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EIA Directive Procedural Guarantees as Substantive Individual Rights in *IL v. Land Nordrhein-Westfalen*

Alexis Haddock
University of Michigan Law School

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EIA DIRECTIVE PROCEDURAL GUARANTEES AS SUBSTANTIVE INDIVIDUAL RIGHTS IN *IL* V. *LAND NORDRHEIN-WESTFALEN*

*Alexis Haddock**

*Environmental impact assessments serve as a necessary tool for attaining the goals of the Aarhus Convention and the EIA Directive (2011/92). The Aarhus Convention and EIA Directive aim to guarantee the public's right to participate in environmental decision-making, to be provided information necessary to effectively participate, and to have access to a procedure to challenge a decision. The ECJ's recent case *IL v. Land Nordrhein-Westfalen* articulates the current interpretation of the European Union Member States' obligations under the EIA Directive to provide individuals standing to challenge impact assessment decisions. This opinion reaffirmed that in cases where the procedural defect did not affect the outcome of the project's authorization decision, Member States may restrict standing only to individuals' claims based on procedural defects where it prevented their participation in the entire decision-making process. Drawing from Advocate General Hogan's opinion in *IL v. Land Nordrhein-Westfalen*, this paper advocates for designating the procedural guarantees themselves as substantive individual rights. The existing EIA Directive and Aarhus Convention procedural rights are rendered ineffective if the information required to be disseminated in environmental impact statements is not provided. Lacking this information and blocked from challenging these decisions in court, individuals cannot be informed participants, cannot access a review procedure, and cannot fully execute their rights under EU law. If unchanged in light of this rights designation, current Member State laws may violate the Charter of Fundamental Rights of the European Union, the Treaty on the Functioning of the European Union, and general principles of Community law.*

TABLE OF CONTENTS

INTRODUCTION	464
I. HISTORY OF ENVIRONMENTAL PROTECTION UNDER THE EUROPEAN UNION.....	465
A. <i>Aarhus Convention</i>	466
B. <i>Environmental Impact Assessment Directive</i>	468
II. THE C-535/18 <i>IL V. LAND NORDRHEIN-WESTFALEN</i> DECISION	470
A. <i>Judgment of the European Court of Justice</i>	471
B. <i>Opinion of AG Hogan</i>	472

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III. PROCEDURAL GUARANTEES AS SUBSTANTIVE INDIVIDUAL RIGHTS.....	475
IV. IMPLICATIONS FOR MEMBER STATES' NATIONAL LAWS	479
A. <i>Infringement of fundamental rights</i>	480
B. <i>Violation of general principles of the European Union</i>	481
CONCLUSION.....	482

INTRODUCTION

Environmental impact assessments serve as an important tool for implementing the European Union's environmental policy. The *United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters* adopted in Aarhus (the "Aarhus Convention") and *Directive 2011/92/EU* (the "EIA Directive") demonstrate the European Union's dedication to environmental protection and access to justice in environmental matters through public access to information and participation in the decision-making process.¹ Under the EIA Directive, public and private projects likely to have a significant effect on the environment must obtain authorization from the relevant Member State prior to construction.² As a condition to authorization, developers provide specific information about the potential environmental effects of the project supplemented by the government and members of the public.³ Individuals and groups have used the European Union court system to clarify the obligations of Member States and the requirements of those seeking project authorization. Under European Court of Justice ("ECJ") caselaw, when a procedural defect does not affect the outcome of the project's authorization decision, Member States may restrict standing to individuals' claims when procedural defects entirely prevent their participation in the decision-making process.⁴

IL v. Land Nordrhein-Westfalen is the most recent ECJ case that addresses standing to challenge deficient impact assessments under the EIA Directive.⁵ In the case, AG Hogan advocated for considering the procedural guarantees found in the EIA Directive, such as those found in Article 6, substantive individual rights.⁶ This

1. *See generally* Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention]; *see also* Directive 2011/92, of the European Parliament and of the Council of 13 Dec. 2011 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 2011 O.J. (L 26) 1.

2. Directive 2011/92, art. 2(1), 2011 O.J. (L 26) 1, 3.

3. Directive 2011/92, recital 7, 2011 O.J. (L 26) 1, 1.

4. *See, e.g.*, Case C-72/12, Altrip v. Land Rheinland-Pfalz, ECLI:EU:C:2013:712 (Nov. 7, 2013).

5. Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2020:391 (May 28, 2020).

6. *See* Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2019:957, ¶35 (Nov. 12, 2019) (Opinion of Advocate General Hogan).

finding would significantly broaden standing to allow individuals to challenge any deficiency found in environmental impact assessments based on their substantive right to that information.⁷ The ECJ, however, did not adopt the recommended ruling from Advocate General (“AG”) Hogan.⁸ AG Hogan’s opinion and this paper nevertheless suggest that Member State laws, such as those discussed in *Land Nordrhein-Westfalen*, could be understood to violate Article 47 “Right to an effective remedy and to a fair trial” and Article 52(1) “Scope and interpretation of rights and principles” of the Charter of Fundamental Rights of the European Union (the “CFR”), Treaty on the Functioning of the European Union (the “TFEU”), and general principles of Community law.⁹

Part I provides a brief history of the European Union’s environmental protection policy and legislation, specifically the Aarhus Convention and the EIA Directive. Part II discusses the recent case *Land Nordrhein-Westfalen*. This paper overviews the ECJ judgment prior to reviewing AG Hogan’s opinion. Part III Section A argues for the procedural guarantees of the EIA Directive to be considered substantive individual rights. Section B then analyzes the implications of this designation on Member State laws, specifically the German laws in *Land Nordrhein-Westfalen*. The paper argues that, in light of the procedural guarantees being substantive individual rights, certain national laws violate the Charter of Fundamental Rights of the European Union and the Treaty on the Functioning of the European Union.

I. HISTORY OF ENVIRONMENTAL PROTECTION UNDER THE EUROPEAN UNION

Despite its absence from the founding treaties of the European Union (“EU”), the environment quickly became a focal point for Community law.¹⁰ The foundational goal of creating a single common market deriving from the Treaty of the European Economic Community provided the incentive and opportunity to take environmental action.¹¹ The European Economic Community’s concern of diverging environmental regimes among the Member States and the resulting potential

7. See Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2019:957, ¶¶36-37 (Nov. 12, 2019) (Opinion of Advocate General Hogan).

8. Compare Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2020:391 (May 28, 2020) with Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2019:957 (Nov. 12, 2019) (Opinion of Advocate General Hogan).

9. Charter of Fundamental Rights of the European Union arts. 47, 52(1), Mar. 30, 2010, 2010 O.J. (C 83) 389; Consolidated Version of the Treaty on the Functioning of the European Union, May 9, 2008, 2008 O.J. (C115) 47 [hereinafter TFEU].

10. See Treaty Establishing the European Coal and Steel Community, 18 Apr. 1951, 261 U.N.T.S. 140; Treaty Establishing the European Economic Community, 25 Mar. 1957, 298 U.N.T.S. 3.

11. See Elisa Morgera, *Introduction to European Environmental Law from an International Environmental Law Perspective* 7 (Univ. Edinburgh Sch. L. Working Paper Series, Paper No. 37, 2010).

distortion of the internal market motivated legislation.¹² The focus on environmental policy grew stronger with subsequent policy declarations,¹³ directives,¹⁴ and ECJ decisions.¹⁵ While the Single European Action in 1987 established the first explicit legal basis for European Union environmental legislation,¹⁶ subsequent treaties and international conventions enhanced the EU's ability to legislate on environmental matters. The Treaty of Maastricht, entered into force in 1993, designated the environment as an objective of the European Community.¹⁷ Legal bases for environmental action further increased in both the Amsterdam Treaty of 1999 and the Lisbon Treaty of 2009 by explicitly calling for sustainability and efforts to combat climate change.¹⁸

The European Union continues to widen its scope and sharpen its focus regarding environmental issues through legislation and judicial action followed by extensive enforcement and monitoring policies.¹⁹ Notably, the rise in environmental laws coincided with increased discussion of environmental rights.²⁰

A. Aarhus Convention

Entered into force on October 30, 2001, the Aarhus Convention forms the foundation of environmental policy for the rights of individuals and non-government organizations.²¹ This international treaty identifies procedural rights as prerequisites to accomplishing sufficient environmental protection:

12. Charles-François Mathis, *European Environmental Policy*, DIGIT. ENCYC. EUR. HIST. (June 6, 2020), <https://ehne.fr/en/encyclopedia/themes/political-europe/a-european-%E2%80%9Cmodel%E2%80%9D-defined-public-policies/european-environmental-policy>.

13. See, e.g., Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States Meeting in the Council of 22 November 1973 on the Programme of Action of the European Communities on the Environment, 1973 O.J. (C 112).

14. See, e.g., Council Directive 75/439/EEC, 1975 O.J. (L 194) 23; Council Directive 85/337/EEC, 1985 O.J. (L 175) 40.

15. See, e.g., Case 240/83, *Procureur de la République v. Ass'n de défense des bruleurs d'huiles usagées*, 1985 E.C.R. 531 (Feb. 7, 1985) (The ECJ declared environmental protection is an "essential objective" of the European Union).

16. Morgera, *supra* note 6, at 8.

17. Christian Kurrer, *Environmental Policy: General Principles and Basic Framework*, EUR. PARLIAMENT (Nov. 2011), <https://www.europarl.europa.eu/factsheets/en/sheet/71/environment-policy-general-principles-and-basic-framework>.

18. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts art. 2, Oct. 2, 1997, 1997 O.J. (C 340) 1; Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 143, Dec. 13, 2007, 2007 O.J. (C306) 1.

19. Kurrer, *supra* note 17.

20. *Protecting the Environment Using Human Rights Law*, COUNCIL EUR., <https://www.coe.int/en/web/portal/human-rights-environment> (last visited Apr. 21, 2021).

21. See generally Aarhus Convention, June 25, 1998, 2161 U.N.T.S. 447.

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.²²

Articles 4 and 5 on the accessibility, collection, and dissemination of environmental information form the right of access to information.²³ Articles 6, 7, and 8 of the Aarhus Convention state the right to participate in the decision-making process.²⁴ These articles require signatory parties to ensure public participation in specifically enumerated activities; plans, programs, and policies relating to the environment; and preparation of regulations.²⁵

The right of access to justice to enforce environmental law found in Article 9 is a driving force in improving the public's environmental rights in EU Member States.²⁶ This article's first section requires Member States to provide access to a review procedure when a public authority has allegedly failed to adequately handle an environmental information request while the second section requires an avenue for individuals to challenge the substantive and procedural legality of the Member State's decision, act, or omission.²⁷ Notably, the second provision, Article 9(2), may be constrained by standing requirements.²⁸ While standing requirements must remain consistent with the overarching obligation to provide wide access to justice to the public, the Aarhus Convention does not state what this requirement entails.²⁹ Article 9(3) ensures a general right to challenge acts and omissions by private parties and public authorities violating environmental law in an administrative or judicial procedure.³⁰ These review procedures must provide "adequate and effective remedies . . . and be fair, equitable, timely, and not prohibitively expensive."³¹ Further, this article safeguards effectiveness by requiring parties to provide the public information on how to access these review procedures and consider assistance mechanisms to reduce financial and other barriers to access to justice.³² The Aarhus Convention commits its signatory parties to the protection of the environment by ensuring practical avenues for individuals and certain groups to enforce environmental

22. *Id.* art. 1.

23. *Id.* arts. 4–5.

24. *Id.* arts. 6–8.

25. *Id.*

26. See Áine Ryall, *Access to Justice in Environmental Matters in the Member States of the EU: The Impact of the Aarhus Convention* 8 (N.Y.U. Jean Monnet Working Paper Series, Paper No. 5/16, 2016).

27. Aarhus Convention art. 9.

28. *Id.*

29. Ryall, *supra* note 19, at 9.

30. *Id.*

31. Aarhus Convention art. 9(4).

32. *Id.* art. 9(5).

policies. EU secondary legislation mimics the system of access to environmental information and review procedures for disputes designed by the Aarhus Convention.

B. *Environmental Impact Assessment Directive*

The European Union implemented portions of the Aarhus Convention through a variety of legislative measures—specifically, Regulation 1367/2006/EC, Directive 2003/35/EC, and Directive 2011/92/EU.³³ The EIA Directive follows from the original directive adopted in 1985, and subsequent adaptations represent an expansion of Member States' obligations regarding environmental impact statements and derived procedural and substantive rights.³⁴

The EIA Directive requires Member State compliance with common standards designed to achieve the EU's environmental goals.³⁵ This is achieved through policies on mandatory environmental impact assessments and public participation in the decision-making process.³⁶ Public and private projects likely to cause significant environmental effects, due to their size, location, or specific nature, trigger the obligation to conduct environmental impact assessments.³⁷ Article 5 lists the minimum requisite information for the report, but Member States retain some discretion to determine what constitutes relevant information.³⁸ Article 6(3) lists specific pieces of information that Member States must make available to the public in order to fulfill this obligation.³⁹ The EIA Directive calls on Member States to enact measures to ensure the public is given an opportunity to express their opinion based on the information supplied.⁴⁰ They must allow the public reasonable time to consider this information to form an informed opinion.⁴¹ Member States shall give the public concerned "early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall . . . be entitled to express comments and opinions . . . before the decision on the request for development consent is taken."⁴² This disclosure relates to the overarching goal of the directive to create an opportunity for public participation in decision-making when the proposed project likely creates significant environmental effects.

33. Council Regulation 1367/2006, 2006 O.J. (L 264) 13 (EC); Council Directive 2003/35, art. 1, 2003 O.J. (L 156) 17 (EC); Council Directive 2011/92, art.1, 2011 O.J. (L 26) 1 (EU).

34. *See* Council Directive 85/337/EEC, 1985 O.J. (L 175) 40. While Council Directive 2011/92/EU, 2011 O.J. (L 26) 1 (EU) has been amended by Directive 2014/52/EU, 2014 O.J. (L 124) 1, the relevant portions of the directive for this paper remained either unchanged or insubstantially altered by the 2014 amendments.

35. Directive 2011/92, recital 3, 2011 O.J. (L 26) 1, 1.

36. Directive 2011/92, recitals 6–17, 2011 O.J. (L 26) 1, 1–2.

37. Directive 2011/92, arts. 2, 4, 2011 O.J. (L 26) 1, 3–4.

38. *Id.* art. 5.

39. *Id.* art. 6(3).

40. *Id.* art. 6.

41. *Id.*

42. Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2019:957, ¶4 (Nov. 12, 2019) (Opinion of Advocate General Hogan).

To ensure an opportunity to challenge these decisions, the EIA Directive mandates Member States to provide access to a review procedure before a court or another independent and impartial body established by law.⁴³ This provision, found in Article 11, derives from Article 9 of the Aarhus Convention by aiming to provide a right to contest decisions related to environmental assessments.⁴⁴ Standing requirements qualify access to a review procedure provided for in Article 11. In order to have standing under Article 11, one must be a member of the public concerned, which is defined by the EIA as having either a sufficient interest or maintaining an impairment of a right where Member State administrative procedural law requires this as a precondition.⁴⁵ While Article 288 of the TFEU states directives are binding as to the results to be achieved, Member States are left discretion as to methods of implementation.⁴⁶ Therefore, Member States may determine what constitutes a sufficient interest and the impairment of a right for purposes of admissibility under Article 11, provided these rules are no less favorable to petitioners than those governing similar domestic actions.⁴⁷ As a result of conflicting interpretations of the EIA Directive, ECJ case law arose to outline the parameters of individuals' standing to challenge decisions and the extent to which Member States can constrain that right.

The EIA Directive and other EU environmental legislative efforts do not provide an absolute integration of the Aarhus Convention into EU law nor does the Aarhus Convention have direct effect.⁴⁸ The ECJ's role in interpreting treaties and EU secondary legislation has greatly determined the expansion of the rights and obligations in this space. Despite the gap between Aarhus Convention and the EIA Directive, the ECJ in *Arnsberg* has stated the access to justice obligation found in Article 11 of the EIA Directive must be interpreted in light of the Aarhus Convention.⁴⁹ The EIA Directive, specifically Article 11 ensuring access to a review procedure, should additionally be read in accordance with general principles of EU law and specifically Article 47 of the CFR granting rights to an effective remedy for breach of Community rights, as discussed further in this paper.⁵⁰

43. Directive 2011/92, art. 11, 2011 O.J. (L 26) 1, 6.

44. Jan Darpö, *Article 9.2 of the Aarhus Convention and EU Law*, 11 J. EUR. ENV'T. & PLAN. L. 367, 368 (2014).

45. See Directive 2011/92, arts. 1(2)(e), 11(a)–(b), 2011 O.J. (L 26) 1, 3, 6.

46. TFEU art. 288, May 9, 2008, 2008 O.J. (C115) 47.

47. See 33/76, *Rewe-Zentral v. Landwirtschaftskammer für daas Saarland*, 1976 E.C.R. 1989 (“It is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law . . . it being understood that such conditions cannot be less favourable than those relating to similar actions at domestic nature.”); C-115/09, *Bund für Umwelt und Naturschutz Deutschland v. Arnsberg*, 2011 E.C.R. I-3673, 3720–1.

48. See C-240/09, *Lesoochránárske Zoskupenie VLK v. Ministerstvo Životného Prostredia Slovenskej Republiky*, 2011 E.C.R. I-1285, 1307.

49. See C-115/09, *Bund für Umwelt und Naturschutz Deutschland v. Arnsberg*, 2011 E.C.R. I-3673, 3720.

50. Charter of Fundamental Rights of the European Union art. 47.

II. THE C-535/18 *IL V. LAND NORDRHEIN-WESTFALEN* DECISION

Land Nordrhein-Westfalen marks the most recent iteration of the ongoing debate questioning what rights are created under the EIA Directive, who are the rightsholders, and how Member States comply. This specific case arose due to a dispute involving the EIA Directive, the Umwelt-Rechtsbehelfsgesetz (the “German Environmental Appeals Act”), and the Verwaltungsverfahrensgesetz (the “German Administrative Procedure Act”).⁵¹

The main proceeding stems from an environmental impact assessment which failed to provide the requisite information to the public under the EIA Directive and the Water Framework Directive. The Landesbetrieb Straßenbau Nordrhein-Westfalen, the roadbuilding agency for North Rhine-Westphalia, submitted a plan for construction of a new highway.⁵² A project such as this falls within the parameters of the EIA Directive, and an environmental impact assessment must be conducted and approved by the appropriate authorities.⁵³ The roadbuilding agency displayed planning documents related to the traffic, species protection, and wildlife effects of the highway construction and use from August 30 to September 29, 2010.⁵⁴ Notably missing from this collection were documents related to the noise pollution and planned drainage system which would discharge rainwater into surrounding bodies of water or into groundwater.⁵⁵ The public objected to these deficiencies, forcing the Landesbetrieb Straßenbau Nordrhein-Westfalen to amend the planning documents.⁵⁶ Yet in its amended submission, the Landesbetrieb Straßenbau Nordrhein-Westfalen only included additional documents relating to noise pollution.⁵⁷

Despite the insufficient information provided, the Bezirksregierung Detmold, the district government in charge of regulating these project submissions, approved the roadbuilding request on September 27, 2016.⁵⁸ It was following this approval that a group of private individuals, some of whom feared contamination of their domestic well for drinking water and expropriation of private property, filed an appeal of this decision before the Bundesverwaltungsgericht (the “German Federal Administrative Court”).⁵⁹ The claimants brought an action challenging the

51. Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2020:391, ¶¶26-27 (May 28, 2020). For the purposes of this paper, the elements of the case, opinions, and judgements focusing on Directive 2000/60/EC, of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, 2000 O.J. (L 327) 1, have been omitted.

have been omitted.

52. *Id.* ¶28.

53. *Id.* ¶4; Directive 2011/92, Recital 7, 2011 O.J. (L 26) 1, 1.

54. Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2020:391, ¶30 (May 28, 2020).

55. *Id.*

56. *Id.* ¶32-34.

57. *Id.* ¶¶ 31-34.

58. *Id.* ¶27.

59. *Id.* ¶32.

authorization and base their admissibility on the infringement of a right under Article 11(1)(b) of the EIA Directive.⁶⁰ The German Federal Administrative Court, in its opinion, noted the missing assessment of the project's effects on the surrounding bodies of water and compliance with water protection requirements.⁶¹ During judicial proceedings, the missing assessment was finally provided.⁶²

The German Federal Administrative Court considered the admissibility of this claim in light of the German Administrative Procedure Act. Acknowledging that the public was not sufficiently informed of the project's environmental effects in compliance with the EIA Directive, the German Court nevertheless held that this procedural defect could not serve as viable grounds for individuals to appeal the project's approval.⁶³ The missing components of the environmental impact assessment would not have influenced the regulatory authority to deny the project had the documents been initially included.⁶⁴ Absent the defect, the project would still have been approved.⁶⁵ Under the German Administrative Procedure Act, a procedural defect must altogether deny an individual the opportunity to participate in the decision-making process in order to be invoked to annul a project's approval.⁶⁶ The German Federal Administrative Court claimed that this restriction did not contravene the objective of the EIA Directive in giving the public concerned wide access to justice.⁶⁷

Relying upon Article 267 of the TFEU, the German Federal Administrative Court referred to the ECJ, the question of whether limiting individuals' admissibility to challenge cases where a procedural defect entirely denies individuals the opportunity to participate in the decision-making process is consistent with Article 11(1)(b) of the EIA Directive.⁶⁸

A. Judgment of the European Court of Justice

On May 28, 2020, the European Court of Justice answered this question in the affirmative.⁶⁹ When remediating a procedural defect in a project's impact assessment would not affect the approval of said project, Member States may limit individuals' requests for the annulment of the project to instances where the irregularity deprived them of any participation in the decision-making process without breaching Article 11 of the EIA Directive.⁷⁰

60. *Id.* ¶1.

61. *Id.* ¶34.

62. *Id.*

63. *Id.* ¶35.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* ¶48; TFEU art. 267.

69. Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2020:391, ¶63 (May 28, 2020).

70. *Id.*

To reach this conclusion, the ECJ examined the EIA Directive, specifically the powers reserved to Member States. Citing Article 11(3) of the EIA Directive, the ECJ highlighted the discretion the directive leaves to Member States to determine which rights qualify and what constitutes the infringement of a right for purposes of Article 11(1)(b).⁷¹ A national law may limit standing by not recognizing the infringement of an individual's right if the procedural defect does not have a demonstrable impact on the decision because, according to the ECJ, if the defect fails to affect the decision then it cannot be considered to have violated a right.⁷² The alternative "opens up a remedy in cases where Article 11(1)(b) of the EIA Directive 2011/92 does not require it."⁷³ If the procedural flaw does not affect the final decision, Member States may require applicants to prove that the procedural defect wholly deprived them of their participation rights.⁷⁴

Similar to the German Federal Administrative Court, the ECJ therefore acknowledged the procedural flaw in the EIA provided to the public but proceeded to state the defect had no impact on the project's approval; this confirmed authorization for the proposed highway.⁷⁵ The ECJ also found that a national law, like Germany's, containing admissibility limitations grounded in the deprivation of participation in the decision-making process was consistent with the EIA Directive and with general EU law.⁷⁶ It follows from this analysis that the ECJ does not believe the German Administrative Procedure Act to be in violation of EU law nor the EIA Directive for the standing limitations imposed on individuals.

B. Opinion of AG Hogan

Advocate General Hogan promotes an alternative response to the referring court's question. As an Advocate General, Hogan provides an impartial opinion that is nonbinding but advisory to the ECJ and to EU Member States. In *Land Nordrhein-Westfalen*, he advocates for an expansive reading of the obligation Member States have to protect the right of effective judicial protection. AG Hogan calls for the procedural guarantees found in the EIA Directive to be considered substantive

71. *Id.* ¶59.

72. Case C-72/12, *Altrip v. Land Rheinland-Pfalz*, ECLI:EU:C:2013:712, ¶¶49–51 (Nov. 7, 2013).

73. Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2020:391, ¶60 (May 28, 2020).

74. *Id.* ¶61 ("Eine nationale Regelung, nach der die Zulässigkeit von Rechtsbehelfen Einzelner von der Geltendmachung einer Rechtsverletzung abhängt und die es den Einzelnen zugleich erlaubt, sich auf einen Verfahrensfehler, der die Öffentlichkeitsbeteiligung am Entscheidungsverfahren berührt, auch dann zu berufen, wenn sich dieser Fehler nicht auf den Inhalt der fraglichen Entscheidung ausgewirkt hat, eröffnet folglich einen Rechtsweg auch in Fällen, in denen Art. 11 Abs. 1 Buchst. b der Richtlinie 2011/92 dies nicht verlangt." [It is therefore open to the national legislature to make the admissibility of an action for annulment of the decision authorizing a project for a procedural flaw, where the latter is not such as to modify the meaning of this decision, on the condition that it effectively deprived the applicants of their right to participate in the decision-making process.]).

75 *Id.* ¶50.

76 *Id.* ¶63.

individual rights allowing individuals to invoke them in an action for the annulment of an environmental impact assessment.⁷⁷

Similar to the ECJ decision, this opinion's analysis begins by overviewing the origins and purpose of the EIA Directive.⁷⁸ The Aarhus Convention, the basis of the EIA Directive, focuses on providing access to information, public participation in decision-making process, and access to justice in environmental matters.⁷⁹ AG Hogan also draws a parallel between Article 11 of the EIA Directive and Article 9(2) of the Aarhus Convention providing for the public's ability to participate and challenge decisions regarding an environmental impact assessment.⁸⁰

AG Hogan advocated for national laws, and in this case the German Administrative Procedure Act, to be reviewed in reference to the Charter of Fundamental Rights of the European Union.⁸¹ The CFR applies to the review of Member States' national laws when the legislation involves Member States acting within the scope of European Union law, per Article 51(1) of the CFR.⁸² The ECJ considers Member States to be implementing an EU law obligation when they enact procedural law involving matters referred to in Article 9(3) of the Aarhus Convention.⁸³ By implementing procedural rules derived from the Aarhus Convention and through the EIA Directive, Member States act within the realm of EU law as opposed to merely domestic law. Per Article 51(1) of the CFR, since the Member States are implementing EU law, the CFR must be considered in the review of the Member States national laws.⁸⁴

The applicability of the CFR triggers strengthened safeguards of the right to judicial protection. AG Hogan stresses that "Article 9(3) of Aarhus Convention read in conjunction with Article 47 of [CFR] imposes on Member States an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law."⁸⁵ The affirmative obligation of Member States to ensure effective judicial protection of rights conferred by EU law

77. Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2019:957, ¶35 (Nov. 12, 2019) (Opinion of Advocate General Hogan).

78. *Id.* ¶23–24.

79. *Id.* ¶24.

80. *Id.*; see also Darpö, *supra* note 35, at 368.

81. *Id.* ¶37.

82. Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2019:957, ¶25 (Nov. 12, 2019) (Opinion of Advocate General Hogan).

83. See Charter of Fundamental Rights of the European Union art. 51(1); Aarhus Convention, June 25, 1998, 2161 U.N.T.S. 447; Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2019:957, ¶25 (Nov. 12, 2019) (Opinion of Advocate General Hogan).

84. See Charter of Fundamental Rights of the European Union art. 51(1); Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2019:957, ¶25 (Nov. 12, 2019) (Opinion of Advocate General Hogan).

85. Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2019:957, ¶26 (Nov. 12, 2019) (Opinion of Advocate General Hogan) (quoting Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd*, ECLI:EU:C:2017:987, ¶45 (Dec. 20, 2017)).

has implications for Member States' discretion under Article 11 of the EIA Directive. AG Hogan finds that Article 11 "cannot be interpreted restrictively or in a manner which negates the substance of an objector's right to effective judicial protection."⁸⁶ This reading applies when the legislation in question limits a right protected by the CFR, as are the circumstances in the case *Land Nordrhein-Westfalen* regarding the German Environmental Appeals Act and the German Administrative Procedure Act. Imposing procedural limitations must not conflict with the objective of ensuring wide access to justice for the public concerned as provided for by the Aarhus Convention and EIA Directive.⁸⁷ AG Hogan circumvents Member State discretion to legislate procedural rules affecting admissibility under Article 11 to be within the bounds of their obligation to protect the right to effective judicial protection and ensure the public wide access to justice.

Through the EIA Directive, the EU legislature requires Member States to ensure the public's opportunity to challenge the legality of impact assessment decisions.⁸⁸ Referring to *Altrip*, AG Hogan notes it was not the EU legislature's intention to consider ability to alter the final decision as a condition for standing under Article 11.⁸⁹ The EU legislature was willing to allow individuals the right to contest environmental decisions if the procedural defect deprived the individual of the right to participate in the decision-making process.⁹⁰ AG Hogan explicitly draws a distinction where the ECJ does not. A Member State's law cannot require individuals to demonstrate they have been deprived of the right to participate in the *entire* decision-making process.⁹¹ Individuals deprived of their right to participate in *any part* of the decision-making process retain standing, and national laws may not exclude individuals whose rights have been so infringed.⁹²

Taking these elements into account, procedural guarantees noted in the EIA Directive, specifically those found in Article 6, should be considered substantive individual rights.⁹³ As such, AG Hogan claims an individual affected by the results of an environmental impact assessment decision must have the right to challenge on the grounds of any procedural defect except when the authorities provide evidence the defect's inclusion would not alter the decision.⁹⁴

As a result, national laws that condition an individual's right to challenge environmental impact assessment approvals on the denial of the right to participate

86. *Id.* ¶27.

87. *Id.* ¶28.

88. Directive 2011/92, art. 11(1), 2011 O.J. (L 26) 1, 6.

89. Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2019:957, ¶¶30–31 (Nov. 12, 2019) (Opinion of Advocate General Hogan); Case C-72/12, *Altrip v. Land Rheinland-Pfalz*, ECLI:EU:C:2013:712, ¶47 (Nov. 7, 2013).

90. Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2019:957, ¶¶30–31 (Nov. 12, 2019) (Opinion of Advocate General Hogan).

91. *Id.* ¶36.

92. *See id.*

93. *Id.* ¶35.

94. *Id.* ¶32.

in the *entire* decision-making process conflict with the EIA Directive and EU law.⁹⁵ This is due to the procedural rights being substantive individual rights and that right being denied to individuals. However, national laws are consistent with the EIA Directive and EU law if they require individuals to prove their deprivation of at least one procedural guarantee.⁹⁶ Individuals may be denied this right to complain about a procedural defect if the competent authorities provide sufficient evidence that the defect did not alter the contested decision.⁹⁷

AG Hogan concludes that the German Administrative Procedure Act must allow any procedural defect to be grounds for individual standing under Article 11(1)(b) of the EIA Directive except when the authorities provide evidence the defect's inclusion would not have led to a different decision.⁹⁸ Because it does not currently provide for this, AG Hogan argues that the German Administrative Procedure Act violates EU law. The Advocate General closes his analysis by highlighting the law's potential violations of Article 47 "Right to an effective remedy and to a fair trial" and Article 52(1) "Scope and interpretation of rights and principles" of the CFR in addition to possibly being excessive and disproportionate.⁹⁹

Due to the advisory and non-binding role of the Advocate General, the ECJ was not bound to adopt AG Hogan's opinion. It remains to be seen whether AG Hogan's opinion will be influential in subsequent relevant cases.

III. PROCEDURAL GUARANTEES AS SUBSTANTIVE INDIVIDUAL RIGHTS

In agreement with AG Hogan's opinion, this paper elaborates on why the procedural guarantees should be considered substantive rights and the effect such a determination in the future could have on Member States. According to AG Hogan, despite recognition of procedural rights as substantive individual rights, claims can be blocked if the defect's inclusion would not have altered the decision.¹⁰⁰ However, this paper argues that if procedural defects are considered individual substantive rights, then individuals should be able to base claims on the impairment of a right using Article 11(1)(b) of the EIA Directive. The ECJ's current reasoning that defects that did not affect the decision cannot be considered a rights violation, and therefore cannot be the basis of a challenging claim, no longer applies if the procedural elements are right themselves.

Deriving from the AG opinion in *Land Nordrhein-Westfalen*, this argument for a rights designation finds support in the spirit of the Aarhus Convention, the EIA Directive, and the ECJ case law derived thereof. The Aarhus Convention and EIA Directive aim to guarantee the public's right to participate in environmental decision-

95. *Id.* ¶¶36–37.

96. *Id.* ¶38.

97. *Id.* ¶32.

98. *Id.* ¶38.

99. *Id.* ¶37.

100. *Supra* Part II.B.

making, to be provided the necessary information to effectively participate, and to have access to a procedure to challenge the substantive or procedural legality of a decision.¹⁰¹ The Aarhus Convention focuses on the protection of the rights of the public to use information to fully execute their participation rights.¹⁰² The EIA Directive largely implements the goals of the Aarhus Convention so that Member States must comply with its mandates and the public may rely upon the rights the directive affords them.¹⁰³

The stated goals must all be achieved equally for any of them to be fully effective. The EIA Directive recitals claim specific information must be supplied to the public¹⁰⁴ to ensure effective public participation that enables the public to challenge decisions.¹⁰⁵ Without proper access to information, the public will be unable to be an informed participant in the decision-making process. The list of information that must be provided to the public in the EIA Directive, specifically in Article 6, is intentional and exhaustive.¹⁰⁶ Member States and individuals undergoing the environmental impact assessment may disseminate more information than is otherwise required but a minimum threshold must be met.¹⁰⁷ When the minimum information is not provided, the EIA Directive is violated and the rights of the public to be informed participants in the decision-making process are infringed.¹⁰⁸

When this kind of infringement occurs, individuals should retain the right to challenge the procedural legality of the decision given they were not afforded the minimum amount of information required by the EIA Directive to effectively participate in the decision-making process. Further, the inability to sufficiently challenge decisions on procedural or substantive grounds largely diminishes the accountability of environmental impact assessment decisions and aggressively limits the public's ability to monitor violations of the EIA Directive. The right to a judicial procedure to challenge decisions provides an effective and necessary mechanism for the public to participate.¹⁰⁹

Support for this argument can be found in ECJ jurisprudence interpreting the EIA Directive. The ECJ highlights the need for a wide interpretation of the EIA Directive in order to adequately achieve the directive's objective. According to the

101. See Aarhus Convention arts. 5–6, 9; see also Directive 2011/92, arts. 6, 11, 2011 O.J. (L 26) 1, 4–6.

102. See Aarhus Convention arts. 4, 8.

103. Darpö, *supra* note 35, at 368.

104. Directive 2011/92, recital 12, 2011 O.J. (L 26) 1, 2.

105. See Directive 2011/92, recital 16, 2011 O.J. (L 26) 1, 2.

106. See Directive 2011/92, art. 6, 2011 O.J. (L 26) 1, 4–5.

107. See Directive 2011/92, recital 3, 12–13, 2011 O.J. (L 26) 1, 2.

108. See Directive 2011/92, art. 6, 2011 O.J. (L 26) 1, 4–5.

109. See Directive 2011/92, recital 17, 2011 O.J. (L 26) 1, 2; *Development of an Assessment Framework on Environmental Governance in the EU Member States*, at 63 (May 2019), https://ec.europa.eu/environment/environmental_governance/pdf/development_assessment_framework_environmental_governance.pdf (stating the root cause of poor implementation of environmental law was weak governance and that transparency, public participation, and access to justice were among the solutions to this problem).

ECJ in *Altrip*, the objective of the EIA Directive was to afford a better-informed public the ability to participate in the decision and review of environmental impact assessments through the compliance with procedural rules.¹¹⁰ Importantly, the court claims that the public must be able to invoke any procedural defect in support of their wide access to justice, specifically “that [the] public must be able to invoke any procedural defect in support of an action challenging the legality of decisions covered by [the EIA Directive].”¹¹¹ However, this grant is cabined by excluding individuals’ standing for procedural defects which do not affect the decision.¹¹² The Court reasons that such defects do not constitute a right themselves and do not impair a right.¹¹³ Compliance with the procedural rules is especially important given the purpose of these rules and overall procedural objective of the EIA Directive to ensure the public is informed about assessments on projects likely to significantly alter their environment. Allowing the public to base legal action on any procedural deficiency upholds the aim of giving the public concerned wide access to justice through information disclosure and participation. Restrictions on challenges to assessments where the procedural rules have not been complied with go against the objective of the EIA Directive to allow access to justice and participation in this process.

Member States courts must broadly interpret the EIA Directive alongside other components of EU law. The ECJ has stated in *Lesoochranárske Zoskupenie* that Member State courts must read to the “fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with Article 9(3) of [the Aarhus Convention] and the objective of effective judicial protection of the rights conferred by European Union law”¹¹⁴ In *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation*, the ECJ further asserts Article 9(3) of the Aarhus Convention must be read alongside Article 47 of the CFR, which provides for the right to an effective remedy and to a fair trial.¹¹⁵ This reading imposes an obligation on Member States to ensure effective judicial protection of rights conferred by EU law, in particular the provisions of environmental law. The ECJ also obliges Member States to interpret Article 11’s access to justice provision in light of the Aarhus Convention.¹¹⁶ By including the requisite that Member States interpret the EIA Directive to the fullest extent possible in accordance with Aarhus Convention principles and EU law rights

110. See Case C-72/12, *Altrip v. Land Rheinland-Pfalz*, ECLI:EU:C:2013:712, ¶¶97–98 (Nov. 7, 2013).

111. *Id.* ¶48.

112. *Id.* ¶51.

113. *Id.* ¶49.

114. Case C-240/09, *Lesoochranárske Zoskupenie VLK v. Ministerstvo Životného Prostredia Slovenskej Republiky*, 2011 E.C.R. I-1285, 1307. While this case involved environmental protection organization petitioners, the interpretation should be expanded to include individuals as well.

115. Case C-664/15, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd*, ECLI:EU:C:2017:987, ¶58 (Dec. 20, 2017).

116. Case C-570/13, *Gruber v. Unabhängiger Verwaltungssenat für Kärnten*, ECLI:EU:C:2015:231, ¶34 (Apr. 16, 2015).

protection, the ECJ restricts national courts' ability to narrow the meaning of this directive.

Despite affirmatively stating that Member States retain discretion under Article 11 of the EIA Directive to determine procedural rules, the ECJ and principles of Community law restrict this discretion. The Court in *Gruber* confirmed that national legislatures may alter standing requirements by limiting the rights eligible for individuals to rely on in EIA Directive claims to only individual public-law rights.¹¹⁷ The Court expressly states, however, that provisions of EIA Directive Article 11 relating to the public's right to challenge environmental impact assessment decisions cannot be interpreted restrictively.¹¹⁸ Additionally, Member States' significant discretion in determining what constitutes a 'sufficient interest' or 'impairment of a right' is "limited by the need to respect the objective of ensuring wide access to justice for the public concerned" based on the wording of EIA Directive Article 11(3) and Aarhus Convention Article 9(2).¹¹⁹ The *Gruber* decision places greater importance in respecting the specific goals of the EIA Directive and Aarhus Convention over that of Member States' unrestricted discretion in this situation.

Further, while Member States retain discretion over procedural rules, these national laws must not be less favorable than those governing similar domestic situations and must not make it impossible or excessively difficult to bring a challenge in court. This draws from the general principle of effectiveness under EU law as well as *Wells* regarding the EIA Directive.¹²⁰ In *Wells*, the ECJ stated that the public must be able to ensure Member States' compliance with the EIA Directive through judicial review.¹²¹ Member State laws must allow for local enforcement action by the public through the judicial system.¹²²

It is worth elaborating why the procedural guarantees should be considered substantive rights rather than procedural rights under the EIA Directive or Aarhus Convention. This argument does not call for the ECJ to adopt a reading of the EIA Directive that provides individuals with a right to a procedure to enforce their rights since such has already been secured by Article 11 of the EIA Directive. However, the EIA Directive and Aarhus Convention procedural rights are rendered ineffective if information required by the EIA Directive is not provided in the environmental impact assessments. Under the Aarhus Convention and EIA Directive, individuals

117. Case C-570/13, *Gruber v. Unabhängiger Verwaltungssenat für Kärnten*, ECLI:EU:C:2015:231, ¶40 (Apr. 16, 2015).

118. *Id.*

119. *Id.* ¶¶38–39.

120. Case C-201/02, *Wells v. Sec'y of State for Transp.*, 2004 E.C.R. I-748, 768; Denis Edwards, *The Impact of the EU Law Principle of Effectiveness*, SOLIC. J., June 19, 2012, at 23, <https://www.ftbchambers.co.uk/sites/default/files/the-impact-of-the-eu-law-principle-of-effectiveness.pdf>.

121. Case C-201/02, *Wells v. Sec'y of State for Transp.*, 2004 E.C.R. I-748, 766.

122. Ryall, *supra* note 19, at 8.

have a right to be informed participants.¹²³ Without the information listed in the EIA Directive, they cannot fully exercise their right to be informed. Individuals therefore have a right to the specific environmental information developers must publicly provide without which they would be unable to execute their right to be informed participants in the decision-making process. Because individuals cannot fully exercise their right to be informed without adequate information, the required information becomes a substantive right.

In addition, these are substantive rights due to functional concerns. When individuals are denied their right to information, they should be able to rely on their rights to challenge a project's approval on the basis that they were not informed participants. Member State legislatures may, however, limit standing for individuals challenging assessment decisions to claims which involve a violation of a substantive individual right.¹²⁴ Under the ECJ's reading in *Land Nordrhein-Westfalen*, if a national legislature limits challenges to claims of subjective rights violations, individuals would be barred from challenging the informational failures of the environmental impact assessment and prevented from exercising their rights under the EIA Directive.¹²⁵ By framing the procedural guarantees as substantive individual rights, this obstacle to standing is circumvented, and individuals would retain their right to challenge decisions based on deficient impact assessments. If the procedural guarantees were treated as substantive rights, the claims the plaintiffs in *IL v. Land Nordrhein-Westfalen* brought would have been admissible.

If these procedural guarantees are considered substantive individual rights, then any impact assessment deficiency will constitute a violation of individuals' rights. ECJ rulings which only considered individual rights infringed if the procedural defects affected a project's approval status would no longer bar these complaints because the claims would be based on a rights violation and no longer require the plaintiff to demonstrate an inability to participate in the entire decision-making process.¹²⁶ Plaintiff should then be able to bring claims challenging deficient impact assessments under Article 11(1)(b) of the EIA Directive due to the infringement of their substantive individual right.

IV. IMPLICATIONS FOR MEMBER STATES' NATIONAL LAWS

If the ECJ adopts my position that EIA Directive procedural guarantees are considered substantive individual rights, then Member State rules affecting this process must be re-examined for consistency with EU law. National procedure rules must be interpreted in light of the newfound rights designation. Member States have an obligation under Community law to achieve the results envisaged by the directive

123. See Aarhus Convention, arts. 5(8), 6(2); Directive 2011/92, art. 6, 2011 O.J. (L 26) 1, 4–5.

124. Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland v. Arnsberg*, 2011 E.C.R. I-3673, 3720–1.

125. Case C-535/18, *IL v. Land Nordrhein-Westfalen*, ECLI:EU:C:2020:391, ¶57 (May 28, 2020).

126. See, e.g., Case C-72/12, *Altrip v. Land Rheinland-Pfalz*, ECLI:EU:C:2013:712 (Nov. 7, 2013).

as do national courts in interpreting the national law.¹²⁷ The EIA Directive goals are best achieved through adopting an approach more similar to AG Hogan's interpretation. Member State laws implementing the directives, including the EIA Directive, must be interpreted in conformity with the directive to achieve the results desired and to be fully effective.¹²⁸ The ECJ has implied that to ensure effective judicial protection in environmental matters, Member State courts have a duty to interpret their laws, to the fullest extent possible, to be consistent with the Aarhus Convention's objectives.¹²⁹ After examining the German Environmental Appeals Act, which implements the EIA Directive, and provisions of the German Administrative Procedure Act, both acts may violate EU law if the procedural guarantees were to constitute substantive individual rights.

A. Infringement of fundamental rights

Assuming this rights designation is adopted, certain Member State laws such as those discussed in *Land Nordrhein-Westfalen* violate Articles 47 and 52(1) of the CFR that apply when national laws act within the scope of EU law.¹³⁰ The contested acts help implement the EIA Directive which imposes obligations on the Member State to conduct environmental impact assessments in the prescribed manner. Accordingly, national courts must ensure observance of fundamental rights by these Member State laws.¹³¹ Article 47 of the CFR protects the right to an effective remedy and to a fair trial.¹³² Member State acts that prevent individuals from challenging environmental decisions when a substantive individual right has been denied violate Article 47 by denying individuals their right to an effective remedy in light of a rights violation.

National acts violating individual rights while implementing EU law must be analyzed under the principle of proportionality provided for in Article 52(1) of the CFR.¹³³ Article 52(1) qualifies limitations on CFR-protected rights and freedoms by subjecting any limits to a proportionality assessment.¹³⁴ The limitations under Article 52(1) must be necessary and genuinely meet objectives of the general interest of the EU or be required to protect rights and freedoms of others.¹³⁵ However, the principle of proportionality and Article 52(1) do not absolve the German laws in

127. Case 14/83, von Colson v. Land Nordrhein-Westfalen, 1984 E.C.R. I-1891.

128. *Id.*

129. Mariolina Eliantonio, *Case Note on Case C-240/09 Lesoochránárske zoskupenie and Case-115/09 Trianel Kohlekraftwerk*, 49 COMMON MKT. L. REV. 767, 772 (2012).

130. See Case C-617/10, Åklagaren v. Åkerberg Fransson, ECLI:EU:C:2013:105, ¶¶18–22 (Feb. 26, 2013); Charter of Fundamental Rights of the European Union art. 51(1).

131. See Case C-617/10, Åklagaren v. Åkerberg Fransson, ECLI:EU:C:2013:105, ¶¶18–22 (Feb. 26, 2013).

132. Charter of Fundamental Rights of the European Union art. 47.

133. See Charter of Fundamental Rights of the European Union art. 51(1).

134. Charter of Fundamental Rights of the European Union art. 52(1).

135. *Id.*

Land Nordrhein-Westfalen because limitations on standing are not necessary to advancing objectives of the general interest of the EU, and are not needed to protect the rights and freedoms of others.¹³⁶ These limitations may be considered necessary for efficiency in judicial matters; however the limitations are disproportionately restricting individual rights for an insufficient reason that can be accomplished through less restrictive means. Concerns regarding judicial efficiency can be mitigated by requiring plaintiffs to demonstrate at least one EIA Directive component missing from the impact assessment. Requiring plaintiffs to demonstrate a deprivation of at least one specific component of the environmental impact assessment allows courts to ensure claims brought forward are non-frivolous and derive from the EIA Directive. These acts counter the general interest of the EU in securing a high level of environmental protection and improving environmental policies, as described in Article 37 of the CFR, and dedicating resources to achieving this goal in accordance with Articles 191 and 192 of the TFEU.¹³⁷ Also, the allowance of these claims would not harm or infringe upon the rights or freedoms of others. The developers that put forward their project's environmental impact assessment would not have any other rights altered as a result of designating the procedural guarantees as substantive individual rights.

B. *Violation of general principles of the European Union*

In addition to the potential violations of rights under the CFR, Member State laws unjustifiably restricting individuals' ability to challenge decisions that violate their newfound substantive rights may infringe the principle of proportionality and goal of uniform application of the law.¹³⁸ The EU's goal to have uniform application of law across Member States may be damaged if certain Member States upheld current laws that continue to restrict individuals' standing while others did not. This would lead to EU rights being unevenly acknowledged and protected across Member States, a particularly thorny issue when considering transboundary projects.¹³⁹ The unequal acknowledgement of EU rights counters this goal by creating an unclear and imprecise application of legal principles and rights protection.

A potential counterargument to the rights designation as proposed is that a single, perhaps innocent, failure to include a component of an environmental impact assessment could affect the project's authorization. A deficient environmental impact

136. *See id.*

137. Charter of Fundamental Rights of the European Union art. 37; TFEU arts. 191–192.

138. Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, art. 5, 2012 O.J. (C326) 1, 19; CONSULTATIVE COUNCIL OF EUR. JUDGES, COUNCIL OF EUR., THE ROLE OF COURTS WITH RESPECT TO THE UNIFORM APPLICATION OF THE LAW 2 (2017), <https://rm.coe.int/opinion-no-20-2017-on-the-role-of-courts-with-respect-to-the-uniform-a/16807661e3>.

139. *Guidance on the Application of the Environmental Impact Assessment Procedure for Large-scale Transboundary Projects*, at 1, COM (2013), <https://ec.europa.eu/environment/eia/pdf/Transboundary%20EIA%20Guide.pdf>.

assessment and any decision by the authorizing party would be exposed to challenges from individuals. Notably, this paper's proposal only enforces the existing requirements and does not require developers to provide information beyond what is called for in the EIA Directive. It is not a matter of altering information to be provided but of holding developers accountable to complying with the EIA Directive due to its effects on the reliant public. While this may lead to a system where environmental impact assessment are more often delayed or altered, the burden for compliance does not outweigh the desired results of ensuring the public their rights are protected.

CONCLUSION

Environmental impact assessments form a foundational mechanism for individuals and non-government organizations to engage with their environmental protection concerns. *Land Nordrhein-Westfalen* demonstrates the current limitations Member States place on the public's ability to participate in the decisions that dictate changes to their environment. As AG Hogan recommended and as this paper further argues, access to information that is required to be disseminated to the public under the EIA Directive should be considered a substantive individual right.¹⁴⁰ National procedural rules must accommodate this designation and allow individuals to challenge project approvals when impact assessment deficits violate this right. If this designation occurs, Member State laws such as the two German acts in *Land Nordrhein-Westfalen* may be violating the EIA Directive, Article 47 and Article 52(1) of the CFR, and general principles of EU law. This legal argument highlights the continuous tension between Member State procedural autonomy and the protection of rights and execution of directives at the EU level. In the situation as described, the objectives of the EU and protection of EU rights should supersede national procedural rulemaking. It is perhaps unlikely AG Hogan's approach would be adopted by Member States without ECJ adoption, but the ECJ may expand its current position in a future case interpreting the EIA Directive brought by individuals, nongovernment organizations, or other organs of the European Union.¹⁴¹ What is certain is that, as the public increasingly engages their government on environmental protection and regulation issues, Member States will need to confront individuals' rights under the EIA Directive and EU law.

140. See *supra* Part. II.B; *supra* Part. III.

141. The European Commission monitors Member State implementation of the EIA Directive and may enforce compliance through a claim against the Member State in the European Union court system. See *February infringements package: key decisions*, Eur. Comm'n (Feb. 18, 2021), https://ec.europa.eu/commission/presscorner/detail/en/INF_21_441.