Pursuant to Article 6(1), para. 3 TEU "the rights, freedoms and principles in the Charter shall be interpreted … with due regard to the explanations referred to in the Charter".

24) Though the legal effects may be weak, they are nevertheless not absent. As regard Article 38 EUCHR, the EU Network of Independent Experts on Fundamental Rights is taking the view that "the courts cannot ignore such a provision". *See* EU Network of Independent Experts on Fundamental Rights, *Commentary on the Charter of Fundamental Rights of the EU* (2006), p. 315.

25) At national level, for instance, a general principle on health protection does not entail the same legal effects than a fundamental right to health. In order to differentiate a principle from a right, the following French administrative case is a good case in point. The French Council of State nullified a judgment handed down by a lower administrative court that ordered a penal administration to

principle of interpretation.[26] Accordingly, national and EU courts should interpret EU obligations consistently with these principles.[27]

Second, they are not effective *per se*. They require the adoption of implementing measures to become full-fledged. Accordingly, they become "judicially cognisable" where EU and national courts are called upon to review of legality of their implementing acts.[28] If follows that violations of Articles 35, 37 and 38 EUCHR may be invoked by privileged applicants within the context of proceedings for annulment pursuant to Article 263 TFEU.[29] In other words, courts may quash an EU or a national implementing measure on the grounds that it falls short of implementing these EUCHR principles.

2.3. Material Scope: The Intensity of the Review

Pursuant to Article 35, second sentence, Article 37 as well as Article 38 EUCHR, the EU and national institutions and bodies are being called upon to seek a high level of protection while carrying out their different actions and policies. These three provisions reiterate various requirements embodied in the TFEU. Pursuant to Article 3(3) TEU and Article 191 TFEU, the tasks of the EU include the requirement to attain a "high level of protection and improvement of the quality

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transfer a sick prisoner to another jail. The lower court took the view that the prisoner had to be removed in order to be less exposed to the impacts of tobacco consumption. The Council of State went on to say that the protection of human health was a constitutional principle ("*un principe de valeur constitutionnelle*") and not a fundamental freedom ("*une liberté fondamentale*") guaranteed by Article 521-2 of the French Administrative Justice Code. Accordingly, the Council of State concluded that the penal administration had taken every effective step to limit the prisoner's exposure to tobacco. Accordingly, though the administration decided to maintain the prisoner in his jail, the administration did not restrain illegally his fundamental freedom. The administration complied with the constitutional principle. C.E. Ord. Réf., 8 sept. 2005, n°284803, *Garde des sceaux c/ Bunel*, 38 *La semaine juridique* (2005) p.1671.

[26] Reasoning by analogy, it must be noted that Article 11 TFEU – a provision that encapsulates the environmental integration clause – operates as an interpretative principle. *See* Case C-94/03, *Commission* v. *Council* [2006] ECR I-1, para. 26; Opinion AG Jacobs in Case C-379/98, *PreussenElektra* [2001] ECR I-2159, para. 232; Case C-320/03, *Commission* v. *Austria* [2005] ECR I-9871, para. 73 ; Case C-176/03, *Commission* v. *Council* [2005] ECR I-7879, para. 42; and Case T-375/03, *Fachvereinigung Mineralfaserindustrie* [2007] ECR II-121, para. 143.

[27] T. Hervey and J.V. McHale, *Health Law and the European Union* (Cambridge, CUP, 2004) p. 409.

[28] As regard the "justiciability" of the principle enshrined in Article 37, the Charter's drafters took the view that such a provision could be invoked inasmuch as it was fleshed out into more concrete measures adopted either by the EU institutions either by the national authorities. See EU Network of Independent Experts on Fundamental Rights, *supra* note 24, p. 315.

[29] According to the EU Network of Independent Experts on Fundamental Rights' interpretations, given that environmental requirements have to be integrated into the other EU policies, even a measure adopted upon Article 114 TFUE could be criticised for failing to seek a high level of environmental protection (EU Network of Independent Experts on Fundamental Rights, *supra* note 24, p. 315).

of the environment". Public health and consumers' protection policies reiterate this qualitative requirement. In virtue of Article 168 (1) TFEU "a high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities" whereas pursuant to Article 169(1) TFEU, "[i]n order to promote the interests of consumers and to ensure a high level of consumer protection", the Union shall contribute to safeguard various consumers' interests. These Treaty provisions are classified in Table 1 according to the policies at stake.

Be it for patients, consumers or the environment, the requirement to attain a "high level of protection" has scarcely attracted any attention and has been the object of only a few commentaries in the academic literature. These obligations have often been classed under the category of declarations of intent, considered at best as policy principles devoid of any binding force,[30] or as a guarantee of legitimacy which is automatically placed on draft regulations. There is indeed a strong doctrinal resistance to the idea that the courts may control compliance with the requirement for a high level of protection. Indeed, it is argued that it is not a matter for the courts to interfere with the margin of appreciation which is naturally reserved to the EU institutions.[31] This is claimed to undermine the very idea of the separation of powers. Nonetheless, Advocate General Cosmas asserted in 1999 his idea that the level of protection in environmental matters is binding on the EU legislator when it acts on the basis of the old Article 130R of the EEC Treaty (Article 191 TFEU) since a Community rule that does not meet "that

Table 1. Treaty Provisions Encapsulating the Obligation to Seek a High Level of Protection

VALUES	TEU-TFEU PROVISIONS	CHARTER PROVISIONS
Environment	Articles 3(3) TEU; Articles 114 (3), 191 TFEU	Article 37 EUCHR
Health	Articles 114(3) and 168 TFEU	Article 35 EUCHR
Consumers	Articles 114(3) and 169 TFEU	Article 38 EUCHR

30) However, in *Safety Hi-Tech*, the Court of Justice has held that when adopting the prohibition on the use and marketing of Hydrochlorofluorocarbons, "the Community legislature did not infringe the requirement of a high level of protection laid down in Article 130r(2) EC [Article 191(2) TFEU] since no manifest error of assessment had been committed when determining the level of protection". *See* Case C-341/95 *Safety Hi-Tech* [1998] ECR I-4355, para. 53.

31) Accordingly, the obligation to improve living and working standards which is incumbent upon the Member States in the area of social protection has been interpreted as being of a general and policy nature. Case C-126/86 *Gimenez-Zaera* [1987] ECR 3697, and Case C-72/91 *Sloman-Neptune* [1993] ECR I-887.

qualitative criterion" could be annulled.[32] What is more, account must be taken of new case law developments where the Court of Justice quashed European Commission measures that were departing from the obligation to seek a high level of environmental protection.[33]

Last, Article 37 in particular calls for further observations. By providing for a relatively fuzzy objective, such as the quest for a high level of environmental protection and the improvement of its quality, that provision is limited to requiring the public authorities to take action, specifying however that such action calls for the integration of environmental requirements into all Union policies according to the model of the "principle of sustainable development".[34] Accordingly, sustainable development is raised to a principle conditioning the policy of the integration of environmental concerns.[35] This requirement may be surprising: sustainable development has precisely the effect of undermining the scope of public authorities' initiatives, since it implicitly calls for environmental requirements to be weighed up against social and economic interests.[36]

2.4. Personal Scope

Pursuant to Article 51(1) of the Charter, the principles embodied in Article 35, second sentence, Article 37 as well as Article 38 should be implemented by the "institutions and bodies"[37] responsible for the "policies of the Union" "with due regard to the principle of subsidiarity". In other words, these three EUCHR provisions impose obligations incumbent upon the EU institutions and agencies, which are the only bodies entitled to assess the scope and nature of their initiatives.

That said, it must be remembered that, pursuant to Article 51(1)(5), the Charter also "binds" the Member States "when they are implementing Union law". It follows that where the Member States implement EU law, be it internal market law or common agricultural policy (CAP) law, they are subject to the principles set out in the EUCHR. Since the core of national environmental

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32) Opinion of 30 September 1999 in Case C-318/98 *Fornasar* (2000) ECR I-4788, para. 32.

33) Case T-229/04 *Sweden* v. *Commission* [2007] ECR II-2437, paras. 161 and 224; Cases C-14 and 295/06 *Parliament and Denmark* v. *Commission (décaBDE)* [2008] ECR I-1649, paras. 74 and 75.

34) One could argue that sustainable development amounts at most to a solidarity right.

35) Whereas Article 11 TFEU holds that the integration must be implemented "with a view to promoting sustainable development", Article 37 EUCHR requires to integrate environmental concerns "in accordance with the principle of sustainable development".

36) In virtue of Article 3(3) TEU, the "high level of protection and improvement of the quality of the environment" now has the same status as the objective, for example, of "economic growth and price stability" (economic pillar) as well as with that of "full employment and social progress" (social pillar of sustainable development). Though few authorities will contend with the proposition that development should be sustainable, they might disagree on how to flesh out this proposition in individual cases.

37) The French version of Article 21(1) of the Charter adds the concept of "*organismes*".

policy is grounded on the provisions of secondary law,[38] Article 37 is therefore likely to impact upon large parts of environmental law on a national level. That still begs the question as to whether the national measure at issue falls within the scope of EU law. By way of illustration, the Court of Justice recently held that a municipal land planning development scheme was falling outside the scope of ambit of EU law. As a result, EUCHR provisions were inapplicable.[39]

3. Private Enforcement of EU Environmental Law

3.1. The Expansion of Procedural Rights

As discussed above, in the absence of any possibility to rely on a true EU constitutional right to environmental protection, individual rights may emerge pursuant to Article 52(5) EUCHR through the intermediation of EU secondary law. Although EU secondary environmental law does not encapsulate hitherto a substantive right of individuals to a clean environment, a number of provisions of environmental directives provide propitious breeding grounds for procedural rights. Instead of vague principles, individuals may thus invoke a series of procedural rights, in particular those which guarantee the implementation of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters that was adopted on 25th June 1998 in Århus (Århus Convention).[40] In short, that Convention obliges the contracting parties to implement information, participation and litigation rights for individuals and environmental non-governmental organisations (NGOs). Access to justice is linked to the participatory and information rights. Though the focus of this Convention is strictly procedural in content,[41] one can expect that it will influence on the case law of both the EU courts and the European Court of Human Rights (ECtHR).[42]

At EU level, significant legislative developments took place after the entry into force of the Århus Convention, in particular with a view to expanding litigation rights. As a result, in accordance with several environmental directives,

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38) *See* the discussion in section 4. As almost 8 per cent of EU legislation is dedicated to the protection of the environment, this body of legislation has over time become relatively substantial, and national experts estimate that almost 80 per cent of their environmental law is in one way or another shaped by EU obligations. *See* Communication of the Commission on the mid-term review of the Sixth Community Environmental Programme, COM (2007)225 final, 3.

39) Case C-339/10 *Estov Ivanova ad Kemko International EAD* [2010], nyr.

40) In this respect, the EU as well as all its Member States are parties to the Århus Convention.

41) P. Birinie, A. Boyle and C. Redgwell, *International Law & the Environment*, 3rd ed. (OUP, Oxord, 2009) p. 274.

42) M. Pallemaerts (ed.), *The Aarhus Convention at Ten; Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing, Groeningen, 2009).

individuals may invoke environmental requirements before their national courts. An egregious example would be the directive on freedom of access to environmental information that confers a right to access "to any applicant".[43] This directive also holds, in Article 6, that the applicants may introduce an administrative or judicial procedure against the acts or omissions of the public authority. To name another example, the purpose of Article 10a of the Environmental Impact Assessment (EIA) Directive is to incorporate Article 9(2) of the Århus Convention into EU law.[44] Relatedly, pursuant to Directive 2004/35/EC on environmental liability,[45] interested third parties may institute a review procedure against an administration which failed to enact the preventive or remedial measures against an environmental damage. What is more, the EU lawmaker has improved the standing of non-governmental organisations acting in favour of the protection of the environment, whose key role has been recognised both in the ECJ[46] and the ECtHR case law.[47] Those various obligations must be interpreted in the light of, and having regard to, the objectives of the Århus Convention.[48]

This Convention already influences the case law of both EU courts and the ECtHR.[49] For instance, Article 9(2)[50] and 2(5) of this Convention oppose a

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43) Article 3(1) of 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 [2003] OJ *L 41/26.*

44) With respect to EIAs, Article 10a requires Member States to grant standing either (a) to bodies which have a sufficient interest, or (b) to those which "are maintaining the impairment of a right".

45) [2004] OJ *L 143/56.*

46) Directive 2003/35 which has given effect in the EU legal order to the Århus Convention makes particular reference to the role of non-governmental organisations promoting environmental protection. In AG E. Sharpston's views , "the Aarhus Convention and Directive 85/337, as amended by Directive 2003/35, have deliberately chosen to reinforce the role of non-governmental organisations promoting environmental protection. They have done so in the belief that such organisations' involvement in both the administrative and the judicial stages not only strengthens the decisions taken by the authorities but also makes procedures designed to prevent environmental damage work better." *See* Opinion of AG Sharpston in Case C–263/08 *Djurgården-Lilla Värtans Miljöskyddsförening* [2009] paras. 40, 61 and 64.

47) With respect to Article 6(1) ECHR, the ECtHR held that "les ONG jouent un rôle important, notamment en défendant certaines causes devant les autorités ou les juridictions internes, particulièrement dans le domaine de la protection de l'environnement" (text only available in French). Case *Collectif national d'information et d'opposition à l'usine Melox – Collectif stop Melox and Mox v. France*, 28 March 2006.

48) Case C-115/09 *Trianel Kohlekraftwerk Lünen* [2011], para. 41.

49) M. Pallemaerts (ed.), *The Aarhus Convention at Ten; Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing, Groeningen, 2009).

50) Article 9(2) obliges the contracting parties to ensure, within the framework of their national legislation, that members of the public concerned who satisfy specified criteria have access to a review procedure to challenge the substantial and procedural legality of any decision, act or omission subject to Article 6 of the Convention, a provision addressing public participation in decision-making procedures.

narrow interpretation of standing before national courts.[51] What is more, though Article 9(3)[52] is deprived of direct effect, the national courts are called on to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of that provision and the objective of effective judicial protection of the rights conferred by EU law, so as to enable an environmental protection organisation to challenge before them a decision liable to be contrary to EU environmental law.[53]

Nonetheless, a general right to standing for the purpose of enforcing environmental law is still missing.

Although a complete discussion on all the procedural rights encapsulated in that international agreement as well as in EU secondary law is beyond the scope of this paper, it is nevertheless possible to give careful consideration to standing. Indeed, the recognition of a substantive right to a clean environment would be of limited value, if the beneficiaries had no possibility to invoke this right before their national courts.[54]

3.2. Standing of Individuals and Environmental NGOs in National Courts

Should enforcement of environmental law be left entirely in the hands of national authorities? The answer to that question is clearly negative. Given that environmental law suffers from a lack of enforcement, suits lodged by citizens dissatisfied with national agencies' inaction are of utmost importance. First, there is little point in granting participation rights in decision-making unless they can be enforced in courts. Second, the fact of not conferring rights on third parties to challenge the inadequate compliance by national administrations of EU environmental law is likely to weaken that body of law. As stressed by Hilson, "if there are no rights enjoyed by citizens under a particular directive, the enforcement armoury is lessened".[55] Hence, private enforcement where individuals availing themselves of their rights to a clean environment are accorded to initiate proceedings would enhance a weak public enforcement.

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51) CEb, n°193593, 28 May 2009, *Vzw Milieufront Omer Wattez*.

52) Article 9(3) places an additional obligation on each contracting party to ensure that members of the public meeting the criteria laid down in national law have access to administrative or judicial procedures to challenge acts or omissions by public authorities which contravene provisions of national law relating to the environment. However, this paragraph has not yet been incorporated into EU law. *See* Case C-240/09 *Lesoochranárske zoskupenie* [2011].

53) Case C-240/09 *Lesoochranárske zoskupenie* [2011], para. 51.

54) E. Enamorca, 'Division of Competence between Member States and the EC', in J. Jans (ed.), *The European Convention and the Future of European Environmental Law* (Europa Law Publishing, Groeningen, 2003) p. 30.

55) C. Hilson, 'Community Rights in Environmental Law: Rhetoric or Reality?', in J. Holder (ed.), *The Impact of EC Environmental Law in the UK* (Wiley & Sons, Chichester, 1994) p. 58.

In spite of these legislative improvements resulting from the implementation of the Århus Convention in EU law, the Member States retain much leeway in tailoring the standing requirements in accordance with the principle of procedural autonomy.[56] Indeed, in the absence of harmonisation, procedural law remains the domain of Member States. As a result, proceedings initiated by private individuals and environmental NGOs to the national courts have not been successful. In fact, restrictions imposed on the interest to sue, the duration of court proceedings and the financial risk to which applicants expose themselves create obstacles to the invocation of the EU law provision incorrectly transposed before the national courts.[57] The interest to sue is in particular subject to the rider that the majority of environmental rules on an EU level have less the goal of creating procedural rights than of putting in place procedures which enable the national administrations to reconcile environmental protection with economic development.

The upshot of these difficulties is that the weak enforcement of EU environmental law is deemed to be one of the main weaknesses of environmental protection within the EU.[58] Accordingly, the majority of the environmental directives appear as paper tigers due to the hesitancy, or even bad faith, on the part of certain national authorities and the difficulties encountered by the Commission in pursuing infringements before the Court of Justice.[59]

3.3. The Court of Justice's Case Law on Access to Justice as Regards the Private Enforcement of EU Environmental Standards

Given the number of hurdles applicants have to overcome at national level, the question arises as to whether the Member States' procedural autonomy as regards standing in environmental issues is likely to be undermined by the principle of effective judicial protection and the *effet utile*.

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56) This principle is subject to two limitations. On one hand, in accordance with the principle of non-discrimination, the national rules applying for legal proceedings based on EU law may not be less favourable than those which apply in purely national cases. On the other, in accordance with the principle of effectiveness, the exercise of rights granted by EU law "may not be rendered almost impossible or excessively difficult". *See* Case C-33/76 *Rewe* v. *Comet* [1976] ECR I-1523, para. 5; Case 45/76 *Comet* [1976] ECR 2043, para. 14; Case 68/79 *Hans Just* [1980] ECR 501, para. 25; and Case 199/82 *San Giorgio*[1983] ECR 3595, para .14.

57) N. de Sadeleer, G. Roller and M. Dross, *Access to Justice in Environmental Matters and the Role of NGOs; Empirical Findings and Legal Appraisal* (Europa Law Publishing, Groeningen, 2005) 7; J. Ebbesson (ed.) *Access to Justice in Environmental Matters in the EU* (Kluwer Law Intl., The Hague, 2002).

58) Brief mention should be made of the fact that the situation has been worsening with the accession in 2004 and 2007 of a number of new Member States that are lacking sufficient resources to enforce environmental law.

59) P. Wennerås, *The Enforcement of EC Environmental Law* (OUP, Oxford, 2007) pp. 251–308.

To answer this question calls for a closer analysis of the *Rewe/Comet* case,[60] where the Court of Justice drew a dividing line between:

- On the one hand, where [EU] law confers personal or individual rights on individuals, the national courts are called upon to protect these rights in virtue of the principle of cooperation (former Article 10 EC; new Article 4(3) TEU). Accordingly, these individuals can rely on their rights in national courts.
- On the other, in the absence of [EU] rules on the matter, it is "for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural rights which citizens have from the direct effect of [EU] law".[61] It follows that anyone who has an interest in a controversy involving the application of EU law should not have standing unless national law so provides.

Therefore, one could be tempted to distinguish between the environmental directives that expressly grant rights to citizens and those that do not explicitly confer such rights. It is in this context important to stress that in spite of a few procedural directives, the majority of EU environmental regulatory measures do not confer rights on citizens. One could therefore argue that despite the fact that nature protection NGOs have a genuine interest in the correct enforcement of EU wildlife law, the national lawmaker is not required to confer on them enforceable litigation rights. This reasoning is based on the assumption that the nature conservation directives do not confer any rights neither on humans nor on wild species. That said, nothing precludes the national lawmaker to grant standing to the nature protection NGOs.

However, as will be discussed, the principle of procedural autonomy according to the *Rewe/Comet* case is far from being absolute. According to the Court of Justice case law, secondary law obligations can be construed as conferring rights on individuals. Moreover, though they are not conferring any rights to individuals, some provisions are also likely to oppose contrary national law. Broadly speaking, the following cases reflect a shift toward emphasising judicial remedies in the field of environmental protection.

The discussion in this section will be structured in the following manner. First, we will start by considering directives focusing on the improvement of the quality of the environment. Second, we shall move on to directives enshrining procedural rights. Last, we shall address the particularities of directives on nature protection.

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60) Case C-33/76 *Rewe* v. *Comet* [1976] ECR I-1523.
61) *Ibid.*

3.3.1. Directives Embracing Health Protection

Do citizens of the Union enjoy a right to a clean environment in accordance with standards set out in various technical directives? The Court of Justice has accepted that when directives in the area of environmental protection oblige Member States to comply with quality standards aiming at improving the health of individuals, the latter may rely on them before their national courts. This theory was developed in cases concerning directives imposing the respect of air and quality values.[62] In fact, these directives confer indirectly on citizens personal rights as regards their health. In particular, the Court took the view that "whenever the exceeding of limit values could endanger human health, the 'persons concerned' must be in a position to rely upon the EU mandatory thresholds in order to ascertain their rights".[63] It follows that such directives, though they are not sufficiently precise and unconditional to exhibit direct effect, had to be implemented in such a way that "individuals can rely on their provisions before national courts". Indeed, as stressed by the Court, "where the directive is intended to create rights for individuals the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before their national courts".[64] In other words, they had to be implemented by legislations rather than administrative guidelines in a manner that is sufficiently binding. Only if the directives are implemented that way can citizens avail themselves of environmental protection rights in national courts.

Thus, in *Janecek*, the Court of Justice underscored that the persons "directly concerned by a risk that the limit values or alert thresholds may be exceeded" have the right to rely, before their national courts, on the obligation to ensure the respect of those standards, which amounts to oblige the latter to dismiss a restrictive interpretation of the *locus standi*.[65] In particular, the Court stressed that the directive at issue was tailored to control and reduce air pollution and thus to protect "public health".[66] It follows that national law must guarantee an effective

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62) Case C-131/88 *Commission* v. *Germany* [1991] ECR I-825; Case C-361/88 *Commission* v. *Germany* [1991] ECR I-2567, para. 16; Case C-58/89 *Commission* v. *Germany* [1991] ECR I-4983, para. 14; Case C-59/89 *Commission* v. *Germany* [1991] ECR I-2607; and Case C-237/07 *Janecek* [2008] ECR I-6221, para. 37. *See* S. Prechal and L. Hancher, 'Individual Environmental Rights: Conceptual Pollution in EU Environmental Law', 2 *Yearbook European Environmental Law* (2002) pp. 89–115.

63) Case C-361/88 *Commission* v. *Germany* [1991] ECR I-2567, para. 16

64) *Ibid.*, para. 15.

65) *Janecek*, *supra* note 62, para. 39. *See* J. Jans, 'Harmonization of National Procedural Law via the Back Door? Preliminary Comments on the ECJ's Judgment in Janecek in a Comparative Context', in M. Bulterman *et al.* (eds.), *Views of European Law from the Mountain* (Kluwer Law Intl., The Hague, 2009) pp. 273–274.

66) The concept of "public health" is distinct from the concept of "human health" mentioned in Article 191(1) TEU. *See* L. Krämer, 'Note under Case C-237/07 *Janececk*', 5:3–4 *Journal of European Environmental and Planning Law* (2008) pp. 400–401.

judicial protection to persons whose health might be affected by the wrong application of EU environmental law. Where national authorities are not abiding by EU protective obligations, these individuals are entitled to rely on harmonised EU imperative standards.

It is, however, necessary to consider the presumption that the creation of such rights will be an exception. In fact, it is rare for environmental directives to confer rights regarding a clean environment on individuals or associations of individuals. For example, rules which provide for the communication of national reports to the European Commission do not give rise to any rights.[67]

Account must also be taken of the fact that the rights conferred by the Court of Justice in the cases commented above are anthropocentric in focus. It follows that only those "whose health may be affected enjoy personal rights under these directives".[68]

Last but not least, the Court of Justice's case law has been circumvented by new legislative developments. Indeed, the EU lawmaker has been recently carving out quality standards in such a way that "their enforcement by private persons and bodies become impossible".[69]

3.3.2. Directives Enshrining Procedural Rights

Conferring rights to persons likely to be affected by illegal pollution because of the unwillingness of state agencies to ensure compliance with EU harmonised standards does not go far enough. Given that environmental protection is much more than health impairment, an exclusive anthropocentric approach is not sufficient to address the major environmental problems. Therefore, the question arises as to whether the case law on air and water quality directives is likely to encompass directives that are not restricted to human health protection. In that respect the egregious directive on the assessment of the effects of certain public and private projects on the environment[70] (EIA Directive) clearly confers participatory and information rights on citizens, irrespective of health issues.

Since *Kraaijeveld,* it is settled case law, on the one hand, that the national authorities are not endowed with an unfettered margin of discretion when they select the projects submitted to an EIA and, on the other, that individuals may rely on the EIA Directive provisions before their national courts. In other words, even though EIA procedures provide the national authorities with some room to

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67) Case 380/87 *Enichem Base* [1989] ECR 2492, paras. 23 and 24.

68) Hilson, *supra* note 14, p. 56.

69) L. Krämer, 'Environmental Justice in the European Court of Justice', in J. Ebbesson and P. Okowa (eds.), *Environmental Law and Justice in Context* (CUP, Cambridge, 2009) p. 209.

70) Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment. Directive 85/337/EEC was amended by Directive 97/11/EEC of 3 March 1997 [1997] OJ L 73/5 and Directive 2003/35/EEC of 26 May 2003 [2003] OJ L 56/17.

manoeuvre, the national courts are nonetheless called upon to verify whether the authorities do not exceed the limits of their discretion. In so doing, the national courts are required to interpret national law "as far as possible" in conformity with the EU requirements. The Court's reasoning is based on the assumption that

> [p]articularly where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the effectiveness of such an act would be diminished if individuals were prevented from relying on it in legal proceedings and if national courts were prevented from taking it into consideration as a matter of Community law in determining whether the national legislature, in exercising its choice as to the form and methods for implementing the directive, had kept within the limits of its discretion set by the directive.[71]

Linster is a good illustration of proceedings in which the EIA Directive was relied on irrespective of the direct effect of the directive in question. In that case, the national court referred a question to the Court of Justice for a preliminary ruling to know whether it could verify the legality of a procedure for the expropriation in the public interest of immovable property belonging to a private individual taking into account of the EIA Directive which has not been fully transposed, notwithstanding the expiry of the time-limit laid down for that purpose. In particular, the national court begged the Court whether such a finding involved an appraisal of the direct effect of the Directive.

In his opinion in *Linster*, Advocate General Léger made clear that:

> [i]n such proceeding [juridical review of national measures] which are simultaneously 'vertical' and 'objective' (non-personal), in which the pleas put forward by a party against a public body do not seek directly to obtain recognition of an individual right, the question of direct effect tends to be eclipsed by that of primacy.[72]

Furthermore, the Advocate General stressed that "where the national court is faced with a provision which leaves Member States genuine discretion, it has the task, taking account of the objective being sought by the injured party, of verifying that the public body whose decision is being challenged has kept within the limits of the powers which it was left under the directive".[73] The Court did not bother to assess whether the directive at issue exhibits direct effect. It held that the

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[71] Case C-72/95 *Kraaijeveld and Others* v. *Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403; and Case C-435/97 *WWF and Others* v. *Autonome Provinz Bozen and Others* [1999] ECR I-5613, para. 69.

[72] Opinion of AG Léger in Case C–287/98 *Linster* [2000] ECR I-6917, para. 73. Such an interpretation was endorsed in similar cases by AG Elmer in Case C-72/95 *Kraaijeveld* [1996] ECR I-5403, paras. 69–72; and AG Kokott in Case C-127/02 *Waddenzee* [2004] ECR I-7405, para. 140.

[73] *Linster*, *ibid.*, para. 74.

discretion left to the Member State did not "preclude judicial review of the question whether it has been exceeded by the national authorities".[74]

Lastly, in *Christopher Mellor*, the Court held again that in spite of the margin of discretion left by the EIA Directive to the Member States, the national courts are nonetheless called upon to verify whether the authorities did not exceed the limits of their discretion.

"Third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority has actually determined, in accordance with the rules laid down by national law, that an EIA was or was not necessary". Furthermore, they

> must be able to ensure, if necessary through legal action, compliance with the competent authority's screening obligation. That requirement may be met … by the possibility of bringing an action directly against the determination [of the administration] not to carry out an EIA.[75]

It follows that the *locus standi* to challenge an alleged failure correctly to apply particular provisions of environmental legislation of persons interested or directly concerned by the projects subject to an EIA should not be made dependent upon showing a particular or specific link with human health.[76]

To sum up, in these different cases, the "approach of exclusion" of the national rule not implementing the EIA Directive has been prevailing over the "approach of substitution". Accordingly, the issue of private enforcement of EU environmental law is distinct from the recognition of subjective rights.[77] In so doing, the Court of Justice has been placing the emphasis on an "objective control of legality" ('*un recours objectif*'). In this context, one should talk about objective rights ('*droits objectifs*' in French or '*Objektives Recht*' in German) rather than subjective rights ('*droits subjectifs*' in French or '*Subjectives Recht*' in German).[78]

The justification for allowing individuals to rely on EU procedural obligations for the purposes of challenging the legality of national decisions rests on the principle of supremacy rather than the concept of direct effect. Subjective rights are not a precondition for supremacy of EU secondary law.

It follows that not only individuals affected by illegal projects but also interested parties can rely before their national courts on the provisions of the EIA

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74) *Ibid.*, para. 37.
75) Case C–75/08 *Christopher Mellor* [2009], paras. 57 and 58.
76) AG Sharpston Opinion in Case C-115/09 *Trianel Kohlekraftwerk Lünen* [2011], para. 39.
77) J.-V. Louis and T. Ronse, *L'ordre juridique européen* (Helbing & Lichtenhahn, Bruylant and LGDJ, Brussels, 2005) pp. 303–304. The line between the "objective of exclusion" and the "objective of substitution" is far from being theoretical. *See* Opinion of AG Léger in *Linster*, *supra* note 72, para. 78.
78) Attention should be drawn to the fact that both the Århus Convention and the directives implementing it encapsulate the objective legal protection regime as well as the subjective approach.

Directive. Accordingly, a broader interpretation of the concept of interested party should prevail over a narrow interpretation of standing requirements. This interpretation is completely in line with new case law developments regarding Article 10a of the EIA Directive.

In accordance with the Århus Convention which makes provision for an access to judicial proceedings in order to be able to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of its Article 6 (Article 9(2)), the EIA Directive makes provision in its Article 10a for a review procedure before a court of law beneficiating to the members of the public concerned, under the condition that they have a "sufficient interest", or alternatively, that they maintain the "impairment of a right".[79] Unlike natural or legal persons, non-governmental organisations promoting environmental protection always have the status of "the public concerned" provided that they comply with "any requirements under national law". Accordingly, the non-governmental organisations acting in favour of the protection of the environment are deemed, pursuant to Article 10(a), third intend, to "have an automatic right of access to justice".[80]

Though the EU lawmaker has clearly been giving litigation rights to specific categories of citizens, the vagueness of the terms of Article 10a confers some discretion to the Member States. In *Djurgården-Lilla Värtans Miljöskyddsförening*, the Court of Justice had to verify whether Sweden had exceeded that discretion. The Court found that this provision at least applies to "a provision of national law which reserves the right to bring an appeal against a decision on projects which fall within the scope of that directive solely to environmental protection associations which have at least 2000 members".[81] Accordingly, the members of the public concerned "must be able to have access to a review procedure to challenge the decision by which a body attached to a court of law of a Member State has given a ruling on a request for development consent, regardless of the role they might have played in the examination of that request".[82]

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79) As regard standing before national courts, both Article 9(2) of the Århus Convention and Article 10 a of the EIA directive (Directive 85/337, as amended by Directive 2003/35) expressly leave to the parties the decision to require either "a sufficient interest" typical of an or the demonstration of "an impairment of a right, where administrative procedural law of a Member State requires this as a precondition". What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. In other words, the national rules implementing the provision relating to the access to justice set out in the EIA Directive are of strict interpretation, since the Århus Convention's main objective is to widen standing. Moreover, according to Article 10(a), 5th indent, those procedures must "be fair, equitable, timely and not prohibitively expensive".

80) Opinion of AG Sharpston in *Djurgården-Lilla Värtans Miljöskyddsförening*, *supra* note 46, paras. 42 and 43.

81) *Ibid.*, para. 52.

82) *Ibid.*, para. 39.

Lastly, German administrative law sets out that an action challenging an administrative measure will be admissible only if the administrative measure affects the claimant's rights. In fact, infringement of environmental law primarily concerns the general public and not the protection of individual rights. As a result, environmental protection organisations aiming at protecting the general public have no standing. In *Trianel Kohlekraftwerk Lünen*, the Court went on to say that the German *Schutznorm* theory was at odds with Article 10a.[83]

3.3.3. Directives on Nature Protection

A final issue must be addressed. Directives on nature protection do not enshrine neither participatory nor litigation rights.[84] However, the absence of such rights did not prevent the Court of Justice to pave the way to improve legal remedies. In *Waddenzee*, the Court of Justice stressed that the effectiveness of secondary law would be undermined:

> In particular, where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of Community law in order to rule whether the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set out in the directive.[85]

More recently, in *Lesoochranárske zoskupenie*, the referring court asked whether an environmental protection association, where it wishes to challenge a decision to derogate from a system of full protection of a species of Community interest – the brown bear – put in place by the Habitats Directive may derive a right to bring proceedings under EU law, having regard, in particular, to the provisions of Article 9(3) of the Århus Convention. The Court of Justice held that Article 9(3) did not contain any clear and precise obligation capable of directly regulating the legal position of individuals on the grounds that "that provision is subject, in its implementation or effects, to the adoption of a subsequent measure".[86] Nonetheless, given that the Convention's provisions "are intended to ensure effective environmental protection",[87] the Court expressed the view that "if the

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83) Case C-115/09 *Trianel Kohlekraftwerk Lünen* [2011], para. 51. This interpretation was supported by different authors. *See* A. Schwerdtefeger, '*Schutznorm* theorie and Aarhus Convention. Consequences for German law', 4 *Journal of European Environmental and Planning Law* (2007) pp. 270–277; Jans, *supra* note 65, p. 274; de Sadeleer, Roller and Dross, *supra* note 57, p. 204.

84) N. de Sadeleer and C. H. Born, *Droit international et communautaire de la biodiversité* (Dalloz, Paris, 2004) pp. 481—581.

85) Case C-72/95 *Kraaijeveld* [1996] ECR I-5403, para. 56; Case C-127/02 *Waddenzee* [2004] ECR I-7405, para. 66.

86) Case C-240/09 *Lesoochranárske zoskupenie* [2011], para. 45.

87) *Ibid.*, para. 46.

effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Århus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law". As a result, "it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Århus Convention".[88]

This line of reasoning is completely in line with the *Kraijeveld* case law. Private enforcement does not depend upon the willingness of the EU lawmaker to protect claimant's individual interests. Even if the Habitats Directive does not protect human health, citizens or NGOs who merely have a general interest in the proper enforcement of that Directive can invoke it in national courts.[89]

4. ECHR Rights

Since it satisfies the characteristics of an Union governed by the "rule of law",[90] the EU has in virtue of Article 6(3) TEU enhanced the status of fundamental rights within the EU legal order in relying on constitutional rights as well as the rights embodied in the ECHR. These rights are qualified *"as general principles"*. According to the case law of the Court of Justice, respect for human rights is a condition of the lawfulness of EU acts.[91] As a result, measures which are incompatible with observance of the human rights thus recognised are not acceptable in the EU.[92]

As far as environmental protection is concerned, Article 6(3) TEU brings the case law of the ECtHR on nuisances even more firmly within EU law. It is the aim of this last section to assess whether ECHR case law is likely to reinforce EU and national environmental law in providing new remedies for the victims of pollution.

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88) *Ibid.*, paras. 49 and 50.

89) The Court of Justice departed thus from AG Kokott's opinion who had been stressing that "there is no evidence to suggest that rights of an individual are established. The objective of protection laid down by Article 6(2) and (3) of the habitats directive is to conserve habitats and species within areas which form part of Natura 2000. Unlike in the case of rules on the quality of the atmosphere or water, the protection of common natural heritage is of particular interest but not a right established for the benefit of individuals. The close interests of individuals can be promoted only indirectly, as a reflex so to speak." *See* Opinion of AG Kokott in Case C-127/02 *Waddenzee* [2004] ECR I-7405, para. 143.

90) Article 2 TEU.

91) Opinion 2/94 [1996], para. 34.

92) Case C-112/00 *Schmidberger* [2003] ECR I-5659, para. 73; and Joined Cases C-402/05 P and C-415/05 P [2008] *Kadi* ECR I-6381, para. 284.

4.1. Absence of a Specific Environmental Right

Two issues arise for comment here. On one hand, the key role of environmental protection measures in today's society has been recognised by the ECtHR.[93] As a result, national environmental policy measures are pursuing an objective of general interest likely to restrain fundamental rights enshrined in the ECHR. Accordingly, fundamental rights do not override environmental protection measures. By way of illustration, planning regulations that interfere with the right of peaceful enjoyment of private property are clearly a legitimate aim "in accordance with the general interest" for the purpose of the second paragraph of Article 1 of the First Protocol.[94]

On the other hand, as was the case with the original EEC Treaty, the ECHR, adopted in 1950, was drafted at a time when environmental law did not yet exist. Although with the introduction of subsequent amendments environmental questions came to take on an increasing importance under EU treaty law, no right to the conservation of nature or the environment was included under the rights and freedoms guaranteed by the ECHR.[95] For this reason, the Strasbourg Court still refuses to grant preferential status to "environmental human rights".[96] In the Court's view, "neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect".[97]

However, despite the absence of an adequate regulatory framework to condemn violations of protection thresholds or the failure to implement court orders requiring the cessation of harmful or hazardous activities, the ECtHR has nevertheless ended up indirectly guaranteeing a minimum level of environmental protection.[98] In fact, a constructive and dynamic interpretation of the ECHR has permitted these concerns of a new nature to filter gradually into the interpretation of first generation human rights, including in particular:

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93) *Fredin* v. *Sweden*, 18 February 1991, para. 14.

94) *Hakansson and Sturesson* v. *Sweden*, 15 July 1987; *Fredin* v. *Sweden*, 18 February 1991; *Pine Valley Development Ltd. And Others* v. *Ireland*, 29 November 1991, paras. 54 and 57; *Jacobsson* v. *Sweden*, 15 October 1995; *Buckley* v. *United Kingdom*, 25 September 1996.

95) *Fadeyeva* v. *Russia*, 9 June 2005, para. 68; *Kyrtatos* v. *Greece*, 22 May 2003, para. 52.

96) *Hatton and others* v. *the United Kingdom*, No. 36022/97, para. 122, ECHR 2003-VIII.

97) *Kyrtatos* v. *Greece*, para. 52.

98) M. Dejeant-Pons and M. Pallemaerts, *Droits de l'Homme et environnement* (Conseil de l'Europe, Strasbourg, 2002); D. Garcia San José, *La protection de l'environnement et la Convention européenne des droits de l'homme* (Conseil de l'Europe, Strasbourg, 2005); M. Pâques, 'L'environnement, un certain droit de l'homme', 1 *Administration publique trimestrielle* (2006) pp. 38–66; F. Haumont, 'Le droit fondamental à la protection de l'environnement dans la CEDH', *Aménagement-Environnement* (2008) pp. 9–55; C. Hilson, 'Risk and the European Convention on Human Rights: Towards a New Approach', 11 *Cambridge Yearbook of European Legal Studies* (2009) pp. 353–375.

- the right to life (Article 2),
- the right to a fair trial (Article 6),
- the right for private and family life and the home (Article 8),
- the freedom of expression and information (Article 10),
- the freedom of assembly and association (Article 11),
- the right to private property (Article 1 of the Additional Protocol).[99]

Although the essential core of the decisions issued by the ECtHR is based on Article 8, the other provisions cited above also deserve attention. What is more, since the ECtHR rules on situations with highly specific facts, it is at times difficult to infer definitive conclusions from its judgments.

4.2. Article 2 ECHR

Though environmental degradation and in particular poor air quality is still causing hundreds of thousands premature deaths in Europe,[100] the right to life enshrined in Article 2 has not been a particularly fruitful source of case law, since in the view of the ECtHR there has not been any opportunity to examine the complaints concerning the violation of Article 2 where it has already ruled on an application introduced on the basis of Article 8. Accordingly, few judgments have ruled on the extent of this provision.[101] When the inappropriate management of a landfill causes the death of local residents, the inadequate nature of the regulatory framework is liable to result in the violation of Article 2.[102] The positive obligation to take all necessary measures to protect life accordingly means that a preventive policy must be implemented. As regards the procedural aspect of Article 2, both judicial proceedings as well as criminal law remedies must comply with the requirements of the positive obligation for the law to safeguard life.[103] One of the difficulties concerns without doubt the fact that the threshold of seriousness necessary in order to apply this provision is higher than that required under Article 8, since the interference must be liable to result in death, even if it was not caused intentionally or unlawfully.[104]

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[99] Lack of space prevents any discussion of the right to private property enshrined in Article 1 of the Additional Protocol.

[100] European Environmental Agency, *Europe's Environment. The Fourth Assessment* (Copenhagen, 2007), p. 73.

[101] *Guerra* v. *Italy*, 19 December 1998, para. 62; *Taskin*, 10 November 2004, para. 140; *Luginbühl* v. *Switzerland*, 17 January 2006; *Ockan* v. *Turkey*, 28 March 2006, para. 57; *Tatar* v. *Romania*, 27 January 2009, para. 72.

[102] *Oneryildiz* v. *Turkey*, 18 June 2002. This arrest was confirmed after a transfer to the Grand Chamber. *See Oneryildiz* v. *Turkey*, 30 November 2004.

[103] *Oneryildiz* v. *Turkey*, 30 November 2004, paras. 92 to 96.

[104] *L.C.B.* v. *United Kingdom*, 9 June 1998, para. 39. In that case, the Court considered that Article 2 had not been infringed, given the absence of proof concerning the causal link between the exposure of the applicant's father to radiation during nuclear tests and her leukaemia.

4.3. Article 6 ECHR

The difficulty in relying on Article 6 in environmental cases depends on the fact that the challenge, which must be real and serious, must concern a "civil right".[105]

This led the ECtHR to disregard this provision in the following cases. A right to participation in the decision making process relating to the construction of a road cannot be inferred from this provision, which applies exclusively to judicial proceedings and not to administrative proceedings.[106] By the same token, the Court held that the challenge to a permit to operate nuclear power plants was not of a civil nature on the grounds that there was not a sufficiently close connection between the operating standards of the plant and the right to physical protection of the applicants, who were not able to establish the existence of a precise and imminent threat.[107] The link between the decision to extend the operation of a nuclear power plant and the right to bodily integrity was considered too tenuous and too distant.

In other cases, the Strasbourg Court has held that Article 6(1) was liable to be violated. This was in particular the case in a challenge brought against an administrative authorisation to store waste, on the grounds that the said authorisation interfered with the rights of owners of adjacent land to use drinking water.[108] Since Article 6(1) grants the citizen the right to have court orders enforced within a reasonable time, the failure to enforce a court order requiring the cessation of the operations of a hazardous activity as well as the unlawful resumption of that activity with a view to circumventing a judicial decision resulted in a violation.[109] The restriction of access to environmental information may also amount to an infringement of Article 6(1) where the respondent State has prevented the applicant from gaining access to documents which are essential in order to establish his right.[110]

The ECtHR went one step further in adjudicating that proceedings for annulment initiated by an NGO against an authorisation permitting the expansion of a nuclear plant, which had not been subject to public inquiry, calls into question rights of a civil nature pursuant to Article 6(1). The Court relied on the following argument: given that the NGO's application was instigated in order to "defend the general interest against that which it perceives as an activity that is hazardous for the general public", there was a sufficient connection with a civil right within

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105) *Association des amis de Saint-Raphaël et Frejus* v. *France*, 29 February 2000.
106) *Smits, Kleyn and Hal* v. *Netherlands*, 3 May 2003.
107) *Balmer – Schafroth* v. *Switzerland*, 26 August 1997; *Athanassoglou and others* v. *Switzerland*, 6 April 2000.
108) *Zander* v. *Sweden*, 25 November 1993, para. 27.
109) *Taskin and others* v. *Turkey*, 10 November 2004; *Öneryiltiz* v. *Turkey,* 30 November 2004; *Lemke* v. *Turkey*, 5 June 2007, para. 53.
110) *Mc Ginley and Egan* v. *United Kingdom*, 9 June 1998, para. 86.

the meaning of Article 6(1).[111] Moreover, the ECtHR underscored that a more restrictive interpretation would not match the expectations of modern society, "where environmental NGOs play a key role".[112] Finally, it goes without saying that the restrictions imposed on the right of access of an NGO which even though it is in the general interest also defends the individual interest of its members against the risks created by a landfill.[113]

4.4. Article 8 ECHR

Whether the pollution is caused directly by the state or whether responsibility for it is the result of an absence of adequate regulation of private industry,[114] the protection of the right to respect for their private life and home has given rise in recent years to a particularly rich case law on environmental matters, even though this provision does not make any claim to protect the environment.[115] The following sections will examine the scope of the protection offered under Article 8 ECHR, the nature of the damage to the environment, as well as the state interests which may justify the damage.

4.4.1. Scope of the Protection

Article 8 is undeniably framed in anthropocentric terms, according to which the environment deserves to be protected only because it is used by humankind. Accordingly, the destruction of a marshland cannot be analysed as a restriction brought to the private or family life of local residents.[116]

Moreover, only the private sphere of the victims of environmental pollution is protected. In principle, this case law is not particularly favourable to

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111) *Collectif national d'information et d'opposition à l'usine Melox – Collectif stop Melox and Mox* v. *France,* 28 March 2006, para. 4 (text only available in French). *See also Gorraiz Lizarraga* v. *Spain*, 27 April 2004, para. 36.

112) Decision *Collectif national d'information et d'opposition à l'usine Melox – Collectif stop Melox and Mox* v. *France*, 28 March 2006, para. 4 (text only available in French).

113) *L'Erablière* v. *Belgium*, 24 February 2009.

114) Inasmuch as the environmental damage may be authorised directly by the granting of an administrative authorisation or indirectly due to the absence of adequate measure, Article 8 may also be applied to pollutions emitted by individuals or private undertakings. As a result, the violation of Article 8(1) may arise from a failure to regulate private undertakings. *See* notably *Ruano Morcuende* v. *Spain*, 6 September 2005; *Fadeyeva* v. *Russia*, 9 June 2005, para. 89; *Moreno Gómez* v. *Spain*, 16 November 2004, para. 57; *Tatar* v. *Romania*, 27 January 2009, para. 87; *Dées* v. *Hungary*, 9 November 2010, para. 23.

115) *Fadeyeva* v. *Russia*, 9 June 2005, para. 68.

116) Even though the Court considers that the damages caused to the environment do not interfere with the applicants' private and family life, it does not, however, preclude that the destruction of a forest area in the vicinity of the applicants' house could have affected indirectly the applicants' own well-being. *See Kyrtatos* v. *Greece*, 22 May 2003, para. 53.

NGOs, which cannot claim that they have been the victims of a violation of Article 8.[117]

According to ECtHR case law, both the private life sphere and the protection of the domicile are likely to be affected by environmental impairments. Most cases adjudicated so far were lodged by claimants complaining of an invasion of their domicile due to an environmental pollution.[118] On the other hand, in other cases, only the private and family life was at stake, with no link with the domicile. In adjudicating these cases, the ECtHR has been widening the territorial scope of Article 8. In that respect, the *McGinley and Egan* case is a good case in point. That case concerned information required by the applicants about the risks incurred during nuclear tests by British soldiers.[119]

4.4.2. Nature of the Damage

4.4.2.1. Types of Damages

As regards the nature of the damage, the ECtHR accepts, due to the particularly broad spectrum of the ecological problems, that they are not only material or corporeal. They may also be non-material or incorporeal. Accordingly, noise pollution,[120] atmospheric emissions,[121] smells,[122] radiation,[123] and concerns over the increase in allegedly harmful emissions amount just as much to interferences in the domicile or the private life of the applicants.[124]

Although the Court has been condemning states on the grounds that they have interfered illegally with relatively varied aspects of private life (well-being, peace of mind, and so on), in the majority of cases it is the health of the victims that is at issue, most often due to their exposure to hazardous substances. Since the damage may be caused from the anguish and anxiety felt by the victims due to the continuation of unlawful situations, the concept of health is interpreted broadly.[125] Finally, by not requiring that their health has been seriously jeopardised by interference of the state, the Court appears to view favourably the situation of the victims.

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117) *Asselbourg and 78 Others and Greenpeace Luxemburg* v. *Luxemburg*, 29 June 1999, para. 4.

118) The interference with the domicile may be caused by the exploitation of an airport (*Hatton*), by a waste-treatment plant (*Lopez Ostra*) or by electromagnetic emissions from a transformer located against the claimant's house (*Ruano Morcuende)*.

119) *Mc Ginley and Egan* v. *United Kingdom*, 9 June 1998.

120) The Court and the former Commission have had to deal with a swathe of cases concerning noise nuisances. A summary of those may be found in paras. 92 and 93 of case *Mileva* v. *Bulgaria*, 25 November 2010. *See in particular Moreno Gómez* v. *Spain*, 16 November 2004.

121) *Fadeyeva* v. *Russia*, 9 June 2005.

122) *Lopez Ostra* v. *Spain*, 9 December 1994, para. 58.

123) *Ruano Morcuende* v. *Spain*, Decision of 17 January 2006.

124) *Guerra and others* v. *Italy*, 19 February 1998, para. 57.

125) *Egan*, 9 June 1998, para. 99; *Giacomelli* v. *Italy*, 2 November 2006, para. 104; *Tatar* v. *Romania*, 27 January 2009, para. 122.

4.4.2.2. Significance of the Damage

There must in any case be a "direct and sufficient link" between the impugned situation and the applicants' home or private or family life. Whether it comes in the form of exposure to a polluting substance or to noise pollution, the interference must directly affect his home, or his private or family life.[126]

In spite of the extremely varied situations ranging from the risk of damage to alleged harm to health, the protection conferred by Article 8 applies in the event that the interference exceeds a "a minimum level of severity".[127] Although the requirement of the seriousness of the harm is established, little has been stated with regard to its extent.[128] Since it is a relative concept, the evaluation of this "minimum level of severity" will depend on all of the circumstances of the case, such as the periodicity, the intensity, the repetition, the duration, the ability of authorities to enforce environmental law, the location of the pollution and the level of existing environmental degradation.[129] Furthermore, the particular sensitivity of the applicant may reinforce the sufficiently direct nature of the link. A sufficiently close link with private and family life may also be established where the dangerous effects of the disputed activity have been examined within the context of an environmental impact report.[130] Furthermore, the Court had regard to the findings of domestic courts.[131] A detailed examination of the manner in which some of these criteria have been applied should be made.

As regard the distance between the source of the pollution and the applicant's home, the ECtHR's reasoning raises some questions. Given that in the majority of cases the hazardous installations are located within a short distance from the applicant's home, the Court appears to be reluctant to apply Article 8(1) where the pollution's source is far away from the victim's home.[132]

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126) *Fadeyeva* v. *Russia*, 9 June 2005, para. 68.

127) *Fadeyeva* v. *Russia*, 9 June 2005, paras. 69–70; *Giacomelli* v. *Italy*, 2 November 2006, para. 76; *Mileva* v. *Bulgaria,* 25 November 2010, para. 90.

128) The following sources of pollution were deemed to be characterised by a certain degree of gravity. The smells, noises and smokes caused by a waste-treatment plant interfere with the right enshrined in Article 8(1) (*Lopez Ostra* v. *Spain*, 9 December 1994, para. 51). By the same token, night clubs and bars exceeding the municipal noise thresholds infringe Article 8(1) (*Moreno Gómez* v. *Spain*, 16 November 2004). This is also the case of a steel plant exceeding air quality standards (*Fadeyeva* v. *Russia,* 9 June 2005, para. 70) as well as municipal traffic exceeding significantly statutory thresholds (*Dées* v. *Hungary*, 9 November 2010, para. 23). On the other hand, the pollutions caused by an urban development do not appear to be sufficiently serious to be taken into account under Article 8 (*Kyrtatos* v. *Greece*, 22 May 2003, para. 54; *see also Luginbühl* v. *Switzerland,* Decision of 17 January 2006, para. 2).

129) *Fadeyeva* v. *Russia*, 9 June 2005, para. 69.

130) *Taskin and others* v. *Turkey*, 10 November 2004, paras. 17, 19 and 21; and *Lemke* v. *Turkey*, 5 June 2007, para. 36.

131) *Taskin and others* v. *Turkey*, 10 November 2004, paras. 12 and 111–114; and *Ockan and Others* v. *Turkey*, 28 March 2006, para. 40.

132) *Atanasov* v. *Bulgaria*, 2 December 2010, para. 76. However, the Court held in another mining case that the fact that the victim of a pollution lived 50 kilometres from the polluting gold mine

The ECtHR generally assumes that Article 8(1) has been violated where the exposure or environmental quality thresholds have been exceeded. It cannot be denied that where the concentrations of toxic pollutants have exceeded the regulatory thresholds, the pollution becomes potentially dangerous to the health and well-being of the applicant. Similarly, the repetition over a period of several years of noise pollution in excess of the thresholds authorised during night hours will infringe the rights protected under Article 8.[133] That said, the mere fact that the source of pollution is unlawful is not sufficient to ground the assertion that the applicants' rights under Article 8 have been interfered with.[134] In fact, the issue of proper enforcement of domestic environmental or land planning law has not been approached as "a separate and conclusive test but rather as one of many aspects which should be taken into account in assessing whether the State has struck a faire balance".[135]

4.4.2.3. *The Precautionary Principle*

As a matter of principle, the ECtHR requires that the applicant produces "reasonable and convincing evidence of the likelihood that a violation affecting him personally would occur; mere suspicion or conjecture is insufficient in this regard".[136] Similarly, the "minimum level of severity" threshold is not exceeded when the health risks remain mainly speculative, irrespective of the fact that the applicant is particularly sensitive to electromagnetic radiation.[137] In so doing, by categorically excluding the possibility that the risk of a future violation may confer on the individual applicant the status of "*victim*", the Court does not follow a precautionary logic.

However, in *Tatar*, when confronted with contradictory scientific assessments concerning the impact on health of sodium cyanide, the ECtHR referred to the precautionary principle when condemning the superficial nature of the

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was sufficient enough to establish a strong link with his private and family life. *See Lemke* v. *Turkey*, 5 June 2007, para. 36 (text only available in French).

133) *Moreno Gómez* v. *Spain*, 16 November 2004.

134) *Mileva* v. *Bulgaria,* 25 November 2010, para. 91.

135) F. McManus, 'Note under *Gómez* v. *Spain*', 8 *Environmental Law Review* (2006) p. 227.

136) *Asselbourg and 78 Other and Greenpeace Luxemburg* v. *Luxemburg*, Decision of 29 June 1999, para. 1; *Bernard and 47 other physical persons as well as Greenpeace Luxemburg* v. *Luxemburg*, Decision of 29 June 1999, para. 1. In *Fadeyeva*, the ECtHR stressed that there was "a very strong combination of indirect evidence and presumptions" which made it possible to conclude that the applicant was suffering from a prolonged exposure to hazardous pollutants (*Fadeyeva* v. *Russia*, 9 June 2005, paras. 80–88).

137) Given that the risks entailed by mobile phones' antennas are still embroiled with controversies, the ECtHR has been taking the view that these risks remain speculative. According to the Court, one cannot, for now call on the state to enact more stringent standards for the sake of particularly vulnerable persons (*Luginbühl* v. *Switzerland*, Decision of 17 January 2006). The margin of appreciation granted to the state here goes against the precautionary principle.

investigation into the risks incurred by the local population, which had been carried out prior to the issue of the authorisation for a gold mine.[138]

4.4.3. State's Margin of Appreciation

In addition to demonstrating the serious nature of the damage, the applicant must overcome a second obstacle: his right to respect for private and family life is tempered by the application, when reviewing the interference, of the principle of the margin of appreciation and the proportionality principle. Provided that the state respects the conditions laid down thereunder ("in accordance with the law", necessity and proportionality of the interference), Article 8(2) permits infringements of the right to a clean environment, as inferred from the first paragraph.

Although it enjoys a broad margin of appreciation, the state must strike a fair balance between the objectives pursued by the interference and the respect of the applicants' private life and home.[139] The question therefore arises as to what extent *the interference is acceptable*.

When called on to assess the correct balance, the state will by definition find itself in a favourable position. Its margin of appreciation is especially broad[140] where the environmental rights are not granted a special status.[141] This means, for example, that the fair balance struck between the rights of those residing in the vicinity of airports and the economic well-being of the country is generally weighed against the residents.[142]

The ECtHR has shown itself to be more sensitive to the efforts undertaken by the state than to the status of the victim.[143] Where the state has done all it could to avoid the interference, the Court will take the view that Article 8 has not been infringed.[144] Accordingly, the interference with the right to respect for their private life and home, consisting in the right to sleep at night, is more easily justified

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138) *Tatar* v. *Romania,* 27 January 2009, esp. paras. 109–120.

139) If it is lawful for the state to oversee worker protection and social welfare, it should not, however, do so to the detriment of protection of health and the environment. The economic and social interest cannot prevail *per se* over Article 8.

140) About the extent of the margin of appreciation in environmental matters, *see particularly Hatton and others* v. *United Kingdom*, 8 July 2003, paras. 97 *et seq*.; *Oneryildiz*, 30 November 2004, para. 107; *Fadeyeva* v. *Russia*, 9 June 2005, para. 102; *Giacomelli* v. *Italy*, 2 November 2006, para. 80.

141) *Oneryildiz* v. *Turkey*, 30 November 2004, para. 107; *Fadayeva* v. *Russia*, 9 June 2005, para. 104.

142) *Pauwell and Rayner* v. *United Kingdom*, 21 February 1990, para. 45; *Hatton and others* v. *United Kingdom*, 8 July 2003, paras. 124–128.

143) *Luginbühl* v. *Switzerland*, Decision of 17 January 2006 (text only available in French). In this case, the Court held that "*compte tenu de l'état du débat scientifique actuel*" on the noxiousness of mobile phones' antennas and considering that "*les efforts entrepris par les autorités compétentes pour suivre le développement scientifique en la matière et pour réexaminer périodiquement les valeurs limites applicables*", the Swedish authorities could not exceed their margin of appreciation by granting building licenses for mobile phones' antennas, irrespective of the applicant's vulnerability to electrosmog.

144) *LCB* v. *United Kingdom* (1999), para. 27.

than in matters regarding sexual preferences, where the margin of appreciation left to the state is particularly reduced.[145]

4.3.4. Limits Brought to the State's Margin of Appreciation

The search for a fair balance is not, however, an absolute science. The extent of the margin of appreciation is subject to three limits.

In the first place, the state has a positive duty to enact adequate measures to secure the applicants' rights. Thus, the state authorities are required to put in place a preventive regulatory framework under which the standards are adapted "to the specific features of the activity concerned, and in particular to the level of risk which may result".[146] The enactment of a significant number of the regulatory measures makes it possible to ensure respect for the fair balance: prior assessment of risks, application of maximum exposure thresholds, measures to mitigate impacts, proper enforcement, and partial compensation to victims.[147] However, the state enjoys a certain margin of appreciation in tailoring the measures intended to protect Article 8 rights.[148]

Secondly, the interference will not be permitted where the public authorities break the law. Accordingly, in most cases where rulings are made against the states, the ECtHR points to the flagrant breach of environmental regulations.[149] The defendant state cannot expect to persuade the Court that it is striking a fair balance between the needs of the community and the applicants' rights by not enforcing domestic regulation.[150] In several cases, the ECtHR highlighted the absence of law enforcement, and in particular the fact that national court decisions ordering the closure of the plant were ignored by administrative authorities.[151] It is inevitable that where the seriousness of the damage is assessed with reference to the breach of pollution exposure standards, the interference will always be illegal. Indeed, these regulatory standards are deemed to afford the

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145) *Dudgeon* v. *United Kingdom*, 22 October 1981, para. 52.

146) *Budayeva* v. *Russia*, 20 March 2008; *Tatar* v. *Romania*, 27 January 2009, para. 88.

147) Compensation, even partial, may constitute a measure likely to ensure the right balance. *See* Eur. Comm. HR, *S. v. France*, 17 May 1990.

148) *Buckley* v. *United Kingdom*, 25 September 1996, paras. 74–77; *Taskin and Others* v. *Turkey*, 10 November 2004, para. 116; *Giacomelli* v. *Italy*, 2 November 2006, para. 80; *Dées* v. *Hungary*, 9 November 2010, para. 23.

149) *Hatton* v. *United Kingdom*, 8 July 2003, para. 120; *Fadeyeva* v. *Russia*, 9 June 2005, para. 83–84. *A contrario*, in the absence of a noise threshold exceeding the recommended thresholds by the World Health Organization, wind turbines located nearby second homes are not likely to interfere significantly with the private and family life of the applicants. *See Fägerskiöld* v. *Sweden*, 28 February 2008.

150) P. Birnie, A. Boyle and C. Redgwell, *International law & the Environment* (OUP, Oxford, 2009) p. 285.

151) *Taskin and Others* v. *Turkey*, 10 November 2004; *Lemke* v. *Turkey*, 5 June 2007, paras. 124–125.

citizens a minimum level of protection. Accordingly, an individual right of action to enforce these minimum standards might arise.

Thirdly, with a view to guaranteeing a fair balance, the ECtHR has imposed the requirement to comply with obligations of a procedural nature, the contents of which are inspired by the Århus Convention. For example, the absence of an environmental impact study on the exploitation of a plant for the treatment of hazardous waste and the refusal by the authorities to comply with national court's judgments condemning the irregular nature of the contested activity demonstrate that the state has not been able to strike a fair balance between the interest of the community in disposing of a waste treatment plant and the enjoyment of local residents of their right to respect for the home and private and family life.[152] Similarly, the resumption of mining activities liable to cause pollution must first be subject to "the conduct of investigations and studies of an appropriate nature to prevent and evaluate in advance" their effects on the environment.[153]

Moreover, the ECtHR has enshrined, expanding the scope of Article 8, the rights to information and to challenge domestic decisions pursuant Article 9(2) of the Århus Convention. It has also underscored the importance for the public of being able to gain access to these studies in order, on the one hand, to evaluate the danger to which it is exposed and, on the other hand, to permit opponents to initiate court proceedings in the event that their observations have not been sufficiently taken into consideration. The deprivation of these procedural guarantees entails a violation of Article 8, although this provision does not lay down any express procedural conditions.[154]

However, the procedural guarantees are not unlimited. Whilst the decision to authorise the exploitation of an activity violating the right enshrined by Article 8 will necessarily entail the conduct of appropriate investigations and studies, the fact remains that the decision may be taken even though the authority does not have "comprehensive and measurable data … in relation to each and every aspect of the matter to be decided".[155] The national authority may therefore accept the interference on the basis of incomplete information.

4.3.5. Concluding Observations

It is therefore clear from the case law that either the absence of a legal framework as well as the failure to comply with the rules – both substantive (emissions thresholds) as well as procedural (information, participation by the public) – will entail a violation of Article 8. However, the case law is open to criticism. First of

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152) *Giacomelli* v. *Italy*, 2 November 2006.
153) *Lemke* v. *Turkey*, 5 June 2007, para. 44; *Tatar* v. *Romania,* 27 January 2009, para. 116.
154) *Hatton* v. *United Kingdom*, 8 July 2003, para. 128; *Taskin and Others* v. *Turkey*, 10 November 2004; *Giacomelli* v. *Italy*, 2 November 2006, para. 82.
155) *Hatton and others* v. *United Kingdom,* 8 July 2003, para. 128.

all, it must be observed that the right to private life is not protected where the substantive protection standards prove to be inadequate, which is generally the case. This could lead the authorities to conduct themselves in a cynical manner: at best, the state would no longer regulate pollution; at worst, it would set particularly relaxed emissions values which would never be exceeded. Since no regulatory violation could be averred, Article 8 rights would not operate in favour of the victims. It could, however, be stated in response to these criticisms that the regulatory framework must forestall damage in an effective manner, as required under the case law of the ECtHR.[156]

As regards the procedural aspect, it is not clear what the added value of the ECHR is beyond the procedural rights contained in the Århus Convention as well as the national and EU regulations issued in accordance with it.

By specifying the procedures for the implementation of the right to participation, the legislative advances of these last years (for example, general obligation to provide active information) appear to be markedly more significant than the relatively fluid contributions of Strasbourg case law. At this stage, it must be pointed out that the right enshrined in Article 8 is far from having established a lead on the legislative developments at international and EU level.

4.3.6. Right to Information under Article 8 ECHR

As far as access to information is concerned, Article 8 takes precedence over Article 10. Accordingly, the state is also subject, pursuant to Article 8, to a positive obligation to provide information regarding the environmental risks to which the public is exposed. The ECtHR considers that this amounts to an essential procedural guarantee in order to strike a fair balance between private life and state interferences. Interpreted in its procedural dimension, this provision may also come to the assistance of those whose private and family life is disrupted by the stress and anxiety related to the exposure to a particular risk of pollution. This obligation is all the more pressing where the authorities dispose of information which would have permitted the residents to evaluate these risks and to take appropriate action in order to protect themselves.[157]

In this regard, Article 8 requires[158] that "an effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information",[159] failing which the Article will be violated. Therefore, a decision

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156) *Budayeva* v. *Russia*, 20 March 2008; *Tatar* v. *Romania,* 27 January 2009, para. 88.

157) *Guerra and others* v. *Italy*, 19 December 1998, para. 60.

158) *Tatar* v. *Romania*, 27 January 2009, para. 116.

159) *McGinley and Egan* v. *United Kingdom*, 26 November 1996, para. 101. Similarly, the right to the protection of the health set out in Article 11 of the European Social Charter is breached when the authorities do not go to the trouble of "enter[ing] into fair and genuine consultations with those exposed to environmental risks" about the risks of pollution to which they are exposed due to the

which interferes with private life is not admissible unless it is taken on conclusion of a transparent decision making process involving public inquiries, the provision of information, and so on. On the other hand, where there are faults in the decision making process, the ECtHR may rule that Article 8 has been violated by the state.

By contrast, the ECtHR has accepted, in other cases, that the state had complied with its positive obligation by creating a special procedure according to which the applicants could have gained access, had they taken advantage of it, to information of such a nature as to allay their fears of a violation of their right to respect for their private and family life resulting from their exposure to the risk of radiation.[160]

4.4. Article 10 ECHR

The two aspects of Article 10 – the "*right to receive*" information and the right to express ideas – may be called into question by the state. Although the right to information, as well as the corresponding obligation on the authorities to collect it, constitutes one of the pillars of environmental law, Article 10 has been systematically set aside by the ECtHR in environmental cases in favour of Article 8.[161] Furthermore, the applicant must provide evidence that the activity for which he is seeking information is of a hazardous nature. On the other hand, the ECtHR will more readily hold that there has been a violation of freedom of expression where it may be jeopardised by legal proceedings for defamation instigated against certain activists and environmental protection associations known for their uncompromising stances on controversial issues. The following cases deserve attention:

- the prohibition made to a scientist to mention in the media the dangers of a new technology for the human health;[162]
- the arrest of eco-warriors peacefully demonstrating against hunting;[163]
- the censorship of a report devoted to the sealing as well as the sentencing of its authors to damages;[164]
- the sentencing of an NGO criticising the behaviour of a municipal councillor favouring illegal building projects in protected areas;[165]

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exploitation of lignite. *See* European Comm. of Social Rights, *Fondation Maranyopoulos* v. *Greece*, 6 December 2006, para. 217.

160) *McGinley and Egan* v. *United Kingdom*, 26 November 1996, paras. 101–102.

161) *Guerra and others* v. *Italy*, 19 February 1998, para. 53. This provision "cannot be construed as imposing on a State … positive obligations to … disseminate information of its own motion" (*Roche* v. *United Kingdom*, 19 October 2005, para. 172).

162) *Hertel* v. *Switzerland*, 25 August 1998.

163) *Steel and others* v. *United Kingdom*, 23 September 1998.

164) *Bladet Tromseu and Stensaas* v. *Norway*, 20 May 1999.

165) *Vides Aizsardzibas Klubs* v. *Lettonia*, 27 May 2004.

- the sentencing for public defamation of an ecological elected representative who criticised a senior civil servant for his words concerning the absence of dangerousness of a radioactive cloud;[166]
- the sentencing of people publically contesting road developments even though the remarks made contained a share of subjectivity.[167]

4.5. Article 11 ECHR

Referring to this provision is rather atypical. Account must be taken of the fact that arrangements seeking to include landowners on a compulsory basis in a hunting association, despite their moral opposition to hunting,[168] as well as the prohibition of a public meeting by an environmental protection association[169] have been censured under the terms of Article 11 ECHR.

5. Conclusions

Given the binding nature of the EUCHR, the principles enshrined in Article 37, Article 35, second sentence and Article 38 are likely to become a benchmark for judicial review of legislative and executive EU acts as well as national measures implementing EU environmental obligations. What is more, a number of procedural rights have emerged through the intermediation of EU secondary law. For instance, in fleshing out the Article 37 requirements into more concrete measures, the lawmaker is likely to award specific rights to the victims of pollutions. Pursuant to Article 52(5) EUCHR, the ways in which these rights are implemented is subject to be reviewed in the light of the above-mentioned principles.

It is also worthy to note that he Court of Justice of the European Union has been showing less deference to the national law on standing. With a view to improving the enforcement of environmental law, the Court of Justice has clearly been broadening the scope of rights beyond the directives that aim at protecting human health. In so doing, the Court has been contributing to an effective enforcement of environmental law in national courts irrespective of health impairment issues. The EUCHR principles should contribute to improve EU environmental enforcement by private parties.

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166) *Mamère* v. *France*, 7 November 2006.
167) *Almeida Azevedo* v. *Portugal*, 23 January 2007; *Lombardo and others* v. *Malta,* 24 April 2007.
168) *Chassagnou and others* v. *France*, 29 April 1999, para. 117; *Schneider* v. *Luxemburg*, 10 July 2007, para. 82.
169) *Zeleni Balkni* v. *Bulgaria*, 12 April 2007.

Last but not least, in accordance with Article 6(3) TEU, the case law of the Court of Justice is likely to take stock with ECtHR case law developments. Although EU law does not specify a self-standing right to environmental protection, such a right emerges in the wake of the fundamental rights enshrined by the ECHR. In this respect, Articles 6 and 8 ECHR are likely to reinforce the enforcement of both EU and national environmental law. Nevertheless, it must be remembered that this case law amounts to a greening of the existing first generation of human rights, rather than forging a new generation of human rights. Moreover, the wide disparity of standards in the absence of EU or international harmonisation across Europe undermines the ECHR rights. In other words, this case law falls short of guaranteeing a full right to environmental protection.

To sum up, though the Lisbon Treaty has been making headway with fundamental rights, a lot of water will have to flow under the bridge before a right to a clean environment is written in stone in European constitutional law.