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# ENVIRONMENTAL NGOS AND ACCESS TO JUSTICE: ARTICLE 9(3) OF THE AARHUS CONVENTION AND THE EU COURTS PERSPECTIVE

## I. Introduction: access to justice in environmental matters in the Aarhus Convention

The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[1], signed by the EU in 1998 and enforced by the same organisation in 2005[2], provides for wide access to justice in environmental matters allowing *members of the public* to play a relevant role in protecting the environment.

The Convention is structured in three 'pillars', each of them establishing a *right of the public* for the signing Parties to implement: access to environmental information, participation in public decisions affecting environment and access to justice in environmental matters. This latter, actually, is a sort of *transversal* right, because the convention sets special rules for the public to have access to justice (both judicial and non-judicial) in case of violations of the rights connected with the first pillar,[3] with the second pillar[4] and, finally, to any other violation of environmental law.[5]

In the context of the Convention, access to justice is generally subject to the framework of the Parties' national legislation. However, some grounds of review are specified in Art. 9 in accordance with the *pillar* concerned: par.1 grants access to justice whenever a request for information is *ignored*, *wrongfully refused*, *inadequately answered* or *otherwise not dealt with*. Par. 2 states the criteria of the *sufficient interest* or *impairment of a right* (that are the basic, common requisites to challenge administrative decisions before the national administrative courts) to have access to justice in case the provisions on participation are violated. Par. 3 contains a more general provision, stating that, in the framework of the Parties' national legislation, and in addition to the rules concerning access to justice what

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[1] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 28.06.1998, Aarhus, 2161 UNTS 447 [Aarhus Convention].

[2] Council Decision of 17 February 2005, 2005/370/EC, on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ L 124, 17.5.2005. 1–3.

[3] See Convention, Art. 9 par. 1, referred to "any person".

[4] See Convention Art. 9 par. 2, referred to "the public *concerned*".

[5] See Convention Art. 9 par. 3, referred to "members of the public" with no further specification.

is provided in the previous paragraphs, members of the public should have access to justice to challenge any violation of national environmental law.

What is the role of environmental NGOs in the context of the Convention?

According to Art. 2, par. 5, NGOs promoting environmental protection and meeting the requisites required by national legislation, are automatically considered *public concerned*, meaning "the public affected or likely to be affected by, or having an interest in, the environmental decision-making". Art. 9, par. 2, states that NGOs' interest is deemed *sufficient* and they are deemed to have rights that can be impaired. Finally, according to Art. 9 par. 3, NGOs (as members of the public) meeting the criteria laid down by national law, should have access to justice and the chance to challenge acts and omissions in violation of environmental law. Therefore, environmental NGOs enjoy a sort of *special status* in the Convention since they actually should not need to demonstrate a special interest to gain access to justice.

In the implementation of the Convention's provisions on access to justice by the European Union (EU), however, many problems (and much criticism on the part of the environmental NGOs) arose. Here, all the peculiarities of the EU legal system and of its relationship with international law emerged. The *contentious* case of the environmental NGOs shows how formal compliance with international law could turn out in substantial non-compliance and how less than smooth the integration between the two legal systems can be. Longstanding litigation has involved the environmental NGOs, the EU judiciary and the Aarhus Convention Compliance Committee (ACCC) in the attempt to guarantee the Convention's rights.

This paper aims to highlight the main problems surrounding the implementation of the Convention by the EU and the following litigation on access to justice in the framework of the relationship between EU law and international law as it has been shaped by the Court of Justice.

The paper is organised as follows: chapter II offers a preliminary overview of the Aarhus Convention in the context of mixed agreements and their interpretation. Chapter III describes the implementation of the Convention's provisions by the EU, through Regulation 1367/2006 and the main problems arising for the NGOs and their access to justice in environmental matters. Chapter IV provides description and some discussion on the lengthy litigation that involved the NGOs, the EU judiciary and the Compliance Committee at the international level. Chapter V draws some conclusions and attempts some hypotheses on future developments.

## II. The Aarhus Convention as a mixed agreement

The Aarhus Convention (the Convention) was signed by the European Community and its Member States. It is, therefore, a *mixed* agreement.

This circumstance might be of little relevance in the present discourse were it not for the fact that the EU judiciary – and the EU Court of Justice (Court of Justice), especially – have always played a critical role in the interpretation of this kind of agreement, considerably extending its own jurisdiction during the past decades. Some of this interpretative effort involved the Convention as well.

It is worth stating from the beginning that what follows is not intended to be a thorough description of mixed agreements which form an extremely complex topic.[6] Nor will this work discuss the more general issue of the EU international relations according to the division of competences between the EU and the Member States, which has to be considered already known.

The rest of this paragraph is rather intended to highlight some general issues relating to mixed agreements that could be useful for the following examination of the Aarhus Convention. The very existence of mixed agreements mainly stems from the fact that these agreements involve matters pertaining both to the EU and the Member States competencies.[7] Mixed agreements have found different classifications in academic literature. According to *Allan Rosas*[8] they could be classified following the obligations of the parties in the Convention (whether they are *parallel* or *shared* and, in the latter case, whether they are *coexistent* or *concurrent*).[9]

A further classification of mixed agreement suggests a division between bilateral (only one third party) and multilateral agreements. This latter case is typical of environmental agreements in general and of the Aarhus Convention in particular.

Finally, mixed agreements might be classified according to their *completeness*. A complete agreement is one signed by all the Member States whereas an incomplete agreement is signed only by some of them.[10]

The *state* of the competencies in mixed agreements and the subsequent responsibility in complying with the relevant obligations, have often been the object of Declaration by the European Union. Apparently, these declarations seldom led to clarification for the other parties, especially where a final paragraph stating that "*The*

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[6] The literature on mixed agreements is rather extensive and grew in importance especially during the last century's Eighties. However, the practice of concluding this type of agreements dates back to the early Sixties. See for example O'Keeffe, David – Schermers, Henry G. (eds.): *Mixed Agreements*, Kluwer, Deventer, 1983; Dolmans, Maurits J.F.M.: *Problems of Mixed Agreements: Division of Powers within the EEC and the Right of Third States*, Asser Instituut, The Hague, 1985; Koskenniemi, Martti (ed.): *International Law Aspects of the European Union*, Kluwer, The Hague/London/Boston, 1998. More recently, Heliskoski, Joni: *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States*, Kluwer, The Hague/London/New York, 2001; Eeckhout, Piet: *External Relation of the European Union*, *Legal and Constitutional Foundations*, Oxford University Press, Oxford, 2004; Hillion, Christophe – Koutrakos, Panos (eds.): *Mixed Agreements Revisited*, *The EU and its Member States in the World*, Hart Publishing, Oxford, 2010; Cannizzaro, Enzo – Palchetti, Paolo – Wessel, Ramses A.: *International Law as Law of the European Union*, Martinus Nijhoff Publishers, Leiden, 2012.

[7] The issue of mixed agreements is obviously connected to the division of competencies resulting from Articles 2 to 6 of the EU Treaty of Functioning, where EU exclusive and shared (and residual) competencies are defined.

[8] Rosas, Allan: Mixed Union – Mixed Agreements. In: Koskenniemi, Martti (ed.), 1998. 128.

[9] Parallel competencies imply that both the Union and the Member States have the power to conclude the whole agreement assuming the relevant rights and obligations. In case of shared competencies, instead, part of the agreement falls into the Union's competence and another part in the Member States' one. Here, another distinction could be drawn between subjects pertaining to coexistent competencies – with part of the agreement involving exclusive competencies either of the EU or the States – and subjects of concurrent competence *stricto sensu*, where both the EU and the States have the power to conclude international agreements without any of them having the power to prevent the other from doing so. The environment belongs to this latter category.

[10] For this distinction see Granvik, Lena: Incomplete Mixed Environmental Agreements of the Community and the Principle of Bindingness. In: Koskenniemi, Martti (ed.) 1998. 255. In this perspective, the Aarhus Convention is a complete agreement.

*exercise of Community competence is*, *by its nature*, *subject to continuous development*", was added.[11]

In this context, it is worth noticing that two different declarations were issued by the European Community for the Convention, one at the moment of signing, the other at the moment of approving (ratifying) it[12]. The first declaration is particularly important for the topic under discussion here, because, as we will see further on, the EU Commission strongly relied on it when the ACCC found for non-compliance to the Convention's obligations on the EU part, as in access to justice.[13]

The Declaration issued at the moment of signing the Convention states:

> "*Within the institutional and legal context of the Community* (…), *the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention*" [14].

The same sentence appears in the second Declaration (issued on approval of the Convention, in 2005) where the EU also states that the implementation of Article 9, par. 3 of the Convention – *i.e.* the establishing of "*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*" – rests on Member States, unless the relevant authorities are Community institutions or bodies.[15] Here again a final clause on the exercise of Community competence which is, "*by its nature*, *subject to continuous development*" is added.

A further clause stipulates that "[*t*]*he European Community is responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force*". [16]

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[11] See Koutrakos, Panos: *EU International Relations Law*, Hart Publishing, Oxford/Portland, 2015. 176.

[12] Such declarations are actually required by Article 19, par. 5 of the Convention to Regional Economic Integration Organizations (REIOs) stating that: "In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence". All the Declarations of the signing parties are available on the UNECE website: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII13&chapter=27&clang=_en#EndDec (30.09.2018)

[13] See Comments by the European Commission, on behalf of the European Union, to the draft findings and recommendations by the Aarhus Convention Compliance Committee with regard to Communication ACCC/C/2008/32, point 21. https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html (10.9.2018).

[14] Declaration by the European Community in Accordance with Article 19 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Annex to Council Decision 2005/370/EC of 17 February 2005 OJ L 124 17.5.2005. 3.

[15] "[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 provisions of Community law covering the implementation of those obligations".

[16] On the difficulties stemming from this statement see Fasoli, Elena: Apportioning the Obligations Arising Under the UNECE Aarhus Convention Between the EU and its MSs: the Real Scope of the 'Community Law in Force'. *Diritto Pubblico Comparato ed Europeo*, 20 (2018) 1, 186.

## II.1 The interpretation of mixed agreements

The role of the Court of Justice in the interpretation of mixed agreements has been the object of several judgments, though the solutions it found were not always of the utmost clarity[17].

Scholars usually describe the theoretical path followed by the Court starting from the *Haegeman* case[18]. Stating on the interpretation of a 1961 bilateral agreement between the Community, the Member States and Greece, the Court decided for its own jurisdiction assuming that, being the agreement signed by the Council, it would have to be considered an act of the European institutions. Therefore, it would be subject to the Court's interpretation following (the then) Article 177 of the EEC Treaty.[19]

Twelve years later the Court faced the same issue of interpretation in *Demirel case*.[20] The case involved the interpretation of a bilateral agreement with Turkey on the free movement for workers. In the proceedings for preliminary ruling some member States suggested that the free movement of third countries' workers fell outside the interpretative jurisdiction of the Court. This latter, however, held the contrary and found for its own interpretative jurisdiction (also) claiming for the necessity of a uniform application of the agreement's provisions by the States.

At the end of the Nineties the issue of the interpretative jurisdiction of the Court on mixed agreements rose again in relation to Article 50 of the (so-called) TRIPs Agreement[21] on trade marks.

In *Hermès case*[22] and later in *Dior case*[23] the Court relied on the argument of the Community interest to a uniform interpretation of an agreement's provision that fell both within the Community's and the Member States' competence. "*Only the Court of Justice acting in cooperation with the courts and tribunals of the Member States pursuant to Article 177 of the Treaty is in a position to ensure such uniform interpretation*".[24]

The Court, in the end, built the theoretical framework of mixed agreements on two main points: its own jurisdiction as in their interpretation, close cooperation between the Community and the Member States as in fulfilling the relevant obligations.[25] However, this

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[17] The literature on the topic is rather extensive. See, for example, Heliskoski, Joni: The Jurisdiction of the European Court of Justice to Give Preliminary Rulings on the Interpretation of Mixed Agreements. *Nordic Journal of International Law*, 69 (2000) 4, 395; Koutrakos, Panos: Interpretation of Mixed Agreements. In: Hillion, Cristophe – Koutrakos, Panos (eds.) 2010. 116.; Koutrakos, 2015. 229; Neframi, Eleftheria: Mixed Agreement as a Source of European Union Law. In: Cannizzaro, Enzo – Palchetti, Paolo – Wessel, Ramses A. (eds.), 2012. 325.

[18] C-181/73, *R. & V. Haegeman v Belgian State*, Judgment of 30 April 1974, ECLI:EU:C:1974:41.

[19] Preliminary ruling. The argument was not totally convincing since the agreement could not be considered an act of the Community institutions only to the extent it would have involved the Community competencies.

[20] C-12/86, *Meryem Demirel v Stadt Schwäbisch Gmünd*, Judgment of 30 September ECLI:EU:C:1987:400, point 9.

[21] Trade-Related Aspects of Intellectual Property (TRIPs), Marrakesh, 15 April 1994, 1869 UNTS 299.

[22] C-53/96, *Hermès International v FHT Marketing Choice BV*, Judgment of 16 June 1998, ECLI:EU:C:1998:292.

[23] C-300/98 and C-392/98 (joint cases), *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV*, Judgments of 14 December 2000, ECLI:EU:C:2000:688 [Dior]

[24] *Dior*, points 37–38.

[25] Koutrakos, 2015. 243. Some interesting considerations on the interpretation of mixed agreements can be also drawn from the case-law on States' failures to fulfil obligations, where the Court (often without extensive argumentation) includes in the area of Community law subjects covered by some Conventions' provisions

framework is not always clear, and the Court's reasoning not always convincing, being "*either cryptic or unnecessarily convoluted*," [26] at least as far as the jurisdiction is concerned.

## II.2 Direct effects of mixed agreements

The *Dior* case is also interesting because it raises the question whether a mixed agreement's provisions can have direct effects. Here, the Court of Justice envisages a distinction between its jurisdiction in interpreting the agreement and its jurisdiction in recognising direct effects to some of its provisions.

After examining the conditions under which the Community law can recognise direct effects to the provisions of an international agreement (its provisions must contain clear, precise and unconditional obligations, and they must not be subject, in their implementation and effects, to the adoption of any implementation measure), the Court links the existence of its jurisdiction on direct effects of international agreements to the existence of Community legislation in the relevant field.[27]

The definition and scope of *legislation* in respect to a given field is, again, unclear. In *Merck Genéricos*[28], for example, the Court adopted a rather restrictive approach holding that, in the field of trademarks, Community legislation was at that moment very sectoral and not comprehensive enough to consider it covering the subject.[29]

Another important decision of the Court of Justice involving direct effects of mixed agreements refers to the very Art. 9, par. 3 of the Aarhus Convention. In the *Lesoochranárske zoskupenie VLK* case[30] the Slovak Supreme Court instituted preliminary ruling asking whether the aforementioned provision could be deemed to have direct effects in national legal systems and whether the same provision implied the right to challenge any measure adopted by public bodies in violation of national environmental law.The Court of Justice

that apparently lay outside it. See, for example, C-13/00, *Commission v Ireland*, Judgment of 19 March 2002, ECLI:EU:C:2002:184, on the application of the Berne Convention and C-239/03, *Commission v France* Judgment of 7 October 2004, ECLI:EU:C:2004:5 (also known as *Étang de Berre*) on the application of the Convention on the Protection of the Mediterranean Sea from Pollution.

[26] Koutrakos, 2015. 246.

[27] "In a field in respect of which the Community has not yet legislated and which consequently falls within the competence of the Member States, the protection of intellectual property rights, and measures adopted for that purpose by the judicial authorities, do not fall within the scope of Community law. Accordingly, Community law neither requires nor forbids that the legal order of a Member State should accord to individuals the right to rely directly on the rule laid down by Article 50(6) of TRIPs or that it should oblige the courts to apply that rule of their own motion". Dior, point 48.

[28] C-431/05, *Merck Genéricos – Produtos Farmacêuticos Ld*ª *v. Merck & Co. Inc. e Merck Sharp & Dohme Ld*ª, Judgment of 11 September 2007, ECLI:EU:C:2007:496.

[29] The Court omitted to consider "four legislative proposals pending at the time; these included measures on compulsory licensing of patents relating to pharmaceutical products for export to countries with public health problems, the Community patent, the conferment of jurisdiction on the Court of justice in disputes relating to the Community patent, and the establishment of the Community Patent Court and concerning appeals before the Court of First Instance". Koutrakos, 2015.131.

[30] C-240/09, *Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, Judgment of 8 March 2011, ECLI:EU:C:2011:125 [*Lesoochranárske zoskupenie VLK*. The case is also known as *Slovak bear*]. On this case see Hoops, Björn: The Interpretation of Mixed Agreements in the EU after *Lesoochranárske zoskupenie. Hanse Law Review*. Vol. 10. No 1. 2014. 3.

adopts here the *Dior* approach, considering first the existence of EU legislation covering the object of Art. 9, par. 3 of the Convention (the right to a wide access to justice in environmental matters), as a condition for its jurisdiction on direct effects. In this case, the only existing piece of legislation is Regulation 1367/2006, implementing Article 9 in its entirety but only for the Community institutions and bodies. Thus, strictly speaking, the condition for a statement of the Court on the Convention's direct effects was not met.[31] However, the Court held that

> "*a specific issue which has not yet been the subject of EU legislation is part of EU law*, *where that issue is regulated in agreements concluded by the European Union and the Member State and it concerns a field in large measure covered by it.* (*...*) *In the present case*, *the dispute in the main proceedings concerns whether an environmental protection association may be a 'party' to administrative proceedings concerning*, *in particular*, *the grant of derogations to the system of protection for species such as the brown bear. That species is mentioned in Annex IV*(*a*) *to the Habitats Directive*, *so that*, *under Article 12 thereof*, *it is subject to a system of strict protection from which derogations may be granted only under the conditions laid down in Article 16 of that directive.* (*...*) *It follows that the dispute in the main proceedings falls within the scope of EU law*".[32]

Furthermore, the Court considers it is

> "*irrelevant that Regulation No. 1367/2006*, *which is intended to implement the provisions of Article 9*(*3*) *of the Aarhus Convention*, *only concerns the institutions of the European Union and cannot be regarded as the adoption by the European Union of provisions implementing the obligations which derive from Article 9*(*3*) *of the Aarhus Convention with respect to national administrative or judicial proceedings.* (*...*) *Where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law*, *it is clearly in the interest of the latter that*, *in order to forestall future differences of interpretation*, *that provision should be interpreted uniformly*, *whatever the circumstances in which it is to apply.* (*...*) *It follows that the Court has jurisdiction to interpret the provisions of Article 9*(*3*) *of the Aarhus Convention and*, *in particular*, *to give a ruling on whether or not they have direct effect*".[33]

Once found for its jurisdiction, the Court denied that direct effects could derive from Art. 9 par 3 of the Aarhus Convention. This latter did not contain any clear and precise obligation that could directly regulate the legal situation of individuals.

> "*Since only members of the public who meet the criteria*, *if any*, *laid down by national law are entitled to exercise the rights provided for in Article 9*(*3*), *that provision is subject*, *in its implementation or effects*, *to the adoption of a subsequent measure*".[34]

It is worth noticing that in *Lesoochranárske zoskupenie VLK*, the Court of Justice stated on direct effects of an international convention for the first time. In *Dior case*, in fact, it

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[31] See Advocate General *Sharpston*'s Opinion, point 72.

[32] *Lesoochranárske zoskupenie VLK*, points 36–38.

[33] *Lesoochranárske zoskupenie VLK*, points 41–43.

[34] *Lesoochranárske zoskupenie VLK*, points 45.

had only defined the criteria to establish its interpretative jurisdiction, leaving to national courts the decision on direct effects. Furthermore, as it will emerge in the next chapters, the Court's judgment contained an important statement on the national courts' role in granting compliance with the Convention.[35]

## III. EU legislation and access to justice in environmental matters: Regulation No. 1367/2006

In 1996 the European Community issued Regulation No. 1367 (of the European Parliament and of the Council) "*on the application of the provisions of the Aarhus Convention on Access to Information*, *Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies*" (Aarhus Regulation).[36] The Regulation implements (nearly) all the Convention's provisions, including Art. 9, par. 3. However, as we will see further on, some of the regulation's provisions raised such difficulties in access to justice as to trigger two parallel disputes. The first involves the EU judiciary, the second involves the Convention's Compliance Committee, this latter having a sort of *suspended* conclusion and thus uncertain consequences.

For a better understanding of the problems underlying access to justice in environmental matters it might be useful to start from the provisions of the Convention relating to the topic in question.

As already stated in the Introduction, Convention's Art. 9 is ideally structured in three parts each of them corresponding to one of its pillars.[37]

Paragraph 1 of Art. 9 refers to access to justice in case access to environmental information is denied or unsatisfactorily handled. Here, the Convention states that each Party shall ensure within the framework of its national legislation, access to a review procedure before a court of law or another independent and impartial body established by law. It is worth noticing that access to *courts* does not completely cover the field of *justice*, since the same paragraph provides that alternative remedies should be granted as well: the parties shall ensure that the interested person "*has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law*".[38]

Paragraph 2 refers to violations of the Convention's provisions on public participation in decision-making related to specific activities affecting the environment. In this case the Convention stipulates that members of the *public concerned* having standing in accordance to national legislation shall "*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*

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[35] *Lesoochranárske zoskupenie VLK*, point 51.

[36] For an overview of the institutional passages that led to the Regulation, see Pallemaerts, Marc: Access to Environmental Justice at EU Level: Has the 'Aarhus Regulation' Improved the Situation? In: Pallemaerts Marc (ed.), *The Aarhus Convention at Ten. Interactions and Tensions Between Conventional International Law and EU Environmental Law*, Europa Law Publishing, Groningen, 2011. 273.

[37] On the topic, see Hedemann-Robinson, Martin: EU Implementation of the Aarhus Convention's Third Pillar: Back to the Future over Access to Environmental Justice? – Part 1 and Part 2. *European Energy and Environmental Law Review*, 23 (2014) 3 and 4, 102–114. 151–170.

[38] Convention, Art. 9, par. 1.

*and procedural legality of any decision*, *act or omission subject to the provisions of article 6*" (*i.e. provisions on participation to environmental decisions*).[39]

The rules of standing are therefore left to the Parties' national legislation, under two conditions: the first is the (general) aim of granting wide access to justice, the second refers to the position of environmental NGOs meeting the requisites set in Art. 2, par. 5[40] which are automatically considered by the Convention *public concerned* which implies that they automatically have standing.

Finally, par. 3 contains a sort of additional general clause on access to justice, with an obligation ("each Party *shall*") to ensure that the members of the public meeting the requisites (if any) set by national legislation, 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.

In any case, procedures aimed at solving environmental disputes should provide for adequate remedies and be "*fair*, *equitable*, *timely and not prohibitively expensive*". Decisions should be given in writing and be accessible to the public.[41]

The former European Community implemented the Convention through the Aarhus Regulation, with different techniques as to the three pillars. Access to environmental information is essentially regulated with reference to EC Regulation No. 1049/2001 (on access to information held by the European institutions) while the Aarhus regulation's provisions only cover some residual aspects.[42]

Participation in public institutions' environmental decisions is regulated by Article 9 of the Aarhus Regulation which simply recalls the Convention's provisions with a more specific definition of the term *plans and programmes* included in Art. 2 of the same Regulation.[43]

Implementation of Art. 9, par. 3 of the Convention (by Articles 10 – 12 of the Aarhus Regulation) seems more interesting.

As a preliminary consideration it is worth noticing that three principles on access to justice can be found in the Aarhus Regulation's Recitals. The first relates to the compatibility of the Aarhus Regulation with the Treaty's provisions on access to justice and its applicability only to public authorities' decisions.[44] The second is the preference for the administrative remedy rather than direct access to the judiciary: environmental NGOs meeting the requisites laid down in the Aarhus Regulation, shall give the institution the opportunity to reconsider its decisions first, so that access to the Court of Justice must be preceded by a request for internal review to the institution that issued the contested decisions.[45] This leads to the third principle, according to which access to the

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[39] See, especially, Annex I to the Convention.

[40] Art. 2, par. 5, in turn, refers to the requisites established by national legislation.

[41] See Art. 9 par. 4 of the Convention. Accessibility to the public is actually provided ("shall") for courts' decisions while it is facultative for other bodies' decisions ("whenever possible").

[42] See Arts. 3–8 Regulation No. 1367/2006.

[43] According to Art. 2, par. 1 (e), plans and programmes are (only) the ones which are subject to preparation and, as appropriate, adoption by a Community institution or body, which are required under legislative, regulatory or administrative provisions and contribute to, or are likely to have significant effects on, the achievement of the objectives of Community environmental policy, such as laid down general environmental action programme.

[44] See Recital (18) Regulation No. 1367/2006

[45] See Recitals (19) and (20). The same principle applies in case of an institution's omissions.

judiciary is possible only once the request for internal review has been rejected or declared inadmissible.[46]

### III.1 Access to internal review: the requisites for environmental NGOs

As previously stated, the Aarhus Convention provides for a special status for the environmental NGOs meeting the requisites laid down by the Parties' national legislation since they are deemed to have interests or rights, the *sufficiency* of which or the impairment of which, enables access to justice.

In implementing the Convention's provisions in the EU legal system, Art. 11 of the Aarhus Regulation states four requisites for the environmental NGOs willing to make a request for internal review to meet. These requisites are further specified in Arts. 3 and 4 of the Commission Decision No. 50/2008 and its Annex.

The first requisite is legal personality. To this requisite, independence and being non-profit must be added. Whenever the national law requires special procedures to have legal personality attested, the relevant documentation must be submitted. Secondly, NGOs shall also have environmental protection as their primary stated objective. This statement does not necessarily have to result from the organisation's statute (as the *formal* object of its activity), since it could also result from less formal sources such as the organisation's website[47]. Thirdly, NGOs must have existed for more than two years and they must be actively pursuing the objective referred to before. This requisite can be drawn partly from the organisation's statute and partly from the annual reports that the NGO shall also provide according to Dec. No. 50/2008.

Finally, the object of the request for internal review must fall within the organisation's objectives and activity.

All the requisites shall be supported by the relevant documents that the organisation is due to provide along with the request for internal review. However, documents containing formal evidence of the requisites can be substituted by any other equivalent documents in case the former cannot be provided for reasons not attributable to the NGO. The same principle applies whenever the documents sent cannot provide evidence of the fact that the object of the request for internal review falls within the objectives of the NGO's activity.

Furthermore, in case the organisation could not provide evidence of its independence or non-profit character through appropriate documents, these requisites can be declared from the organisation, the declaration "*signed by a person empowered to do so within the non-governmental organisation*".[48]

The submission of all the requested documents triggers the internal review procedure, with a first step consisting of the examination of the NGO's requisites by the relevant institution or body. Lack of documentation means a request for additional information "*to be*

[46] See Recital (21).

[47] The Annex to Commission Dec. No. 50/2008/EC (Commission Decision of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No.1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts) states that the NGOs wishing to submit a request for internal review must provide their statute or by-laws or any other document fulfilling the same role under national practice.

[48] See Art. 3, par. 3 of the Commission Dec. No. 50/2008.

*provided by the organisation within a reasonable period to be specified by the Community institution or body concerned*", with a correlative suspension of the time limits laid down in Article 10 of the Aarhus Regulation.[49] The same institution or body could also directly consult the national authorities of the NGO's country of origin or registration to verify the information provided.

### III.2. Access to internal review: the problem of the reviewable acts

The object of internal review, i.e. the decision that can be reviewed, is another critical issue in the Aarhus Regulation context.

According to Art. 10 of the Aarhus Regulation, a request for internal review can be submitted to the institution or body "*that has adopted an administrative act under environmental law or*, *in case of an alleged administrative omission*, *should have adopted such an act*". The definition of administrative act can be found in Art. 2 par. 1 (g) of the same Regulation where it is stated that administrative act means "*any measure of individual scope under environmental law*, *taken by a Community institution or body*, *and having legally binding and external effects*". Art. 2, par. 2 excludes from the category of administrative acts all the measures taken by a Community institution "*in its capacity of administrative review body*" such as in Arts. 81, 82, 86 e 87 (now, respectively, Arts. 101, 102, 106 e 107) of the Treaty concerning competition; Arts. 226 e 228 (now, respectively, Arts. 258 e 260) of the Treaty concerning infringement procedures; Art. 195 (now Art. 228) concerning complaints to the European Ombudsman and Article 280 (now Art. 325) concerning OLAF proceedings. It is, therefore, excluded, that decisions resulting from contentious procedures undergo further review[50].

Thus, according to Art. 2 of the Aarhus Regulation the only measures that can be reviewed are: a) individual acts, b) issued under environmental law.

The fact that only individual measures are subject to internal review is not really surprising for the administrative lawyer: the rule recalls the typical construction of the administrative decision (so familiar to the continental legal systems) as a decision of individual scope.

However, the functioning of a national administrative system cannot be compared with the functioning of the EU system. European administration, in its various configurations, does not always produce administrative decisions in the form of individual acts, as it works as *direct* administration only in a (very) limited way.[51] This is especially true in the environmental sector, where the institutions' (the Commission's) acts are mostly general

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[49] See Art. 4, par. 2 of the Commission De (c. No. 50/2008.

[50] See, for example, decision C(2008) 6995 of 23 October 2008, on request submitted by Liga para a Proteção da Natureza and decision B.2 JHM/RVV/mkl D*2014/104829 of 23 October 2014, on request submitted by Friends of the Earth, where the EU Commission (DG Competition), states that the contested 'Guidelines on State aid for Environmental Protection and Energy 2014–2020', were issued according to Article 107 par. 3 (g) of the Treaty and thus excluded from internal review.

[51] EU administration and EU administrative law are the objects of extensive studies. See, among the many, Schwarze, Jürgen: *European Administrative Law*, 1st ed. revisited, Sweet & Maxwell, London, 2006. Craig, Paul: *EU Administrative Law*, 3rd ed., Oxford University Press, Oxford, 2018. Craig, Paul: *UK*, *European and Global Administrative Law. Foundation and Challenges*, Cambridge University Press, Cambridge, 2015.

or normative following Arts. 290 and 291 of the Treaty of Functioning of the European Union (TFEU).

At the beginning, environmental NGOs sought to bypass this obstacle trying to figure out elements of *individuality* in general acts in the attempt to render the Commission's decisions with a larger impact on the environment (for example, decisions on the use of pesticides or polluting industrial emissions) reviewable. To this aim the most popular route was to consider a general act as a sum of many individual acts.

Another route was to interpret the *individual* measure in the meaning of *non-legislative* measure referring especially to the delegated or implementing acts of Articles 290 and 291 TFEU.[52]

Finally, there are a number of requests for internal review of the Commission's decisions approving derogations to some standard limits under submission of special national plans.[53] In this case the NGOs held that the Commission's approval concerned a group of identified plants for which a temporary derogation was requested.[54]

These arguments have always been rejected by the Commission that has (strictly) considered the *measures of general scope* in the meaning of measures addressed to an indeterminate number of non-individuated persons. Thus, approvals of derogations to the established limits of industrial emissions under a National Transitory Plan are to be considered general acts because they are addressed to the Member State, notwithstanding the fact that only some specific plants will benefit from the allowance.[55]

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[52] See, for example, the request for internal review of the Commission Regulation No. 149/2008 (of 29 January 2008 amending Regulation (EC) No 396/2005 of the European Parliament and of the Council by establishing Annexes II, III and IV setting maximum residue levels for products covered by Annex I thereto) establishing the maximum levels of residues in food products. Here the relevant NGO states: "although the Regulation might have the form of a general measure, the contents of Regulation 149/2008 can be considered to be a compilation of decisions concerning the residues of all the individual products and substances". Art. 2 par. 1 (g) of the Aarhus Regulation should be interpreted as referring to acts that are not strictly 'individual' but rather 'non-legislative', otherwise: "[a]ny other interpretation of this article would make the procedure meaningless as it would exclude practically all Community acts". In the request for internal review of the Commission Executive Regulation No. 359/2012, it is stated: "Il s'agit bien d'un acte non législatif, faisant suite à la demande d'approbation de la société TAMINCO, laquelle a sollicité l'application de la procédure accélérée prévue au article 14 à 19 du règlement 33/2008".

[53] The typical case is the National Transitory Plans related to industrial emissions and air pollution in general. See, for example Article 32 of EU Directive No. 75/2010 (of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) or Article 22 of EC Directive 50/2008 (of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe).

[54] The request for internal review of the Commission's decision approving free transitory allowances to the Czech Republic – under Article 10 par 1(c) of EC Directive No. 87/2003 of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC – to improve the electricity production, states: "[t]he Commission Decision is a measure of individual scope. It is addressed to the Czech Republic and it applies to objectively determined situations and it entails legal effects for individual beneficiaries – recipients of free allowances. The allocations of free allowances will affect particular operators and installations that are listed in the national plan approved by the Commission, thus there is a specifically determined group of benefitting entities".

[55] See the Commission's Reply to the request for internal review of the Commission's decision approving the Greek Transitional Plan (2013/687/EU): "The Commission Decision 2013/687/EU not to raise any objection to the Greek transitional national plan pursuant to Article 32(5) of Directive 2010/75/EU is addressed to the

The systematic declaration of inadmissibility of the requests for internal review by the Commission triggered a sort of *short-circuit*: what should have been an opportunity for simple and inexpensive access to justice turned out to be a reason for litigation, with a significant (double) intervention of the EU judiciary, first the General Court[56] and then the Court of Justice[57].

The second requisite for a measure to be subject to internal review is to be adopted 'under environmental law', where some uncertainty could rise about the scope of environmental law. It is true that Article 2, par. 1 (f) of the Aarhus Regulation states that

> "*environmental law means Community legislation which*, *irrespective of its legal basis*, *contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving*, *protecting and improving the quality of the environment*, *protecting human health*, *the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems.*"

But this definition still seems too wide and requires some refinement.

However, recent case-law confirmed that the concept of environmental law needs extensive interpretation. In *TestBioTech Ev* an environmental NGO had submitted a request for internal review of a Commission decision to authorise the commerce of food containing genetically modified soy. The Commission rejected the request on the basis that the contested decision was not adopted under environmental law but fell within the field of health and food security. The General Court held that

> "*environmental law*, *within the meaning of Regulation No. 1367/2006*, *covers*, *in this case*, *any provision of EU legislation*, *concerning the regulation of genetically modified organisms*, *that has the objective of dealing with a risk*, *to human or animal health*, *that originates in those genetically modified organisms or in environmental factors that may have effects on those organisms when they are cultivated or bred in the natural environment*".[58]

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Greek authorities. The Decision confirms that the framework established by the plan is compatible with Art. 32 of Directive 2010/75/EU and the associated Commission Implementing Decision 2012/115/EU (…). It furthermore follows from its recitals that the Decision also confirms that sufficient information has been provided regarding the measures that will be implemented in order to achieve the emissions ceilings. These measures, unlike the overall emissions ceilings, constitute contextual information and are therefore not listed in the Annex of the Decision. Therefore, this Decision does not establish nor approve specific individual obligations for the operators concerned. It is for the Greek authorities to implement the plan and take the decision affecting installations individually".

[56] T-338/08 *Stichting Natuur en Milieu & Pesticide Action Network Europe v European Commission*, Judgment of 14 June 2012, ECLI:EU:T:2012:300 [*Stichting Natuur*] and T-396/09, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v European Commission*, Judgment of 14 June 2012, ECLI:EU:T:2012:301.

[57] Joint cases C-401/12 P to C-403/12 P, *Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, Judgment of 13 January 2015 ECLI:EU:C:2015:4 and joint cases C-404/12 P to C-405/12 P, *Council of the European Union and European Commission v Stichting Natuur en Milieu & Pesticide Action Network Europe*, Judgment of 13 January 2015, ECLI:EU:C:2015:5.

[58] T-33/16, *TestBioTech eV v Commission*, Judgment of 14 March 2018, ECLI:EU:T:2018:135. The request for internal review against the Commission's decision authorising *Pioneer Overseas Corporation* and *Monsanto* the trade of soy 305423, MON 87705 e MON 87769 – according to Regulation (EC) No. 1829/2003 (establishing EFSA) – had been submitted by the NGOs *TestBioTech e GeneWatch* on 29 May 2015. The Commission held that: "*GMOs are explicitly mentioned as* '*elements of the environment*' *in Article 2*(*l*)(*d*)(*i*) *of the Aarhus Regulation to which Article 2*(*l*)(*d*)(*vi*) *refers for the purpose of access to environmental information under*

Combining the two requisites of the *individuality* of the measure and its adoption under environmental law, the scope of internal review turns out to be clearly defined: on the one hand, it is limited to the institutions' (and bodies')[59] decisions with individuated addressees (mainly authorisations). On the other hand, as a sort of counterbalance, the width of the concept of environmental law (apparently) opens the review to measures adopted in fields other than the environment strictly considered.

## IV. NGOs and access justice: the EU Courts' judgments and the Compliance Committee's findings

It is clear, from what has emerged so far, that the environmental NGOs trying to gain access to the EU justice face a difficult situation.[60] The critical point is that, in this case, the two legal systems (the international and the EU systems) are, somehow, unaligned, so that the implementing system (the EU) cannot satisfy the objectives of the other.

In other words, for what concerns access to justice, the EU legislation stipulates that the environmental NGOs can have access to the Courts only after exhausting all the internal remedies (which is a general rule in the EU and in many other national legal systems) and, thus, only after a request for internal review is rejected. It could be noticed that the rejection (or inadmissibility declaration) of the request for internal review becomes, for the NGO, the *act of direct and individual concern* that Art. 263 TFEU requires for legal persons to have standing before the Courts. This is not, however, the solution to the problem, since the Court would only examine the legality of the internal review decision and not (or only in an indirect way) the challenged institution's decision.

Furthermore, as previously stated, the Commission's decisions with the greatest impact on the environment, are mainly general/regulatory acts.

The implementation of the Aarhus Convention's Art. 9 par. 3 by the EU, in the framework of its legislation and in formal compliance with the same Convention, led to a paradoxical outcome: where the Convention would have claimed a wide access to justice, the EU system ended up narrowing it to an extreme point.

This situation generated two interesting disputes, one (already mentioned) properly *judicial* involving the EU Courts; the other, international and non-judicial involving the Aarhus Convention Compliance Committee against the European Union as a signing Party of the Convention.

Both disputes face the same legal issue – that is the compatibility of the EU legislation to the Convention – but from two partially different perspectives. The EU judiciary adopted

*Aarhus Regulation*, *but due to a systematic interpretation and in light of the objective of the Regulation and of the Aarhus Convention*, *Article 10 is to be interpreted in the sense that only the allegations of the requests for internal review of decisions adopted under Regulation* (*EC*) *1829/2003 under the Aarhus Regulation which cover the environmental and health impacts due to the release of GMOs in the environment are to be re-examined*, *but not the health impacts of the consumption of GM food and feed*". See, Reply of the European Commission to the Request for Internal review of 16.11.2015. 5: http://ec.europa.eu/environment/aarhus/pdf/30_reply.pdf

[59] On the reasons to add *bodies* to *institutions* see Pallemaerts (2011). 278.

[60] See Caranta, Roberto: Environmental NGOs (eNGOs) or: Filling the Gap between the State and the Individual under the Aarhus Convention. In: Caranta, Roberto – Gerbrandy, Anna – Müller, Bilun, *The Making of a New European Culture: the Aarhus Convention*, Europa Law Publishing, Groningen, 2018. 407440.

a (somehow) narrower perspective, which mainly focused on the possible invalidity of Art. 2, par. 1 (g) and Art. 10 of the Aarhus Regulation. A wider approach has been adopted by the Compliance Committee, which extended its examination to the rules of standing for the environmental NGOs and other, more general, issues related to the EU legal system.

### IV.1. The EU Courts' judgments: cases T-338/08 and T-369/09 and joint cases C-401 to C-403/12 and C-404 to C-405/12

Following rejection by the EU Commission of some requests concerning Regulation No. 149/2008 and Decision C(2009) 2560, the interested NGOs instituted proceedings before the General Court, challenging the rejection decision.

The dispute led to two interesting judgments, both of 14 June 2012, that strongly influenced the requests for internal review in the following two years, and where the EU court of first instance stated on the validity of Article 2 of the Aarhus Regulation.

In case T-338/2008 the NGOs *Stichting Natuur en Milieu* and *Pesticide Action Network Europe* challenged the Commission's decision rejecting their request for review of Regulation No.149/2008 stating, on the one hand, that the latter could be considered as a substantially individual act and, on the other hand, that Article 2 par. 1 (g) of the Aarhus Regulation was incompatible with Article 9 par. 3 of the Convention, as the limitation of the review to individual acts left too narrow a space for access to justice: the contrary to what the Convention required.

The General Court dismissed the first complaint, denying that the Commission Regulation could be considered an individual act. It was, in fact, a general act applying

> "*to objectively determined situations and entail*[*ing*] *legal effects for categories of persons envisaged generally and in the abstract*". *Nor could it have been considered a bundle of individual acts because it was not adopted in response to individual claims.*[61]

On the second plea, however, the Court upheld the NGOs argument stating that:

> "*an internal review procedure which covered only measures of individual scope would be very limited*, *since acts adopted in the field of the environment are mostly acts of general application. In the light of the objectives and purpose of the Aarhus Convention*, *such limitation is not justified*".[62]

Furthermore, the Court held that while Article 9 of the Convention left discretion to the signing Parties as to the definition of the persons having the right to recourse and also to the 'type of justice' (administrative or judicial), it did not leave the same discretion as to the types of challengeable acts.

The Court thus decided for invalidity of Art. 10 of the Aarhus regulation and annulled the Commission's contested decisions.

The same arguments were held by the General Court in deciding case T-369/09 and annulling the Commission's decisions that had rejected the requests for internal review submitted by the NGOs *Vereniging Milieudefensie* and *Stichting Stop Luchtverontreiniging Utrecht*.

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[61] *Stichting Natuur* case, point 41.

[62] *Stichting Natuur* case, point 76.

The aforementioned judgments of the General Court led, on the one hand, to the Commission to appeal to the Court of Justice, but, on the other, they triggered new requests for internal review by NGOs now believing it admissible that internal review covered general acts as well[63]. The Commission, however, systematically rejected this argument, holding that the General Court's judgments had been appealed and the question was thus awaiting final definition by the Court of Justice. In the meantime, Art. 10 of the Aarhus Regulation, as in force, should be applied[64]. Furthermore, as the General Court's judgments produced their effects only in relation to the cases decided, the argument would not hold for any request for internal review[65].

In two different and coeval judgments, the Court of Justice took the opportunity to reconsider the issue of mixed agreements and the relationship between EU and international legislation.

The central point of discussion is, again, the compatibility of Art. 10 of the Aarhus Regulation with Article 9, par. 3 of the Convention. The Court of Justice, however, dismantled the General Court's argument holding that Art. 9 par. 3 could not be used as a parameter to assess the legality of Regulation's Art. 10. The former, in fact, was neither unconditional nor sufficiently precise, this being one of the conditions for an international agreement to be interpreted by the Court of Justice and for the Court to state on the compatibility of EU legislation with international law[66]. In sum, Article 9 par. 3 left the Parties a wide margin of discretion, not only as to the requisites that members of the public have to meet to have access to justice, but also to the modalities (administrative and/or judicial) of that justice. Furthermore, in the Court's opinion, Article 9 par. 3 neither contains a specific obligation that the Union intended to comply with, nor a precise provision which the relevant Union's act recalls.

This way of reasoning inevitably led the Court to conclude that the aforementioned Art. 9 could not be used as a parameter to state on the invalidity of Aarhus regulation's Art. 10 and the General Court, in doing so, erred in law.

### *IV.1.1. Some reflexions on the Court of Justice's decisions*

On a closer examination, the Court's reasoning is not totally convincing, leaving the reader with the impression of a quick dismissal of a thorny issue. However, some suggestions for a different and more articulated approach on the matter might be found in Advocate General *Jääskinen*'s Opinion. After a precise reconstruction of the Court's jurisprudence on the relationship between international and EU law,[67] the Advocate General comes to the

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[63] See, for example the request for internal review submitted by *Greenpeace Netherlands* and *Pesticide Action Network Europe* on 27 June 2012 reiterating their request concerning Commission's Directive No. 77/2010. The request had been rejected because it was referred to a general act pending proceedings before the General Court.

[64] EU Commission, DG Environment, 11 July 2014.

[65] EU Commission, DG Health, 6 August 2013.

[66] The Court recalls here its previous judgments, C-308/06, *The Queen*, *on the application of International Association of Independent Tanker Owners* (*Intertanko*) *and Others v Secretary of State for Transpo*rt, ECLI:EU:C:2008:312, Judgment of 3 June 2008; and joined cases C-120 and C-121/06, *FIAMM & Others v Council of the European Union and Commission of the European Communities*, Judgment of 9 September 2008, ECLI:EU:C:2008:476.

[67] Opinion of the Advocate General *N. Jääskinen*, 8 May 2014, joint cases C-401/12 P to C-403/12 P.

conclusion that Aarhus Regulation's Article 10 is actually incompatible with the Convention if correctly interpreted.[68]

It is, in particular, worthy of notice that assessing the compatibility of EU legislation with international agreements might lead to different outcomes depending on the subject involved in the latter. In this perspective, the Aarhus Convention could not be compared with other association or partnership agreements, since it is aimed at creating "*a body of rules of general scope including ambitious* '*political*' *objectives*, *which is often the case in particular in the areas of environmental protection and transport law*".[69] The Aarhus Convention, thus, could be seen as a sort of *environmental Constitution*, an agreement establishing the statute of a fundamental right to environmental protection, "*a source of* '*rights of civic participatio*n', *taking the form of a codification of procedural rights in relation to the environment*".[70] If *Lesoochranárske zoskupenie VLK* case-law were to be applied – thus assuming that the margin of discretion left to the signing Parties by an international agreement would prevent this latter's provisions to be used as a parameter for the legality of the implementing EU (secondary) legislation – a twofold problem would arise. In fact, not only would the legality of the Aarhus Regulation be impossible to be assessed by the EU judiciary, but also the national legislation would fall outside the scope of judicial examination because there are no EU directives replicating the content of the Convention's Article 9, par. 3. A *grey zone* would therefore emerge, where no judicial review could apply.

To avoid this situation, a different approach should be taken, that is assume that international agreements' provisions which confer rights but do not have direct effects, could be used as a parameter for judicial review of EU secondary legislation "*provided that the characteristics of the convention in question do not preclude this*".[71]

Anyway, in the Advocate General's perspective, Article 9 par. 3 of the Convention is not to be considered a provision totally lacking direct effect. This might be the case whenever it leaves the Parties to establish the requisites for the members of the public to gain access to public decision-making through participation or access to justice. But a direct effect could be envisaged in relation to the final outcome to be reached, i.e. an effective environmental protection through access to justice.[72] This is one of the main objectives of the Convention and, therefore, it should be affecting its interpretation.

This construction would not admit any restriction of the categories of challengeable (either judicially or through administrative proceedings) acts apart from those acts that are explicitly excluded by the scope of the Convention, since they are adopted by the public authorities in their legislative or judicial capacity.[73]

Furthermore, the limited scope of internal review narrows the potential of the remedy too much: the same Advocate General points out that the only practical applications of

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[68] See, Opinion, point 60, where the Advocate General states that the Court's case-law on the topic, far from being a consolidated block, is "rather marked by a certain degree of diversity which sometimes borders on inconsistency".

[69] Opinion, point 62.

[70] Opinion, point 87.

[71] Opinion, point 78.

[72] Art. 9, par. 3 of the Convention could be therefore seen as a MIXED provision.

[73] See Art. 2, par. 2 of the Convention.

the review had, until that moment, involved market authorisations to GMOs and chemical products under the *REACH Regulation*.[74]

In sum, interpreting Art. 10 of the Aarhus Regulation in a way which is compatible with the spirit of the Convention, leads to the conclusion that the article is invalid.

On a closer examination, however, the Advocate General's interpretative choice, according to which only legislative acts are outside the scope of internal review, is not totally convincing.

Actually, Art. 2, par. 2 of the Convention, in excluding the acts adopted in the legislative or judicial capacity of the relevant authority from the scope of the Convention, refers, according to the *Implementation Guide* to the Convention,[75] to the acts issued by Parliaments (whose members are accountable to the electorate) or by the courts. The Court of Justice has interpreted this provision (transposed in Directive No. 4/2003 on access to environmental information) in the same sense[76] on the basis that the procedure through which these acts are formed and issued grants sufficient transparency and public scrutiny on the objects and the contents of the norms.[77]

Now, as already stated, EU Commission's activity in the environmental sector consists, for a relevant part, in the issuing of acts which can be considered either general or normative, their function being the integration or derogation of EU legislation.[78] These acts have, therefore, the normative character of the sources of law – albeit their *second level* status – but this does not mean that they can always be considered *legislation*. On the point, the Court has actually held that, depending on the case, either they fall within the executive capacity of the Commission (if they integrate or implement legislation) [79] or they share the same nature of the legislation they are derogating.[80]

Furthermore, if the argument of the nature of the act is raised, another problem comes to light. The general act, which is also normative (that is, it is a source of law) is actually taken into account by the Aarhus Convention but in a different provision: no longer Art. 9, but Art. 8, according to which Parties "*shall strive to promote effective public participation at an appropriate stage*, *and while options are still open*, *during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment*".

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[74] Regulation (EC) No. 1907/2006 of the European Parliament and the Council of 18 December 2006, concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No. 793/93 and Commission Regulation (EC) No. 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC. See Opinion, point 129.

[75] UNECE, *The Aarhus Convention: an Implementation Guide*, 2nd ed., 2014. 49. Available at https://www.unece.org/env/pp/implementation_guide.html (10.9.2018).

[76] C-515/11, *Deutsche Umwelthilfe eV v Bundesrepublik Deutschland*, Judgment of 18 July 2013, ECLI:EU:C:2013:523.

[77] See, on the point, Advocate General *Sharpston*'s Opinion (*Deutsche Umwelthilfe*).

[78] Legislation is intended here as *secondary legislation*, according to the EU law terminology – as only Treaties are considered primary legislation – but, in a broader sense, it is referred to primary sources of law.

[79] See, for example, *Stichting Natuur* case, point 65, where the Court denies that Commission regulation (EC) No. 149/2008 through which the Commission amends Regulation (EC) n. 365/2005 of the European Parliament and of the Council.

[80] T-685/14, *European Environmental Bureau v European Commission*, Order of 17 July 2015, ECLI:EU:T:2015:560, point 41.

This might mean that, as far as normative acts (adopted by public authorities – the executive regulations) are concerned, the protection provided by the Convention is *anticipated* to the procedural stage (through participation) rather than expected *after* the adoption, through the tool of justice. In this perspective, the limitation to individual acts having legally binding and external effects, stated in Art. 10 of the Aarhus regulation does not appear incompatible with the Convention at all, not even with the so-called *spirit* of it.

Now, the actual opportunity for the environmental organisation to participate in the making of the Commission's regulations (apart from the access to information, according to Regulation No. 1049/2001) is all but certain. Some suggestions on the point could be retrieved from Communication No. 704/2002: here the Commission recognised the need of wide consultation, especially where proposals for legislation were concerned:

> *"*[*b*]*y fulfilling its duty to consult*, *the Commission ensures that its proposals are technically viable*, *practically workable and based on a bottom-up approach. In other words*, *good consultation serves a dual purpose by helping to improve the quality of the policy outcome and at the same time enhancing the involvement of interested parties and the public at large. A further advantage is that transparent and coherent consultation processes run by the Commission not only allow the general public to be more involved*, *they also give the legislature greater scope for scrutinising the Commission's activities* (*e.g. by making available documents summarising the outcome of the consultation process*)".[81]

In any case, the crucial point of the issue shifts to the *dialogue* that the Commission is willing to open with the *civil society's organisations* during the formation of environmental (general or normative) acts. The dialogue (either in the form of consultations or other forms of participation) is actually in the hands of the Commission itself and though the participation outcomes "*should be taken into account as far as possible*",[82] they are not legally binding and they are subject to the principle of proportionality, according to which

> "[*t*]*he method and extent of the consultation performed must* (…) *always be proportionate to the impact of the proposal subject to consultation and must take into account the specific constraints linked to the proposal*." [83]

In the end, even approaching the problem from the *participation* side, the outcome is not satisfying. Especially considering the practical results, the approach does not appear in line with the objective of an effective environmental protection, as outlined by the Aarhus Convention.

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[81] See, EU Commission, Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission, COM(2002) 704 def, of 11 December 2002. 5. http://ec.europa.eu/governance/docs/comm_standards_en.pdf (10.9.2018.) This document is explicitly recalled by art. 2 of the Annex to Commission Decision No. 401/2008, amending Decision No. 50/2008 on the application of the Aarhus Regulation, despite reference is made to article 9 of the Regulation and not article 8.

[82] See the last paragraph of Art. 8 of the Convention.

[83] EU Commission, 2002. 18.

### IV.2. The international dispute and the intervention of the Aarhus Convention Compliance Committee: The problem of the NGOs' standing.

Proceedings before the ACCC have been another occasion to examine the problematic relationship between international and EU law.

The ACCC was established in 2002, following Art. 15 of the Convention which provided for the Meeting of the Parties to "*establish*, *on a consensus basis*, *optional arrangements of a non-confrontational*, *non-judicial and consultative nature for reviewing compliance with the provisions of this Convention*."

Leaving aside any consideration about the structure and the functioning of the Committee, it is worth focusing on case C/2008/32, the ten-year long litigation that opposed the Committee – triggered by the communication of the NGO *ClientEarth* as a *member of the public* – to the EU and that never came to a real conclusion.[84]

The case was so long and complex that the Committee had to divide its findings in two parts. The first adopted in 2011, was interlocutory about the EU compliance, while awaiting the General Court's judgment on the case T-338/08. The other part was issued on 17 March 2017: here the Committee definitely found for EU non-compliance in relation to Art. 9 par. 3 of the Convention.

The procedure before the Committee involved a wide exchange of documentation, communications and replies, between the EU Commission and the interested NGO. In particular, after the issuing of the two aforementioned judgments by the Court of Justice,[85] the communicant NGO complained about the persistence of critical points in the Aarhus Regulation.

Firstly, in the NGO's opinion, the Court had adopted a restrictive interpretation of the Convention and the Regulation both in relation to the object of the internal review and to the access to such review. In addition, the choice of the administrative procedure would have raised some doubts on the side of impartiality.

Secondly, the NGO insisted on the absence of any referral to the type of reviewable acts in the Convention, therefore implying that the Aarhus Regulation's choice to limit the review to individual acts – and to exclude the acts resulting from *contentious* procedures – was invalid. The further requisites established for the reviewable acts by Regulation's Art. 2, par. 1 (g), namely, the fact that the act must be adopted under environmental law and has to have binding and external also appeared incompatible with the Convention's Art. 9 par. 3.[86]

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[84] ACCC/C/2008/32. http://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html (20.6.2018). For a discussion of the case see also Fasoli, Elena – McGlone, Alistair: The Non-Compliance Mechanism of the Aarhus Convention as a Soft Enforcement of International Law: Not So Soft After All!. In: *Netherlands International Law Review*, 65 (2018) 1, 42.

[85] Cfr. ClientEarth Communication ACCC/C/2008/32. Update on Court of Justice rulings in cases C-401/12 P to C-405/12 P, 23 February 2015. https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/frCommC32_23.02.2015/frCommC32_comments_on_CJEUs_ruling_of_15.01.15.pdf (10.9.2018)

[86] ClientEarth Communication ACCC/C/2008/32. Update on Court of Justice rulings in cases C-401/12 P to C-405/12 P, points 60 and 69 respectively. Notice that the first argument could be overcome by the recent judgment of the General Court which adopted a wide interpretation of the concept of environmental law (*above*, III.2.).

Thirdly, the statement of the Court of Justice according to which Art. 9 par. 3 of the Convention did not have direct effects since it required further implementation by the Parties – and therefore it could not constitute a parameter to assess the validity of EU legislation –, was also criticised by the communicant. Following the Advocate General's opinion (not shared by the Court of Justice) the NGO assumed that Art. 9 par. 3 was actually unconditional: no obligation to lay down specific requisites for the members of the public to meet could be retrieved by the provision.[87]

Fourthly, in the NGO's opinion, the Court of Justice missed the opportunity to reaffirm a principle already stated in *Lesoochranarske zoskupenie VLK* in relation to the national courts: here the Court, whilst denying direct effect to Art. 9 par. 3, had prompted the national courts to interpret the national "*procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9*(*3*) *of the convention*".[88]

Finally, the communication contains some general observations as to the standing of environmental NGOs. This topic is a crucial one, it has been considered by the ACCC as well and it could possibly lead to some change in the EU courts' future case-law.

To better understand the issue, it might be useful to start from the previously mentioned Art. 263 par. 4 TFEU, according to which natural and legal persons can institute proceedings against an act addressed to that person or which is of direct and individual concern to them – where both the requisites are assessed through the *Plaumann* test,[89] and also against *regulatory acts* that are of direct concern for the person and do not require any further implementation measure.[90] Natural and legal persons are thus considered *non-privileged applicants* whose position (*locus standi*) differs from the one enjoyed by Member States

[87] Obviously, this interpretation would open to an actio popularis and this is also recognised in the Communication. On this topic see also the Background Paper issued by the Task Force on Access to Justice (established by the MoP during its first meeting, in 2002), in view of its eighth meeting, in June 2015: "*the Parties may not take the clause* '*where they meet the criteria*, *if any*, *laid down in its national law*' *as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging act* [*sic*] *or omissions that contravene national law*. *Accordingly*, *the phrase* '*the criteria*, *if any*, *laid down in its national law*' *indicates a self-restraint on the Parties not to set too strict criteria*. *Access to such procedures should thus be the presumption*, *not the exception*".

[88] "*The Court thus adopted different standards in the implementation of Article 9*(*3*) *of the Convention*, *one for Member States*' *courts in which access to courts must be granted*, *and one for itself barring access to justice*". See ClientEarth Communication, 23 February 2015, point 28.

[89] In the famous *Plaumann* case (C-25/62, *Plaumann & Co v Commission of the European Economic Community*, Judgment of 15 July 1963, ECLI:EU:C:1963:17) the Court defined the meaning of the two requisites, stating that an act is of individual concern if it affects the person as an individual (and not as a member of a group or category). An act is of direct concern whenever it does not require any implementation for its effects to produce. For a reconstruction of the theoretical framework behind the restrictive interpretation of the Court, see van Wolferen, Matthijs: The Limits of the CJEU's Interpretation of Locus Standi, A Theoretical Framework. *Journal of Contemporary European Research*, 12 (2016) 4, 914–930.

[90] It is widely acknowledged that Art. 263 TFEU, amending art. 230 TEC, extended the types of challengeable acts (formerly only *decisions* and *regulations*) and eliminated the requisite of the *individual concern* for regulatory acts, where the term *regulatory* refers to all general acts. This implies that natural and legal persons have standing even if the act is not addressed to them, as long as it is of direct concern and does not require any implementation measure. For what concerns the term *regulatory acts*, the Court of Justice (C-583/11, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, Judgment of 3 October 2013, ECLI:EU:C:2013:625) held that they form a narrower category than the acts contained in the first part of art. 263 par. 4 TFEU, since the former do not include *legislative acts*.

and the EU institutions named in pars. 2 and 3 of Art. 263. These latter are *privileged applicants* in that they are not subject to the same restrictions.

Article 263 should be paired with Art. 277 TFEU, stating the possibility to institute proceedings, on the same grounds provided in Article 263, against the act of *general application* adopted by the EU institutions and bodies "*in order to invoke before the Court of Justice of the European Union the inapplicability of that act*".

The issue of the NGOs' standing is probably one of the most controversial ones in the context of the relationship between international and EU law. Despite the rules for access to justice for private (natural and legal) persons have become less restrictive (especially after the Lisbon Treaty) the framework of the standing resulting from the TFEU is still rather narrow and this narrowness constituted one of the most relevant arguments of the dispute examined here.

In many occasions the environmental NGOs have complained about the fact that if, on the one hand, the internal review of a general act is not admissible, then on the other access to judicial review is also precluded due to the requisites provided by art 263, par. 4 TFEU: for legal persons, 'direct and individual concern', or direct concern and no measures of implementation for regulatory acts.

The EU courts have always adopted a strict interpretation of the rule: in case T-312/14 concerning a Commission's action plan on Fisheries, for example, the General Court held that

> "*the condition that the decision forming the subject-matter of the proceedings must be of direct concern to a natural or legal person requires the disputed act to affect directly the applicant's legal situation and leave no discretion to its addressees*, *who are entrusted with the task of implementing it*."[91]

If this is not the case, the applicant could only institute proceedings against an act which is of direct and individual concern where the latter requisite implies either personal qualities or circumstances specifically referred to the person.[92]

These rules also apply to the environmental NGOs for which no measure adopted from EU institutions in environmental matters could ever be of direct concern:

> "[*a*]*n EU institution's decision in an environmental matter does not restrict the rights of an environmental NGO nor does it impose obligation on them* (…). *The environment is a diffuse interest that is the concern of millions of people not of a* '*closed circle of people determined at the moment*' *of the adoption of a Commission's decision*."[93]

In its reply, the Commission rejected most of the communicant's arguments. In the draft findings sent to the former, however, the ACCC seems to share the communicant's view expressing criticism both on the side of the *individuality* of a measure to be a reviewable

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[91] T-312/14, *Federcoopesca & Others v European Commission*, Judgment of 7 July 2015, ECLI:EU:T:2015:472 point 33 [*Federcoopesca* case]. See also T-37/04, *Região autónoma dos Açores v Council of the European Union*, Judgment of 1 July 2008, ECLI:EU:T:2008:236, where the Court held that a the fact that a regional authority is entitled to specific protection under Community law (i.e. the special position enjoyed by the outermost regions in art. 349 – former art. 299 – TFUE) is not sufficient to give it standing to bring proceedings for the purposes of the fourth paragraph (former art. 230) of art. 263.

[92] *Federcoopesca* case, point 63. On this issue see also, T-262/10, *Microban International Ltd & Microban Europe Ltd v European Commission*, Judgment of 25 October 2011, ECLI:EU:T:2011:623.

[93] See ClientEarth, Communication to the ACCC of 12 August 2015 – Update case T-312/14. 2. https://www.unece.org/fileadmin/DAM/env/pp/compliance/C200832/communication/frCommC32_judgement_24.07.2015.pdf (8.9.2018).

one – when no such restriction can be found in the Convention – and on the side of the NGOs standing, where a strict interpretation of Art. 236, par. 4 of the Treaty on the part of the judiciary leaves no room for a direct access to the Courts on their part.

Recommendations to the EU Commission by the ACCC followed, either to amend the Aarhus Regulation, rendering it more adherent to the Convention, or to suggest the judiciary a more flexible interpretation of the rules of standing for the environmental NGOs.[94]

### IV.3. The EU Commission reply and following developments.

By the end of October 2016, the EU Commission sent its comments to the ACCC draft findings, contesting the Committee's conclusions on different perspectives. Beyond the specific replies to the complaints raised in the document, some preliminary, general considerations by the Commission on the peculiarities of the EU legal system are of great interest.

Firstly, the EU legal system cannot be compared with those of the national Parties (to which the Aarhus Convention is mainly directed) since the former does not share the same features with the others. The difference is clearly highlighted in the European Community Declaration made at the moment of signing the Convention and re-affirmed at the moment of its approval.

According to the Commission,

> "*the EU Declaration implies that the Union adhered to the Convention in full respect of all sources of international law*, *including*, *first of all*, *the EU Treaties. Any modification of the Aarhus Regulation or adoption of new implementing legislation can thus only take place within the boundaries and in full compliance with the institutional balance and the specific role conferred by the TFEU and TEU on each EU institution*, *including the CJEU in its jurisdictional role*, *and both the Parliament and the Council in their legislative functions*."[95]

An amendment to the Aarhus Regulation in potential contrast with the rules of standing established in the TFEU was therefore out of question. And an extension of the internal review mechanism to general acts could lead – in case of rejection of the request – to access to the judiciary regardless of the requisites provided by Art. 263, par. 4 TFEU.

However, on this point, the Commission's reply is not convincing, since Art. 12 of the Regulation, in providing access to the Court of Justice, expressly recalls the *accordance with the relevant provisions of the Treaty*. An amendment of the Treaty had, anyway, never been proposed by the ACCC.

For what concerns a possible amendment of Regulation's Art. 2 par. 1 (g), the Commission raises again an unconvincing argument, that is, there is no Convention's provision imposing a review of general acts "(…) *nor it is clear to which extent such a review can meaningfully take place for this particular category of acts*."[96]

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[94] ACCC, Draft Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union, points 117 and 118. https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html (10.9.2018).

[95] Comments by the European Commission, on behalf of the European Union, to the draft findings and recommendations by the Aarhus Convention Compliance Committee with regard to Communication ACCC/C/2008/32, point 21. https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html (10.9.2018).

[96] European Commission, Proposal for a Council decision on the position to be adopted, on behalf of the European

Secondly, the Commission fully rejects the idea that the jurisprudence and the way the Courts interpret the law can be "*modulated following compliance findings*. *Certainly*, *its case-law may evolve and become more comprehensive* (…). *However*, *any such development is decided by the Union judicature itself*".[97] In other words, the Commission could never suggest how to interpret the law to the courts, since this would not respect the principle of separation of powers. In the Commission's opinion, in the end, the ACCC's recommendation would raise a 'constitutional' issue. A negative vote by the EU representative on the document would result at the following Meeting of the Parties (MoP) which was held in September 2017.

The Council, however, adopted a somewhat *softer* position, stating the Union "*should explore ways and means to comply with the Aarhus Convention*" on the condition that the Committee's findings are amended eliminating any reference to 'making recommendations' to the Courts. According to the Council's position, the EU representatives proposed that the MoP did not – as it usually does – *endorse* the Committee's findings but *took note* of them with regard to the case.

Due to the opposition of a number of parties to the EU position,[98] consensus (the ordinary rule, in the spirit of the United Nations) on the adoption of the Committee's draft decision could not be reached. But as the MoP had to take a unanimous decision an agreement had to be found. It was eventually agreed that, this being an exceptional circumstance, the decision-making on case 32/2008, would be postponed to the next ordinary session to be held in 2021. However, the EU confirmed the will to explore solutions to grant compliance with the Convention and the MoP asked the ACCC to keep monitoring any further developments.

## V. Concluding remarks

The next three years could actually give the EU a chance to find new ways for a substantial compliance with the Aarhus Convention, taking into account the ACCC proposals. At present, however, the chance of an amendment of Art. 2, par. 1 (g) of the Aarhus Regulation seems quite far off, being the relevant EU institutions unwilling to do it.

The second route, that is, a judicial interpretation which is more consistent with the Convention and therefore more flexible in applying the rules of Art. 263 of the Treaty, is apparently undesirable because any intervention of the executive on the judiciary would be in contrast with the separation of powers principle.

From a practical perspective, however, this second route could be the most feasible: the EU Courts can exercise wide interpretative action on the Treaties' provisions. If, on the one hand, the Court of Justice held that it could not state on the validity of Articles 10 and 2, par. 1 (g) of the Aarhus Regulation,[99] on the other hand, the same Court seems to

Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention regarding compliance case ACCC/C/2008/32. 5–6. https://www.unece.org/environmental-policy/conventions/public-participation/meetings-and-events/public-participation/2017/fifty-eighth-compliance-committee-meeting-under-the-aarhus-convention/doc.html. (10.9.2018).

[97] Comments by the European Commission, point 22.

[98] Namely, Norway, Switzerland, Georgia and Ukraine. A report of the positions of the Parties can be found in the Report of the Sixth session of the Meeting of the Parties, Budva, Montenegro, 11–13 September 2017. 13. https://www.unece.org/fileadmin/DAM/env/pp/mop6/Documents_aec/ece.mp.pp.2017.2_aec.pdf. (10.9.2018)

[99] See Schoukens, Hendrik: Access to Justice in Environmental Cases after the Rulings of the Court of Justice of 13

have moved towards an *interpretative solution*, where it held that the national courts had a *duty* to interpret, as far as possible, their domestic procedural rules in accordance to the objectives of the convention. This *recommendation* could actually work for the Court itself.[100]

So far, the EU judiciary has been reluctant to follow this direction. In the recent case *Mellifera eV*[101] the General Court held that the ACCC draft findings of March 2017 contained just a proposal and were issued after the contested decision had already been taken by the Commission. In any case, the conformity of EU legislation to international law cannot result in an interpretation of the latter which is *contra legem*:[102] the Aarhus Convention thus cannot serve as a pretext to interpret Art. 10 of the Aarhus regulation as referring to general acts.

On the applicants' side, however, new challenges seem to arise on the interpretation of Art. 263, par. 4, TFEU. In a recent application for annulment to the General Court, a group of people (thirty-six individuals and a youth organisation[103]) claim that EU legislation on greenhouse gas emissions is unlawful in that it fails to prevent climate change.[104] They argue, in particular, the inadequacy of the traditional interpretation (through the *Plaumann* test) of the *individual concern* criterion when legislation is challenged. This interpretation would "*lead to an obvious gap in judicial protection*" *and to the* "*intolerable paradox that the more serious the ham and thus the higher the number of affected persons is*, *the less legal protection is available*".[105] Moreover, in the Court of Justice's stringent interpretation of the standing for non-privileged applicants, a violation of right to an effective legal protection (Art. 47 of the EU Charter of Fundamental Rights) is envisaged.

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January 2015: Kafka Revisited? In: *Utrecht Journal of International and European Law*, 31 (2015) 81, 46.

[100] The ACCC, in its Findings of 17 March 2017 (point 83) writes: "*the Committee regrets that despite its findings with respect to the national courts, the CJEU does not consider itself bound by this principle*". Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union. https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html (10.9.2018). This is also an aspect of what is said to be the *Janus face* of the Court: "*very positive and affirming concerning legal challenges to administrative decision-making in national courts on the one hand*, *but very strict and of a rejecting nature when dealing with direct action on the other*". See Darpö, Jan: On the Bright Side (of the eu's Janus Face). The EU Commission's Notice on Access to Justice in Environmental Matters. *Journal for European Environmental & Planning Law*. 14 (2017) 3–4, 373–398.

[101] T-12/17, *Mellifera e.V.*, *Vereinigung für wesensgemäße Bienenhaltung v European Commission*, Judgment of 27 September 2018, ECLI:EU:T:2018:616. For a first comment on the case, see Berthier, Anaïs: Article 9(3) of the Aarhus Convention remains a dead letter in the European Union legal order. https://www.clientearth.org/article-93-of-the-aarhus-convention-remains-a-dead-letter-in-the-european-union-legal-order (27.12.2018).

[102] *Mellifera*, point 87.

[103] The applicants (families adversely affected by the climate change) are from different EU and non-EU countries. The litigation action has a dedicated website: https://peoplesclimatecase.caneurope.org where the applicants have published their pleadings. The action has been brought on 23 May 2018, T-330/18, *Carvalho and Others v Parliament and Council*.

[104] See Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814; Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No. 525/2013; Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision 529/2013/EU.

[105] Application for annulment pursuant to article 263 TFEU. https://peoplesclimatecase.caneurope.org/wp-content/uploads/2018/08/application-delivered-to-european-general-court.pdf (27.12.2018).

It might be too early for an evaluation of the last MoP decision's effects on the EU jurisprudence and there is still room, in the forthcoming years, for a change. Some signals in this perspective might be found in the setting up, at the beginning of the present year, of an Environmental Compliance and Governance Forum,[106] a group of experts with the aim to

> "*assist the Commission in the coordination and monitoring of the implementation of the actions to improve environmental compliance and governance as well as in the preparation of legislative proposals or policy initiatives in the field of environmental compliance and governance*", *also in relation to* "*access to justice in environmental matters*".[107]

This seems, at the moment, the main way to guarantee, at the EU level, that conscious involvement of people in environmental protection that the Convention requires. An alternative route might involve the Member States (also Parties to the Convention), extending access to the EU judicature.[108]

The discussion of the next cases brought to the General Court will probably shed some light on the EU judiciary's intentions and possible new lines of interpretation of the legal standing in environmental matters.

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[107] See Art. 2(a)(ii) of the Commission Decision of 18 January 2018.

[108] As suggested by Pánovics, Attila: Case ACCC/C/2008/32 and the Non-compliance of the EU with the Aarhus Convention. *Pécs Journal of International and European Law*, 6 (2017) 2, 18.

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