

Requests for internal review and the revised Aarhus Regulation

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ABSTRACT This article examines the development of EU law in the context of access to justice guaranteed under the Aarhus Convention. It considers how the Court of Justice of the European Union and the Compliance Committee of the Convention (ACCC) interpret obligations arising under Article 9(3) of the Convention.

When the EU ratified the Convention in 2005 it committed to guaranteeing broad access to justice in environmental matters at both national and Union levels. Until now, the 2006 Aarhus Regulation is the sole piece of EU legislation outside the provisions of the Treaties that was adopted for the purpose of providing the basis for access to justice in environmental matters at Union level. Unfortunately, the internal review procedure set out by the 2006 Aarhus Regulation has been interpreted so restrictively by the Court of Justice of the EU that its added value in striving for better access to courts remained ephemeral.

The article discusses the findings of the ACCC on the EU's non-compliance with Article 9(3) of the Convention, and highlights the recent legislative activities at EU level relating to access to justice in environmental matters. The application of the revised Aarhus Regulation will demonstrate whether the European Union has duly implemented its international obligations regarding access to justice in environmental matters.

KEYWORDS Aarhus Convention, access to justice in environmental matters, Aarhus Regulation, internal review of administrative acts

1. Introduction

The UNECE¹ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters² is the most

¹ The United Nations Economic Commission for Europe, abbreviated as UNECE, is one of the five regional commissions of the United Nations. The UNECE region encompasses the whole of Europe and five Central Asian countries, as well as Canada, the United States and Israel. Over 70 international professional organisations and other non-governmental organisations take part in UNECE activities. As a multilateral platform, UNECE facilitates pan-European economic integration and cooperation among its 56 member countries, and promotes sustainable development and prosperity.

² UN Treaty Series 2161, 447.

far-reaching international agreement on environmental rights. It was adopted in Aarhus, Denmark, in June 1998, and signed by 39 European countries and the European Community. It entered into force in October 2001 and its Parties now include 46 countries and the European Union.³

The main aim of the Convention is to allow the public to become more involved in environmental matters and to actively contribute to improved preservation and protection of the environment. Public participation gives the public the opportunity to express its concerns, contributes to greater transparency, improves openness and accountability, and a more effective pursuit of the environmental objectives. It also enables public authorities to take due account different views, which is vital to enhance the quality and the implementation of their decisions.

Since its adoption, the Convention has been a model for application of the concept of ‘environmental democracy’ as enshrined in Principle 10⁴ of the Rio Declaration on Environment and Development. The main objective of the Convention is to contribute to the protection of the right of every person of present and future generations in an environment adequate to his or her health and well-being.⁵ The Convention was the first legally-binding international agreement putting the principles of environmental democracy into action, and confirming the global importance of environmental rights which are at the heart of sustainable development.

After 20 years of being in force, the Aarhus Convention remains the most inspiring international instrument in the field of environmental democracy.⁶ In October 2021, the Parties to the Convention also agreed to establish a mechanism in the form of a Special Rapporteur on environmental defenders to provide a rapid response to alleged violations.⁷ The Rapporteur’s role is to take measures to protect any person experiencing, or at imminent threat of penalization, persecution, or harassment for seeking to exercise their rights under the Aarhus Convention.⁸ This decision marks an important step for the advancement of environmental democracy, helping to uphold the universal right to a clean, healthy and sustainable environment – as recognized by the UN Human Rights Council earlier the same month.⁹ On 24 June 2022, the Meeting

³ https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27.

⁴ <https://www.unep.org/civil-society-engagement/partnerships/principle-10>

⁵ See Article 1 of the Convention.

⁶ “Aarhus Convention celebrates its twentieth anniversary”, 9 July, 2018, <https://unece.org/media/press/1381>.

⁷ See Decision VII/9 on a rapid response mechanism to deal with cases related to article 3(8) of the Aarhus Convention, ECE/MP.PP/2021/CRP.8.

⁸ “Rapid response mechanism to protect environmental defenders established under the Aarhus Convention”, 22 October, 2021, <https://unece.org/media/environment/Aarhus-Convention/press/361413>.

⁹ “Access to a healthy environment, declared a human right by UN rights council”, 8 October, 2021, <https://news.un.org/en/story/2021/10/1102582>.

of the Parties to the Aarhus Convention has elected, by consensus, *Mr. Michel Forst*¹⁰ as the world's first Special Rapporteur on environmental defenders.¹¹

2. Access to justice in environmental matters

The Aarhus Convention consists of three important aspects of environmental governance, namely access to information, public participation in decision-making and access to justice in environmental matters. Access to justice provides the foundation of the 'access rights', as it facilitates the public's ability to enforce their right to be informed, to participate, and to hold regulators and polluters for environmental harm. The Convention does not define the notion of act or body acting in a legislative capacity. In the second subparagraph of Article 2(2), it merely distinguishes between judicial and administrative procedures, and excludes public authorities when they act in a judicial capacity, but not when they act by way of administrative review. Administrative acts should be subject to review where they have legally binding and external effect as long as those acts are not adopted by bodies or institutions acting in a legislative or judicial capacity.¹²

The Convention not only guarantees access to justice but goes further and sets down minimum standards for administrative and judicial mechanisms.¹³ Article 9(3) of the Convention provides for access to judicial or other review procedures for challenging acts and omissions by private persons and public authorities which contravene environmental law.¹⁴ Nevertheless, Article 9(3) does not require an *actio popularis* allowing any natural or legal person to have access to review procedures. However, between an *actio popularis*, and an approach limiting administrative review to environmental NGOs only, it is possible to establish a legal framework which allows Parties a degree of discretion to provide criteria that must be met by members of the public¹⁵ before they have access to justice. Where they have a sufficient interest or maintain the

¹⁰ He was formerly UN Special Rapporteur on the situation of human rights defenders (2014-2020) and UN Special Rapporteur on Haiti (2008-2013), under the Human Rights Council.

¹¹ "World's first Special Rapporteur on environmental defenders elected under the Aarhus Convention", 24 June, 2022, <https://unece.org/media/Environment/press/368806>

¹² In the same way, omissions should be covered where there is an obligation to act under environmental law.

¹³ Áine Ryall, "Access to Justice in Environmental Matters in the Member States of the EU: The Impact of the Aarhus Convention," *Jean Monnet Working Paper* 16, no. 5 (2016), 3.

¹⁴ Article 9(3) states that each Party to the Convention must ensure that "where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

¹⁵ The term 'members of the public' in the Convention includes, but is not limited to environmental NGOs; see Article 2(5) of the Convention.

impairment of a right, members of the public should have access to environmental proceedings in order to challenge in courts or before other review bodies, the procedural or substantive legality of administrative acts or omissions which contravene environmental law. This means that the Parties have a broad margin of discretion when defining the rules for the implementation of the administrative or judicial procedures referred to in Article 9(3).

Judicial review constitutes an important aspect of any legal system operating under the rule of law. Access to justice also represents a significant issue given the essential enforcement deficit of environmental laws. Today, there is still a number of practical and/or formal obstacles to have access justice, including unreasonable fees and restrictive procedural requirements curbing the possibilities of the public to represent environmental interests.

3. The Aarhus Convention and the EU

The Aarhus Convention was signed by the European Commission in 1998, and approved by the Council in 2005.¹⁶ However, the fact that the European Community had ratified the Convention did not mean that all EU Member States automatically became Parties. Each of them had to ratify separately, and to date all 27 Member countries are Parties to the Convention.

The EU is a special Party, but it is still bound by the Aarhus Convention and its obligations in full.¹⁷ Pursuant to Article 216(2) TFEU, international agreements concluded by the EU bind its institutions and prevail over the acts laid down by those institutions. However, Union primary law, such as the EU Treaties, takes precedence over the Convention.¹⁸ The EU is required by Article 3(1) of the Convention to take the necessary legislative, regulatory and other measures to establish and maintain a clear, transparent and consistent framework to implement the Convention. The provisions of EU law must be consistent with the requirement of the Convention and, as a Party to the Convention, the EU is subject to the mechanism for review of compliance with the obligations established therein.

Upon signature and upon approval of the Convention the EU made a Declaration in which it drew attention to the ‘institutional and legal context of the Community’ and the repartition of tasks with its Member States in the areas covered by the Convention.¹⁹ Previous Community rules on access to

¹⁶ Council Decision 2005/370 (OJ 2005 L 124, 17.5.2005, 1.)

¹⁷ Rui Lanceiro, “The Review of Compliance with the Aarhus Convention of the European Union,” in *Global Administrative Law and EU Administrative Law (Relationships, Legal Issues and Comparison)*, eds. Edoardo Chiti and Bernardo Giorgio Mattearella (Berlin Heidelberg: Springer-Verlag, 2011), 381.

¹⁸ See order of 28 September 2016, *PAN Europe and Others v Commission* (T-600/15, ECLI:EU:T:2016:601).

¹⁹ The Declaration is published on the UN Treaty Collection website under the heading „Declarations and Reservations”.

documents helped shape the Convention; the obligations deriving from the Aarhus Convention are implemented by secondary EU legislation. In 2003, two directives have been adopted to develop the first and second pillars of the Convention.²⁰ Unfortunately, the proposed directive on access to justice in environmental matters²¹ did not make through the legislative process, as the Commission withdrew the proposal following a 10-year long period of inaction by the Council.²² Consequently, Community environmental law already provided for review mechanisms to provide requested environmental information of public consultation in relation to environmental impact assessments and integrated pollution prevention and control permit decisions.

Increased public access to justice in environmental matters contributes to achieving the objectives of Union policy on the protection of the environment by overcoming current shortcomings in the enforcement of environmental law and, eventually, to a better environment. The proper function of judicial review in the EU is to a large extent dependent on how one views the nature of the EU. A discussion about access to justice is therefore a discussion about the nature of the acts which are adopted by the EU institutions.²³

3.1 The *Plaumann* doctrine

As regards access to justice, it is clear from the settled case-law of the CJEU that Article 9(3) of the Aarhus Convention is not directly applicable within the EU legal order, nor can it be relied upon as a criterion for assessing the legality of EU acts.²⁴ In the EU legal order, the main avenue to challenge acts and omissions of EU institutions are actions for annulment. Actions for annulment are complemented by the possibility for national courts to refer questions as to the validity of EU acts, in cases where the validity of an EU act feature in an existing national dispute.²⁵

https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en.

²⁰ See Directive 2003/4/EC of the European Parliament and the Council of 28 January 2003 on public access to environmental information (OJ L 41, 14.2.2003, 26.) and Directive 2003/35/EC of the European Parliament and the Council of 26 May 2003 providing for public participation in respect of drawing up certain plans and programmes relating to the environment and amending, with regard to public participation and access to justice, Council Directive 85/337/EEC and 96/61/EC (OJ L 156, 25.6.2003, 17.)

²¹ COM(2003) 624 final, 24.10.2003.

²² OJ C 153, 21.05.2014, 3.

²³ Alexander H. Türk, *Judicial Review in EU Law* (Cheltenham: Edward Elgar Publishing, 2009), 2.

²⁴ Judgment of 27 September 2018, *Mellifera eV v Commission* (T-12/17, EU:T:2018:616, paragraph 85.).

²⁵ Juliette Delarue and Sebastian D. Bechtel, “Access to Justice in State aid: how recent legal developments are opening ways to challenge Commission State aid decisions that may breach EU environmental law”, *ERA Forum* 22, no. 2 (May 2021): 6.

Article 263(4) TFEU sets out the conditions under which an action for annulment may be brought by non-privileged applicants before the CJEU. The conditions laid down in Article 263(4) TFEU and its predecessors have been interpreted by the CJEU in its jurisprudence, the landmark case concerning the interpretation of the ‘individual concern’ test being *Plaumann*,²⁶ in which the CJEU ruled that “*persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of 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*”. The *Plaumann* formula still poses considerable problems for private persons to gain direct access to the CJEU for administrative acts of general application.

The Convention and the EU have mutually reinforced and developed each other over the years. On the one hand, EU law, as interpreted by the CJEU,²⁷ has served as a catalyst of access to justice for environmental NGOs at national level.²⁸ As the Commission’s Notice on access to justice in environmental matters shows,²⁹ CJEU case-law has been steadily strengthening the basis for giving standing before national courts.

On the other hand, the EU’s own rules on *locus standi* have been the subject of criticism for being overly restrictive. The CJEU developed its *Plaumann* case-law over the years and adapted it to particular legal or factual circumstances, irrespective of the nature of the applicant. For example, in case *Stichting Greenpeace* the Court held that the *Plaumann* test “*remains applicable, whatever the nature, economic or otherwise, of those of the applicants’ interests which are affected*”.³⁰

In this regard, the Treaty of Lisbon has not radically changed the situation, neither the Charter was intended to change the system of judicial review laid down by the EU Treaties. The Treaty of Lisbon contains a small amendment of the standing requirements for non-privileged applicants. A new limb of Article 263(4) TFEU is introduced which allows those having ‘direct concern’ to challenge regulatory acts not entailing implementing measures.³¹ Where these new prerequisites laid down in Article 263(4) TFEU apply, there is no need for the applicant to show that he or she is individually concerned by the contested

²⁶ Judgment of 15 July 1963, *Plaumann & Co v Commission* (25/62, ECLI:EU:C:1963:17).

²⁷ The CJEU consists of the General Court and the Court of Justice.

²⁸ See judgment of 12 May 2011, *Bund für Umwelt* (C-115/09 Trianel, EU:C:2011:289), and judgment of 8 March 2011, *Lesoochránárske zoskupenie* (C-240/09 Slovak Bears I, ECLI:EU:C:2011:125).

²⁹ Commission Notice on access to justice in environmental matters, C(2017) 2616 final, 28 April 2017, 12.

³⁰ Judgment of 2 April 1998, *Stichting Greenpeace Council (Greenpeace International) and Others v Commission* (C-321/95 P, EU:C:1998:153).

³¹ In environmental policy, most EU acts do require national implementing measures at some stage.

act. Besides widening the direct access to the CJEU, the Treaty of Lisbon gives particular relevance to the role of national courts in Article 19(1) TFEU, second sentence, according to which “*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*”. By the way, where an applicant can clearly challenge a measure under Art. 263(4) TFEU, they cannot at the same time ask a national judge to refer the issue of validity to the CJEU.³² The right to trigger the preliminary ruling procedure is enjoyed exclusively by the national court,³³ which is permitted to declare an EU act valid, but not invalid.³⁴

3.2 The Aarhus Regulation³⁵

In order to implement obligations on the Community level, a new regulation was adopted in 2006, supplementing Community legislation on access to documents held by the Commission, the European Parliament and the Council,³⁶ but the Convention was the direct reason for the adoption of the Aarhus Regulation.³⁷ The Regulation includes obligations of the EU institutions and bodies related to all three pillars of the Convention. As regards the interplay between the EU and the national level, the initiative had to take into account in particular that the EU is an integrated legal and judicial order.

As the CJEU has held on a number of occasions,³⁸ Article 9(3) of the Convention is not directly applicable in the Union legal order and cannot be invoked as a criterion to judge the legality of EU acts. The Parties have wide discretion to implement it as Article 9(3) only applies where ‘*the criteria, if any, laid down by ... national law*’³⁹ are met. Article 9(3) is thus subject, in its implementation and effects, to the adoption of subsequent measures.

³² Judgment of 25 July 2018, *Georgsmarienhütte* (C-135/16, ECLI:EU:C:2018:582, paragraphs 17 and 18).

³³ See in this regard the judgment of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 39 and the case-law cited).

³⁴ Judgment of 22 October 1987, *Foto-Frost* (314/85, EU:C:1987:452, paragraphs 14 and 15).

³⁵ Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention to Community institutions and bodies (OJ 2006 L 264, 25.9.2006, 13-19.).

³⁶ Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31.05.2001, 43-48.)

³⁷ See recital 4 of the Regulation.

³⁸ See for example judgment of 13 January 2015, *Stichting Natuur en Milieu and Pesticides Action Network* (Joined Cases C-404/12 P and C-405/12 P, ECLI:EU:C:2015:5, paragraphs 47 and 51). See equally judgment of 13 January 2015, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (Joined Cases C-401/12 P to C-403/12 P, ECLI:EU:C:2015:4, paragraph 55).

³⁹ It should be noted that EU law is considered as ‘national law’ for the purposes of Article 9(3) of the Convention.

Article 9(3) of the Convention requires ‘members of the public’ that meet the criteria, if any, laid down in the law, to be given access to administrative or judicial proceedings. The Aarhus Regulation implements *inter alia* Article 9(3) of the Convention for EU institutions and bodies. To that end, the Regulation has created a new form of administrative review, by creating a new category of acts, namely, requests for an internal review of ‘administrative acts’.⁴⁰

As described in Article 10 of the Regulation, the procedure for internal review is quite simple.⁴¹ Any non-governmental organisation that meets the criteria set out in Article 11 is entitled to make a request for internal review⁴² to the Union 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. ‘Environmental law’ was defined in Article 2(2)(f) of the Regulation as EU legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of EU environmental policy as set out in Article 191 TFEU.

‘Administrative act’ is defined by Article 2(1)(g) of the Regulation as “*any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects.*” The conditions required for an act to be regarded as an ‘administrative act’ within the meaning of Article 2(1)(g) are cumulative. Furthermore, Article 2(2) excludes from the notion of administrative acts measures taken by an EU institution in its capacity as an administrative review body, notably under competition rules, and infringement, Ombudsman and OLAF proceedings.

Article 2(1)(h) of the Aarhus Regulation defines ‘administrative omission’ as “*any failure of a Community institution or body to adopt an administrative act*” as defined in Article 2(1)(g). In turn, Recital 11 further provides that ‘*omissions should be covered where there is an obligation to adapt an administrative act under environmental law.*’

The Aarhus Regulation can be used by environmental NGOs both to seek administrative review under the Regulation and judicial review under the first limb of Article 263(4) TFEU. Where previous requests for internal review have been unsuccessful, the NGO concerned may institute proceedings before the

⁴⁰ Matthijs van Wolferen and Mariolina Eliantonio, “Access to Justice in Environmental Matters in the EU: The EU’s Difficult Road towards Non-compliance with the Aarhus Convention,” in *Research Handbook on EU Environmental Law*, eds. Marjan Peeters and Mariolina Eliantonio (London: Edward Elgar Publishing, 2020), 158.

⁴¹ The request needs to be in writing, be lodged within 6 weeks, and state the ground for review. The EU institution or body has to consider the request, unless it is clearly unsubstantiated. It is required to state its reasons in a written reply within 12 weeks, in exceptional cases 18 weeks.

⁴² For detailed rules governing the request for internal review see Commission Decision 2008/50/EC of 13 December 2007 (OJ 2008 L 13, 24.). Under that decision the party requesting review must provide ‘the relevant information and documentation supporting those grounds’ (see Article 1, point 3, of that decision).

General Court⁴³ in accordance with the relevant provisions of the EU Treaties.⁴⁴ They can bring the matter before the European Ombudsman or before the General Court in accordance with the provisions laid down in Articles 228 or 263, respectively, of the TFEU. Unfortunately, the Regulation did not change the Plaumann doctrine in this regard, as one of the conditions for environmental NGOs to institute proceedings is to do so “*in accordance with the relevant provisions of the Treaty*”, and thus the EU’s general *locus standi* rules.⁴⁵

3.3 Internal reviews under the Aarhus Regulation

The purpose of the Aarhus Regulation was precisely to implement the Aarhus Convention. In theory, the internal review procedure should therefore apply to all measures within the meaning of the Convention. Article 10(1) of the Regulation failed correctly to implement Article 9(3) of the Convention because the former provision covered only acts of individual scope.⁴⁶ On a number of occasions administrative review of an EU act has been refused because of this requirement (so far, it has only been available for certain chemicals and GMO decisions). The effect of a restricted definition of ‘environmental law’ in Article 2(2)(f) was that certain provisions and measures, to a great extent fell outside its scope.⁴⁷ Other reasons for inadmissibility were that the EU act fell into categories of act specifically excluded by the Aarhus Regulation.

Since the Aarhus Regulation has entered into force, environmental NGOs have submitted a number of internal review requests.⁴⁸ For example, four organisations⁴⁹ sent urgent requests to the Commission to review its decision of 12 September 2007 adopting the list of candidates to be proposed by the Commission to the Management Board of the European Chemicals Agency by the latter of the Executive Director of the Agency. The Commission considered that such staff related decisions are by their very nature to be regarded as internal to the institution or body concerned and thus incapable of having ‘external effects’ within the meaning of the Regulation. Therefore, the

⁴³ The first case whereby environmental NGOs have instituted proceedings for the annulment of the reply sent to them by the Commission under Title IV of the Regulation was Case T-338/08 *Stichting Natuur en Milieu and Pesticide Action Network Europe v Commission* (EU:T:2012:300).

⁴⁴ See Recital 21 and Article 12(1) of the Aarhus Regulation.

⁴⁵ Sacha Garben, “Articles 191-193,” in *Commentary on the EU Treaties and the Charter of Fundamental Rights*, eds. Manuel Kellerbauer, Marcus Klamert and Jonathan Tomkin (Oxford: Oxford University Press, 2019), 1525.

⁴⁶ An EU act is regarded as being of general application if it applies to objectively determined situations and entails legal effects for categories of persons regarded generally and in the abstract.

⁴⁷ See judgment of 14 March 2018, *TestBioTech v Commission*, (T-33/16, EU:C:2018:135, paragraph 45).

⁴⁸ <https://ec.europa.eu/environment/aarhus/requests.htm>.

⁴⁹ European Environmental Bureau (EEB), Friends of the Earth Europe (FOEE), Health & Environment Alliance (HEAL) and Women in Europe for a Common Future (WECF)

Commission considered the requests as inadmissible as they concerned a measure which is not an administrative act as defined in Article 2(1)(g) of the Regulation.⁵⁰

In another procedure, a not-for-profit association registered in Germany, which works for the conservation and promotion of bees, submitted a request to the Commission for internal review of Implementing Regulation (EU) 2016/1056 of 29 June 2016.⁵¹ As regards the extension of the approval period of the active substance ‘glyphosate’, the Commission extended for a second time the approval period, setting its new expiry date. Again, the request for internal review was rejected by the Commission as inadmissible on the grounds that the act referred to in that request did not constitute an EU measure of individual scope. In that regard, the Commission explained *inter alia* that the Implementing Regulation did not state to whom it was addressed but merely provided that it was binding in its entirety and directly applicable in all Member States.⁵² The provisions of the Implementing Regulation were applicable to all operators manufacturing or placing on the market plant protection products containing glyphosate.

In another case, the environmental NGO meeting the criteria for standing under the Aarhus Regulation, submitted a request for internal review the decision of the EIB’s Board of Directors.⁵³ The EIB rejected the request, stating that it was inadmissible because the internal review procedure did not apply to its financing decisions. ClientEarth brought an action for annulment of this decision,⁵⁴ and the General Court rejected the argument of the EIB and the Commission that the decision was not subject to review because it was not taken ‘under environmental law’. The Court underlined that “*all acts of public authorities which run counter to the provisions of environmental law should be open to challenge*”,⁵⁵ and the financing decision was taken under environmental law, because it was adopted on the ground that it satisfied lending criteria for projects relating to the environment.⁵⁶ In paragraph 170 of its judgment, the General Court also rejected the argument by the EIB that the financing decision lacked ‘legally binding and external effects’, even though the terms and conditions of the financing had to be negotiated after the Board of Directors had made its decision.⁵⁷

⁵⁰ https://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20EEB.pdf.

⁵¹ OJ L 2016 L 173, p. 52.

⁵² See Article 2 of the Implementing Regulation.

⁵³ The decision related to the provide financing to the construction of a biomass power generation plant in Spain.

⁵⁴ See judgment of 27 January 2021, *ClientEarth v European Investment Bank* (T-9/19, EU:T:2021:42).

⁵⁵ Paragraph 125 of the judgment.

⁵⁶ Paragraphs 138-142.

⁵⁷ James Flynn, Sarah Abram, and Hugo Leith, “EU General Court annuls decision of the European Investment Bank and underlines importance of environmental law in EU legal order”, *Brick Court Chambers*, 28 January, 2021, <https://www.brickcourt.co.uk/news/detail/eu-general-court-annuls-decision-of-the->

3.4 Case ACCC/C/2008/32

In March 2017, after extensive and detailed consideration of a communication that was submitted by an environmental NGO (ClientEarth) in 2008, the Aarhus Convention Compliance Committee⁵⁸ (hereinafter ACCC) found that the EU was in non-compliance with the Convention due to the very limited possibilities for citizens and NGOs to have access to justice at the EU level and to bring cases before the CJEU.⁵⁹ The EU failed to comply with Article 9(3)-(4) of the Convention with regard to access to justice by members of the public because neither the Aarhus Regulation nor the jurisprudence of the CJEU implemented or complied with the obligations arising under those paragraphs.⁶⁰

The ACCC added that the Regulation cannot compensate for these shortcomings as it equally breaches the Convention on the following points:

- the review mechanism should be opened up beyond NGOs to members of the public,
- review should encompass general acts and not only acts of individual scope,
- every administrative act that is simply “relating” to the environment should be challengeable, not only acts “under” environmental law,
- acts that do not have legally binding and external effects should also be open to review.⁶¹

Moreover, the findings of the ACCC in case ACCC/C/2008/32 touch on a basic principle of the Union legal order, that is the principle of judicial protection by means of remedies provided for in the EU Treaties in order to protect rights derived from EU law. The ACCC also considered that there has

europa-investment-bank-and-underlines-importance-of-environmental-law-in-eu-legal-order.

⁵⁸ Pursuant to Article 15 of the Convention, the ACCC was established and is competent to review the Parties’ compliance with the provisions of the Convention. The ACCC is an independent committee consisting of nine persons who are directly elected by the Meeting of the Parties (MoP) by consensus. The compliance mechanism under the Convention provides the possibility for any member of the public or environmental NGOs to submit communications to it about alleged non-compliance with the Convention.

⁵⁹ This was the second part of findings in case ACCC/C/2008/32, which have appeared in two parts; Part II is available at: https://unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/Findings/C32_EU_Findings_as_adopted_advance_unedited_version.pdf.

⁶⁰ For an in-depth analysis of the ACCC’s findings, see Benedikt Pirker, “Implementation of the Aarhus Convention by the EU – An Inconvenient Truth from the Compliance Committee,” *European Law Blog*, 24 April, 2017, <https://europeanlawblog.eu/2017/04/24/implementation-of-the-aarhus-convention-by-the-eu-an-inconvenient-truth-from-the-compliance-committee/>.

⁶¹ See paragraphs 85-121 of the ACCC’s findings.

been no new direction in the jurisprudence of the CJEU that will ensure compliance with the Convention.⁶² It was recommended that the CJEU modifies its case-law or that the EU legislator amends the Aarhus Regulation (or adopts new legislation).

The European Commission immediately declared that the findings of the ACCC were problematic for the EU because they did not recognise the EU's special legal order. In the Commission's view, the findings neither acknowledged the central role of national courts as ordinary courts of Union law, nor recognised the system of preliminary rulings under Article 267 TFEU as a valid means of redress.⁶³ In this regard, it cannot be considered that, by adopting the Aarhus Regulation, which concerns only EU institutions and moreover concerns only one of the remedies available to private persons for ensuring compliance with EU environmental law, the Union was intended to implement the obligations which derive from Article 9(3) of the Aarhus Convention with respect to national administrative or judicial procedures, which, as EU law now stands, fall primarily within the scope of national laws.

The ACCC considered that it was possible paragraphs 122 and 123 of its findings on communication ACCC/C/2008/32 (Part II) to be addressed through appropriate amendments to the Aarhus Regulation, and did not expect the EU legislator to set up a separate regime for access to justice in environmental matters. The findings of the ACCC concerned access for the members of the public to challenge acts and omissions by EU institutions and bodies that contravened EU law relating to the environment. They did not concern acts or omissions at the Member State level at all.

3.5 The amendment of the Aarhus Regulation

The Aarhus Regulation has long been criticised by academic commentators and environmental NGOs as falling short of Aarhus requirements, particularly in the context of access to justice.⁶⁴ Until the adoption of the ACCC's findings, EU institutions have shown much reluctance to revise the Aarhus Regulation. On June 2018, the Council adopted Decision (EU) 2018/8818,⁶⁵ based on Article 241 TFEU, and requested the Commission to submit a study on the EU's options for addressing the findings of the ACCC, and to submit a proposal

⁶² See paragraphs 122-123 and 81-83 of the findings.

⁶³ Article 263(4) TFEU and the Aarhus Regulation do not exhaust the system of redress, which also includes Articles 267 and 277 TFEU.

⁶⁴ Marc Pallemmaerts, "Access to Environmental Justice at the EU Level: Has the 'Aarhus Regulation' improved the situation?," in *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, ed. Marc Pallemmaerts (Groningen: Europa Law Publishing, 2011), 271-312.; Ludwig Krämer, "The Aarhus Convention and the European Union," in *The Aarhus Convention, A Guide for UK Lawyers*, ed. Charles Banner (Oxford: Hart Publishing/Bloomsbury, 2015), 92-93.

⁶⁵ OJ L 155, 19.6.2018, 6.

Requests for internal review and the revised Aarhus Regulation

for amending the Aarhus Regulation (or otherwise inform the Council on other measures).

In October 2019, the Commission published the study that it had commissioned on options for resolving the problem of the EU's non-compliance with the Convention. The study and the accompanying staff working document⁶⁶ confirmed that the most effective way to address the problem was through revising the Aarhus Regulation. In December 2019, the Communication on the European Green Deal contained the commitment to *"consider revising the Aarhus Regulation to improve access to administrative and judicial review at EU level for citizen and NGOs who have concerns about the legality of decisions with effects on the environment"*.⁶⁷

On 14 October 2020, the Commission has adopted a legislative proposal with the objective of bringing the EU into compliance with the Aarhus Convention and to ensure delivery of the European Green Deal.⁶⁸ The proposal of the Commission contains an explicit reference to Article 9(3) of the Convention and the concerns expressed by the ACCC in its findings.

The Commission has engaged constructively with the European Parliament and the Council to facilitate the adoption of the amendments before the next Meeting of the Parties.⁶⁹ The amendment of the Aarhus Regulation⁷⁰ was adopted in October 2021. In the same month, MoP7 endorsed the findings of the ACCC in case ACCC/C/2008/32, and at the same time concluded by adopting the revised Aarhus Regulation the EU had made all necessary steps to ensure compliance with the Convention.

The initiative of the Commission aimed to remedy the shortcomings regarding access to justice in environmental matters in the EU by measures aimed both at the EU and the national levels. The most significant constraint in practice was the limitation to acts of individual scope. Article 9(3) of the Convention does not specify that the opportunity it provides for bringing administrative procedures relates only to cases where the acts at issue are of individual scope. The limitation of the internal review to administrative acts of individual scope has been the main ground for the non-admissibility of requests made by environmental NGOs for internal review. This means that environmental NGOs could not obtain administrative review of acts of general

⁶⁶ SWD(2019) 378 final, 10.10.2019.

⁶⁷ COM(2019) 640 final, 11.12.2019, 23.

⁶⁸ COM(2020) 642 final, 14.10.2020.

⁶⁹ The seventh session of the Meeting of the Parties to the Aarhus Convention (MoP7) took place in Palais des Nations, Geneva from 18 to 22 October 2021. Following another decision at the meeting, Bissau-Guinea will become the first country outside the UNECE region to accede to the Convention that is open to all United Nations members, available at: <https://unece.org/media/environment/Aarhus-Convention/press/361456>.

⁷⁰ Regulation (EU) 2021/1767 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies (OJ L 356, 8.10.2021, 1-7.).

application.⁷¹ Many applications for administrative review have been rejected for this reason. It was therefore necessary to broaden the scope of the internal review procedure to include non-legislative acts of general scope.⁷²

The internal review procedure also has to cover EU acts that had been adopted in the implementation of policies other than EU environmental policy. The Aarhus Regulation simply provided for internal review where a Community (EU) institution or body has “*adopted an act under environmental law*”. But Article 9(3) of the Convention is broader than that. It is clear from the wording and the scheme of Articles 9(3) and (4) of the Convention that all public authorities which run counter to the provisions of environmental law should be open to challenge. Thus, in view of the fact that environmental law is in a constant state of development, access to justice in environmental matters should not be limited solely to acts of public authorities that have as their formal legal basis a provision of environmental law. It is already clarified that an internal review should be carried out in order to verify whether an administrative act ‘*contravenes*’ environmental law.

Deadlines are also being extended to improve the quality of the scrutiny: 2 extra weeks to consider whether to launch a request for review are to be added, while the institution concerned gets 4 extra weeks to reply. As regards access to justice, members of the public acting together in the public interest will be able to ask for scrutiny of such request when it is supported by at least 4000 citizens from at least 5 Member States, with at least 250 members of the public coming from each of those Member States.

4. Conclusions

Effective judicial systems play a crucial role in safeguarding the rule of law enshrined in Article 2 TEU, and in ensuring effective application of EU law and improving public trust in public administrations. The Charter of Fundamental Rights of the EU,⁷³ in its Article 47, in the fields covered by EU law, provides the right to an effective remedy and a fair trial.⁷⁴ The Charter of Fundamental Rights of the EU confirms in its Article 47 the right to an effective remedy to everyone whose rights and freedoms guaranteed by the law of the Union are

⁷¹ Including acts of general application covered by the third limb of Article 263(4) TFEU.

⁷² Article 2(1)(g) of the Regulation also required a measure to have ‘legally binding and external effects’ before the measure falls within the definition of ‘administrative act’ and thus within the scope of Article 10(1).

⁷³ OJ C 326, 26.10.2012, 391-407.

⁷⁴ Zoltán Szente, “Conceptualising the principle of effective legal protection in administrative law,” in *The Principle of Effective Legal Protection in Administrative Law – A European comparison*, eds. Zoltán Szente and Konrad Lachmayer (London: Routledge, 2017), 5.

violated.⁷⁵ Moreover, private persons (citizens and NGOs) must be provided with effective remedies in environmental matters, since the involvement and commitment of the public and all stakeholders is crucial to the success of the European Green Deal.

The amendment of the Aarhus Regulation was important to correct failures in the implementation caused by the use of words and terms that do not fully correspond to the terms of the Convention. The commitment to environmental democracy made by the EU institutions now rests largely on the successful implementation of the new provisions of the revised Aarhus Regulation.

The amendment of the Aarhus Regulation will certainly improve the possibilities for private persons to request that EU institutions review their acts with the aim to ensure better environmental protection. Hopefully, it will further improve the openness, transparency and accountability of EU actions and will support the Commission's objective to achieve transformative change under the European Green Deal.⁷⁶

The question that is now open is therefore whether the CJEU remains hardly accessible to private persons seeking to challenge EU acts harmful to human health and/or the environment. Hopefully, the narrow interpretation of the 'direct and individual concern' test by the *Plaumann* case-law and the compliance of the EU with the requirements of the Aarhus Convention will be solved. We will see how the revised Aarhus Regulation will improve the possibilities to request that the EU institutions review their acts to better ensure environmental protection,⁷⁷ and how the gates of the CJEU will be opened as proposed by environmental NGOs and the ACCC.

⁷⁵ It can also be recalled that Art. 37 of the Charter provides for the integration of a high level of environmental protection and the improvement of the quality of the environment into the policies of the Union.

⁷⁶ Press release, "Political agreement on the Aarhus Regulation: Commission welcomes increased public scrutiny of EU acts related to the environment", Brussels, 13 July, 2021, https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3610.

⁷⁷ <https://www.reuters.com/business/environment/greenpeace-takes-legal-action-over-eus-green-label-gas-nuclear-2022-09-19/>.

