Headnote

As understood in line with EU law, section 47 (1) of the Federal Immission Control Act (BImSchG, *Bundesimmissionsschutzgesetz*) grants to a recognised environmental protection organisation rights of its own within the meaning of section 42 (2) of the Code of Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*) (in connection with the Court of Justice of the European Union, judgments of 25 July 2008 - C-237/07 [ECLI:EU:C:2008:447], Janecek - and of 8 March 2011 – C-240/09 [ECLI:EU:C:2011:125], Lesoochranárske zoskupenie VLK <"Slovak Brown Bear">).

Judgment of 5 September 2013 - BVerwG 7 C 21.12

Sources of law

Federal Immission Control Act;BImSchG, *Bundes-Immissionsschutzgesetz;* section 47 (1)
Code of Administrative Court Procedure;VwGO, *Verwaltungsgerichtsordnung;* section 42 (2), section 82 (1) sentence 2

Act on Supplementary Provisions on Appeals in Environmental Matters in accordance with EC Directive 2003/35/EC;UmwRG, *Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG*; section 3

Aarhus Convention art. 9 (3)
Directive 2003/35/EC art. 2 (3) and art. 3 no. 1
Directive 2008/50/EC art. 23 (1)

Summary of the facts

The claimant, a national environmental protection organisation recognised in accordance with section 3 of the Act on Supplementary Provisions on Appeals in Environmental Matters in accordance with EC Directive 2003/35/EC (UmwRG, *Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG*), requests an amendment to the ambient air quality maintenance plan for the city of D.

There has been an ambient air quality maintenance plan for the agglomeration of the Rhine-Main Area since 2005. The sub-plan for the city of D. was further developed in February 2011. The ambient air quality maintenance plan provides for a number of local measures aiming at reducing the pollutant concentrations for particulate matter and nitrogen oxide ($N0_X$) in the municipal area of the city of D. by 2015. The ambient air quality maintenance plan presumes that immission thresholds can certainly be adhered to in 2015 for particulate matter on all roads in the city of D., whilst this does not apply to nitrogen dioxide (NO_2). According to the prognosis the immission thresholds for NO_2 will not be complied with on the three busiest roads in the city of D. by 2015, but they can nonetheless be considerably reduced.

After the claimant had applied to the defendant for an amendment to be made to the ambient air quality maintenance plan, therein arguing that a low-emission zone (*Umweltzone*) had not been considered despite it not being guaranteed that the limit value would be complied with by 2015, the claimant brought an action before the Administrative Court.

The Administrative Court upheld the action and placed the defendant under an obligation to amend the ambient air quality maintenance plan for the city of D. in a way that it contains the necessary measures to ensure compliance with the immission thresholds for NO_2 of 40 µg/m3, averaged over a calendar year, in the municipal area of D. as quickly as possible. The Court held that the request, which was filed as a general action for performance, was admissible as an altruistic representative action. This follows from the ruling of the Court of Justice of the European Union (ECJ) of 8 March 2011 in the case C-240/09, according to which a court must interpret national procedural law so as to ena-

ble an environmental protection organisation that was recognised in accordance with section 3 UmwRG to challenge before a court a decision liable to be contrary to EU environmental law. The Administrative Court held that it was immaterial that such standing to bring proceedings was not (yet) explicitly provided for in national procedural law. According to the Court, the action was well-founded. The defendant, the Court held, was obliged in accordance with section 47 (1) of the Federal Immission Control Act (BImSchG, *Bundes-Immissionsschutz-Gesetz*) and section 27 (2) of the Thirty-Ninth Ordinance Implementing the Federal Immission Control Act of 2 August 2010 - Ordinance on Ambient Air Quality Standards and Emission Ceilings (Federal Law Gazette (BGBl., *Bundesgesetzblatt*) I p. 1065) (39. BImSchV, 39. *Verordnung zur Durchführung des Bundes-Immissionsschutzgesetzes Verordnung über Luftqualitätsstandards und Emissionshöchstmengen,*) to take all suitable and proportionate measures within the framework of the ambient air quality maintenance plan for the city of D. to keep the period during which the applicable limit value for NO_2 was exceeded as short as possible.

Reasons (abridged)

13 The appeal on points of law, which was lodged as a “leapfrog appeal” (*Sprungrevision*) after having been admitted by the Administrative Court and with the consent of the claimant, is admissible but without merit, and hence was to be rejected (section 144 (2) of the Code of Administrative Court Procedure (VwGO, *Verwaltungsgerichtsordnung*)). The judgment of the Administrative Court violates law subject to review insofar as it affirms the claimant’s standing to bring proceedings by applying considerations which are not correct (1.). The ruling however proves to be correct in this regard for other reasons (section 144 (4) VwGO; 2.). In all other respects, the ruling complies with federal law (3.). (…)

15 b) The Administrative Court presumes that the requirement of standing to bring proceedings in accordance with section 42 (2) VwGO applies mutadis mutandis to the right to have the ambient air quality maintenance

plan supplemented that is asserted by means of a general application for an injunction. The claimant was said not to be asserting its own rights. It was nonetheless said to have standing to bring proceedings against the background of the ruling of the Court of Justice of the European Union of 8 March 2011 in case C-240/09 [ECLI:EU:C:2011:125], Lesoochranárske zoskupenie VLK ("Slovak Brown Bear"), which, according to the Administrative Court, requires an interpretation of national procedural law in favour of legal protection, even if such standing was not (yet) explicitly provided for in national procedural law.

16 It emerges sufficiently clearly from these brief statements, which explicitly refer to the mandate for interpretation that was given by the Court of Justice of the European Union, that the Administrative Court does not derive the claimant's standing to bring proceedings directly from EU law, independently of national law. If the Administrative Court applies EU law in order to affirm standing to bring proceedings in the sense of an altruistic representative action which is not yet available in national procedural law, and does so regardless of the fact that no individual rights are affected, it refers to the opening clause that is provided in section 42 (2) first half sentence VwGO, which is to be interpreted in compliance with EU law.

17 This legal view is in violation of law subject to review. (…)

19 bb) The Administrative Court has rightly taken the ruling of the Court of Justice of the European Union as guidance when examining whether the claimant may file a representative action.

20 In the judgment of 8 March 2011, the Court of Justice of the European Union made a statement on the legal impact of art. 9 (3) of the Convention of 25 June 1998 on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention; Act of 9 December 2006, (BGBI. II p. 1251). The Aarhus Convention has not only been ratified by all Member States of the EU, but also by the EU itself (Council Decision of 17 February 2005, OJ EU L 124 p. 1). As a "mixed convention", it is part of EU law, and as such it was the subject-matter of the judgment of the Court of Justice of the European Union of 8 March 2011 in

case C-240/09.

21 The Court of Justice of the European Union first of all found that the EU, and hence the Court itself, is certainly competent for the implementation and interpretation of art. 9 (3) of the Aarhus Convention when it comes to questions of participation and of legal protection in proceedings the content of which relates to the implementation of EU environmental law. It went on to state that art. 9 (3) of the Aarhus Convention does not currently apply directly have direct effect because of the reservation regarding the way of national implementation which it contains. The national courts are nonetheless obliged to interpret their national administrative procedural law as far as possible in accordance with both the aims of art. 9 (3) of the Aarhus Convention, and with the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.

22 (1) In their legal considerations, the national courts are obliged to take the ruling into account as part of EU law in their legal judgment (…). The criticism to be held against the argumentation of the judgment changes nothing in this regard. It is manifest that the boundary to an ultra vires act (*ausbrechender Rechtsakt*), e.g. as a result from an alleged breach of art. 5 (1) first sentence EU the presumption of which would moreover trigger an obligation of "remonstration" in the sense of another preliminary ruling (Federal Constitutional Court (BVerfG, *Bundesverfassungsgericht*) decision of 6 July 2010 - 2 BvR 2661/06 - Rulings of the Federal Constitutional Court (BVerfGE, *Entscheidungen des Bundesverfassungsgerichts*) 126, 286 <303 et seq.>), has not been overstepped (…).

23 (2) The interpretation guideline of the Court of Justice of the European Union also encompasses the case at hand. The ambient air quality maintenance planning in accordance with section 47 (1) BImSchG (in the version of the Eighth Act Amending the Federal Immission Protection Act of 31 July 2010, BGBl. I p. 1059) serves to transpose Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ EU L 152 p. 1). (…)

25 cc) The Court of Justice of the European Union instructs the courts, in accordance with provisions of national law which are open to interpretation, to afford environmental protection organisations access to the courts that is as broad as possible in order to thus guarantee the implementation of the environmental law of the Union. The Administrative Court is wrong to presume that this matter can be dealt with through the provision of section 42 (2) first half sentence VwGO.

26 This legislative alternative permits exceptions to be made to the requirement to assert a violation of one's own rights. It is however as such not a provision that is open to interpretation within the meaning of the ruling of the Court of Justice of the European Union, but only a reserve clause or opening clause which must be implemented by a decision on the part of the competent legislator. Section 42 (2) first half sentence VwGO itself is however open to interpretation in the sense that, in addition to provisions of federal and federal state law, provisions of EU law can of their own as a separate statutory provision afford independent rights to act as a claimant detached from substantive entitlements. It is only on the basis of such a normative decision that the question of scope for interpretation directed by EU law arises.

27 The Administrative Court does not designate a provision which satisfies the reserve clause or opening clause which it interprets as an expansion against the background of the judgment of the Court of Justice of the European Union. There is in fact no such provision that is open to such an interpretation.

28 Special standing to bring proceedings within the meaning of section 42 (2) first half sentence VwGO, facilitating an objective review of laws, has only been stipulated in national law in narrowly-restricted areas. The existing provisions, serving to enforce environmental interests, are not applicable.

29 (1) The case at hand does not fall within the scope of application of the representative action under the law on nature conservation pursuant to section 64 (1) of the Federal Nature Conservation Act (BNatSchG, *Bundesna-*

turschutzgesetz). The same applies to section 1 UmwRG. The restrictive prerequisites of subsection (1), which - through art. 10a of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ No. L 175 p. 40) in the version of Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ EU L 156 p. 17) - also serves to transpose art. 9 (2) in conjunction with art. 6 of the Aarhus Convention are not met (cf. Bundestag printed paper (BT-Drs., *Bundestagsdrucksache*) 16/2497 p. 42).

30 (2) The scope of application of the Environmental Appeals Act (*Umwelt-Rechtsbehelfsgesetz*) cannot be expanded to cover art. 9 (3) of the Aarhus Convention by means of analogy (…). There is no unintended legislative loophole.

31 As already discernible from its official designation (Act on Supplementary Provisions on Appeals in Environmental Matters in accordance with EC Directive 2003/35/EC), as well as from the official note on the transposition of provisions of EU law, the Environmental Appeals Act serves to transpose art. 9 (2) of the Aarhus Convention. By contrast, and as is shown by the Memorandum on the Ratification of the Aarhus Convention (*Denkschrift zur Ratifizierung der Aarhus-Konvention*), the legislator did not consider there to be any need to amend domestic law (BT-Drs. 16/2497 pp. 42 and 46) in order to satisfy the obligations emerging from art. 9 (3) of the Aarhus Convention. In this respect, the Environmental Appeals Act was understood when it was enacted as a regulation outlining its scope of application as exhaustive. This has not changed in the meantime. Regardless of the ruling of the Court of Justice of 8 March 2011, the legislator has also retained the explicit restriction of the scope in the Act Amending the Environmental Appeals Act and other Environmental Provisions (*Gesetz zur Änderung des Umwelt-Rechtsbehelfsgesetzes und anderer umweltrechtlicher Vorschriften*) of 21 January 2013 (BGBl. I p. 95). This only inserts the amendments required

by the judgment of the Court of Justice of 12 May 2011 (C-115/09 [ECLI:EU:C:2011:289], Trianel) with the objective of “complete 1:1 transposition” of art. 10a of Directive 85/337/EEC, as well as of art. 9 (2) of the Aarhus Convention (BT-Drs. 17/10957 p. 11). An extension to the circumstances covered by art. 9 (3) of the Aarhus Convention is hence ruled out.

32 An unintended legislative loophole can also not be presumed to exist because there are many reasons for the assumption that the legislator’s legal opinion regarding the lack of a need to adjust national law when ratifying the Aarhus Convention is incorrect. It does not concur with the understanding of the contractual obligations forming at international level.

33 On the basis of art. 15 of the Aarhus Convention, the signatory states established a body - in the form of the Compliance Committee - which is to assess compliance with the Convention without however prejudging formal arbitration proceedings pursuant to art. 16 of the Aarhus Convention (cf. on the modus operandi of the Compliance Committee: The Aarhus Convention: An Implementation Guide, Second Edition, 2013, pp. 234 et. seqq.). Its case-law is to give a clear profile to the Convention for all signatory states. Even if the Compliance Committee satisfies itself with giving recommendations, the legal views which it expresses nonetheless take on considerable weight. This emerges not lastly from the fact that, to date, all findings of the Compliance Committee on the unconventionality of the law in a signatory state have been approved at the meetings of the signatory states (art. 10 of the Aarhus Convention) (cf. Implementation Guide, p. 238).

34 In accordance with established line of recommendations on art. 9 (3) of the Aarhus Convention, the margin of appreciation granted to the signatory states in accordance with the wording of the provision is ultimately less broad than presumed by Germany in particular. The Compliance Committee explained its understanding of the “third pillar” of the Aarhus Convention on Access to Justice in accordance with art. 9 (3) of the Aarhus Convention in a series of recommendations (essentially ACCC/C/2005/11 <Belgium> of 16 June 2006, para. 35 et. seqq.; ACCC/C/2006/18 <Denmark> of March 2008 para. 29 et seqq.; ACCC/C/2008/32 Part I <EU> of 14 April 2011, para. 77 et. seqq.; ACCC/C/2010/48 <Austria> of 16 December 2011, pa-

ra. 68 et. seqq.; cf. on this also Implementation Guide, pp. 197 et. seqq. and 207 et seq.). Here, the Committee initially stresses - also following on from decision II/2, which was accepted during the meeting of the signatory states held from 25 to 27 May 2005, para. 14 to 16 of which call for a manifestly legal protection-friendly understanding of art. 9 (3) of the Aarhus Convention (ECE/MP.PP/2005/2/Add.3 of 8 June 2005) - the margin of implementation for the national legislator and the need for an overall context of the normative environment. The following statements of the Committee however leave no doubts that, in the view of the Compliance Committee, the environmental protection organisations must, as a matter of principle, be granted a possibility to challenge the application of environmental law before a court. The signatory states do not have to introduce a system for an actio popularis so that anyone could challenge any act that has an environmental connection. In the view of the Compliance Committee, however, the wording “where they meet the criteria, if any, laid down in its national law” cannot justify the introduction or retention of such strict criteria, which ultimately prevent all or almost all environmental protection organisations from challenging acts which contradict national environmental law. In the view of the Compliance Committee, the wording rather indicates the voluntary restriction of the signatory states not to impose criteria that are too stringent. There should be a presumption in favour of access to review proceedings. This access should not be the exception. Being affected by the circumstances or having an interest could be considered as admissibility criteria. In the proceedings against Austria, the Compliance Committee explicitly considered it not to be sufficient that a representative action is provided for within the scope of art. 9 (2) of the Aarhus Convention (ACCC/C/2010/48 para. 71 et. seqq.).

35 If, accordingly, the question of “whether” a representative action under environmental law can be lodged is resolved by the Convention, the signatory states nonetheless retain a margin of appreciation as to the question of “how”. The lack of implementation of said international obligation by the national legislator is not the same as an unintended legislative loophole.

36 An interpretation contra legem - in the sense of a methodically impermissi-

ble adjudication - is not required by EU law (cf. ECJ, judgments of 4 July 2006 - C-212/04 [ECLI:EU:C:2006:443], Adeneler - para. 10 and of 16 June 2005 - C-105/03 [ECLI:EU:C:2005:386], Pupino - para. 44, 47). The claimant wrongly invokes the judgment of the Federal Court of Justice of 26 November 2008 - VIII ZR 200/05 - (Decisions of the Federal Court of Justice in Civil Matters (BGHZ, *Entscheidungen des Bundesgerichtshofes in Zivilsachen*) 179, 27). An obligation to further refine the law in line with the directives by means of teleological reduction or extension of a provision of national law is certainly contingent on a sufficiently certain, i. e. a clear, precise and unconditional provision of EU law which as a matter of principle has direct effect. This is not available here because, given the failure of the Commission's Proposal for a Directive on access to justice in environmental matters of 24 October 2003 - COM(2003) 624 - final, art. 9 (3) of the Aarhus Convention has yet to be transposed into EU law.

37 (3) It also follows that no such provision which is open to interpretation can be found in EU law. This already follows imperatively from the fact that art. 9 (3) of the Aarhus Convention is not directly applicable. A provision which is not directly applicable cannot however be a starting point of an interpretation which makes this provision applicable as to the merits. Such a reasoning would be circular (…).

38 2. The violation of rights which has been identified is however not material. The Administrative Court has, ultimately, rightly affirmed the claimant's standing to bring proceedings. It follows from section 42 (2) second half sentence VwGO. The claimant can claim that its rights were violated by the refusal to establish an ambient air quality maintenance plan in compliance with the requirements of section 47 (1) BImSchG in conjunction with section 27 of the Thirty-Ninth Ordinance Implementing the Federal Immission Control Act). Section 47 (1) BImSchG affords not only to natural persons who are directly affected, but also to environmental protection organisations, that are recognised in accordance with section 3 UmwRG, the right to demand the establishment of an ambient air quality maintenance plan meeting the imperative provisions of the law on ambient air quality.

39 a) If the immission thresholds - including any margins of tolerance - speci-

fied in an ordinance are exceeded , the competent authority must, pursuant to section 47 (1) BImSchG, draw up an ambient air quality maintenance plan that defines the necessary measures for achieving a durable reduction of air pollution and conforms to the requirements of the ordinance. The same applies if an ordinance regulates an ambient air quality maintenance plan to be established in order to ensure compliance with target values. The measures of an ambient air quality maintenance plan must be suited to shorten as far as possible the period during which immission thresholds which are already to be complied with are exceeded.

40 Ambient air quality law pursues two overlapping protective purposes with this provision: Harmful impacts on both human health, and on the environment as a whole, are to be avoided, prevented or reduced by implementing the established ambient air quality goals (art. 1 no. 1 of Directive 2008/50/EC).

41 aa) A right for natural persons directly affected by an exceedance of the immission thesholds to bring an action follows from the protection of human health aimed at by the Act. This aspect was clarified by the Court of Justice of the European Union. The case-law which it handed down on the action plans in accordance with art. 7 (3) of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ EC L 296 p. 55) in the version of Regulation (EC) No. 1882/2003 of the European Parliament and of the Council of 29 September 2003 (OJ EU L 284 p. 1), section 47 (2) BImSchG, old version (ECJ, judgment of 25 July 2008 - C-237/07 [ECLI:EU:C:2008:447], Janecek - para. 42), can certainly also be transferred in this respect to the ambient air quality maintenance plans in accordance with art. 23 (1) of Directive 2008/50/EC and section 47 (1) BImSchG, new version (…).

42 As the claimant is a legal entity, its health cannot be affected. It is unable to assert the violation of a subjective right to compliance with the immission thresholds following from a guarantee of physical integrity. In accordance with the traditional understanding of the term “subjective right”, the same

would apply where the law on ambient air quality serves to protect the environment as such and hence a general interest.

43 bb) EU law however requires a broader interpretation of the subjective right positions following from the law on ambient air quality.

44 The Court of Justice of the European Union presumes that directly-affected legal entities are entitled to bring an action in the same way as natural persons (judgment of 25 July 2008, see above, para. 39). It has not explained in detail the criteria regarding how a party has to be affected in order to open up a subjective legal position on which an action could be based. The expansion of the possibilities to legal protection over and above the assertion of individual legal positions is nonetheless set out therein.

45 (1) If the fact of being affected is determined by a geographical relationship with the radius of action of the immissions (…), it nonetheless follows from this case-law that the legal entity - on the basis of the protective purpose of the provision as it is emphasised in para. 38 of the judgment - may make a third-party interest its own concern, for example an enterprise established in such a location regarding the health of its workers.

46 The legal power which is thus awarded by EU law, when section 42 (2) second half sentence VwGO is interpreted in conformity with EU law, is to be recognised in the interest of the principle of effectiveness following from art. 4 (3) EU as a subjective right (…). It determines at the same time the understanding of the provisions issued by the Member States to transpose EU law, and results in an expansion of the term “subjective right”. Only such an understanding does justice to the development of EU law. It was determined from the outset by the tendency, through generous recognition of subjective rights, to also encourage citizens for the decentralised enforcement of EU law. The citizen then simultaneously has “procuratory” legal status, related to the objective interest in ensuring the practical effectiveness and unity of EU law. This legal status can also be brought to the fore (…).

47 (2) The directly-affected legal entities to which a right to act as a claimant is granted by section 47 (1) BImSchG include environmental protection organ-

isations recognised in accordance with section 3 UmwRG.

48 An interpretation of section 47 (1) BImSchG in a way that, in addition to directly-affected natural persons, environmental protection organisations also have the right to demand compliance with the imperative provisions of the law on ambient air quality, is required by art. 23 of Directive 2008/50/EC and art. 9 (3) of the Aarhus Convention. With regard to circumstances which are subject to EU law - as is the case with the drawing up of ambient air quality maintenance plans in the case at hand - the Court of Justice of the European Union demanded in its judgment of 8 March 2011 broad access to justice for environmental protection organisations because the “safeguarding an individual’s rights under EU law” must be guaranteed (see above para. 48 and 51). On this basis, the right to bring an action, which the Court of Justice recognised in its judgment of 25 July 2008 (see above.) in terms of ambient air quality maintenance, must also cover environmental protection organisations. As was stated above, a fundamental negation of such rights of environmental protection organisations would furthermore be incompatible with the Compliance Committee’s case-law on art. 9 (3) of the Aarhus Convention.

49 Neither EU law nor art. 9 (3) of the Aarhus Convention however demand that each environmental protection organisation be granted a right to compliance with the imperative provisions when drawing up an ambient air quality maintenance plan. In the same way as natural persons, environmental protection organisations can only have substantive subjective rights if they belong not only to the general public, but also to the “public concerned”. Article 2 no. 5 of the Aarhus Convention and - for the environmental impact assessment - the identical wording contained in art. 3 no. 1 of Directive 2003/35/EC define the “public concerned” as the public affected or likely to be affected by, or having an interest in, the environmental decision-making. Non-governmental organisations campaigning for environmental protection which meet all the prerequisites according to domestic law have an interest within the meaning of this definition (cf. also art. 2 (3) of Directive 2003/35/EC). These organisations shall be able to make public environmental protection interests their own concern.

50 What preconditions an environmental protection organisation must satisfy in accordance with domestic law in order to be entitled to make the environmental protection interests their own concern in cases regarding the drawing up of an ambient air quality maintenance plan is not explicitly regulated. Section 3 UmwRG only regulates which environmental protection organisations may lodge appeals in accordance with the Environmental Appeals Act. It is however possible to derive from this provision the fundamental principle that only those environmental protection organisations which are recognised in accordance with this provision shall be entitled to assert before a court that legal provisions serving environmental protection have been violated. The rights to participation and to lodge appeals in accordance with sections 63 and 64 BNatSchG are linked to recognition in accordance with section 3 UmwRG. There is no normative indication that, in the drawing up of ambient air quality maintenance plans, the right to demand compliance with the imperative provisions of the law on ambient air quality, which as a matter of principle is also granted to environmental protection organisations, could be subject to further prerequisites.

51 3. The impugned judgment is not based on a violation of law subject to an appeal on points of law in other respects. (…)