

Case ACCC/C/2008/32 and Non-compliance of the EU with the Aarhus Convention

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The importance of wider public participation in shaping environmental policy and the advantages of better access to courts for citizens and their organisations are widely recognized. The Aarhus Convention obliges contracting parties to guarantee the public environmental rights. These rights are essential tools which contribute to strengthen effective environmental protection policies

The present situation in EU law as far as access to justice in environmental matters is rather complex. EU legal instruments in force do not cover fully the implementation of the obligation resulting from Article 9(3) of the Convention.

In March 2017, after extensive and detailed consideration of a communication that was submitted by an environmental NGO in 2008, the Compliance Committee of the Aarhus Convention found that the European Union was in non-compliance with the Convention due to the very limited possibilities for citizens and NGOs to have access to justice at EU level and to bring cases before the Court of Justice of the EU. Hopefully, the case before the ACCC against the EU will have important consequences for the Aarhus-conform interpretation of EU law by the Court.

Keywords: Aarhus Convention, access to justice, compliance

1. Introduction

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice¹ (hereinafter the Convention) is a multilateral environmental agreement under the aegis of the United Nations Economic Commission for Europe (UNECE). The Convention entered into force in 2001 and has currently 47 Parties, including the EU and its Member States. Together with its Protocol on Pollutant Release and Transfer Registers (PRTRs), the Convention is one of the two legally binding international instruments that put into effect and implement Principle 10 of the 1992 Rio Declaration on Environment and Development.²

The Convention is an essential step forward in encouraging and supporting public awareness in the field of environmental protection and better implementation of environmental legislation in the UNECE region, in accordance with the concept of sustainable development. Even though it only to countries in the UNECE region (the Parties to the Convention), it has had some influence on the political discussion and legal development also in other parts of the world.³

¹ Aarhus, Denmark, 25 June 1998, 2161 UNTS 447.

² <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm> (16 August 2017).

³ A. Pánovics: The Aarhus Convention Model, in M. Szabó, P.L. Láncoš & R. Varga (Eds.): Hungarian Yearbook of International Law and European Law 2016, Eleven International Publishing, 2017, pp. 259-261.

The Convention is a unique international legal instrument, which combines the subject of environmental protection with human rights, and simultaneously with the responsibilities of public institutions and citizens toward the environment. It represents an important extension of environmental rights, and its focus is strictly procedural in content. The main aim of the Convention is to guarantee three procedural rights for citizens and environmental NGOs: access to information, access to participation and access to justice in environmental matters. The content of the Convention is structured around these ‘pillars’. Another element that distinguishes the Convention from human rights regimes is that it grants environmental NGOs, subject to relevant requirements under national laws, a right to act on behalf of the environment.⁴

Under Article 1 of the Convention, each Party must guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in order to contribute to protection of the right of every person of present and future generations to live in an environment adequate to his health or well-being. The seventh and eighth recitals in the preamble confirm that aim and supplement it with the duty of every person to protect and improve the environment.

The institutional structure of the Convention is composed of two main bodies: the Secretariat and the Meeting of the Parties (hereinafter MOP). The MOP meets ordinarily every two years, and it has the power to set up subsidiary bodies. The Convention is endowed with a compliance mechanism that is unique, particularly when compared to with the compliance mechanisms of other environmental agreements. Pursuant to Article 15, the Convention’s respected compliance mechanism, the ‘Aarhus Convention Compliance Committee’ (hereinafter the ACCC) was set up by the first MOP, held in Lucca in 2002.⁵

The most innovative feature of the ‘non-confrontational, non-judicial and consultative’ procedure of the ACCC is that members of the public have the right to make complaints to an independent and impartial committee at international level.⁶ This is the first compliance system which permits members of the public to lodge a claim against a state.⁷

The cases brought to the ACCC are almost entirely based on communications from members of the public, and for each admissible case the ACCC concludes whether it finds that the Party concerned is in compliance with the Convention or not. The ACCC conducts a comprehensive assessment of the circumstances and of the national system in each case. Compliance control is not limited to fact-finding; the compliance procedure was established to improve compliance with the Convention, rather than to redress violations of individual rights.⁸

The effectiveness of the ACCC relies heavily on cooperation by the Party experiencing difficulties in complying. Upon recommendations of the ACCC, the MOP makes final decisions on compliance issues. The ACCC’s power to adapt recommendations directly towards the Parties to the Convention is severely

⁴ J. Ebbesson: Public Participation, in D. Bodansky, J. Brunnée & E. Hey: The Oxford Handbook of International Environmental Law, Oxford University Press, 2008, p. 701.

⁵ <http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf> (18 August 2017).

⁶ The members of the Compliance Committee are legal experts who serve in their personal capacity, and do not represent the countries of which they are nationals.

⁷ M. Fitzmaurice: Environmental justice through international complaint procedures? Comparing the Aarhus Convention and the North American Agreement on Environmental Cooperation, in J. Ebbesson and Ph. Okowa (Eds.): Environmental Law and Justice in Context, Cambridge University Press, 2009, p. 214.

⁸ J. Ebbesson: Access to Justice at the National Level: Impact of the Aarhus Convention and European Union Law, in M. Pallemmaerts (Ed.): The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law, Europa Law Publishing, Groningen, 2011, p. 250.

limited by the requirement of consent by the latter.⁹ Up to the present time, all its findings have been approved by consensus by the MOP.¹⁰

2. The Third Pillar of the Aarhus Convention

‘Access to justice in environmental matters’ can be defined as ensuring effective redress for citizens and their associations, by allowing them to challenge acts or omissions of the public administration before a court of law or other independent or body established by law (also known as ‘*locus standi*’ or legal standing). This involves broad access rights, with timely and not prohibitively expensive procedures, including effective remedies covering also injunctive relief, as appropriate.¹¹

Within the provisions of the Convention, the essential requirements of access to justice are expressed in Article 9. In its structure, this provision reflects the three above-mentioned ‘pillars’ of the Convention, and highlights that access to justice rights are auxiliary to, and supportive of, other rights.¹²

Article 9(3) of the Convention provides that “(...) each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge act and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.” While Article 9(3) refers to “the criteria, if any, laid down in national law”, the Convention neither sets these criteria nor sets out the criteria to be avoided.¹³ Rather, the Convention allows a great deal of flexibility in defining which members of the public have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action (*‘actio popularis’*) in their domestic laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental NGOs or other members of the public from challenging acts or omissions that contravene national law relating to the environment.

As far as access to justice is concerned, the Convention tackles the lack of standing for the environment by granting the right to a judicial review procedure to members of the public directly interested in a decision or an omission or maintaining the impairment of a right as well as to non-governmental organisations (hereafter NGOs) promoting the environment and meeting any requirements set out in national law (requirements which must, in any case, be consistent with the objective of giving the public

⁹ C. Pitea: Procedures and Mechanisms for Review of Compliance under the 1998 Aarhus Convention Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, in T Treves, L. Pineschi, A. Tanzi, C. Pitea, C. Ragni & F. Romanin Jacur (Eds.): Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements, T.M.C. Asser Press, The Hague, 2009, p. 241.

¹⁰ V. Koester: The Compliance Mechanism – Outcomes and Stocktaking, Environmental Policy and Law, Vol. 41, No. 4-5, 2011, p. 202.

¹¹ See Ann. 12 of SWD(2017) 255 final, Impact assessment on a Commission Initiative on Access to Justice in Environmental Matters.

¹² Art. 9(1) refers to the separate right of access to information; Art. 9(2) relates to rights to participate in decision-making procedures; Art. 9(3) covers acts and omissions that infringe environmental law in general; Art. 9(4) addresses remedies and the timeliness and costs of the procedures in previous paragraphs.

¹³ See the findings of the ACCC with regard to communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2, paras 29-37) and communication ACCC/C/2006/18 (Denmark) (ECE/MP.PP/2008/5/Add.4, paras 29-31).

the widest possible access). The Convention completed the package by stipulating that judicial review procedures should be effective, timely and not prohibitively expensive.¹⁴

3. The EU as a Party to the Convention

Recognizing the specific features of the Convention, the European Community signed it in 1998. It was back then and still is of considerable importance for the Parties to the Convention. The Convention has been ratified by all Member States¹⁵ and the EC; the latter approved it on 17 February 2005, just before the second MOP to the Convention.¹⁶

Since its ratification, the Convention is an integral part of the EU legal order under the terms of Article 216(2) TFEU, which confers competence on the EU with respect of the conclusion of international agreements.¹⁷ Pursuant to Article 216(2) TFEU, international agreements concluded by the EU bind its institutions and consequently prevail over acts of secondary EU legislation.¹⁸ It follows that international agreements concluded by the EU, including the Convention, do not have primacy over EU primary law. The primacy of international agreements concluded by the EU over acts of secondary law means that the latter must, so far as is possible, be interpreted in a manner that is compatible with those agreements.¹⁹

The EC felt important not only to sign up to the Convention at Community level, but also to cover its own institutions, alongside national authorities.²⁰ The EC made a Declaration upon signature and upon approval of the Convention in which it notified the Aarhus bodies about the “institutional and legal context of the Community” and the repartition with its Member States in the areas covered by the Convention.²¹

In October 2003, the European Commission proposed a package of three legislative acts to implement the Convention. The Commission wanted to get it decided by the Council as a package deal.²² As a result, the first two pillars of the Convention have been covered in EU law by means of two Directives from 2003,²³ but the proposal on access to justice in environmental matters from the same year, directed

¹⁴ See Ann. 12 of SWD(2017) 255 final (Impact assessment on a Commission Initiative on Access to Justice in Environmental Matters: <http://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-255-F1-EN-MAIN-PART-1.PDF> [17 October 2017]).

¹⁵ Ireland was the last Member State to ratify the Convention in 2012.

¹⁶ Council Decision 2005/370/EC, OJ 2005 L 124/1.

¹⁷ Á. Mohay: The complex relationship of EU law and international law, with special regard to the European Convention on Human Rights, *Państwo I Prawo*, Vol. 71, No. 6, 2016, pp. 25-43.

¹⁸ Case C-308/06, *Intertanko and Others v Secretary of State for Transport*, EU:C:2008:312, para 42; Case C-401/12 P to C-403/12 P, *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, EU:C:2015:4, para 52; Case C-404/12 P and 405/12 P, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, EU:C:2015:5, para 44.

¹⁹ Case C-335/11 and C-337/11, *HK Danmark v Dansk almennyttigt Boligselskab, HK Danmark v Dansk Arbejdsgiverforening*, EU:C:2013:222, para 29.

²⁰ In accordance with EU law, the references to ‘national law’ in the Convention should be interpreted as referring to the domestic law of the EU.

²¹ The Declaration of the EU is published on the UNECE website, see: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en (25 August 2017).

²² T. Delreux: *The EU as International Environmental Negotiator*, Ashgate, 2011, p. 89.

²³ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ 2003 L 41/26) and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans

at implementing provisions relevant to the third pillar, received strong opposition from a number of EU Member States.²⁴ The Commission proposal of 2003 remained with the Council for over a decade without any agreement being found or in prospect.²⁵ Finally, the signature of the Convention is the direct reason for the adoption of another Community act in the form of a regulation (hereinafter the ‘Aarhus Regulation’²⁶) whilst previous Community rules on access to documents helped shape the Convention.

4. Access to Justice in Environmental Matters and the CJEU

Ineffective access to justice contributes to implementation failures. The European Commission’s annual reports highlight that significant shortcomings in the implementation and enforcement of EU environmental legislation persist in some Member States.²⁷ On 6 February 2017 the Commission published the first ever comprehensive overview of how EU environmental policies and laws were applied on the ground. The analysis shows that they work but there are big gaps in how they are put into practice across the Member States.²⁸

Enforcement of environmental law, in contrast to other areas of EU law, mainly rests with public authorities. Their ability to take into account the need to protect the environment may be limited by many factors. It is therefore important that supplementary avenues for improving enforcement of environmental law are available. In particular, actions by citizens and/or environmental NGOs in relation to the application and enforcement of environmental laws would assist in the protection of the environment.²⁹ Ensuring that individuals and NGOs have access to justice is also a means of improving Member State’s implementation of EU environmental laws.

In general, most authors underestimate the nature of standing requirements. More than any single point of law, they can tell the story of a state’s DNA.³⁰ In the case of environmental law, access to justice is complicated because correct implementation may relate to public rather than private interests.³¹ For reasons of legal history, such concerns are usually of a type which is less easy for an environmental interest group (citizens and their organisations) to satisfy than for a property owner of an economic operator. Under classic rules on standing, only where a subjective right is impaired, or when a direct

and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ 2003 L 156/17).

²⁴ The proposed directive specified minimum common rules for the transposition of access to justice provisions by the Member States.

²⁵ In 2014 the Commission withdrew the pending proposal of the Directive on access to justice in the framework of the REFIT exercise, and started looking into alternative ways to improve access to justice in environmental matters at national level. See Withdrawal of obsolete Commission proposals, OJ 2014 C 153/3.

²⁶ Regulation (EC) No 1367/2006 of the European Parliament and the Council of 6 September 2006 on the application of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006 L 264/1.

²⁷ COM(2017) 370 final, p. 5.

²⁸ See SWD(2017)33-60 final, The EU Environmental Implementation Review: Common challenges and how to combine efforts to deliver better results.

²⁹ COM(96) 500, Implementing Community Environmental Law, p. 11.

³⁰ M. van Wolferen: The Limits to the CJEU’s Interpretation of Locus Standi, a Theoretical Framework, Journal of Contemporary European Research, Vol. 12, Issue 4, 2016, p. 921.

³¹ As AG Sharpston observed at the hearing in Case C-115/09 (EU:C:2011:289), „the fish cannot go to court”.

interest is at stake, can environmental law be the subject of court actions. Traditional concepts on standing can be therefore inadequate when it comes to the environment.

Legal protection in environmental matters generally serves not only the individual interests of claimants, but also, or exclusively, the public. Environmental issues simply cannot be reduced to private or public interest, because environmental interests are collective, diffuse and fragmented to a large extent.³² Recognition of the public interest in environmental protection is especially important since there may be many cases where the legally protected interests of particular individuals are not affected or are affected only peripherally. However, the environment cannot defend itself before a court, but needs to be represented, for example by active citizens and their organisations.³³

4.1. The Principle of Effective Judicial Protection

Effective justice systems play a crucial role in upholding the rule of law and the fundamental values of the EU, as well as in ensuring effective application of EU law. In order to function effectively, every judicial system needs to set out clear procedural rules, including on access to justice. In national justice systems normally whoever claims the impairment of a right or has an interest to act may bring a case before a court in order to seek redress for an alleged breach caused by private persons or public entities (rules on standing). Access to justice in environmental matters, in addition to the issue of who can bring an action (*i.e.* standing), also includes issues on the scope and conditions of the action, the available remedies and the costs. In other words, it is a package made up of several interlinked parts.³⁴

Access to justice in environmental matters is intrinsic to EU environmental law,³⁵ and draws on fundamental principles of EU law that are reflected in the EU Treaties, the Convention and secondary legislation as interpreted in case-law of the CJEU. Specific provisions aimed at ensuring reasonable access to justice are currently restricted to a few areas of EU environmental law.³⁶

The rule of law includes an effective judicial protection of rights conferred by EU law. This is reflected in EU primary law. Both the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) strengthen access to justice in general, including via explicit reference in Article 19(1) TEU on sufficient remedies to ensure effective legal protection and incorporation of the Charter on Fundamental Rights.³⁷

Under the principle of sincere cooperation laid down in Article 4(3) TEU it is for the courts of the EU Member States to ensure judicial protection of a person's right under EU law. In addition, Article 19(1) TEU requires EU Member States to 'provide remedies sufficient to ensure effective legal protection in

³² A. Pánovics: The Need for an EU Directive on Access to Justice in Environmental Matters, Essays of Faculty of Law University of Pécs, Yearbook of 2010, Pécs, pp. 137-138.

³³ See Opinion of AG Kokott in Case C-260/11, *Edwards and Pallikaropoulos v Environment Agency*, EU:C:2012:645, paras 40, 42.

³⁴ SWD(2017) 255, Impact Assessment on a Commission Initiative on Access to Justice in Environmental Matters, p. 3.

³⁵ EU environmental law covers a wide range of legislation which contributes to the pursuit of the objectives set out in Art. 191 TFEU.

³⁶ See Art. 6(2) of Directive 2003/4/EC, Art. 13 of Directive 2004/35/EC, Art. 25 of Directive 2010/75/EU, Art. 11 of Directive 2011/92/EU, Art. 23 of Directive 2012/18/EU, and recital 27 of Directive (EU) 2016/2284.

³⁷ See Art. 47 which covers the conditions of access, including legal aid.

the fields covered by Union law'.³⁸ This provision confirms the principle of effective legal protection that has been developed in the case-law of the Court.³⁹

Article 37 of the Charter of Fundamental Rights of the European Union only contains a principle providing for a general obligation on the EU in respect of the objectives to be pursued in the framework of its policies, and not a right to bring actions in environmental matters before the CJEU.⁴⁰ Article 47 of the Charter on Fundamental Rights enshrines in its first paragraph the right to an effective remedy.⁴¹ That provision reaffirms the principle of effective judicial protection, which is a general principle of EU law stemming from the constitutional traditions common to the Member States and enshrined in Articles 6 and 13 ECHR.⁴²

As regards Article 47 of the Charter, it is also settled case-law that that provision is not intended to change the system of judicial review laid down by the EU Treaties, and particularly the rules relating to the admissibility of direct action brought before the CJEU.⁴³ However, legal protection under the Convention goes further than effective legal protection under the Charter on Fundamental Rights, as Article 47 expressly relates to the protection of individual rights. The basis for the assessment of the need for effective legal protection is therefore the actual person whose rights have been violated, rather than the public interest of society.

Stressing that EU law is a distinct and autonomous legal order, the Court has endorsed and developed general principles, such as those of equivalence and effectiveness,⁴⁴ in order to define and support it, while recognizing the procedural autonomy of EU Member States, *i.e.* the power to fix their own detailed procedural requirements.⁴⁵

4.2. Preliminary Rulings and the Direct Effect of Article 9(3)

Effective judicial protection is closely linked to the uniform interpretation of EU law by the Court, and the possibility for national courts to submit questions to the Court by way of preliminary reference under the conditions set out in Article 267 TFEU.⁴⁶ Under EU law, while it is not possible to contest directly an EU act before the courts of the Member States, individuals and NGOs may in some countries be able

³⁸ Case C-404/13, *ClientEarth and Regina v The Secretary of State for the Environment, Food and Rural Affairs*, EU:C:2014:2382, para 82.

³⁹ J.H. Jans & H.H.B. Vedder: *European Environmental Law after Lisbon*, 4th edn., Europa Law Publishing, Groningen, 2012, p. 274.

⁴⁰ Order of the General Court in Case T-600/15, *PAN Europe and Others v Commission*, ECLI:EU:T:2016:601 para 47.

⁴¹ "Everyone whose rights and freedoms guaranteed by the law of the Union are violated, has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article."

⁴² Case C-432/05, *Unibet v Justitiekanslern*, EU:C:2007:163, para 37.

⁴³ Case C-283/11, *Sky Österreich v Österreichischer Rundfunk* (EU:C:2013:28, para 42), Case C-426/11, *Alemo-Herron and Others v Parkwood Leisure*, EU:C:2013:521, para 32; Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:625, para 98.

⁴⁴ See, for example Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, para 43; Case C-570/13 *Karoline Gruber v Unabhängiger Verwaltungssenat für Kärnten and Others*, para 37.

⁴⁵ Case C-416/10, *Križan and Others v Slovenská inšpekcia životného prostredia*, EU:C:2013:8, para 106.

⁴⁶ The evolution of CJEU case-law on access to justice is mostly the result of preliminary references from national courts in which they seek clarification of what their role should be in applying EU environmental law.

to challenge an implementing measure and thus pursue the annulment by asking the national court to request a preliminary ruling of the Court.

The system of preliminary rulings is the keystone of the EU legal order, which, by setting up a dialogue between the CJEU and the national courts, has the object of securing uniform interpretation of EU law.⁴⁷ Yet, such a procedure requires that the NGO is granted legal standing in the Member State concerned, and that the national court decides to bring the case to the Court.

The Court has issued several rulings clarifying EU requirements on access to justice. A lot of preliminary references have been submitted to the Court by national courts, seeking clarification on whether access should be given and under what conditions.⁴⁸ The growing number of preliminary references shows that many EU Member States may be forced to change their national legislation to bring it in line with the obligations resulting from the Convention as interpreted by the Court.

Through its case-law, the Court has *partly filled the gap* left by the absence of EU legislation concerning Member States obligations under Article 9(3) of the Convention. In the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding right derived from EU law, since the Member States are responsible for ensuring that those rights are effectively protected in each case.⁴⁹ In the *'Slovak Brown Bears case'*⁵⁰ the Court confirmed that national courts must interpret access to justice rules in a way which is compliant with the Convention. The Court found that Article 9(3) of the Convention had no direct effect, but despite the absence of access to justice provisions in the Habitats Directive, national courts should nevertheless facilitate access by environmental NGOs. The famous judgment forced national courts to interpret law as much as possible in such a way as to enable environmental NGOs, in line with Article 9(3) of the Convention, to challenge administrative decisions in the EU Member States.

In general, the provisions of an international agreement to which the EU is a party can be directly relied on by individuals, if the nature and the broad logic of that agreement do not preclude it, and those provisions appear, as regards their content, to be unconditional and sufficiently precise.⁵¹ The Court has already held that Article 9(3) of the Convention did not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals and therefore did not fulfil those conditions. Since only members of the public *'who meet the criteria, if any, laid down in national law'* are entitled to exercise rights provided for in Article 9(3), that provision is subject, in its implementation or effects, to the adoption of a subsequent measure.⁵²

⁴⁷ See Opinion 2/13 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (EU:C:2014:2454, para 198)

⁴⁸ Especially the Djurgården case (C-263/09), the Trianel case (C-115/09), the Boxus case (C-128/09), the Slovak Brown Bears case (C-240/09), the Solvay case (C-182/10) and the Altrip case (C-72/12) should be mentioned in this respect.

⁴⁹ Case C-567/10, *Inter-Environnement Bruxelles and Others v Région de Bruxelles-Capitale*, EU:C:2012:159, paras 28-31.

⁵⁰ Case C-240/09, *Lesoochranské zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, EU:C:2011:125. This case concerned an environmental association's entitlement to challenge a ministerial hunting derogation from the strict species protection provisions of the Habitats Directive (92/43/EEC, OJ 1992 L 206/7).

⁵¹ Case C-300/98 and C-392/98, *Dior and Others v Assco Gerüste and Others*, EU:C:2000:688, para 42; Case C-401/12 P to C-403/12 P *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, para 54.

⁵² Case C-240/09, *Lesoochranské zoskupenie*, para 45; C-401/12 P to C-403/12 P, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, para 55.

4.3. The Plaumann Doctrine in Environmental Matters

The legal remedies available to private persons against EU acts of general application have long been one of the most contentious issues in EU law. According to the system for judicial review of legality established by the EU Treaties, Articles 263, 267 and 277 TFEU established a ‘complete’ legal system of remedies and procedures designed to ensure judicial review of the legality of acts of the EU institutions and has entrusted such review to the EU Courts.⁵³ First on Article 173 of the EEC Treaty and subsequently on Article 230 EC, the Court has adopted a strict interpretation of standing of natural and legal persons to institute proceedings. Despite much criticism, the Court adhered to this case-law, and confirmed it in particular in cases *Unión de Pequeños Agricultores*⁵⁴ and *Jégo-Quéré*.⁵⁵

According to the formula often used in the case-law of the Court, ‘*direct concern*’ means that an EU act must affect directly the legal situation of the individual and leave no discretion to its addressees, who are entrusted with the task to implementing it, such implementation being purely automatic and resulting from EU rules without the application of other intermediate rules.⁵⁶ In accordance with settled case-law dating back to the judgment of 15 July 1963 in the *Plaumann* case,⁵⁷ “*persons other than those whom a decision is addressed may only claim to be individually concerned if that decision affect them by certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed*” (so-called ‘Plaumann doctrine’ or ‘Plaumann formula’).

As far as natural persons are concerned, where the specific situation of the of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the act. The same applies to associations which claim to have *locus standi* before the CJEU. In the absence of special circumstances, such as the role which it could have played in a formal procedure leading to the adoption of the measure in question, an association cannot be considered to be individually concerned, and is therefore not entitled to bring an action for annulment on behalf of its members where the latter cannot do so individually.⁵⁸

The entry into force of the Treaty of Lisbon and the developments in CJEU case-law have put alternative ways of improving access to justice in EU environmental law back in the spotlight.⁵⁹ Not least as a reaction to the case-law of the Court, the Treaty of Lisbon introduced a reform of direct legal remedies available to private persons. The fourth paragraph of Article 263 TFEU permitted private persons to bring an action for annulment ‘against a regulatory act which is of direct concern to them and does not entail implementing measures’.⁶⁰ It is still debated how far that reform extended the standing of

⁵³ See, to that effect, Case C-294/83, *Les Verts v Parliament*, EU:C:1986:166, para 23.

⁵⁴ Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, EU:C:2002:462, para 36.

⁵⁵ Case C-263/02 P, *Commission v Jégo-Quéré, & Cie SA*. EU:C:2004:210, para 45.

⁵⁶ Case C-386/96 P, *Dreyfus v Commission*, EU:C:1998:193, para 43.

⁵⁷ Case 25/62, *Plaumann v Commission*, EU:C:1963:17, para 107.

⁵⁸ Case C-321/95 P *Greenpeace Council and Others v Commission* (EU:C:1998:153, paras 28-29).

⁵⁹ M. Pallemarts: Compliance by the European Community with its Obligations on Access to Justice as a Party to the Aarhus Convention, Report for WWF-UK, Institute for European Environmental Policy (IEEP), June 2009, p. 30.

⁶⁰ This provision was originally to be incorporated into the Treaty establishing a Constitution for Europe (‘the Constitutional Treaty’) as Art. III-365(4). Against this background, the Treaty of Lisbon does not establish a systematisation and hierarchisation of EU acts like the Constitutional Treaty.

individuals and their organisations, but the Court has pointed out that the interpretation of the EU system of remedies cannot have the effect of setting aside the conditions expressly laid down in the Treaty. This would go beyond the jurisdiction conferred by the Treaty on the EU Courts.⁶¹

5. The Draft Aarhus Decision in Case ACCC/C/2008/32

On 1 December 2008, an environmental NGO (Client Earth), supported by a number of entities and a private individual, brought a case to the ACCC concerning insufficient compliance by the EU with its obligations under the Convention. The communicant alleges a failure by the EU as a Party to the Convention to comply with Article 3(1) and Article 9(2)-(5), of the Convention. The communication alleged that by applying the ‘individual concern’ standing criterion for private individuals and NGOs that challenged decisions of EU institutions before the CJEU, the EU fails to comply with Article 9(2)-(5). Moreover, the Aarhus Regulation fails to grant to individuals or entities, other than NGOs, such as regional and municipal authorities, access to internal review; and that the scope of this internal review procedure is limited to appeals against administrative acts of an individual nature. As a result, the EU fails to comply with Articles 3(1) and 9(2). Finally, the communication alleges that by charging the applicants before the CJEU with expenses of an uncertain and possibly prohibitive nature in the event of the loss of their case, the EU fails to comply with Article 9(4). Additionally, the communicant alleges also a breach of Article 6 by not providing for public participation, and related access to justice, in decision-making related to certain decisions taken by the EU institutions.

After lengthy discussions, the ACCC submitted its findings in Case ACCC/C/2008/32 to the EU on 17 March 2017. The jurisprudence examined by the ACCC was built by the CJEU on the basis of the old text in the EC Treaty.⁶² Despite of the fact that the wording of Article 263(4) TFEU is different, this difference in itself did not provide a significant change of the jurisprudence. This means that the Plaumann doctrine still can be considered as an *absolute bar* to proceeding in environmental cases. The consequences of applying the Plaumann doctrine to environmental and health issues is that in effect no member of the public is ever able to challenge an EU act in such case before the CJEU. While businesses have relatively easy access to the CJEU to defend their commercial interests, environmental NGOs have virtually no access to the same Court to protect the environment other than in access to documents cases.

Both the system of judicial review in the national courts and the request for preliminary ruling is a significant element for ensuring consistent application and proper implementation of EU law in the Member States, but they cannot serve as a basis for generally denying members of the public access to the CJEU. Thus, the system of preliminary ruling does neither in itself meet the requirement of access to justice in Article 9 of the Convention, nor compensate for the strict jurisprudence of the Court.⁶³

In paragraph 123 of its findings, the ACCC held that “*the Party concerned fails to comply with Article 9, paragraphs (3) and (4), of the Convention with regard to access to justice by members of the public neither the Aarhus Regulation, nor the jurisprudence of the CJEU implements or complies with the obligations arising under those paragraphs*”. The Aarhus Regulation, in combination with the jurisprudence of the CJEU, has effectively prevented individuals and environmental NGOs from seeking access to justice in environmental matters at EU level in all but access to documents cases.

⁶¹ Unión de Pequeños Agricultores (C-263/02 P, EU:C:2004:210, paras 43-44).

⁶² Art. 230(4) EC.

⁶³ ACCC/C/2008/32 (Part I); ECE/MP.PP/C.1/2011/4/Add.1, May 2011, paras 89-90.

The recommendations of the ACCC do not either explicitly or implicitly require or suggest an amendment of Article 263(4) TFEU or any other provision of the EU Treaties. The EU is entirely free to decide whether to implement the recommendations via case-law,⁶⁴ or by amending the Aarhus Regulation,⁶⁵ or by taking any other measure it considers appropriate.⁶⁶

At the express invitation of the Council of the EU, two members of the ACCC and a representative of the secretariat attended the session of the Council Working Party on International Environmental Issues⁶⁷ held on 22 March 2017. It is also worth mentioning that on 28 April 2017, the Commission adopted an interpretative guidance document ('Notice') to the Member States on how to implement the access to justice provisions of the Convention within their own jurisdictions.⁶⁸ The notice document covers legal standing, the intensity of scrutiny, and the effective remedies to be provided by national courts, and several other safeguards. Its scope is limited to access to justice in relation to decisions by public authorities of the Member States, and it does not address legal standing of private parties before the CJEU. Nor does it concern the judicial review of acts of the EU institutions.

6. The Position of the EU at MOP-6

One of the findings, namely that the EU fails to comply with paragraphs (3) and (4) of Article 9, has been incorporated into draft Decision VI/8f, which was submitted to the sixth session of the Meeting of the Parties to the Convention (MOP-6). The event provided a platform for Parties, signatories, international organisations, NGOs and other stakeholders to discuss achievements and challenges with regard to promoting effective environmental rights in relation to a wide range of issues.⁶⁹ MOP6 was held in parallel with the fifty-eight meeting of the ACCC (10-13 September 2017). The MOP also re-elected by consensus two members of the ACCC, and elected by consensus four new members.⁷⁰

On 29 June 2017, in the context of the ongoing MOP-6 preparations, the Commission presented a proposal for a Council decision on the position to be adopted at MOP-6 regarding case ACCC/C/2008/32.⁷¹ In response to the findings of the ACCC, the Commission initially proposed that the MOP should *reject* the finding of non-compliance. The Explanatory Memorandum to the Commission's proposal asserts that the "*Union secondary legislator may not amend the rules provided for in Article 263(4) TFEU and has to respect the case-law developed by the Union judiciary which determines the correct interpretation of the Treaty.*"⁷² Moreover, the findings "*challenge constitutional principles of EU law that are so fundamental that it is legally impossible for the EU to follow and comply with the findings.*"⁷³

⁶⁴ Para 123 (c).

⁶⁵ Para 123 (b).

⁶⁶ Para 123 (a).

⁶⁷ The Working Party on International Environmental Issues EU positions for international negotiations related to environmental and climate change issues.

⁶⁸ C(2017) 2616 final, Commission Notice on Access to Justice in Environmental Matters.

⁶⁹ The sessions also featured a 'joint High-level Segment', where delegations focused on the role of the Convention and the Protocol in implementing the Sustainable Development Goals (SDGs).

⁷⁰ Including Ms. Zsuzsanna Bögös who had been nominated by Hungary.

⁷¹ COM(2017) 366 final.

⁷² Ibid 5.

⁷³ Ibid 7.

On 17 July 2017, the Council adopted a decision on the position of the EU at MOP-6 regarding case ACCC/C/2008/32. Whilst the Commission's concerns were acknowledged by the Council, it agreed to amend the proposal.⁷⁴ The Council stressed that the findings of the ACCC are problematic for the EU because the findings do not recognize the EU's special legal order. In view of separation of powers in the EU, the Council cannot give instructions to the CJEU concerning its judicial activities.⁷⁵

In the Council decision, the EU – with all Member States in unanimity – accepted the draft EU position; subject to some amendments of the Commission's proposal in order to clarify *inter alia* the intention of the MOP not to require the EU to interfere with the independence of its judiciary. On the other side, the EU and its Member States reiterated their full commitment to the principles and objectives of the Convention, as well as their unwavering respect for its compliance system.⁷⁶

The decision entered into force immediately after its adoption, and the Council communicated it to the Convention's Secretariat. Thus, the EU has arrived to Montenegro with a proposal that the MOP should end the longstanding practice whereby findings of non-compliance are endorsed by the MOP, proposing instead that the MOP should only '*take note*' of these findings.⁷⁷ The EU has also proposed further weakening amendments to the draft decision on its non-compliance, notably that the actions recommended by the ACCC should only be '*considered*' and that the recommendations should not explicitly address the problems with the jurisprudence of the CJEU.

Every single finding of non-compliance has been endorsed by the MOP since the establishment of the Aarhus compliance mechanism, with the full support of the EU. The flat refusal has put the spotlight on the weaknesses of the EU's internal decision-making processes. The Member States of the EU are the only Parties to the Convention whose positions during the MOP sessions are not public. In practice a few Member States together with the Commission can effectively determine the position of the entire EU, which represents a majority of the Parties.

Despite the EU's considerable influence in the UNECE region, not a single other Party or stakeholder has spoken in support of the EU position at MOP-6. The Parties to the Convention – including the EU – discussed adopting the findings of the ACCC, and rejected the EU's proposal not to adopt the findings that the EU is breaching the Convention by preventing the members of the public from challenging the EU institutions' environmental decisions in court. The EU has been heavily criticized for its failure to accept an international panel's ruling; environmental NGOs expressed their deep concern at the response of the EU to the findings of the ACCC.⁷⁸

As no other Parties supported the position of the EU, the resulting stand-off led to the matter being postponed to the next session of the MOP in four years' time. While this delay and the poor precedent it creates are problematic, the adoption of the EU position would have been far worse for the Convention.

⁷⁴ Statement by the Commission, 11194/17 ADD1 REV1, 17 July 2017:
<http://data.consilium.europa.eu/doc/document/ST-11194-2017-ADD-1-REV-1/en/pdf> (30 August 2017).

⁷⁵ <http://data.consilium.europa.eu/doc/document/ST-11150-2017-INIT/en/pdf> (30 August 2017).

⁷⁶ <http://www.consilium.europa.eu/en/press/press-releases/2017/07/17-aarhus-convention/> (30 August 2017).

⁷⁷ This is crucial for the EU as endorsing makes them legally binding.

⁷⁸ <http://eeb.org/eu-slammed-for-lack-of-respect-for-rule-of-law-on-environmental-justice/> (15 September 2017).

7. Conclusions

Environmental law is at the forefront of EU efforts to build a sustainable future, and by bringing environmental cases to the courts, citizens and NGOs can help ensure the correct application of environmental law. The extent and complexity of EU environmental legislation, combined with the implementation deficit, underline the importance of access to justice at both EU and national levels.

It is important to note that review of the Parties' compliance with the Convention is an exercise governed by international law. A Party to the Convention may not invoke its internal law as justification or failure to perform an international treaty. The internal division of powers is no excuse for not complying with international law.⁷⁹

Over the years, the Aarhus Convention and the EU have mutually reinforced and developed each other. The interplay between EU law and the Convention have been subject to numerous accounts in academic literature, including the double standards applied by the EU institutions in this area.⁸⁰ Now the EU institutions should start to work on revising the relevant EU legislation to bring it into line with the findings of the ACCC. As one of the Parties to the Convention, the EU has to explore ways and means to comply in a way that is compatible with the fundamental principles of the EU legal order and with its system of judicial review.

The Commission should review the application of the request for internal review procedure according to the Aarhus Regulation, namely the criteria applied for the admissibility of the requests. The legal instrument 'request for internal review' has not fulfilled the expectations. In recent years only a few requests have been filed and even fewer accepted as eligible. Especially criteria concerning the characteristics of an act taken by an EU institution or body should be a subject of review and be interpreted in a restrictive manner to ensure wider access to the merits of the cases.⁸¹

The Court also should, within the limits of its judicial prerogatives, interpret the provisions of the EU Treaties and of the Aarhus Regulation in a manner consistent with the obligations of the EU established by the Convention. The judgments of the CJEU show that it can be extremely traditional in its views on access to justice issues. In recent years, there have been a number of evolutions in CJEU case-law with respect to access to justice in environmental matters before the national courts, clearly demonstrating an 'activist' approach by the Court.

With the findings and recommendations of the ACCC the time has come for the reassessment of the Plaumann case-law on individual concern. Unfortunately, the CJEU is an authoritative international court, and its members are not keen on having their decisions scrutinized by a non-judicial body set up by an environmental agreement.⁸² If the Court will in the future confirm its traditional case-law on legal standing for non-privileged applicants, it will be up to the Member States (also as Parties to the Convention) to extend access to the EU judicature.

⁷⁹ ECE/MP.PP/C.1/2006/4/Add.2, para 41.

⁸⁰ See L. Krämer: Access to Environmental Justice: the Double Standards of the ECJ, *Journal of European Environmental & Planning Law*, Vol. 14, Issue 2, pp. 159-185.

⁸¹ Access to Justice in Environmental Matters under the Aarhus Convention, Justice & Environment Position Paper, May 2010, p. 6.: [http://www.justiceandenvironment.org/_files/file/J&E-Aarhus-position-paper-2010-05-24\(1\).pdf](http://www.justiceandenvironment.org/_files/file/J&E-Aarhus-position-paper-2010-05-24(1).pdf) (9 September 2017).

⁸² A. Ali: The EU and the compliance mechanisms of multilateral environmental agreements: the case of the Aarhus Convention, in E. Morgera (Ed.): *The External Environmental Policy of the European Union: EU and International Law Perspectives*, Cambridge University Press, 2012, p. 298.