OPINION OF ADVOCATE GENERAL SHARPSTON

delivered on 15 July 2010[1]

1. This reference for a preliminary ruling from the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) concerns the effect of Article 9(3) of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('the Aarhus Convention');[2] in particular, whether that article should has, or should, be construed as having direct effect within a Member State's legal order.

2. This case raises important issues regarding the allocation of jurisdiction to interpret provisions of mixed agreements as between the national courts of individual Member States and the Court of Justice.

1 — Original language: English.

2 — The Aarhus Convention was concluded on 25 June 1998 and entered into force on 30 October 2001. As of 22 November 2009, there were 44 Parties to the Aarhus Convention, including the Slovak Republic (which acceded to the Convention on 5 December 2005) and the European Union ('EU') (which acceded on 17 February 2005).

The Aarhus Convention

3. The preamble to the Aarhus Convention recognises that every person has the right to live in an environment adequate to his or her health and well-being and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations. To be able to assert that right and observe that duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters.

4. Article 3 of the Aarhus Convention sets out its general provisions. In particular, Article 3(1) states that: 'Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement

measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention.'

5. Article 6 contains a number of elements dealing with public participation in the decision-making process. Its relevant provisions read as follows:

'1. Each Party:

(a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;

(b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions …'

6. Article 9 is entitled 'Access to Justice'. Its relevant provisions read as follows:

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

(a) [h]aving a sufficient interest or, alternatively,

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

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

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

The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement

of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

…'

7. Article 19 sets out the provisions regarding ratification. Article 19(5) states that: 'In their instruments of ratification, acceptance, approval or accession, the regional economic integration organisations referred to in [A]rticle 17 [[3]] shall declare the extent of their competence with respect to the matters governed by this Convention. These organisations shall also inform the Depositary of any substantial modification to the extent of their competence.'

EU law[4]

The EC Treaty

8. At the material time, Article 174 EC[5] governed Community policy on the environment. It states that the policy adopted is to contribute to the pursuit of certain objectives, namely preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems. Article 175(1) EC[6] states that '[t]he Council, acting in accordance with the procedure referred to in Article 251 [EC] and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Community in order to achieve the objectives referred to in Article 174 [EC].'

9. The first sentence of the first subparagraph of Article 300(2) EC, and the first subparagraph of Article 300(3) EC set out the procedural requirements for the conclusion of an agreement between the Community and one

3 — Article 17 defines "regional economic integration organisations" as organisations "constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters". The European Union is included within that definition by necessary implication.

4 — As the reference was made, and all the facts arose, before the Lisbon Treaty came into effect, I will refer to the law and structure of the EU as it existed before that point. None the less, given that the issues raised in the present case are of continuing importance, I have, where appropriate, also referred to the law of the European Union as it now stands, as 'EU law'.

5 — Now Article 191 TFEU.

6 — Now Article 192 TFEU.

or more States or international organisations which, under Article 300(7) EC, will be binding on the institutions of the Community and on the Member States. [7]

Incorporation of the Aarhus Convention into Community law

10. Before the Aarhus Convention was approved, the measures required to incorporate Article 9(2) of that Convention into Community law were in fact adopted by Directive 2003/35. [8]

Directive 2003/35

11. The following recitals are pertinent:

'(5) On 25 June 1998 the Community signed the [Aarhus Convention]. Community law should be properly aligned with that Convention with a view to its ratification by the Community.

…

(9) Article 9(2) and (4) of the Aarhus Convention provides for access to judicial or other procedures for challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of the Convention.

(10) Provision should be made in respect of certain Directives in the environmental area which require Member States to produce plans and programmes relating to the environment but which do not contain sufficient provisions on public participation, so as to ensure public participation consistent with the provisions of the Aarhus Convention, in particular Article 7 thereof. Other relevant Community legislation already provides for public participation in the preparation of plans and programmes and, for the future, public participation requirements in line with the Aarhus Convention will be incorporated into the relevant legislation from the outset.

7 — The provisions of Article 300 were replaced by Article 218 TFEU.

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

(11) Council Directive 85/337/EEC [[9]] and Council Directive 96/61/EC [[10]] should be amended to ensure that they are fully compatible with the provisions of the Aarhus Convention, in particular Article 6 and Article 9(2) and (4) thereof.

(12) Since the objective of the proposed action, namely to contribute to the implementation of the obligations arising under the Århus Convention, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of the action, be better achieved at Community level, the Community may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty ….'

12. In order to incorporate the requirements of Article 9(2) of the Aarhus Convention into EU law, Directive 2003/35 then inserted Article 10a into Directive 85/337 and Article 15a into Directive 96/61.

Council Decision 2005/370/EC

13. On 17 February 2005 the Aarhus Convention was approved on behalf of the European Community by Council Decision 2005/370/EC. [11] That approval was duly based on Article 175 EC, the first sentence of the first subparagraph of Article 300(2) EC, and the first subparagraph of Article 300(3) EC.

14. The annex to Decision 2005/370 contains a declaration by the European Community in accordance with Article 19 of the Aarhus Convention. [12] The second paragraph of the Declaration states that 'the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention … Consequently, [the] Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts

9 — Directive of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40: "Directive 85/337" or "the EIA Directive").

10 — Directive of 24 September 1996 concerning integrated pollution prevention and control (OJ 1996 L 257, p. 26: "Directive 96/61" or "the IPPC Directive").

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

12 — 'The Declaration.'

provisions of Community law covering the implementation of those obligations.'

15. Article 9(3) of the Aarhus Convention has been incorporated into EU law only partially, by Regulation (EC) No 1367/2006, [13] which however applies solely to the institutions of the European Union. It has not been incorporated more generally. Although the Commission presented a proposal for a directive of the European Parliament and of the Council on access to justice in environmental matters on 24 October 2003, [14] that proposal has not been adopted and become law.

16. Finally, in the light of the facts giving rise to the proceedings before the national court, it is convenient to mention that the brown bear (*ursus arctos*) is designated under Annex II to the Habitats Directive [15] as a species of Community interest whose conservation requires the designation of special areas of conservation, and under Annex IV as a species of Community interest in need of strict protection.

National law

17. By Decree No 1840 of 23 September 2005 the Slovak Republic's National Council agreed to accede to the Aarhus Convention. The Convention entered into force in the Slovak Republic on 5 March 2006.

18. Administrative procedure in the Slovak Republic is governed by, inter alia, Law No 71/1967 Coll. on administrative proceedings ('the Administrative Procedure Code'). Article 14 of that code permits persons to claim recognition of their status as parties to administrative proceedings that directly concern their rights and legally protected interests.

19. Prior to 30 November 2007, the second sentence of Article 83, paragraph 3, of Law No 543/2002 gave the status of 'parties to the proceedings' to associations whose objective was the protection of the environment. That status was available to associations who made a written request to be allowed to participate, and who did so by a set deadline. Under paragraph 6 of that law, such associations could request to be notified of any proceedings likely to affect the environment. Under paragraph 7, the public authorities were obliged to notify the associations accordingly. Such associations also had the opportunity to contest before the courts, in accordance with Article 250, paragraph 2, of the Civil Procedure Code, any decisions taken.

13 — Regulation of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13).

14 — COM(2003) 624 final.

15 — Council Directive 92/43/EEC of 21 May on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7: 'the Habitats Directive').

20. However, Law No 543/2002 was amended by Law No 554/2007, with effect from 1 December 2007. The effect of that amendment, so far as is here relevant, was that environmental associations (such as the present applicant before the referring court) are now classed as 'interested parties' rather than as 'parties to the proceedings'. In substance, as the Slovak Government indicated at the hearing, the change of status precludes those associations from themselves directly initiating proceedings to review the legality of decisions. Instead, they must request that a public attorney act on their behalf.

Facts and questions referred

21. The applicant before the national court, Lesoochranárske zoskupenie VLK ('LZ'), is an unincorporated association concerned with environmental protection. LZ requested the defendant, the Ministerstvo životného prostredia Slovenskej republiky (the Ministry of the Environment of the Slovak Republic: 'the Ministry') to inform it of any administrative decision-making procedure which might potentially affect the protection of nature and the environment, or which concerned granting derogations to the protection of certain species or areas.

22. At the beginning of 2008, LZ was informed of a number of pending administrative proceedings brought by, inter alia, various hunting associations. On 21 April 2008 the Ministry took a decision granting a hunting association's application for permission to derogate from the protective conditions accorded to the brown bear. In the course of that procedure, and in subsequent ones, LZ notified the Ministry that it wished to participate, seeking recognition of its status as a party to the administrative proceedings under the provisions of Article 14 of the Administrative Procedure Code. In particular, LZ asserted that the proceedings in question directly affected its rights and legally-protected interests arising from the Aarhus Convention. It also considered that convention to have direct effect.

23. In its decision of 26 June 2008 ('the contested decision') the Ministry confirmed its decision of 21 April 2008. It further stated that LZ did not have the status of a party to the proceedings. LZ could not, therefore, appeal against the decision of 21 April 2008. Moreover, the Ministry considered that the Aarhus Convention was an international treaty which needed to be implemented in national law before it could take effect. In its view, the Slovak Republic is the addressee of Article 9(2) and (3) of the Aarhus Convention; and those provisions, in themselves, do not contain any unequivocally drafted fundamental right or freedom which would be directly applicable, in the sense of the 'self-executing' theory

used in public international law, to public authorities.

24. LZ lodged an action against the contested decision at the Krajský súd v Bratislave ('the Bratislatva Regional Court'). That court reviewed the contested decision, together with the administrative procedures that had preceded it, and dismissed LZ's application.

25. In reaching that view, the Bratislava Regional Court held that a logical or grammatical interpretation of Article 9(2) and (3) did not grant an applicant the right to participate in administrative and judicial procedure with the status of a party to those proceedings. On the contrary, the Aarhus Convention required its Contracting States to adopt – within an unspecified period – measures of national law, pursuant to which the public concerned would be enabled to participate in the review of decisions concerning activities set out in Article 6 thereof before the court or other administrative bodies.

26. LZ appealed to the Supreme Court, which stayed the proceedings before it and referred the following questions to the Court of Justice:

'(1) Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention, given that the principal objective pursued by that international treaty is to change the classic definition of *locus standi* by according the status of a party to proceedings to the public, or the public concerned, as having the direct effect of an international treaty ("self-executing effect") in circumstances in which the European Union acceded to that international treaty on 17 February 2005 but to date has not adopted Community legislation in order to transpose the treaty concerned into Community law?

(2) Is it possible to recognise Article 9 and in particular Article 9(3) of the Aarhus Convention, which has become a part of Community law, as having the direct applicability or direct effect of Community law within the meaning of the settled case-law of the Court of Justice?

(3) If the answer to the first or the second question is in the affirmative, is it then possible to interpret Article 9(3) of the Aarhus Convention, given the principal objective pursued by that international treaty, as meaning that it is necessary also to include within the concept "act of a public authority" an act consisting in the delivery of decisions, that is to say, that the right of public access to judicial hearings intrinsically also includes the right to challenge the decision of an

administrative body which contravene provisions of its national law relating to the environment?'

27. Written observations were submitted by LZ, the Governments of Germany, Greece, France, Poland, Finland, Sweden, the Slovak Republic and the United Kingdom and the Commission. With the exception of the Greek and Swedish Governments, all these parties attended the hearing on 4 May 2010 and presented oral argument.

Preliminary remarks

Admissibility

28. The first two questions referred to the Court concern the interpretation of 'Article 9, and in particular Article 9(3)' of the Aarhus Convention. The third question is concerned exclusively with Article 9(3). Article 9 is entitled 'access to justice'. Its successive subparagraphs address different aspects of that issue.

29. Thus, Article 9(1) provides for access to review procedures if a request for information is refused. 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. [16] 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. Article 9(4) states that the procedures in the first three subparagraphs should provide adequate and effective remedies, and lays down certain standards with which such procedures should comply. Finally, Article 9(5) obliges the Contracting Parties to inform the public of their rights of access to administrative and judicial review procedures and to consider the establishment of appropriate assistance mechanisms to ensure greater access to justice.

30. The Polish and United Kingdom Governments raise in their observations the question of admissibility. They consider that the sense

16 — The category of 'decision, act or omission' that may be so challenged may be enlarged by national law.

of the questions referred relates only to Article 9(3) and suggest that the Court should therefore declare the reference inadmissible in so far as it relates to the other parts of Article 9 of the Aarhus Convention.

31. According to settled case-law, in references for a preliminary ruling it is solely for the referring court to determine both the need for a preliminary ruling and the relevance of the questions submitted to the Court. Where these questions concern the interpretation of Community law, the Court is in principle bound to give a ruling. Nevertheless, in exceptional circumstances the Court may examine the conditions in which the case was referred to it by the national court, in order to confirm its own jurisdiction. In particular, the Court may refuse to rule on a question referred for a preliminary ruling by a national court where (inter alia) the problem is hypothetical. [17]

32. Before the referring court, LZ has sought to rely only on Article 9(2) and (3) of the Aarhus Convention. Any answer that the Court might give in relation to Article 9(1), (4) and (5) would have no bearing on the case before the national court. That court's references to those other parts of Article 9 are therefore hypothetical and consequently inadmissible.

33. The Aarhus Convention provides for access to justice, under Article 9(2), for persons wishing to challenge any decision, act or omission subject to the provisions of Article 6. Article 6 applies to activities under Annex I to the Convention (a list covering, inter alia, industry projects, energy processing of metals and waste management) and activities which may have a significant effect on the environment under national law.

34. The sphere of operation of Article 9(2) is the same as that covered by the EIA Directive and the IPPC Directive (which operates independently of, and does not preclude the application of, the EIA Directive).

35. This congruity of subject-matter suggests that Article 9(2) has been incorporated fully into EU law. Furthermore, recitals 10 and 11 to Directive 2003/35 indicate that the legislator regarded the amendments introduced by that directive as being adequate to effect a complete incorporation of that provision.

17 — See, for a recent example, Case C-314/08 *Filipiak* [2009] ECR I-11049, paragraphs 40 to 42 and the case-law cited there.

36. In these circumstances, the question whether Article 9(2) has direct effect does not arise.[18]

37. I therefore suggest that the Court should answer the questions referred only in so far as they relate to Article 9(3).

38. Finally, as the United Kingdom rightly observed, although the referring court uses both 'direct effect' and 'direct applicability' in its question, the first two questions before the Court concern the direct effect of Article 9(3).[19] I therefore suggest that the first two questions be treated as referring only to direct effect.

39. For the sake of clarity, I note that the test for 'direct effect' which is relevant in the present case is that applicable to provisions of international law – a test that differs slightly from the test applied to 'internal' provisions of EU law. I shall address the distinction briefly at a later stage.[20]

The first question

40. By its first and second questions, the referring court seeks to find out whether it is possible to recognise Article 9(3) of the Aarhus Convention as having direct effect.

41. The first question, as a number of the parties submitting observations to the Court have pointed out, indirectly raises the issues of competence and jurisdiction in the interpretation of mixed agreements. Indeed, the Commission and the Finnish and Swedish Governments have specifically addressed the question whether the Court has jurisdiction to decide the question referred to it in this case.

42. These competence and jurisdictional issues have been considered by the Court in a long and sometimes convoluted line of

18 — It may be wondered whether the proceedings brought by LZ fall within the scope of Article 6 (and hence Article 9(2)) of the Aarhus Convention. They concern a decision derogating from the protective conditions afforded to the brown bear as a species. Even if they concerned a decision potentially affecting the habitat of the brown bear, such a decision does not seem to me to fall into Annex I of the EIA Directive. Nor does the Habitats Directive seem to contain any provisions addressing the significant effects particular projects may have on the environment. However, all this is a matter for the national court to determine.

19 — The term 'direct effect' denotes that an individual can rely on a provision before a national court, whereas 'direct applicability' denotes that an agreement is self-executing, without European Union or national legislation being needed to implement it.

20 — See point 85, below.

case-law, culminating in the recent decision in *Merck Genéricos*.[21] I propose to begin by analysing that case-law.

The Court's case-law on mixed agreements

43. As a number of scholars have noted, mixed agreements are a particularly contentious type of normative instrument in European law.[22] Initially, the Court focused on the division of competences between the Community and the Member States. In *ERTA*, the Court established the rule that a Member State's external competence is curtailed as and when the Community acquires exclusive external competence. The Community can acquire such exclusive competence through internal regulation.[23] The rule in *ERTA* remains the general starting point for any analysis of mixed agreements.[24]

44. Is the Court's power to interpret mixed agreements therefore limited to those provisions of a mixed agreement that fall within Community competence?

45. At a similarly early point in its case-law, the question began to be raised of the Court's jurisdiction to give preliminary rulings on the validity and interpretation of mixed agreements. In *Haegeman* the Court concluded swiftly that it had such jurisdiction. It did so on the basis that it had jurisdiction over acts of the Community institutions, and that international agreements concluded under what is now Article 300 EC fell within that ambit.[25]

46. Initially, the issue of jurisdictional limitations was not directly addressed.[26] Then in

21 — Case C-431/05 *Merck Genéricos Produtos Farmacêuticos* [2007] ECR I-7001. Advocate General Ruíz-Jarabo Colomer set out, in his Opinion in that case, a careful exposé of the relevant case-law. However, since the issue has been reopened in the present proceedings I shall revisit the authorities that he discussed.

22 — See, for an overview, the introductory chapter in Heliskoski, J., *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States* (Kluwer Law International, The Hague, 2001).

23 — Case 22/70 *Commission* v *Council (ERTA)* [1971] ECR 263, paragraphs 17 to 19.

24 — See, for instance, Ruling 1/78 on the Draft Convention of the International Atomic Energy Agency on the Physical Protection of Nuclear Materials, Facilities and Transports [1978] ECR 2151, paragraphs 31 to 35, but also subsequently Opinion 1/94 [1994] ECR I-5267, paragraph 77. The rule in *ERTA* is also reproduced in Protocol 25 to the Lisbon Treaty, elaborating on Article 2(2) TFEU as regards shared competence.

25 — Case 181/73 *Haegeman* v *Belgium* [1973] ECR 449, paragraphs 4 to 6.

26 — See, for example, Case 65/77 *Razanatsimba* [1977] ECR 2229.

Demirel[27] the Court considered whether it had competence to interpret the provisions of the EEC-Turkey Association Agreement. It held that it did have such competence, on the grounds that the commitments on free movement there at issue fell within the Community's competence.[28] For some time thereafter, the Court took a broad approach towards its jurisdiction to interpret such provisions.[29]

47. In 1996, however, the Court's approach was changed by the *Hermès* litigation,[30] which related to the interpretation of provisions of the TRIPs agreement. In those proceedings, which concerned the question whether a national interim measure was a 'provisional measure' within the meaning of Article 50 of TRIPs, the Court saw its jurisdiction challenged, on the grounds that there had been no decision by the Community to exercise a non-exclusive competence within a mixed agreement.[31]

48. The Court held that it did have jurisdiction to interpret the article in question on the basis that Regulation (EC) No 40/94,[32] which related to (and was affected by) Article 50 of TRIPs, had already come into force at the time at which the agreement was signed. As the situation fell within national law and Community law, the Court had jurisdiction primarily on the basis that it was required to forestall future divergences in interpretation which would have arisen had the matter been left to national courts.[33] In reaching that conclusion the Court relied specifically on *Giloy*[34] and *Leur-Bloem*[35] (both cases

27 — Case 12/86 [1987] ECR 3719.

28 — Paragraphs 6 to 12 of the judgment. As Eeckhout has noted, however, in *Demirel* the Court stated that the question of whether it had jurisdiction to interpret a provision containing a Member State-only commitment did not arise. Rather it simply confirmed that there was a link between Community competence and jurisdiction (*External Relations of the European Union*, Oxford University Press, 2004, p. 236).

29 — That decision has formed the basis for a long line of case-law on the EEC-Turkey Association Agreement, from Case C-192/89 *Sevince* [1990] ECR I-3461 and Case C-237/91 *Kus* [1992] ECR I-6781 onwards.

30 — Case C-53/96 [1998] ECR I-3603.

31 — In point 52 of his Opinion in *Merck Genéricos*, Advocate General Ruíz-Jarabo Colomer repeated Eeckhout's remark (op. cit., p. 237) that the *Hermès* case exposed the weaknesses in using Community competence as the criterion for jurisdiction: that the latter is held hostage to the complexity of the former. I too would agree with that assessment.

32 — Council Regulation of 20 December 1993 on the Community Trade Mark (OJ 1994 L 11, p. 1).

33 — Paragraphs 22 to 33 of the judgment. That passage has been construed broadly, as conferring interpretative jurisdiction in areas of joint Community/Member State competence, by commentators such as Dashwood (see, for example, 'Preliminary Rulings on the Interpretation of Mixed Agreements' in O'Keeffe, and Bavasso (eds) *Judicial Review in European Union Law: Liber Amicorum in Honour of Lord Slynn of Hadley* (Kluwer Law International, the Hague, 2000, p. 173)). However, Heliskoski criticises that broad construction in *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and its Member States*, (op. cit. pp. 59-60). *Merck Genéricos* appears to deal the quietus to the broad approach, although the idea of forestalling future divergences in interpretation remains a valid reason for endorsing the judgment reached in that case.

34 — Case C-130/95 [1997] ECR I-4291

35 — Case C-28/95 [1997] ECR I-4161.

concerning uniform interpretation of Community and national law without the added complication of shared competence under a mixed agreement).

49. The Court confirmed that approach a couple of years later in *Dior*, [36] another case concerning the interpretation of Article 50 of TRIPs. In that judgment it extended to other intellectual property rights its interpretative jurisdiction over Article 50, but for present purposes the more interesting development lies in paragraph 49 of the judgment, where the Court distinguished between trade marks and industrial designs, on the basis that the Community had legislated in the field of the former but not the latter. Thus, while the Court stated that the TRIPs provisions relating to trade marks did not have direct effect (though the national courts had a duty of consistent interpretation), it held that for industrial designs Community law neither required nor forbade direct effect. [37]

50. The judgments in *Hermès* and *Dior* left a considerable number of questions unanswered. The link between competence and jurisdiction, for example, was not greatly clarified by those cases; nor was the Court's choice of reasons for the jurisdictional scope it identified itself as possessing in this field. [38]

51. The quest for clarity was not, unfortunately, assisted by *Schieving-Nijstad*, where the Court drew a distinction between jurisdiction to interpret a provision and the authority to determine the procedural rules relating to actions to enforce that provision. [39] The *Étang de Berre* and *Mox Plant* [40] judgments, given in the context of direct actions under Article 226 EC rather than references under Article 234 EC, pared down the analysis previously developed. In those cases, the Court largely passed over the question of jurisdiction, holding only that mixed agreements have the same status

36 — Joined Cases C-300/98 and C-392/98 *Dior and Others* [2000] ECR I-11307.

37 — This approach was criticised for its opacity by Advocate General Jacobs in point 40 of his Opinion in Case C-89/99 *Schieving-Nijstad* and Others [2001] ECR I-5851. Eeckhout agrees with that criticism, wondering 'whether the current [2004] maelstrom of jurisdiction and legal effect contributes much to an effective and workable implementation and application of WTO law at judicial level' (op. cit., p. 243).

38 — Eeckhout offers four different possible reasons for the Court's jurisdiction: the scope of Community obligations; the relationship with harmonised Community law; the approach towards references from the national court and the duty of cooperation. Following the *Dior* judgment there were calls for clearer reasoning from a number of quarters: see, for example, Koutrakos, P., 'The Interpretation of Mixed Agreements under the Preliminary Reference Procedure' (2002) 7 EFA, p. 25, and Heliskoski, J., 'The Jurisdiction of the European Court to Give Preliminary Rulings on the Interpretation of Mixed Agreements' (2000) 69 *Nordic Journal of International Law*, p. 395.

39 — Paragraphs 30 to 38 of the judgment. Eeckhout criticises this in particular, reasoning that the latter is a question of the legal effect of a provision, and that the interpretation of a provision's legal effect is an integral part of the interpretation of that provision.

40 — Case C-239/03 *Commission* v *France* [2004] ECR I-9325 ('*Étang de Berre*') and C-459/03 *Commission* v *Ireland* [2006] ECR I-4635 ('*Mox Plant*') respectively.

as purely Community agreements in so far as their provisions fall within the scope of Community competence. [41]

52. Prior to *Merck Genéricos*, [42] it had therefore become difficult to identify the areas in which the Court had jurisdiction in respect of a mixed agreement. This difficulty is reflected in some of the submissions in the present case, notably those of the Finnish and Swedish Governments, who have addressed the question of the Court's competence as part of their observations on the substantive interpretation of the provision at issue.

53. Against that background, the robust judgment in *Merck Genéricos* was a breath of fresh air. The case itself concerned the interpretation of Article 33 of TRIPs; but it raised the same question as presently occupies the Court: which court is best placed to determine whether a particular provision of a mixed agreement has or could have direct effect?

54. The Court held, firmly, that the jurisdiction to ascribe direct effect to a provision depended on whether that provision lay in a sphere in which the Community had legislated. If so, Community law (as interpreted by the Court) would apply; if not, the legal order of a Member State was neither required nor forbidden to accord to individuals the right to rely directly on the rule in question. Moreover, the Court held that the examination of the sharing of competence between the Community and its Member States called for a uniform reply at Community level that the Court alone was capable of supplying, and that it therefore had the jurisdiction to conduct such an examination. [43]

55. Despite the rather laconic reasoning, it seems to me that the Court in *Merck Genéricos* cut through the Gordian knot and provided a clear answer to the question whether the Court has competence to indicate which jurisdiction is best-placed to determine whether a particular provision has direct effect. It held that it does.

56. I respectfully agree with the conclusion that the Court reached in *Merck Genéricos*. The judgment has the advantage that it takes a highly practical approach to a question that frequently arises in a politically sensitive

41 — *Étang de Berre*, paragraph 25. The Court briefly addressed the question of defining the scope of Community competence, holding that the absence of Community provisions dealing with the specific environmental problem within a field (environmental protection) that was, in general, covered by Community legislation did not undermine Community competence (paragraphs 27 to 31).

42 — Cited above, footnote 21.

43 — Paragraphs 33 to 38.

context. As certain academic commentators have pointed out, the mixed agreement is itself a creature of pragmatic forces – a means of resolving the problems posed by the need for international agreements in a multi-layered system. [44]

57. The analysis that follows closely mirrors the *Merck Genéricos* judgment. I shall merely add certain details as and when I feel that they may be helpful to the Court.

Jurisdiction to interpret a mixed agreement

58. Article 300(7) EC provides that instruments concluded thereunder are to be binding on the institutions of the Community and on the Member States. The Aarhus Convention was just such an instrument. Its provisions now form an integral part of the Community legal system. [45] Mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements in so far as their provisions fall within the scope of Community competence. [46]

59. *Merck Genéricos* was concerned – like the present case – with a mixed agreement in which there was no allocation, as between the Community and the Member States, of their respective responsibilities towards the other contracting parties. The Court held that it had jurisdiction – and was indeed best placed – to examine the matter of the division of competence between the Community and its Member States, and to define the obligations that the Community had thereby assumed. [47]

60. I agree with that position. It seems clear to me that the Court is the only body which is capable of undertaking such an evaluation. [48]

44 — See, in particular, De Baere, G., *Constitutional Principles of EU External Relations* (Oxford University Press, 2008), p. 264.

45 — See *Mox Plant*, paragraphs 82 and 84 and the case-law cited there. This is long-settled case-law: see *Demirel*, paragraph 6 and the case-law cited there.

46 — *Étang de Berre*, paragraph 25 and the case-law cited there. This covers not only provisions falling into the exclusive competence of the Community, but also mixed competence provisions. It may perhaps be helpful to think of the Community acquiring exclusive external competence upon its exercising a latent power. Advocate General Cosmas in point 43 of his Opinion in *Dior* drew the distinction between potential and actual Community competence, suggesting that the former is converted into the latter when the Community takes legislative action in a particular area. The analysis is echoed by Eeckhout (op. cit., p. 271) and I would also endorse it as a way of conceptualising the problem.

47 — Paragraphs 31 to 33 of the judgment.

48 — In *Dior*, Advocate General Cosmas argued forcefully, however, against according to the Court the competence to *interpret all provisions* of a mixed agreement; namely that to do so would encroach upon the competence of the national authorities, and that the institutional role of the Court does not extend to taking a legislative initiative with regard to harmonising national legislation (see points 42 and 48).

Artificially to restrict the Court from taking even the preliminary step of interpreting the legislation as a whole, in order that all parties to the mixed agreement might know their responsibilities and what their substantive powers of interpretation are, seems like a position which cannot be right. Such an approach would not only balance angels on pinheads unnecessarily, but equip those angels with flaming swords.

61. Furthermore, to hold otherwise would cause fragmentation in the implementation of the legislation itself. This in turn would increase legal uncertainty for the Community, for the Member States, for third party States and for potential litigants. Furthermore, there is every possibility that following such a path would lay the Community open to accusations that it was not fulfilling its role as a Contracting Party.

62. For those reasons, it would seem reasonable to apply the analysis taken by the Court in *Merck Genéricos*: that the Court has, at least, sufficient jurisdiction to decide which court – itself or the competent court of a Member State – is best-placed to determine whether a particular provision has direct effect.

Which court is best-placed to determine whether Article 9(3) of the Aarhus Convention has direct effect?

63. The test set out by the Court in *Merck Genéricos* to decide that question [49] is whether the Community has legislated in the particular sphere into which the provision to be examined falls.

64. That test reflects the distinction drawn by the Court in *ERTA*, [50] that is to say, whether or not a provision falls within the exclusive competence of the Community depends on whether sufficiently comprehensive internal rules have been enacted in that area. It also preserves one of the positive aspects of the *Hermès* judgment, namely forestalling future differences of interpretation in instances where Community law will be affected and where there is consequently a need for uniformity.

65. Is Article 9(3) of the Aarhus Convention a provision which lies in a sphere in which the Community has legislated?

49 — Also the related question, for the provision itself, as to whether it is contrary to Community law for a provision of a mixed agreement to be given direct effect.

50 — For the purposes of drawing an *ex post* division of competences in a mixed agreement.

66. Here, one of the problems of the *Merck Genéricos* judgment becomes apparent. That judgment contains no guidance as to what degree of exercise of Community powers is 'of sufficient importance' to lead to the conclusion that the Community has legislated within a particular 'sphere'.

Can recourse be had to 'downstream' legislation?

67. In referring to 'downstream' legislation, I mean legislation concerning the subject-matter of an administrative decision (e.g. the protected species in question), rather than directly governing access to justice in respect of the decision itself. A court will clearly wish to take account of such legislation in reaching its eventual decision, but this raises the question: Does the existence of such legislation also have a bearing in respect of access to justice under the Aarhus Convention?

68. The appeal pending before the referring court concerns the brown bear. The question has therefore been raised whether the fact that the brown bear is included on the list of species protected by the Habitats Directive is relevant for the purposes of determining whether Article 9(3) of the Aarhus Convention lies within a sphere falling within the scope of Community law.

69. In my view it is not.

70. If account were to be taken of such 'downstream' legislation, the interpretation of Article 9(3) would become fragmented. It would depend on the precise facts of the case before the interpreting court. For example, in the present case, whether this Court or the national court had jurisdiction to interpret the Aarhus Convention would depend upon whether the species for which a hunting permit was sought was mentioned in a particular list in the Habitats Directive. That is too random and arbitrary to be a satisfactory basis for determining competence.

71. Of course, much 'downstream' legislation may circumscribe the national court's discretion in a particular case independently of the impact of Article 9(3). Thus, in the present proceedings, recourse might appropriately be had to the Habitats Directive, which lists the brown bear as a protected species. [51] That directive has no direct relevance to the questions referred to this Court and no bearing

51 — See point 16 above.

on whether Article 9(3) of the Aarhus Convention may be given direct effect. Nevertheless, the Slovak Republic has a duty to ensure that the Habitats Directive is implemented effectively.[52]

Defining 'sphere'

72. How tightly should one define the sphere in which the Community must have legislated? A number of possibilities may be envisaged – from the broad abstract concept ('legislation affecting the environment'),[53] to a definition that matches the subject-matter of the Aarhus Convention, or a part thereof ('access to information, public participation in decision-making and access to justice in environmental matters'),[54] to asking whether the precise subject-matter of the particular provision in question has been covered by a legislative measure incorporating that provision into EU law.

73. The division of competences in a mixed agreement is both tempered by pragmatism and prone to evolution. Mixed agreements are sometimes legislative compromises borne of the political necessity to conclude a deal. It would accordingly seem sensible that the Court define the 'sphere' relating to the implementation of a particular provision in a pragmatic manner, having regard both to the international convention itself and to whether EU law has been enacted to incorporate, in respect of the Member States, the specific provision that is at issue.

74. Article 9(3) imposes a particular, distinct set of obligations on the Contracting Parties to the Aarhus Convention. Although the article lies within the broad sphere of 'environmental law' (which has been the subject of a series of legislative initiatives at Community level), the obligations it sets out are sufficiently distinct from the obligations set out in the other parts of Article 9 (as the Council emphasised in the Declaration) for it to be

52 — For example, although the Habitats Directive does not itself provide *locus standi* for a party to challenge an administrative procedure, the referring court might be obliged of its own motion in a case before it to hold the substantive decision to be contrary to the Slovak Republic's obligations under EU law. Alternatively, it might be obliged to provide access to a court under Articles 3(1)(b), 12 and 13 of Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (OJ 2004 L 143, p. 56), if the damage to a protected species (the brown bear) were caused by an 'occupational activity' within the meaning of Article 2(7) of that directive and if the persons concerned had a 'sufficient interest' under Slovak law as provided in Article 12(1), third paragraph.

53 — Implied in *Étang de Berre*, paragraph 28, although, as noted above, that case concerned the jurisdiction of the Court in an infringement action.

54 — This seems to have been the case in *Dior*: see point 32 of the Opinion of Advocate General Cosmas. However, the Advocate General seems to suggest in point 33 that the test should be whether the Community 'exercised its potential power' in that area. The Advocate General also suggested at point 35 examining whether any 'provision of Community law [has] been affected by the interpretation and application' of the article in question'.

necessary for the Court to examine whether the Community has legislated in the particular sphere covered by Article 9(3).

Has the Community legislated in the sphere covered by Article 9(3)?

75. As both the Polish and Finnish Governments point out, the Community has not, so far, legislated in the specific area into which Article 9(3) falls.

76. Although Directive 2003/35 covers Article 9(2), the provisions of Article 9(3) have not yet become part of EU law.[55] The only transposition of Article 9(3) which has occurred is in respect of the EU's own institutions, through Regulation No 1367/2006. To my mind a variation of the common law principle *inclusio unius est exclusio alterius* might be applied here. Thus the presence of a regulation applying Article 9(3) to the institutions serves only to highlight the fact that there is no EU measure incorporating the equivalent obligations into the national legal orders of the Member States.[56] The Commission's proposal for a directive to give effect to Article 9(3) in respect of Member State's obligations has fallen on stony ground. The obligations in Article 9(3) are yet to be transposed into national law through EU law.

77. It seems to me that the proposal for a directive to implement Article 9(3), which has advanced no further, is particularly significant. I do not think that the Court should ignore the absence of relevant Community legislation and allocate to itself the competence to rule on whether or not Article 9(3) has direct effect. If it does so, the Court will be stepping into the legislature's shoes. But the

55 — The apparently broad scope of *Étang de Berre* can be distinguished in this respect. As the Polish Government points out, in that case the Court dismissed objections to its jurisdiction on the basis that general legislation was already in place – what was lacking was legislation dealing with the specific problem before the Court. In the present case, Article 9(3) is an independent provision: it is not itself a subset of the part of Article 9 (Article 9(2)) that has already been incorporated into EU law.

56 — See Case T-37/04 *Azores* [2008] ECR II-103, paragraph 93, in which the Court of First Instance held that the legal effect of Regulation No 1367/2006 was limited to the Community's institutions.

legislature has, thus far, intentionally chosen not to act.

78. Furthermore, the Declaration indicates that the Community considered that 'the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community' fell within the competence of the Member States; and that the Member States were, and would remain, responsible for the performance of those obligations unless and until the Community took action. That it has not done so seems to me to be of crucial importance. [57]

79. So far as the core obligations that are at issue in the present case are concerned, I conclude that Article 9(3) does not lie within a sphere that falls within the scope of Community law.

80. It is therefore for the national courts in the Member States to determine whether Article 9(3) should be construed as having direct effect within a particular Member State's legal order. EU law neither requires nor precludes that interpretation. It is accordingly open to a national court to give the provision direct effect, subject to the conditions provided for by national law; but it is not required by EU law to do so. Rather, in so far as Article 9(3) imposes obligations on a Member State, it is a matter of international law for the Member State to comply with those obligations.

Conclusion

81. I therefore suggest that the Court should rule that it is for the national courts to determine whether Article 9(3) of the Aarhus Convention has direct effect within their own legal order in circumstances in which the European Union acceded to that international treaty on 17 February 2005 but to date has not adopted legislation in order to incorporate that specific provision of the treaty concerned into European Union law in respect of the obligations that it imposes on the Member States (as distinct from the institutions of the European Union).

82. Should the Court not agree with my conclusions on the first question, it becomes necessary to consider questions 2 and 3.

57 — This also further distinguishes the facts of the present case from those underlying *Étang de Berre*.

The second question

83. Is Article 9(3) directly effective?

84. If the Court takes the view that it is necessary to answer that question, I suggest that it should rule that Article 9(3) does not have direct effect.

85. The direct effect (or otherwise) of a provision of an international agreement that is binding on the EU may be set out by the Contracting Parties in the agreement itself. Otherwise, it falls to the courts of those parties to assess whether the provision has direct effect. The Court has accordingly held that a provision in an international agreement concluded by the Communities with a non-member country must be regarded as being directly effective when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. [58]

86. Article 9(3) states that 'in addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment'.

87. In my view Article 9(3) does not contain obligations that are sufficiently clear and precise to govern the legal position of individuals directly, without further clarification or precision.

88. LZ is correct in submitting that members of the public, by virtue of Article 9(3), are meant to be entitled to have access to administrative or judicial procedures. However, they enjoy that entitlement only if they meet the criteria laid down in national law. [59]Neither Article 9(3) itself nor the other provisions of the Aarhus Convention give guidance as to what those criteria might or should be. Rather, as the German Government correctly points out, the *travaux préparatoires* to the Aarhus Convention suggest that the drafters

58 — See, for example, Case C-372/06 *Asda Stores* [2007] ECR I-11223, paragraph 82 and the case-law cited there. See also *Demirel*, cited in footnote 27, paragraph 14, and Case C-308/06 *Intertanko* [2008] ECR I-4057, paragraph 39. Slightly different formulations are to be found in *Dior*, paragraph 42, and the Opinion of Advocate General Poiares Maduro in Case C-120/06 P *FIAMM* [2008] ECR I-6513, in which, at point 26, he criticises the use of the term 'direct effect' as a term of art applying to two different legal norms.

59 — Whether LZ does in fact do so is of course a matter for the national courts.

intended this definition to be left to the Contracting States. [60]

89. In the absence of these express limitations, the potential scope of Article 9(3) would be very wide. Attributing direct effect to Article 9(3), thus bypassing the possibility for Member States to lay down the criteria triggering its application, would be tantamount to establishing an *actio popularis* by judicial fiat rather than legislative action. The fact that the proposal for a directive remains unadopted indicates that, in this particular context, such a step would indeed be inappropriate.

90. LZ argued in the hearing that the Court has stated that the need for criteria to be set by Member States does not necessarily preclude direct effect. However, the cases upon which it relied – namely *Deutscher Handballbund* [61] and *Simutenkov* [62] – can be distinguished on the basis that the criteria remaining to be laid down by the Member States at issue in those cases were fairly limited procedural criteria, rather than wide-ranging substantive criteria.

91. Finally, as the Commission rightly observes, giving Article 9(3) direct effect so that (in the absence of criteria stating otherwise) it may be relied on by any member of the public would generate considerable legal uncertainty for those bodies whose acts or omissions may be the subject of an administrative or judicial procedures. Such bodies may be private persons as well as public authorities. In my view, that is a further reason for considering that Article 9(3) should not have direct effect.

92. I would merely add that the fact that a particular provision in an international agreement is not directly effective does not mean that the national courts of a Contracting Party have no obligation to take it into account. [63]

60 — The *travaux préparatoires* can be found at ECE/MP.PP/2005/3/Add.3 8 June 2005; www.unece.org/env/pp/mop2/mop2.doc.htm. Article 31 of the Vienna Convention on the Law of Treaties ('VCLT') indicates that international law endeavours to give effect to the natural and ordinary meanings of a Treaty's provisions. However, both Article 32 of the VCLT and the general principles of international law provide for the possibility of referring to a Treaty's *travaux préparatoires* in determining the meaning of a term when an interpretation based on the ordinary meaning of a provision, in the light of its object and purpose, would leave the meaning of that term ambiguous or obscure. See Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd edition, Manchester University Press, 1984, p. 141 et seq.

61 — Case C-438/00 *Deutscher Handballbund* [2003] ECR I-4135, paragraph 29.

62 — Case C-265/03 *Simutenkov* [2005] ECR I-2579, paragraphs 24 and 25.

63 — See, by analogy, point 80 of the Opinion of Advocate General Cosmas in *Dior*, cited above, footnote 36.

93. I therefore suggest that, if the Court should take the view that it is necessary to answer the second question referred, it should rule that Article 9(3) of the Aarhus Convention does not have direct effect as a matter of EU law.

The third question

94. By its third question the referring court asks whether the concept of an 'act of a public authority' in Article 9(3) of the Aarhus Convention includes a decision taken by an administrative body.

95. It is clear that the Court is competent to interpret Article 9(3) of the Aarhus Convention in respect of the obligations that that article imposes on the EU institutions by virtue of Regulation No 1367/2006. To the extent that it is desirable – following the reasoning in *Dzodzi*[64] and *Leur Bloem*[65] – for a national court, when applying that provision in the context of its national law, to be aware of the meaning that will be ascribed to key terms in the context of EU law, the Court may wish to answer the third question referred.

96. The difficulty in this case appears to stem from a linguistic particularity in the Slovak text of the Aarhus Convention. The word 'akt' – the term normally used to designate an administrative action in Slovakian law – is used in Article 6 and elsewhere in Article 9, but is not used in Article 9(3). There, the word 'ukon' is used instead. The Slovak Supreme Court has therefore taken the view that the words 'acts and omissions' in Article 9(3) should be taken not to include individual decisions of administrative authorities.

97. However, other language versions suggest that 'akt' is simply the generic description for the positive actions that an administrative body is capable of taking, and that it serves as the counterpoint to 'opomenutí' (omissions), which encompasses everything that such a body should arguably have done, but has failed to do.[66]

64 — Joined Cases C-297/88 and C-197/89 [1990] ECR I-3763.

65 — Cited above, footnote 35.

66 — For example, the English uses 'act or omission'; the French 'les actes ou omissions'; the German 'vorgenommenen Handlungen und begangenen Unterlassungen'.

98. The fact that Article 9(3) differs in phrasing from Article 9(2) (which speaks of 'any decision, act or omission') does not, I think, mean that it should necessarily be read as excluding formal decisions or, indeed as excluding the acts and omissions specified in Article 9(2). If the latter had been the legislator's intention, it seems to me more likely that phrasing such as 'other than those in Article 9(2)' would have been used.

99. A reading of 'acts' in Article 9(3) that includes decisions is supported by the words 'without prejudice to the review procedures referred to in paragraphs 1 and 2'. Article 9(3) is a supplementary provision. It should not be construed restrictively so as artificially to exclude from its scope decisions which might form the subject of procedures under Article 9(1) or (2).

100. I therefore suggest that the Court should answer the third question to the effect that Article 9(3) should be interpreted as including within the concept of 'act of a public authority' an act consisting of the delivery of a decision. The right of public access to judicial review, within the constraints permitted by Article 9(3), should include the right to challenge a decision of an administrative body which is alleged to contravene provisions of a Member State's national law relating to the environment.

Conclusion

101. I therefore suggest that, in answer to the questions referred by the Najvyšší súd Slovenskej republiky, the Court should rule as follows:

(1) The questions referred are inadmissible except in so far as they relate to Article 9(3) of the Aarhus Convention.

(2) It is for the national courts to determine whether Article 9(3) of the Aarhus Convention has direct effect within their own legal order in circumstances in which the European Union acceded to that international treaty on 17 February 2005 but to date has not adopted legislation in order to incorporate that specific provision of the treaty concerned into European Union law in respect of the obligations that it imposes on the Member States.

(3) Article 9(3) of the Aarhus Convention should be interpreted as including within the concept of 'act of a public authority' an act consisting of the delivery of a decision. The right of public access to judicial review, within the constraints permitted by Article 9(3), includes the right to challenge a decision of an administrative body which is alleged to contravene provisions of the Member State's national law relating to the environment.

If the Court should take the view that it has jurisdiction to rule on the direct effect of Article 9(3) of the Aarhus Convention:

(4) Article 9(3) of the Aarhus Convention does not have direct effect as a matter of EU law.