THE TENSION BETWEEN INTERNATIONAL REGULATION AND THE AUTONOMY OF THE EU LEGAL ORDER

The compliance of the EU regarding the access to justice rules of the Aarhus Convention

Emmi Simonen 509398

Re-examining the Foundations of EU Law

Turun yliopiston oikeustieteellinen tiedekunta

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Faculty of Law

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The question of who is entitled to challenge decisions in the field of environmental law is increasingly relevant. As the Compliance Committee of the Aarhus Convention claimed the EU being in non-compliance with its obligations of providing the members of public a legal right to review acts relating to the environmental matters, it engaged into the continuous debate on the EU locus standi rules and the notion of the complete system of judicial protection.

The goal of this master's thesis is two-folded: first, it examines whether the EU is in non-compliance with its international obligations under Arts 9(3) and 9(4) of the Aarhus Convention, namely the access to justice. This question is linked to the status of the international agreements in the EU legal order and private applicants' possibilities to challenge EU measures both directly at the EU level and indirectly via national courts. Second, different initiatives for the way forward are being analyzed. The primary approach of the thesis is legal positivism, anchored to the school of critical legal studies. The approach of postnational constitutionalism is also being incorporated.

The EU is in non-compliance with its obligations regarding the access to justice rules of the Aarhus Convention. The indirect route to the Court of Justice of European Union cannot compensate for the failure of not providing the members of the public access to justice in environmental matters directly. The best way forward is to amend the internal review mechanism under the Aarhus Regulation. The EU is encouraged to carefully examine the consequences when acceding into various international agreements.

Key words: EU law, international law, procedural law, environmental protection, access to justice

TURUN YLIPISTO
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EMMI SIMONEN: Kansainvälisen sääntelyn ja EU:n autonomisen oikeusjärjestelmän välinen jännite: Århusin sopimuksen oikeuden saatavuuteen liittyvien velvoitteiden noudattaminen EU:ssa
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Kysymys oikeuden saatavuudesta ympäristöoikeuden saralla on relevantimpi kuin koskaan. Århusin sopimuksen vaatimusten noudattamista käsittelevä komitea linjasi, että EU ei noudata velvollisuuksiaan antaa yleisöön kuuluville henkilöille oikeus turvautua hallinnollisiin ja tuomioistuinmenettelyihin sellaisten ympäristöön liittyvien toimien osalta, jotka saattavat olla ristiriidassa EU-lainsäädännön kanssa. Samalla komitea osallistui pitkään jatkuneeseen keskusteluun kanneoikeudesta sekä täysin kattavan oikeussuojakeinojen sekä -menettelyiden järjestelmästä EU:ssa.

Tämän pro gradu- tutkielman päämäärä on kaksiosainen: työssä tutkitaan, noudattaako EU Århusin sopimuksen 9(3) ja 9(4) artikloissa säädettyjä muutoksenhaku- ja vireillepano-oikeuteen liittyviä velvoitteitaan. Ensimmäinen tutkimuskysymys on yhteydessä kansainvälisoikeudellisten sopimusten soveltamiseen EU:n oikeusjärjestelmässä sekä luonnollisten henkilöiden että oikeushenkilöiden mahdollisuuksiin nostaa kanne EU:n säädöksiä vastaan joko suoraan EU-tasolla tai epäsuorasti kansallisessa tuomioistuimessa. Tutkielman toisessa osassa esitetään mahdollisia jatkotoimenpiteitä EU:lle. Työn metodi on pääosin oikeuspositivistinen, mutta se sisältää myös oikeuden kriittisen tarkastelun piirteitä. Näkökulma on myös osin konstitutionalistinen.

EU ei noudata kansainvälisoikeudellisia velvoitteitaan Århusin sopimuksen muutoksenhaku-ja vireillepano-oikeuden osalta. Epäsuora reitti EUT:een ei korvaa yleisöön kuuluvien henkilöiden suppeaa mahdollisuutta nostaa kanne ympäristöoikeudellisissa asioissa suoraan EU:n tasolla. Århusin asetuksen muuttamista suositellaan ensisijaisena vaihtoehtona. Jatkossa EU:n kannattaa tarkasti arvioida kansainvälisten sopimusten vaikutukset sen autonomiseen oikeusjärjestelmään.

Avainsanat: EU-oikeus, kansainvälinen oikeus, prosessioikeus, ympäristönsuojelu, oikeuden saatavuus

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ABBREVIATIONS

Aarhus Convention	United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 2161 UNTS 20376
Aarhus Regulation	Regulation (EC) 137/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies
AG	Advocate General
CFI	Court of First Instance
CJEU	Court of Justice of the European Union
Constitutional Treaty	Draft Treaty establishing a Constitution for Europe adopted by the European Convention
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
EC Treaty	Treaty Establishing the European Community
ENGO	Environmental non-governmental organization
Environmental Impact Assessment Directive	Directive 2011/92/EU of the European parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment

Environmental Liability Directive	Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage
EU	European Union
GATT	General Agreement on Tariffs and Trade
Habitats Directive	Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora
Industrial Emissions Directive	Directive 2010/75/EU of the European Parliament and of the Council of 24 November on industrial emissions (integrated pollution prevention and control)
MOP	Meeting of the Parties
NGO	Non-governmental organization
REIO	Regional economic integration organization
Rules of the Procedure	Annex of 2008/401/EC,Euratom: Commission Decision of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the appliction of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institution and bodies

Sofia Guidelines	Draft Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-Making ECE/CEP/24
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNECE	United Nations Economic Commission for Europe
VCLT	Vienna Convention on the Law of the Treaties
VCLT-IO	Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organization

1 INTRODUCTION

1.1 The standing of private applicants in the field of environmental law

Standing, namely *locus standi*, as understood broadly, means "an authority of someone to initiate action".[1] Rules on locus standi entail the power to interevent in regulatory processes. They determine who and according to which criteria, may challenge regulatory power.[2] Regarding the European Union (EU), the direct standing criteria of private applicants[3], as the Advocate General (AG) Kokott put it, "have long been one of the most contentious issues"[4]. Questions concerning access to justice, effective judicial protection and the facilitation of the cooperation between the Court of Justice of European Union[5] (CJEU) and the national courts are highly interlinked to this academic debate.[6]

Ensuring the effective enforcement of EU *environmental law* is particularly important[7], rending the effective mechanisms for access to justice and the availability of a judicial review of EU *environmental* law a key concern.[8] Indeed, it is commonly said that the "environment has

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[1] Christopher Stone, *Should Trees Have Standing? Law, Morality, and the Environment* (3rd edn, Oxford University Press 2010), 35.

[2] Sanja Bogojević, 'Judicial Protection of Individual Applicants Revisited: Access to Justice through the Prism of Judicial Subsidiarity' [2015] 34 Yearbook of European Law 5,5.

[3] In this thesis, any natural or legal persons are referred to as private applicants. Regarding Art 263 of TFEU, this group is often called "non-privileged applicants" by the scholars. See, for instance, Paul Craig and Gráinne de Búrca, *EU law: texts, cases, and materials* (5th edn, Oxford University Press 2015), 514–515.

[4] Opinion of AG Kokott, *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, Case C-583/11 P, EU:C:2013:21, para 1.

[5] CJEU refers to the institution called the Court of Justice of the European Union, as prescribed in Art 19 of TEU. It currently consists of two courts: the General Court (GC) and the European Court of Justice (ECJ). Those courts are being referred in a distinguished manner when needed.

[6] Bogojević (n 2).

[7] Ludwig Krämer, 'Public interest litigation in environmental matters before European Courts' [1996] 8 Journal of Environmental Law 1, 3.

[8] Benedikt Pirker, 'Access to Justice in Environmental Matters and the Aarhus Convention's Effects in the EU Legal Order: No Room for Nuanced Self-executing Effect?' [2016] 25 Review of European Community and International Environmental Law 81, 81.

no voice of its own".[9] The question of who can speak on behalf of nature will get more and more relevant as the consequences of climate change and the loss of biodiversity actualize.

In addition to scholars, recently the Compliance Committee, a body reviewing the implementation of the Aarhus Convention[10] joined the debate on locus standi rules in the context of the EU and in particular in the field of environmental law. The Aarhus Convention is regarded as a groundbreaking international agreement in linking human rights matters into environmental ones.[11] In addition to national states, this global[12] agreement allows regional economic integration organizations (REIOs), such as EU, to accede to it.[13] Its objective is to strengthen the protection of the right of every person, including the future generations, to live in an environment adequate to her health and well-being.[14] To achieve its objective, the provisions of the Convention provide for an obligation to each Party[15], also the EU[16], to ensure the implementation of three pillars of public procedural rights: the right of access to information, participation

[9] Ludwig Krämer, 'The Environmental Complaint in the EU' [2009] 6 Journal of European Environmental and Planning Law 13, 25.

[10] The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 2161 UNTS 20376 (Aarhus Convention).

[11] Elena Fasoli and Alistair McGlone, 'The Non-Compliance Mechanism Under the Aarhus Convention as "Soft' Enforcement of International Environmental Law: Not So Soft After All!' [2018] 65 Netherlands International Law Review 27, 28.

[12] Although the Aarhus Convention was adopted by one of the regional committees of the UN, namely the UNECE, it is pursuant to Art 19(3) open to any United Nations (UN) states if the Meeting of the Parties (MOP) approves it.

[13] Art 17 of the Aarhus Convention, so-called REIO -clause. It is typical for international agreements to call the EU as an REIO although some human rights conventions leave the world "economic" out. See Allan Rosas and Lorna Armati, *EU Constitutional Law: An introduction* (3rd edn, Hart Publishing 2018), 7.

[14] Art 1 of the Aarhus Convention and Jonas Ebbesson, 'Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention' [2011] 4 Erasmus Law Review 71, 74.

[15] According to Art 2(1) of the Aarhus Convention "a Party" means a Contracting Party to the Aarhus Convention.

[16] The EU adopted the Convention on 25 June 1998 and approved it on 17 February 2005. The procedure for approving the Convention are laid down in Arts 300(2) and 300(3) of the Treaty Establishing the European Community (EC Treaty). See also Council Decision (EC) 2005/370 of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L124/1.

in decision-making and, finally, access to justice.[17] The provisions of access to justice are key elements of the Aarhus Convention and considered to be inevitably linked to its effectiveness.[18]

In the decision of 2017, namely findings and recommendations (from now on: findings), the Compliance Committee found the EU in non-compliance with its obligations under the third pillar, access to justice.[19] Under Arts 9(3) and 9(4) of the Aarhus Convention, the EU needs to ensure adequate and effective judicial or administrative review procedures for private applicants to challenge measures contravening environmental law. According to the Committee, the failure of the EU to comply with the Aarhus Convention results from, on the one hand, strict direct locus standi criteria before the CJEU and, on the other, the fact that neither the internal review mechanism of the Regulation (EC) 137/2006[20] (Aarhus Regulation) nor the preliminary ruling procedure before national courts compensate for the failure.[21] As the Compliance Committee joined the continuous debate on the locus standi, it bound it to another heated topic: what are the precise legal effects of international agreements[22] within the EU legal order?[23]

1.2 Research questions and their limitations

The theme of this theses it the alleged failure of the EU to comply with its obligations under the Aarhus Convention. The first research question is whether the EU, in reality, is in non-compliance with Arts 9(3) and 9(4) of the Aarhus Convention, as the Compliance Committee

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[17] Ebbesson (n 14).

[18] Pirker (n 8) 86.

[19] Compliance Committee, 'Findings and recommendations of the Compliance Committee with regard to communication ACC/C/2008/31 (Part II) concerning compliance by the European Union' (2017) ACCC/C/2008/32 (EU), paras 122–123.

[20] of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/23 (the Aarhus Regulation).

[21] Compliance Committee (n 19) paras 59, 122–123.

[22] In international law, all international agreements, regardless of their name, are subsumed under a broad category of "treaties." See, eg. Vaughan Lowe, *International Law* (Oxford University Press 2007), 64. For the matter of clarity, however, the term "Treaty" is being used only for the primary treaties of the EU, namely the Treaty on European Union (TEU) and the Treaty on the Functioning of European Union (TFEU). When referring to international treaties in general, the term "international agreements" is being used. The Aarhus Convention, in turn, is being called with its settled name – the Aarhus Convention.

[23] Pirker (n 8) 82.

has claimed. The starting point is the EU as unique, sui generis, legal system that is not comparable with any other existing system.[24] To answer the first question, it is necessary to analyze which role the Aarhus Convention has in the EU legal order. Additionally, it is also necessary to examine, on the one hand, what criteria do Arts 9(3) and 9(4) of the Aarhus Convention set for the review procedures and, in particular, to the rules of locus standi for private applicants. On the other hand, it is necessary to examine how private applicants can challenge EU measures in matters concerning the environment. These parts of the thesis are expository, interpreting the main provisions concerning the locus standi of private applicants both in the Aarhus Convention and in the EU.[25] The locus standi rules of the EU will then be compared to the obligations under Arts 9(3) and 9(4) of the Aarhus Convention to examine whether the EU has implemented the Aarhus Convention correctly. This part of the research is evaluative, considering whether the EU law is consistent with an external standard, namely the obligations under Arts 9(3) and 9(4) of the Aarhus Convention.[26]

Concerning how private applicants can challenge EU measures, it is possible to distinguish different judicial paths, classified as "direct" and "indirect" access to justice. Direct access enables applicants to review EU environmental law directly before the CJEU under specific Treaty provisions, mainly Art 263(4) of the Treaty on the Functioning of the European Union (TFEU)[27] and the provisions of the Aarhus Regulation. The Aarhus Regulation attempts to implement Arts 9(3) and Art 9(4) of the Aarhus Convention in regard to EU institutions. In the light of the research question, Arts 10, 11, and 12 of the Regulation laying down the rules for an internal review of administrative acts are crucial.

Indirect access, in turn, gives private applicants access to the CJEU in a preliminary ruling procedure through national courts, as provided for in Art 267 of TFEU and interpreted in the

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[24] Rosas and Armati (n 13) 12.

[25] Robert Cryer and others, *Research Methodologies in EU and International Law* (Hart Publishing 2011), 9.

[26] Ibid 9–10.

[27] Bogojević (n 2) 7. In addition to Art 263(4) of TFEU, the legality of the EU law can be directly contested under Arts 265 (action for failure to act) and 277 (objection for illegality) of TFEU. The objection of illegality will be briefly examined in the subchapter 3.3.2. The action for failure to act, in turn, is being excluded from the scope of the thesis since the locus standi rules under it are the same as under Art 263(4) of the TFEU. These two actions are being described as different sides of the same coin, and the ECJ has interpreted them similarly. See, eg. judgment of 16 February 1993, *ENU*, C-107/91, EU:C:1993:56, para 17 and Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Oxford University Press 2014), 426.

case-law of the CJEU.[28] The direct and indirect route together form the judicial system of the EU, often described by the CJEU as "complete".[29] When adhering to this view, the effective access to justice for private applicants does not only depend on the direct route before the CJEU but also the indirect route before the national courts.[30]

The second main research question is what is the way forward for the EU, if it is found in non-compliance with its obligations under Arts 9(3) and 9(4) of the Aarhus Convention? If there are several ways to proceed, which initiatives should be preferred? In determining the most suitable option, the restrictions resulting from the sui generis legal order, the recent developments of the EU court system, and the findings of the Compliance Committee will be taken into account. The question of how the EU should proceed is very accurate because the Commission has already decided to conclude an impact assessment on how the Aarhus Convention is implemented in the judicial system of the EU. [31] Public consultation on the impact assessment closed on 14 March 2019.[32] To answer the questions relating to the possible initiatives, it is necessary to examine the relationship between the EU and international agreements it has acceded to.

The thesis is limited to the locus standi criteria of private applicants in the context of acts and omissions of the *EU* institutions. Consequently, the question of how the private applicants can challenge the measures concluded by the institutions of the Member States is only touched upon in the extent crucial to conclude the analysis on the preliminary reference procedure as a part of the so-called complete judicial system. Moreover, the locus standi of private applicants will not be compared to other jurisdictions, such as the United States of America.

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[28] Bogojević (n 2) 7.

[29] The ECJ announced the complete judicial system for the first time in its landmark verdict, judgment of 23 April 1986, *Les Verts,* C-294/83, EU:C:1968:166, para 23. Later on, this has been tirelessly repeated in the established case law. See, eg. judgment of 3 October 2013, *Inuit Tapiriit Kanatami*, C-398/13, EU:C:2013:625, paras 94–95 and judgment of 25 July 2002, *UPA*, C-50/00P, EU:C:2002:462, para 42.

[30] Opinion 1/09 of the Court (Full Court) of 8 March 2011, Opinion pursuant to Article 300(6) EC, EU:C:2011:123, para 66.

[31] Commission, 'EU implementation of the Aarhus Convention in the area of access to justice in environmental matters' (Staff working document) Ref. Ares(2018)2432060–08/05/2018, 2–3.

[32] Commission, 'EU implementation of the Aarhus Convention in the area of access to justice in environmental matters' (*Commission*) <https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2432060_en> accessed 31 May 2019.

1.3 Methodology and main sources

The approach concerning the questions of whether the EU fails to implement its international obligations pursuant to Arts 9(3) and 9(4) of the Aarhus Convention and what are the precise effects of those provisions in the EU legal order is legal positivism. The main methods of legal positivism in this thesis are interpretation, balancing, and systematization.[33] Since the research questions themselves reflect an inherent conflict of EU and public international law the positivist approach adhered to is anchored to the school of critical legal studies. Critical legal studies reveal that there are myriad interpretations for provisions of the law because legal positivism, as traditionally understood, is not free from values. Instead, the decisions the legislative or judicature reflect certain ideologies.[34]

The underlying assumption of the positivist approach in this thesis is postnational constitutionalism. In the legal framework of the EU, constitutionalization is a dynamic process[35], driven by the CJEU[36], in which an integrated legal order controls the exercise of public power similarly as nation-states and confers rights and obligations on private parties.[37] It attempts to do so by construing a comprehensive framework that regulates the hierarchy between different levels of law and the division of power among different institutions.[38] The system entails a structural vision bound up with the core idea of the constitution, the rule of law.[39] In a sense, constitutionalism – featured with positivist connotations of law – serves as legitimate reasoning of

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[33] Cryer and others (n 25), 38.

[34] Ari Hirvonen, *Mitkä metodit? Opas oikeustieteen metodologiaan* (Yleisen oikeustieteen julkaisuja 2011), 51.

[35] Rosas and Armati (n 13) 2.

[36] Ibid 2. The CJEU has been the motor of the constitutionalization in the EU, establishing the most crucial principles for the hierarchical order of the rule of law, such as direct effect, supremacy, and horizontal effect. See, eg. Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' [1981] 75 American Journal of International Law 1, 3.

[37] Paul Craig, 'Constitutions, Constitutionalism, and the European Union' [2001] 7 European Law Journal 125, 128.

[38] Nico Kirsch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* 3 (Oxford University Press 2010), 23.

[39] Ibid 27.

claims of authority.[40] Therefore the approach of postnational constitutionalism is also being used in answering why and to which limits the EU should comply with its international obligations under Arts 9(3) and 9(4) of Aarhus Convention. As a result, this the approach of this thesis is not free from the ideology. It shares the ultimate assumption with the Commission: the ways available for compliance with the obligations laid down in Arts 9(3) and 9(4) of Aarhus Convention is limited by the fundamental principles of the EU legal order.[41]

The findings of the Compliance Committee[42] is perhaps the main inspiration of the thesis. Additionally, other official documents, such as *travaux préparatoires*[43] of the Aarhus Convention, are being used in supporting the interpretation of Arts 9(3) and 9(4) of the Aarhus Convention. The normative effect of the findings of the Compliance Committee increase when endorsed by the Meeting of the Parties (MOP) because they can then be regarded as an agreement between the parties as regulated in the Vienna Convention on the Law of Treaties[44] (VCLT).[45] Therefore several decisions of the MOPs have been used as interpretative sources in the thesis. At this point, it is also important to note that, as the European Court of Justice (ECJ) has ruled[46], the Aarhus Convention Implementation Guide is a non-legally binding tool to assist in the interpretation of the Convention.[47] The Implementation Guide is used only as expletory material

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[40] Daniel Halberstam, 'Local, global and plural constitutionalism: Europe meets the word' in Gráinne de Búrca and Joseph Weiler (eds) *The worlds of European constitutionalism* (Cambridge University Press 2012), 164. See also Kaarlo Tuori, *European Constitutionalism* (Cambridge University Press 2015), 2. *Tuori* notes that the international law framework tends to reject the autonomous constitutional claims of European law and reduce the constitutionalism to state constitutionalism. This thesis, however, situates itself in the framework of the postnational constitutionalism of the EU.

[41] UNECE, 'Report of the sixth session of the Meeting of the Parties' (2017) ECE/MP.PP/2017/2, 15.

[42] Compliance Committee (n 19).

[43] Travaux préparatoires mean the official documents of the negotiation of the Aarhus Convention. Under the Art 32 of Vienna Convention on the Law of Treaties adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), these can be used as interpreting the intention of a provision of an international agreement.

[44] *Ibid.*

[45] Arts 31(2) (a) and (b) of VCLT stipulate that when a provision of an international agreement is vague, the context, together with any subsequent agreement between the parties, should be taken into account in the interpretation.

[46] Judgment of 16 February 2012, *Solvay,* C-182/10, EU:C:2012:82.

[47] UNECE, *The Aarhus Convention: An Implementation Guide* (2nd edition, United Nations Publication, 2014), 9.

among other relevant sources when interpreting specific provisions of the Aarhus Convention, but acknowledging that they lack binding force.[48]

The most critical judicial literature and peer-evaluated articles regarding the research questions are being used as sources as the questions of locus standi and international agreements in the EU legal order have produced a wide range of research. Alongside the literature and articles, the established case-law of the CJEU and the opinions of AGs are crucial sources of the thesis. Cases *Plaumann*[49], *Inuit Tapiriit Kanatami*[50]and *Microban*[51] as well as *Slovak Bear*[52], *Stichting Natuur en Milieu* [53] and *Vereniging Milieudefensie*[54] play a crucial role in this thesis. Finally, the feedback received in the public consultation[55] of the Commission is being used when suggesting the way forward.

1.4 Thesis structure

After the introductory chapter, the natural starting point for the research question is to clarify the meaning of access to justice. This chapter starts with the different aspects of access to justice in general and continues to interpret the meaning of Art 9(3) of the Aarhus Convention. To clarify the context of Art 9(3) of the Aarhus Convention in the EU legal order, the second part of this chapter focuses on the role of the international law first in general and then in the context of the Aarhus Convention. Also measures the EU has taken regarding to the Art 9(3) of the Aarhus Convention will be introduced.

The following two chapters concentrate on analyzing different ways the EU could have implemented Arts 9(3) and Art 9(4) of the Aarhus Convention. These follow the division of direct

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[48] *Solvay* (n 46), paras 26–28.

[49] Judgment of 15 July 1963, *Plaumann,* C-25/62, EU:C:1963:17.

[50] *Inuit Tapiriit Kanatami* (n 29).

[51] Judgment of 25 October 2011, *Microban,* T-262/10, EU:T:2011:623.

[52] Judgment of 8 October 2011, *Lesoochranárske zoskupenie VLK,* C-240/09, EU:C:2011:125.

[53] Joined cases of 13 January 2015, *Stichting Natuur en Milieu,* C-404/12 P and C-405/12 P, EU:C:2015:5.

[54] Judgment of 13 January 2015, *Vereniging Milieudefensie,* C-401/12P to C-403/12 P, EU:C:2015:4

[55] Commission (n 32).

and indirect access to the CJEU. The focus of the third chapter is on the direct access to justice to CJEU, and it is divided into two parts: first, it assesses the rules on the action for annulment for private applicants under Art 263(4) of TFEU. Then it examines the review mechanisms laid down in the Aarhus Regulation. The last part of the chapter examines if the CJEU has reviewed the Aarhus Regulation in the light of the Aarhus Convention. The fourth chapter, in turn, concentrates on analyzing the indirect access to justice via national courts. First, it introduces the role and the importance of the preliminary reference system in the EU legal order. Second, the precondition of the preliminary reference system, namely the question of the jurisdiction of the ECJ to rule cases concerning Arts 9(3) and 9(4) of the Aarhus Convention, is being examined. The case *Slovak Bear*[56] is of high relevance in this part. Then the role of the Art 9(3) and 9(4) of the Aarhus Convention in the national courts will be examined. Finally, the argument of EU having “a complete judicial system" is being assessed.

The fifth chapter explores the possible further actions of the EU. First, it outlines the tension between the autonomous EU legal order and the compliance mechanisms of the Aarhus Convention and examines the position the EU has taken towards the issue. Then a brief assessment of the number of ways is being presented, including the ranking of the options. The last chapter provides conclusions and suggestions for future research and way forward

[56] *Lesoochranárske zoskupenie VLK* (n 52).

2 THE AARHUS CONVENTION AND THE EU LEGAL ORDER

2.1 The Convention – a bridge between human rights and environmental issues

2.1.1 The third pillar: access to justice

The alleged failure of the EU concerns the third pillar of the Aarhus Convention, access to justice.[1] Access to justice in environmental matters is defined in slightly distinct ways depending on the level of governance. In international context, access to justice refers to the possible procedures for affected persons or non-governmental organizations (NGOs) to have access to different review procedures or international judicial bodies to obtain remedies in some instances which emerge due to, inter alia, the breach of international obligations by the states which contribute to the creation of environmental problems (e.g. climate change).[2] A distinctive feature of the compliance mechanism of the Aarhus Convention is that also NGOs can trigger cases concerning alleged non-compliance of the Parties.[3] In that sense, the compliance mechanism, too, illustrates a general human right orientated approach to environmental rights.[4] In fact, it was an NGO called ClientEarth that initiated the process in which the Compliance Committee

[1] Compliance Committee, 'Findings and recommendations of the Compliance Committee with regard to communication ACC/C/2008/31 (Part II) concerning compliance by the European Union' (2017) ACCC/C/2008/32 (EU), paras 122–123.

[2] Vasiliki Karageorgou, 'Access to Justice in Environmental Matters: The Current Situation in the Light of the Recent Developments at the International and Regional Level and the Implications at the National Level with Emphasis on the UNECE, Region and the EU MS' [2018] 27 European Energy and Environmental Law Review 251, 252. See also Cathrin Zengerling, *Greening International Jurisprudence: Environmental NGOs before International Courts, Tribunals and Compliance Committees* (Martinus Nijhoff Publishers 2013), 77–79.

[3] UNECE, 'Decision I/7 on the Review of Compliance' (2004) ECE/MP.PP/2/Add.8, para 18. Pursuant to the paras 16–17 of the Aarhus Convention also parties and the Secretariat can trigger cases. By now, there are nearly 180 cases triggered by the public, see UNECE, 'Communications from the public' (*UNECE,* 2019) https://www.UNECE,.org/env/pp/cc/com.html (accessed 23 April 2019).

[4] Ibid and Jonas Ebbesson, 'Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention' [2011] 4 Erasmus Law Review 71, 74.

of the Aarhus Convention investigated the compliance of the EU regarding its obligations under Arts 9(3) and 9(4) of the Aarhus Convention.[5]

In a national – or the EU level – the access to justice in environmental matters refers to the right of members of the public to legally review decisions, acts as well as omissions related to environmental matters in a fair manner. In the center of this concept are the review mechanisms of environmental decision-making by public authorities. However, it also relates to challenging acts and omissions of private applicants.[6] The remedy available in the EU is highly dependent on what type of act or omission is being contested and who is challenging it. When referring to the access to justice, this second definition is being used because it also captures the best the nature of Art 9(3), read together with Art 9(4), of the Aarhus Convention.

It is worth noticing that the access to justice pillar, as outlined in Art 9 of the Aarhus Convention, is divided into three different generic categories in which acts, decisions, and omissions can be challenged. These categories established different requirements for review procedures and criteria for locus standi. The minimum standard required for access to justice also depends on the category.[7] First, Art 9(1) concerns the first pillar and sets quite relaxed locus standi requirements.[8] It obliges the parties to guarantee access to justice to alleged refusals and inadequate handlings of public authorities concerning requests of environmental information. Art 9(2) in contrast, prescribes distinct minimum standards for decisions, acts, and omissions by public authorities regarding permits, permit procedures, and decision-making for specific activities. Finally, the subject of this thesis, Art 9(3), catches all measures that fall outside of the scope of Arts 9(1) and 9(2).[9] Next, the meaning of Art 9(3) of the Aarhus Convention will be interpreted.

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[5] ClientEarth, 'Communication to the Aarhus Convention's Compliance Committee´ ACCC/C/2008/30 (ClientEarth 1 December 2008) <https://www.UNECE,.org/env/pp/compliance/Compliancecommittee/32TableEC.html> accessed 21.2.2019.

[6] Jonas Ebbesson,'Access to Justice in Environmental Matters' in *The Max Planck Encyclopedia of Public International Law* (2nd edn 2012), vol 1, para 1.

[7] Ebbesson (n 4) 76.

[8] Karageorgou (n 2) 254.

[9] Hendrik Schoukens, 'Articles 9(3) and 9(4) of the Aarhus Convention on access to justice before EU courts in environmental cases: balancing on or over the edge of non-compliance?' [2016] 25 European Energy and Environmental Law Review 178, 180.

2.1.2 Access to justice under Arts 9(3) and 9(4) of the Convention

Art 9(3) of the Aarhus Convention imposes 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 acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."[10]

This is similar to the definition provided for the access to justice in the previous subchapter[11]: Art 9(3) of the Aarhus Convention obliges the parties to ensure review procedures for members of the public to challenge acts and omissions contravening environmental law. The material scope of Article is very board, not only because it relates to the cases of alleged violations of the environmental law which cannot be classified in the previous two categories of Art 9(1) and Art 9(2) explained in the previous subchapter, but also because it obliges the contracting parties to ensure that acts and omissions of both private and public authorities contravening environmental law are challengeable. It seems like the enacting process of this third category was somewhat challenging.[12] Some of the drafters of the Convention were against of such a broad definition because in their view it did not capture the idea initially given for the Aarhus Convention.[13] Indeed, the working group established for drafting the Aarhus Convention was mandated to prepare a draft convention on access to environmental information and public participation in environmental decision-making, *not* to the general access to justice. A particular reference was, however, made to the Draft Guidelines on Access to Environmental Information

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[10] The Aarhus Convention Art. 9 (3). Paras 2–3 of the same art confer a right to review the procedures insofar the access to environmental information, or public participation have allegedly been violated. However, seeing the Compliance Committee did not claim the EU is in breach of the latter paragraphs, those are not being scrutinized in this thesis.

[11] Ebbesson (n 6).

[12] Albeit the need for Art 9(3) of the Aarhus Convention was recognized, the *travaux préparatoires* reveals that it requires "careful wording." UNECE, Committee on environmental policy, working group for the preparation of a draft convention on access to environmental information and public participation in environmental decision making, 'Report of the second session' (1996) CEP/AC.3/4 Annex I, 7.

[13] UNECE, Committee on environmental policy, working group for the preparation of a draft convention on access to environmental information and public participation in environmental decision making, 'Report of the fifth session' (1997) CEP/AC.3/10, para 5.

and Public Participation in Environmental Decision-Making[14] (Sofia Guidelines), a set of non-binding guidelines adopted under the auspices of the United Nations Economic Committee for Europe (UNECE) which, on the other hand, contain vague model provisions on access to justice.[15] A reference was also made to the principle 10 of the Rio Declaration on Environment and Development[16] that provides for the basis of three pillars of environmental procedural rights, including access to justice.

Others, in contrary, were in the opinion that a general provision of access to justice is needed, given that private applicants can be subjected to some criteria. For instance, the Environmental NGOs Coalition, which was also present in the drafting process, highlighted that the definition should extend to the individuals whose financial or health interests are not affected by a certain decision.[17] Despite the different views, a broad definition of access to justice under Art 9(3) made its way to the final text of the Aarhus Convention.

Art 2(2) (d) of the Aarhus Convention equates "public authorities" with the "institutions of REIOs which are parties to the Convention." It means that also acts and omissions of EU institutions should be challengeable. The Convention extends the status of the public authority even to, inter alia, "any natural or legal persons performing public administrative functions under national law".[18] Consequently, the wording of Art 2(2) of the Aarhus Convention indicates that the functional, not judicial status of the "public authority" is decisive.[19] This supports the view that also the acts and omissions of other institutions and bodies than those that have been

[14] UNECE, ECE Working Group of Senior Governmental Officials "Environment for Europe", 'Draft Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-Making' (1995) ECE/CEP/24, paras 25–26.

[15] UNECE, Committee of environmental policy, 'Report of the special session' (1996) ECE/CEP/18, paras 21–22.

[16] UNCED, 'Rio Declaration on Environment and Development' (1992), A/CONF.151/26 (vol. 1).

[17] UNECE (n 13).

[18] Art 2(2)(b) of the Aarhus Convention.

[19] Ebbesson (n 4) 77.

granted a special status in the EU Treaties should be subject to review.[20] The established meaning of the term "its national law relating to environment" is "the domestic law of the party concerned," in this case, the domestic law of the EU.[21]

The Aarhus Implementation Guide, too, indicates that the scope of Art 9(3) is very broad, meaning "all other kinds of acts and omissions".[22] What is more, the distinction between decision-making concerning permits for specific activities and other acts and omissions, as laid down in Art 9(3) of the Aarhus Convention, is not always so clear.[23] When determining the categories of the activities, the label of the national law of a party is not decisive. Instead, as determined by the MOP, the legal functions and effects of the decision, whether it amounts to a permit to carry out the activity in question, should be decisive.[24] In addition to the acts, the review mechanism should be available for omissions. The non-compliance may result from, for instance, when the courts are reluctant to accept courts are reluctant to accept appeals regarding the public authorities' failure to act.[25]

Concerning the term "contravening provisions (…) of environmental law," it is not required to mention the word "environment" in the title or the heading of the act or omission. Instead, the

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[20] Under Art 7(1) of the EC Treaty, as it stood at the moment of the accession of the EU, only the European Parliament, the Council, the Commission, the CJEU and the Court of Auditors were considered as EU institutions. The successor of this Art is now Art 13(1) of TEU that also provides for the European Council and the European Central Bank status of an EU institution.

[21] UNECE, 'Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union' (2011) ECE/MP.PP/C.1/2011/4/Add.1, para 76. The meaning of the "national law" was first declared in UNECE,'Report by the Compliance Committee: Compliance by Denmark with its obligations under the Convention' (2008) ECE/MP.PP/2008/5/Add.4, para 27.

[22] UNECE, The Aarhus Convention: *An Implementation Guide* (2nd edition, United Nations Publication, 2014), 188.

[23] Jonas Ebbesson, 'Access to Justice at National Level: Impact of the Aarhus Convention and European Union Law' in Marc Pallemaerts (ed), *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing 2011), 253.

[24] UNECE, 'Report of the meeting, Addendum, Findings and recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice (Communication ACCC/C/2005/11) by Bond Beter Leefmilieu Vlaanderen VZW (Belgium))' (2006) ECE/MP.PP/C.1/2006/4/Add.2, 29.

[25] UNECE, 'Report by the Compliance Committee, Addendum, Compliance by Kazakhstan with its obligations under the Convention and its implementation of Decision II/5a of the Meeting of the Parties' (2008) ECE/MP.PP/2008/5/Add.5, 19 and 29.

question is whether the act or omission somehow relates to the environment.[26] The outcome of the decision-making should be a review of grounds of substantive or procedural norms – or even both.[27] It prescribes that the members of the public shall have access not only to the measures or omissions that allegedly violate environmental law in a strict meaning (waste, chemicals) but also legislation that is linked to the environment (e.g., environmental tax, city planning).[28] The only exception not subject to the minimum standard for access to justice under Art 9(3) of the Aarhus Convention are measures enacted by institutions acting in their legislative or judicial capacity. These types of acts and omissions can be excluded from the review.[29]

Art 9(3) of the Aarhus Convention prescribes that the members of the public shall have access to administrative *or* judicial procedures. Put differently; it is in the discretion of parties to appoint the institutions that review the contested acts and omissions.[30] Judicial review procedure refers to the possibility of enforcing environmental law directly by challenging it before a court.[31] The Art 9(4) of the Aarhus Convention, however, prescribes some quality requirements: all review mechanisms "shall provide adequate and effective remedies, and be fair, equitable, timely, and not prohibitively expensive". [32] In this context, "adequacy" refers to ensuring the intended effect of the review procedure, whereas "efficiency" requires that the remedies should be capable of real and efficient enforcement. In other words, it means that parties should attempt to remove any potential obstacles to the enforcement.[33]

Finally, Art 9(3) of the Aarhus Convention stipulates that the access to abovementioned review procedures should be granted for "members of the public." The public is defined as "one or

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[26] UNECE (n 22) 197.

[27] Ebbesson (n 23) 259–260.

[28] Karageorgou (n 2) 254. See also Ebbesson (n 4)76.

[29] Art 2(2) d of the Aarhus Convention.

[30] Schoukens (n 9).

[31] UNECE (n 22) 197.

[32] Art 9(4) of the Aarhus Convention.

[33] UNECE (n 22) 200.

more natural or legal persons, and, according to national legislation or practice, their associations, organizations or groups". [34] On the one hand, the definition is broad and covers all individuals and legal persons, including NGOs.[35] On the other hand, it seems to leave certain discretion to the parties for narrowing the scope of the application by providing for that the members of the public are subject to "meet criteria, if any, laid down in national law." Indeed, the Aarhus Convention did not aim to create a system of *actio popularis.*[36] The term dates back to the Roman law and means, as understood broadly, an act that any individual can bring on behalf of the public interest.[37] In other words, the parties are not obligated to amend their national laws so that anyone in any case could challenge any measure relating to the environment. However, the clause cannot be used by the parties to introduce or uphold so restrictive criteria that they effectively preclude all or almost all environmental non-governmental organizations (ENGO) from challenging acts or omissions that are not in alignment with national law relating to the environment.[38] Parties can avoid *actio popularis* by establishing criteria, such as being affected or having an interest, to be met by the parties to challenge an act or omission successfully. It, however, is required that such criteria should not prevent effective remedies for the members of the public as the application of the criteria should be defined in the light of the objective of the Aarhus Convention, which is, to guarantee the access of justice.[39] In practice, the parties have been deemed to be in non-compliance if they have limited the scope of Art 9(3) in a way which, in reality, no member of the public can challenge an act or omission.[40]

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[34] Art 2(4) of Aarhus Convention.

[35] Schoukens (n 9). The Aarhus Convention also provides for organizations and groups without legal personality an opportunity to challenge actions under the review procedures. However, this is subject to the requirements of national legislation. See, eg. UNECE (n 22) 200.

[36] UNECE (n 22).

[37] William Aceves, 'Actio Popularis? The Class Action in International Law' [2003] University of Chicago Legal Forum 353, 356.

[38] UNECE (n 24) 35.

[39] Ibid 36.

[40] Ibid 39.

2.2 EU as an international player – what game, by which rules?

2.2.1 International agreements in the EU legal order

The relationship between the EU law and public international law, in this thesis the question whether international agreements, such as the Aarhus Convention, are binding for the EU or not, seems to be quite clear: Art 3(5) of the Treaty on European Union (TEU) stipulates that one of the objectives of the EU is to contribute to the "strict observance and development of international law". One could thus assume that such an observance is also applicable to EU institutions and its Member States.[41] Moreover, under Art 21(1) of TFEU, the action of the EU in the international scene shall be guided by values underlying its creation, such as the rule of law, and respect for the principles of the United Nations (UN) Charter and international law.

Besides, the ECJ has ruled that international agreements entered into by the EU are an internal part of the EU legal order.[42] Although the classification between monist and dualist legal orders is somewhat simplified[43], the mere principle that international agreements are automatically incorporated into EU legal order without any implementing measure is traditionally characterized as a monist legal system.[44] Indeed, Art 216(2) of TFEU lays down that "agreements concluded by the Union are binding upon the institutions of the Union and its Member States" .

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[41] Benedikt Pirker, 'Access to Justice in Environmental Matters and the Aarhus Convention's Effects in the EU Legal Order: No Room for Nuanced Self-executing Effect?' [2016] 25 Review of European Community and International Environmental Law 81, 81.

[42] Judgment of 30 April 1974, *Haegeman II,* C-181/73, EU:C:1974:41, paras 4–5.

[43] Walker, for instance, argues that in so-called postnational legal order different legal spheres interconnect and overlap with each other in a way that the distinction between the national and international spheres have become blurred. See Neil Walker, 'Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders' [2008] 6 Oxford University Press 373, 377–378.

[44] Mario Mendez, *The Legal Effects of EU Agreements* (Oxford Studies in European Law 2013), 72.

From the public international law perspective, it is generally presumed that the customary international law[45] binds international organizations, too.[46] International agreements are based on the customary rule of *pacta sunt servanda,* which requires that the obligations provided for in the agreement are binding and need to be performed in good faith.[47] This rule has also been codified in the leading agreement of the interpretation of international agreement law,[48] namely in VCLT. However, the application of its provisions towards the EU is ambiguous.[49] International organizations, such as EU in the light of public international law, are, cannot become, Parties of the VCLT because it applies to the conclusion of international agreements by national states.[50] Moreover, the notorious project of drafting guidelines for the international organizations entering into international agreements, namely the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organization (VCLT-IO), has not been successful: it has not entered into force, and the EU has not signed it. [51] However, the ECJ seems to be open for giving the VCLT a somewhat authoritative status in its legal order. For instance, in the case of *Wightman*[52]*,* the ECJ referred to the provisions of the VCLT in its reasoning on the revocability of the withdrawal from the EU. Moreover, it went

[45] The rules of customary international law derive from general practice, namely custom, contrary to the provisions of international agreements. More on the definition, see, eg. Jan Klabbers, *International Law* (2nd edn, Cambridge University Press, 2017), 26–29.

[46] Ramses Wessel, 'The European Union as a Party to International Agreements: Shared Competences, Mixed Responsibilities,' in Alan Dashwood and Marc Maresceau (eds) *Law and Practice of EU External Relations* (Cambridge University Press 2008), 179.

[47] Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 1999), 107. See also Art 26 both in the VCLT and Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (adopted 21 March 1986, not yet in force). UN Doc. A/CONF.129/15 (VCLT-IO).

[48] Jan Klabbers, *An Introduction to International Institutional Law* (Cambridge University Press 2002), 41.

[49] Wessel (n 46) 179.

[50] Art 1 of the VCLT. See also Wessel (n 46) 179.

[51] See The United Nations, 'Depositary: Status of Treaties (United Nations, 2 May 2019) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-3&chapter=23&clang=_en.> accessed 2 May 2019.

[52] Judgment of 10 December 2018, *Wightman,* C-621/18, EU:C:2018:1999.

on noting that the VCLT has been taken into account in preparing the Treaty establishing the Constitution for Europe.[53]

However, when signing and approving the Aarhus Convention, the EU declared that although it fully supports the objectives of the Convention, its institutions

> "will apply the Convention within the framework of their existing and future rules (…) of Community law in the field covered by the Convention."[54]

This probably does not reflect a specific reservation on behalf of the EU.[55] Reservations are international law instruments made to modify or to exclude the legal effects of the international agreement.[56] Instead, the announcement can be regarded as an interpretative declaration that, according to the VCLT, should be taken into account when considering the purpose of the international agreement[57], in this case, the Aarhus Convention. Alongside reservations, interpretative declarations are typical instruments of international law. They are made unilaterally by actors of international law at the conclusion of an international agreement, aiming to clarify its position concerning the meaning of some part of the agreement.[58] In this context, the declaration of the EU can be understood as an indication to enact EU rules that are necessary in implementing the Aarhus Convention in the EU legal order. These rules, instead of the provisions of the Aarhus Convention, would have legal implications for the EU institutions.[59]

Since the EU has ratified the Aarhus Convention it is binding upon its institutions and the Member States, and its provisions should be implemented in good faith – taken into account the imperative declaration made at the conclusion of the Treaty.[60] However, there is no clarity

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[53] Ibid 7.

[54] The United Nations (n 51).

[55] Marc Pallaemaerts, 'Access to Environmental Justice at EU level: has the Aarhus Regulation improved the situation? In Marc Pallaemaerts (ed) *The Aarhus Convention at Ten: interactions and tensions between conventional international law and EU environmental law* (Europa Law Publishing 2011), 274.

[56] See Ulf Linderfalk, *On the Interpretation of the Treaties* (Springer 2007), 158–159.

[57] Art 31(2) (a) and (b) of VCLT.

[58] Linderfalk (n 56).

[59] Pallaemaerts (n 55).

[60] Klabbers (n 45) 26–29.

on the precise legal effects of international agreements within the EU legal order[61], rendering it one of the most discussed topics in regard to the EU external relations.[62]

The ECJ has also often repeated that these international agreements rank over the EU secondary legislation created by its institutions in the hierarchy of norms.[63] However, the effect of international legal obligations in practice relies on the approach the CJEU gives for its provisions.[64] Three distinct sets of effects, relevant to the cases concerning the implementation of Arts 9(3) and 9(4) of the Aarhus Convention, will be used: *self-executing effect*, a narrower *direct effect,* and *consistent interpretation.* The self-executing effect means a precise norm that offers the judiciary a tool that determines how to decide a case before it. Direct effect, in turn, refers to the conferral of rights and duties upon a private applicant that can be claimed before national courts.[65] As generally known, it was first established in the famous case *Van Gend en Loos.*[66] These distinguished definitions need to be kept separate from the consistent interpretation mentioned above. The primacy of the international agreements means that also EU secondary legislation shall be construed consistently with the corresponding provisions of the international agreements that are part of the EU legal order.[67] The consistent interpretation in this regard means that provisions of EU secondary acts and national law need to be interpreted in conformity with Art 9(3) of the Aarhus Convention.[68]

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[61] Pirker (n 41) 82.

[62] Paul Craig and Gráinne de Búrca, *EU law: texts, cases, and materials* (5th edn, Oxford University Press 2015), 361.

[63] See, e.g., judgment of 10 September 1996, *Commission v. Germany,* C-61/94, EU:C:1996:313, para 52 and Judgment of 3 June 2008, *Intertanko,* C-308/06, EU:C:2008:312, para 42.

[64] Pirker (n 41).

[65] Francesca Martines, 'Direct Effect of International Agreements of the European Union' [2014] 25 The European Journal of International Law 129, 130.

[66] Judgment of 5 February 1963, *Van Gend en Loos,* C-26/62, EU:C:1963:1.

[67] Allan Rosas and Lorna Armati, *EU Constitutional Law: An introduction* (3rd edition, Hart Publishing 2018), 70–71.

[68] Pirker (n 41) 84. See e.g. for different kinds of agreements judgment of 29 April 1982, *Pabst & Richard,* C-17/81, EU:C:1982:129, paras 25–27, judgment of 26 October 1982, *Kupferberg*, C-104/81, EU:C:1982:362, para 27 and judgment of 12 April 2005, *Simutenkov,* C-265/03, EU:C:2005:213, para 29.

The CJEU has admitted both self-executing and direct effect for several agreements. Regarding free trade and association agreements between the EU and partner States, the CJEU has ruled that certain provisions could have a direct effect – without paying too much attention to the nature of those provisions. Arguably the CJEU has had difficulties in formulating a consistent line of reasoning concerning other agreements concerning both direct effect and self-executing effect[69] – topics that will be discussed in both subchapter 3.3.2 and 4.2.1. The principle of consistent interpretation concerning Art 9(3) of the Aarhus Convention will also be discussed in subchapter 4.2.1.

2.2.2 The status and implementation of the Aarhus Convention in the EU

Both the EU and its Member States acceded to the Aarhus Convention, rendering it to a so-called mixed agreement in the light of the EU law.[70] The legal basis for approving the Aarhus Convention is laid down in Art 174(4) of the Treaty Establishing the European Community (EC Treaty), prescribing that about the environmental policy both the EU and the Member States have shared competence to negotiate and conclude agreements with, among other things, international organizations.[71] Shared competence also means that they both may legislate and adopt legally binding acts in that area. The competences in the area of environmental protection are generally regarded, as defined in Art 4(2) of TFEU, as "shared competence". Therefore, Member States have basically been parties to all international agreements concerning the environment to which the EU is also a party.[72]

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[69] Pirker (n 41) 82.

[70] Antonio Ali, 'The EU and the compliance mechanism of multilateral environmental agreements: the case of the Aarhus Convention' in Elisa Morgera (ed) *The External Environmental Policy of the European Union: EU and International Law Perspectives* (Cambridge University Press 2012), 288. See also Marise Cremona, 'Disconnection Clauses in EU Law and Practice', in Panos Koutrakos and Christophe Hillion (eds) *Mixed Agreements Revisited: The EU and its Member States in the World* (Hart Publishing Ltd 2010), 90.

[71] Council Decision (EC) 2005/370 of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L124/1, para 5.

[72] Jan H. Jans, 'Who is the Referee? Access to Justice in a Globalised Legal Order: ECJ: Judgment C-240/09 *Lesoochranárske zoskupenie* of 8 March 2011' [2011] 4 Review of European Administrative Law 85, 87.

Most mixed agreements, however, have specific provisions on the EU and Member States obligations and competences - and the Aarhus Convention is no exception.[73] On the conclusion of the Aarhus Convention, the EU declared that because the EU has not fully implemented the obligations resulting from, inter alia, Art 9(3) of the Aarhus Convention, its Member States are the ones to perform the obligations until the EU adopts legislation covering the implementation.[74]

In regard to the implementation of the Art 9(3) of the Aarhus Convention, the Aarhus Regulation is the only measure enacted by the EU in regard to implementing Arts 9(3) and 9(4) of the Aarhus Convention concerning *EU* acts and omissions. The objective of the Aarhus Regulation is to contribute to the implementation of the obligations arising from the Aarhus Convention in particular by prescribing the rules granting access to justice in the environmental matters at the EU level.[75] The Commission submitted its proposal for Aarhus Regulation on the 24th of October 2004.[76] The Aarhus Regulation entered into force on the 28th of June 2007.[77] One of the most controversial issues in the regulation was the introduction of a new administrative review procedure that enables ENGOs, meeting specific criteria, to force EU bodies and institutions to reconsider certain acts and omissions.[78]

Concerning the Member States locus standi rules, the EU legislature has also enacted measures in some specific sectors of environmental law by secondary legislation, namely Art 11 of Directive 2011/92/EU[79] (Environmental Impact Assessment Directive), Art 25 of Directive

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[73] *Ibid.*

[74] See Annex of the Council Decision (EC) 2005/370 of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L124/1.

[75] Art 1(d) of the Aarhus Regulation.

[76] Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies' COM (2003) 622 final.

[77] Article 14 of the Aarhus Regulation.

[78] Marc Pallaemaerts, 'Access to Environmental Justice at EU level: has the Aarhus Regulation improved the situation? In Marc Pallaemaerts (ed) *The Aarhus Convention at Ten: interactions and tensions between conventional international law and EU environmental law* (Europa Law Publishing 2011), 274.

[79] of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2011] OJ L26/1.

2010/75/EU[80](Industrial Emissions Directive) also, Arts 12 and 13 of Directive 2004/35/EC[81] (Environmental Liability Directive). In addition, the EU has adopted the Directive 2003/35/EC[82] that regulates access to justice in respect of decisions by the Member States on environmental impact assessment and certain environmental installations. According to the preamble, however, it is intended to implement Art 9(2) and (4) of the Aarhus Convention. The directives are not in the focus of this thesis but are essential to bear in mind when analyzing cases regarding the effect of the Aarhus Convention in the national procedural laws.

Moreover, the Commission has already unsuccessfully proposed a directive[83] on access to justice in environmental matters in regard to the *Member States'* acts and omissions in 2003. However, the Member States opposed this harmonizing attempt, probably out of their general reluctance to give up their procedural autonomy.[84]

[80] of the European Parliament and of the Council of 24 November on industrial emissions (integrated pollution prevention and control) OJ L334/17.

[81]of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage OJ L143/56.

[82] of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/17.

[83] Commission, 'Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters' COM(2003) 624 final (not in force).

[84] Adam Lazowski and Steven Blockmans*, Research Handbook on EU Institutional Law* (Edward Elgar Publishing 2016), 435.

3 DIRECT ACCESS TO JUSTICE IN THE EU

3.1 Action for annulment under Art 263(4) of TFEU

3.1.1 Action for annulment regarding the private applicants

Applicants eligible contesting measures of the EU under Art 263 TFEU can be divided into three groups: privileged, quasi-privileged[1] and non-privileged.[2] Privileged applicants are specified in Art 263(2) of TFEU, and they are the Member States, the European Parliament[3], the Council and the Commission.[4] These bodies are always granted standing to challenge an EU measure on the grounds listed in the paragraph even though they might not be addressees of that measure.[5] Second, Art 263(3) of TFEU grants quasi-privileged status to the Court of Auditors, the European Central Bank, and the Committee of the Regions. These applicants only have standing when protecting their institutional rights. [6] Finally, under Art 263(4) of TFEU natural and legal persons, namely non-privileged applicants, can have the standing to challenge the legality of actions of EU bodies.[7] This group of non-privileged applicants is called private applicants throughout this thesis.

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[1] This group has also been called "semi-privileged applicants." See, e.g., Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Oxford University Press 2014), 311. In this thesis, however, the term "quasi-privileged applicants" has been chosen.

[2] Paul Craig and Gráinne de Búrca, *EU law: texts, cases, and materials* (5th edn, Oxford University Press 2015), 514–515.

[3] The power of the European Parliament to review its status has changed over time. It was first in judgment of 22 May 1990, *Chernobyl,* C-70/88, EU:C:1990:217 when the European Parliament was given the quasi-privileged status, put differently given the standing to defend its prerogatives under the action of annulment. The main reason for this was to preserve institutional balance, see *Chernobyl,* para 26. Later on, The Treaty of Nice gave the Parliament a status of the privileged applicant.

[4] Craig and de Búrca (n 2) 515.

[5] According to Art 263(2) of TFEU, the privileged applicants can bring actions "on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or any rule of law relating to their application, or misuse of powers." These grounds are, however, the same for all types of applicants. To put it differently, the applicant will have to show why the act should be annulled on the grounds mentioned in Art 263(2) of TFEU. Paul Craig and Gráinne de Búrca, *EU law: texts, cases, and materials* (n 2), 544.

[6] Art 263(3) of TFEU

[7] Art 263(4) of TFEU

As defined in subchapter 2.1.2, the members of the public mean all natural and legal persons, including NGOs, and therefore closed categories of institutions are too restrictive. It is clear then that they do not fall into the category of privileged or quasi-privileged applicants as listed in Arts 263(2) and 263(3) of TFEU. As a result, when scrutinizing whether the action for annulment enables members of the public to gain standing before the CJEU, the meaning of Art 263(4) of the TFEU should be examined.

Divided into three limbs, Art 263(4) of TFEU provides for as follows:

> "Any natural or legal person may (…)
>
> 1) institute proceedings against an act addressed to that person or;
>
> 2) which is of direct and individual concern to them, and;
>
> 3) against a regulatory act which is of direct concern to them and does not entail implementing measures."[8]

3.1.2 Addressed or directly and individually concerned private applicants

Critical questions concerning the Art 263(4) of TFEU is what type of act is involved and whether such an act is, or is not, addressed to the applicant. Answers to these questions determine criteria which the private applicants must satisfy in order to have a locus standi.[9] According to the first limb of the Art 263(4) of TFEU, *the addressee* of an EU act can challenge it before the CJEU[10]. A decision in environmental matters is rarely addressed to a private applicant. Usually, the Member States are the addressees of decisions concluded by the Commission or the Council. A couple of exceptions exist for instance, in the field of controlling ozone-depilating substances into the EU, the relevant Regulation[11] lays down the conditions in which the Commission allocates import quotas to individual enterprises. Another example falling within the scope of Art 9(3) of the Aarhus Convention is a decision on requests for access to

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[8] Art 263(4) of TFEU.

[9] Lenaerts, Maselis and Gutman (n 1) 315.

[10] Craig and de Búrca (n 2) 515.

[11] Regulation (EC) No 1005/2009 of the European Parliament and of the Council of 16 September 2009 on substances that deplete the ozone layer [2009] OJ L 286/1.

documents containing environmental information under Regulation (EC) No 1049/2001[12].[13] Art 9(3) of the Aarhus Convention obliges the parties to ensure effective and adequate review procedures for "members of the public," in principle to any legal or natural person.[14] On the other hand, as explained in subchapter 2.1.2, the parties can establish criteria in their national law for the members of the public to satisfy.[15] However, the criteria should not be so strict that it effectively precludes almost all ENGOs from access to justice.[16] If the standing is limited solely to organizations or individuals whose names are mentioned in the act, it indeed excludes almost all members of the public from challenging the act. Thus, the first limb of Art 263(4) of TFEU does not implement Art 9(3) of the Aarhus Convention.

The second limb of Art 263(4) of TFEU provides for as follows:

> "Any natural or legal person may (…) institute proceedings against an act (…) which is of direct and individual concern to them."[17]

The criteria for the individual applicant remained somewhat unchanged when compared with its predecessor, Art 230 of the EC Treaty. However, the introduction of the third limb changed the nature of the measures subject to the direct and individual concern -criteria.

The criteria of "direct and individual concern" needs to be satisfied in two situations: when a measure is a legislative act or when an act is of individual application not addressed to the individual but a third party.[18] As mentioned before, the parties of the Aarhus Convention are not obliged to provide for a review mechanism for measures enacted by bodies of institutions

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[12] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145.

[13] Marc Pallaemaerts, 'Access to Environmental Justice at EU level: has the Aarhus Regulation improved the situation? In Marc Pallaemaerts (ed) *The Aarhus Convention at ten: interactions and tensions between conventional international law and EU environmental law* (Europa Law Publishing 2011), 294.

[14] UNECE, *The Aarhus Convention: An Implementation Guide* (2nd edition, United Nations Publication, 2014), 200.

[15] Art 9(3) of the Aarhus Convention.

[16] UNECE, 'Report of the meeting, Addendum, Findings and recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice (Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium))´(2006) ECE/MP.PP/C.1/2006/4/Add.2, 35.

[17] Art 263(4) of TFEU.

[18] Lenaerts, Maselis and Gutman (n 1) 316.

acting in their legislative capacity.[19] This exception applies both to the legislative and also to the executive branch authorities when performing legislative functions because these types of decision-making is clearly different from others. When the legislative makes decisions, the elected representative is, at least in theory, directly accountable to the public through the elections.[20] The courts' mandate to declare an act void or inapplicable is usually removed – or there is a special court established for that function. Someone might consider this reasoning implausible with regard to the EU. The Commission, the Council as well as the European Parliament take part in the legislative procedures, the latter being the only institution capable for directly being accountable through election process.[21] However, an extensive discussion on the nature of the EU legislative procedures is irrelevant since under the second limb of Art 263(4) of TFEU, in principle, all measures can be subjected to judicial review.[22] In that sense it goes beyond what is required under Art 9(3) of the Aarhus Convention.

If an act of an individual application is not addressed to a private applicant but a third party, that private applicant needs to fulfil the criteria of "direct and individual concern." The criteria are cumulative since the applicant needs to satisfy both "direct concern" and "individual concern". [23] Consequently, it suffices to establish that either one of the criteria is too restrictive to implement Art 9(3) of the Aarhus Convention. The first, the individual concern test is being scrutinized.

The CJEU formulated so called individual concern-test in notorious *Plaumann-case*[24]. In the case, the Commission addressed Germany a decision in which it rejected to authorize Germany to suspend the collection of customs duties on the importation of clementines from third countries. A clementine importer from Germany attempted to annul that decision. The CJEU ruled

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[19] Art 2(2) d of the Aarhus Convention, see also subchapter 2.1.2.

[20] UNECE (n 14) 50.

[21] Art 14(3) TEU provides for following: "The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot." In contrast, Art 16(2) stipulates that the Council consists of a representative of each Member State at ministerial level and Art 17(3)– (5) provides for the election system of the members of Commission, which is based on the appointment of the Member States.

[22] Jürgen Bast, 'New Categories of Acts After the Lisbon Reform: Dynamics of Parliamentarization in EU Law' [2012] 49 Common Market Law Review 885, 888.

[23] Lenaerts, Maselis and Gutman (n 1) 316–317.

[24] Judgment of 15 July 1963, *Plaumann,* C-25/62, EU:C:1963:17, para 107.

that the importer was not individually concerned since it was affected because of a commercial activity anyone could practice in the future. Followed by the ruling, the party can be regarded as individually concerned by an act addressed to someone else if the party can somehow be differentiated from all other parties in a way that it can be concerned as an addressee of that act.[25] This ruling has faced much criticism for creating so-called "closed class -test" because in order to challenge an act a private applicant must be a member of a group that cannot be enlarged after the act entered into force.[26] For instance, *Craig* has criticized its retroactive nature because, even though there might only be a few parties that engage in the activity at present, the mere fact that someone might overtake the same activity in the future precludes the possibility of being individually concerned.[27] The CJEU has nevertheless confirmed the *Plaumann-test* in subsequent case law and relied on it when deciding upon the admissibility of the case.[28]

3.1.3 Suitability of the *Plaumann-test* to environmental matters

The GC was occupied with a real environmental law case for the very first time in *Greenpeace and Others v Commission*[29]. In the case, several ENGOs and 16 residents sought an annulment of the Commission decision to assist financially the authorities of the Canary Islands, Spain, for the construction of two power plants.[30] The financial assistance was granted even though the power plants were authorized without conducting an impact assessment[31] although the

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[25] *Ibid.*

[26] Albertina Albors-Llorens, 'Remedies against the EU institutions after Lisbon: an era or opportunity?' [2012] 71 Cambridge Law Journal 507, 514.

[27] Paul Craig, 'Legality, Standing and Substantive Review in Community Law' [1994] 14 Oxford Journal of Legal Studies 507, 509.

[28] See, inter alia, judgment of 2 July 1964, *Glucoseries réunies.* C-1/64, EU:C:1964:57, judgment of 1 April 1965, *Getreide-Import Gesellschaft v Commission,* C-38/64, EU:C:1965:35 and judgment of 17 January 1985*, Piraiki-Patraiki,* C-11/82, EU:C:1985:18.

[29] Judgment of 9 August 1995, *Greenpeace and Others v Commission,* T-585/93, EU:T:1995:147, Ludwig Krämer, 'The EU Courts and Access to Environmental Justice' In Ben Boer (ed) *Environmental Law Dimensions and Human Rights* (Oxford Scholarship 2015).

[30] *Greenpeace and Others v Commission* (n 29), para 13.

[31] Ibid, para 3.

Council Directive 85/337[32] require such an assessment. Furthermore, EU legislation stipulated that projects getting financial assistance from the EU shall align with the Treaty provisions and the EU legislation concerning environmental protection.[33] The applicants were probably aware of the restrictive nature of the *Plaumann-test* because they requested that the GC would take a liberal approach to the locus standi because the reason behind their challenge was to protect the environment. Indeed, the *Plaumann*-test had previously been applied only to cases dealing with economic interests.[34] The GC admitted the previous use of the *Plaumann-test* but went on to rule that it "remains applicable whatever the nature, economic or otherwise, of those of the applicants' interests which are affected" – therefore also in environmental cases. [35] Furthermore, it also confirmed the established case law[36] that an association cannot be considered directly and individually concerned for a measure that affects the general interest of the people whose collective interests it is formed to protect. So if the members of the association cannot bring a successful action for annulment individually, the association cannot do so either.[37] The legal position of the members of the applicant associations cannot be any different from the 16 citizens.[38] The CG could not find out any aspect that would identify the 16 applicants from other local people and thus found the case inadmissible.[39] Therefore, the action for annulment was also inadmissible on behalf of the ENGOs.[40]

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[32] of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40, Art 4.

[33] Council Regulation (ECC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments [1988] OJ L185/9, art. 7.

[34] *Greenpeace and Others v Commission* (n 29), para 32.

[35] Ibid, para 50.

[36] Joined cases of 14 December 1962, *Fédération Nationale de la Boucherie en Gros et du Commerce en Gros des Viandes and Others v Council,* C-19/62 to C-22/62, EU:C:1962:48 and judgment of 18 March 1975, *Union Syndicale v. Council,* C-72/74, EU:C:1975:43.

[37] *Greenpeace and Others v Commission* (n 29), para 59.

[38] Ibid, para 60.

[39] Ibid, para 57.

[40] Ibid, para 60.

The problem of the application of *the Plaumann-test* to environmental law cases is perhaps the best illustrated in the AG Cosmas' opinion on the *Greenpeace and Others v Commission.* He concluded that environmental protection is indeed a question of public interest that in principle concerns all natural persons. The more extensive the harm, the more individuals are affected. Therefore these cases are very unsuitable for the closed category test of *the Plaumann* in which an individual needs to be distinguished similarly as the addressee of an act.[41] However, dismissing the idea of actio popularis*,* the AG Cosmas suggested that the individual concern test should depend on how far away geographically the applicants are from the intervention and how likely the intervention would have a several impact to them.[42]

However, the ECJ was not convinced by the views of the AG Cosmas. In contrast, it confirmed the view of the GC*,* dismissing the appellants' arguments of the test not fitting well to the special nature and characteristics of environmental issues. It went on to affirm the *Plaumann*-test.[43] Besides, it ruled that the decisive issue for the inadmissibility was that environmental harm "might affect, in a general abstract way, a large number of persons who could not be determined in advance" in the way that it would distinguish them according to the *Plaumann*-test.[44]

As the CJEU later applied *Plaumann*–test in the following cases, such as *Danielsson*[45]*, The Union de Pequenos Agricultores*[46] and *Jégo-Quéré*[47] it ended the discussion on locus standi of private applicants*.* These were not environmental cases but cases where a public interest, such as public health, was concerned.[48] In *WWF v. Council*, it concluded that although the purpose

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[41] Opinion of AG Cosmas, *Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities,* Case C-321/95P, EU:C:1997:421*,* paras 102–103.

[42] Ibid, paras 104–105.

[43] *Greenpeace and Others v Commission* (n 29), paras 29–30.

[44] Ibid, para 10.

[45] Judgment of 22 December 1995, *Danielsson,* T-219/95, EU:T:1995:219.

[46] Judgment of 25 July 2002, *UPA*, C-50/00P, EU:C:2002:462.

[47] Judgment of 1 April 2004, *Jégo-Quére,* C-263/02P, EU:C:2004:210.

[48] Krämer (n 29) 116.

of an NGO might be environmental protection, the *Plaumann-test*, as established in the case law, applies.[49]

Although the Aarhus Convention leaves the EU some level of discretion providing for that the members of the public are subject to "meet a criteria, if any, laid down in national law", the clause cannot be used by the parties to introduce or uphold so restrictive criteria that they effectively preclude all or almost all environmental organizations from challenging acts or omissions that are not in alignment with national law relating to the environment. The access to such procedures should be the presumption, not an exception.[50] The environment, as established in the case-law of the CJEU, is of *general* interest, not an *individual* interest, and therefore the cases remain inadmissible.[51] In formulating the individual concern – criteria, the CJEU created almost an insurmountable barrier for private applicants to successfully trigger the second limb of Art 263(4).[52] The criteria for attaining locus standi under the second limb of Art 263(4) of TFEU is indeed too restrictive to implement Art 9(3) of the Aarhus Convention. Finally, the third limb of Art 263(4) of TFEU will be examined.

3.1.4 The acts of direct concern that do not entail implementing measures

The third limb of the Art 263(4), as introduced by the Lisbon Treaty, reads as follows:

> "Any natural or legal person may (…)
>
> institute proceedings against a regulatory act which is of direct concern to them and does not entail implementing measures."

In order to understand this special standing test, the meanings of "regulatory act" and "does not entail any implementing measures" need to be construed. An individual applicant challenging

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[49] Judgment of 2 July 2008, *WWF-UK v. Council,* T-91/07, EU:T:2008:170, para 86.

[50] UNECE, 'Report of the meeting, Addendum, Findings and recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice (Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium))´(2006) ECE/MP.PP/C.1/2006/4/Add.2, 35–36.

[51] Krämer (n 29) 126.

[52] Albors-Llorens (n 26) 513.

these types of acts does not need to satisfy the "individual concern" criteria but needs to show "direct concern".[53]

The term "regulatory act" is only used in the Art 263(4) of the TFEU – but is not defined anywhere in the Treaties.[54] In case *Inuit*[55] the GC defined the concept as

> "(…) covering all acts of general application apart from legislative acts. Consequently, a legislative act may form the subject-matter of an action for annulment brought by a natural or legal person only if it is of direct and individual concern to them." [56]

On appeal, the ECJ confirmed this interpretation of regulatory acts, deeming that the regulatory act covers all acts of general application excluding legislative acts.[57] Therefore, the nature of the act depends on the procedure of which the acts have been enacted and its application. There are two distinct categories of legislative procedures laid down in Art 289 of the TFEU, namely the ordinary legislative procedure and special legislative procedure. Any measure adopted under these procedures are legislative acts.[58] Therefore, *a contrario,* the obvious deduction is that if the EU measure is not enacted under those procedures, it is not a legislative act. [59] There are several different types of non-legislative acts, the most essentially delegated acts and implementing acts as provided for in Arts 290 and 291 of the TFEU. There are also sui generis non-legislative acts based directly on the Treaties.[60] Established in case-law, a measure is of general

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[53] Craig and de Búrca (n 2) 515.

[54] Francis Geoffry Jacobs, 'The Lisbon Treaty and the Court of Justice' in Andrea Biondi and Piet Eeckhout (eds.), *EU Law After Lisbon* (Oxford University Press 2012), 201.

[55] Judgment of 6 September 2011, *Inuit Tapiriit Kanatami,* T-18/10, EU:T:2011:49

[56] Ibid, para 56.

[57] Ibid, para 61.

[58] Art 289(3) of TFEU.

[59] Steve Peers and Marios Costa, 'Court of Justice of the European Union (General Chamber), Judicial review of EU Acts after the Treaty of Lisbon; Order of 6 September 2011, Case T-18/10 *Inuit Tapiriit Kanatami and Others v Commission* & Judgment of 25 October 2011, Case T-262/10 *Microban v Commission'* [2012] 8 European Constitutional Law Review 82, 90.

[60] For instance, Art 81(3) specifies the procedure for the adoption of a decision changing the decision making procedure about family law measures.

application if it applies to objectively determined situations and produces legal effects with regard to the categories of persons defined in a generalized and abstract manner.[61]

If the act is a regulatory act, it is subject to criteria of "direct concern"[62] and "does not entail implementing acts". The term direct concern was first clarified in *Microban*[63]. The case was brought against a Commission's decision exclude triclosan, a chemical substance produced by the applicant, in the list of additives that are allowed in the plastic materials and articles intended to come into contact with foodstuffs under Directive 2002/72/EC[64].[65]

To begin with, GC ruled that Art 263(4) of TFEU does not amend the concept of "direct concern" as it stood in its predecessor Art 230(4) EC Treaty. Therefore, the case-law developed prior-Lisbon Treaty entered into force continues to apply. However, the criteria should not be more restrictive than in its processor in Art 230(4) EC Treaty.[66]

According to the established case-law, two cumulative criteria need to be satisfied in order an act to be capable of being of direct concern for a private applicant.[67] One requirement is that regulatory acts need to affect the legal situation of the private applicant in a direct manner.[68] It follows from the case law that one should distinguish between factual and legal situations. Although some adverse consequences to the private applicant might be direct consequences of transposition of a certain EU measure, they are not of direct concern if they only influence the applicant's factual situation. It is established that, for instance, economic consequences can only

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[61] Opinion of AG Kokott, *Telefónica SA v European Commission*, Case C-274/12P, EU:C:2013:204, para 21.

[62] Already in *Inuit* the GC described the notion of "direct concern" as it stands according to the settled case-law but did not clarify in further. See *Inuit Tapiriit Kanatami* (n 55), para 71.

[63] Judgment of 25 October 2011, *Microban*, T-262/10, EU:T:2011:623.

[64] Commission Directive 2002/72/EC of 6 August 2002 relating to plastic materials and articles intended to come into contact with foodstuffs [2002] OJ L220/18

[65] *Microban* (n 63), paras 1–2.

[66] Ibid, para 32.

[67] Order of GC of 21 May 2010, *ICO Services Ltd v European Parliament and Council of the European Union*, T-441/08, EU:T:2010:217, para 56. See also *Inuit Tapiriit Kanatami* (n 55), para 72.

[68] *Microban* (n 63), para 27. See also joined cases of 13 May 1971, *International Fruit Company*, C-41/70 to C-44/70, EU:C:1971:53, para 25 and judgment of 6 March 1979, *Simmenthal v Commission*, C-92/78. EU:C:1979:53, para 26. On the issue of theoretical discretion see, eg. *Piraiki-Patraiki,* (n 28), para 9.

affect the applicant's factual, not legal situation.[69] However, the line between factual and legal situation seems to be quite thin: for instance, in the *Microban* the GC concluded that the EU measure affected the legal situation of the private applicant since it would limit the use of triclosan, an additive used by the applicant's product and then sold to use in manufacturing items that would have a contact with foodstuffs.[70] Clearly, this also had consequences on the economic situation of the applicant. Later in case law, it has been defined that the legal effects need to be real and definitive.[71]

Until today, no NGO has been able to satisfy the abovementioned criteria of direct concern. It is hard to imagine how an EU measure contravening environmental law would have a direct and definitive consequence on an ENGOs legal situation. If the CJEU continues with such a strict interpretation– especially when it is not even enough when an economic situation of a private applicant is affected.[72] Furthermore, it follows from the case law that the legal position of a public entity is considered to be affected when it cannot use its powers as it wishes, especially when its normative competence is affected.[73] However, NGOs do not have any public power. The first part of the direct concern criteria, as it stands, it too restrictive to implement Art 9(3) of the Aarhus Convention.

Another condition required to be satisfied is the existence of a direct causal link between the EU measure and the effect of this measure on the legal position of the private applicant.[74] Despite the cumulative nature of the requirements in the third limb of Art 263(4) of TFEU, the second condition is also necessary to clarify in order to fully grasp the problematics of an as a party to the international agreement in which most of the parties are indeed states with the quite

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[69] Judgement of 27 June 2000, *Salamander v Parliament and Council,* T-172/98, EU:T:2000:168, para 62. See also *Inuit Tapiriit Kanatami* (n 55), para 75.

[70] *Microban* (n 63), paras 28–30.

[71] Judgment of 12 September 2013, *Palirria Souliotis v Commission,* T-380/11, EU:T:2013:420, para 30.

[72]Anaïs Berthier, 'A first success in the long run for better access to justice in the EU: the scope of the administrative review procedure provided under Regulation 1367/2006 invalidated by the General Court' [2012] 2 Environmental Law Network International Review 92, 94.

[73] Joined cases of 13 December 2018, *Paris, Brussels and Madrid v Commission,* T-339/16, T-352/16 and T-391/17, EU:T:2018:927, para 50.

[74] Albertina Albors-Llorens, 'The Standing of Private Parties to Challenge Community Measures: has the European Court missed the Boat?' [2003] 62 Cambridge Law Journal 72, 75.

different judicial system. It follows from the existing case law that in order an act to be capable of being regarded as being of direct concern to a private applicant the addressee of the measure, who is also responsible for its implementation, has none or purely theoretical discretion as to its implementation of that EU measure. [75] If implementation exists, it should be purely automatic and result from EU legislation without requiring other intermediate rules.[76]

The Compliance Committee did not comment on the second part of the direct concern test.[77] The reason for the implementation criteria is apparent in the context of the EU judicial system. If the applicant exercised any discretion when implementing an EU measure, the private applicant would be affected by the measure of the addressee rather than the EU. Thus, the private applicant should challenge the act of the addressee, meaning often the Member States, instead.[78] The implementation criteria align with the starting point of this thesis: the EU cannot be regarded as a typical state party to the Aarhus Convention but as a unique, *sui generis,* legal system that is not comparable with any other existing system.[79]

In addition to the direct concern – criteria, the reading of Art 263(4) of TFEU makes clear that in order to satisfy the third limb, the regulatory act should not "entail implementing measures".[80] As AG Kokott has pointed out, it is necessary to interpret the term in the light of the draft Treaty establishing a Constitution for Europe adopted by the European Convention (Constitutional Treaty). It was acknowledged that the legal protection of private applicants needs to be strengthened in the EU because before the Lisbon Treaty entered into force, sometimes the only way for private applicants to gain access to justice was to breach a law. In the

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[75] *Microban* (n 63), para 27. See also, for instance, judgment of 5 May 1988, *Dreyfus v Commission,* C-386/96 P, EU:C:1998:193, para 43, *International Fruit Company* (n 68) paras 23–29 and judgment of 6 March 1979, *Simmenthal v Commission* (n 68), paras 25–26.

[76] *Dreyfus v Commission* (n 75), para 43.

[77] Compliance Committee, 'Findings and recommendations of the Compliance Committee with regard to communication ACC/C/2008/31 (Part II) concerning compliance by the European Union' (2017) ACCC/C/2008/32 (EU).

[78] Albors-Llorens (n 74).

[79] Allan Rosas and Lorna Armati, *EU Constitutional Law: An introduction* (3rd edn, Hart Publishing 2018), 12.

[80] Art 263(4) of TFEU.

light of preceding the third limb of Art 263(4) of TFEU produces possibility for a private applicant to challenge an EU act or omission without any need for existing implementing measures.[81]

The starting point of interpretation is that the requirement is different from the direct concern test defined as the absence of the applicant's discretion.[82] The CJEU first interpreted the term "implementing measures" in the case *Telefónica*[83]. In the case, a private applicant sought an annulment of the Commission's decision ruling that the Spanish financial aid scheme is illegal in the light of the legislation regulating the EU state aid scheme. The applicant had profited from the Spanish financial aid scheme. In its ruling, the CJEU first stated that the term "implementing measures" is subjective: the term should be assessed in reference to the person invoking the right to bring proceedings under Art 263(4) of TFEU. It is therefore insignificant whether the act entails implementing measures regarding others. Then CJEU clarified that only the scrutiny should be limited only to the subject matter of the annulment action. When only a part of an act is being challenged, then also only the part of the act should be examined accordingly.[84] Secondly, the CJEU interpreted implementing measures narrowly: an EU act will most likely have to implement measures if its "specific consequences" will be found in the national level.[85] When EU institutions, bodies or agencies are responsible for the implementation of an EU act, an action for annulment, together with the action of illegality under Art 277 TFEU, is possible.[86] Finally, the CJEU concluded that the contested act entailed implementing measures towards the private applicant and thus the action for annulment was not successful.[87]

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[81] Opinion of AG Kokott (n 61), paras 35–41. See also opinion of AG Jacobs, *Unión de Pequeños Agricultores v Council of the European Union,* Case C-50/00 P, EU:C:2002:197, para 43.

[82] *Palirria Souliotis v Commission* (n 71), para 44.

[83] Judgment of 19 December 2013, *Telefónica v Commission*, C-274/12 P, ECLI:EU:C:2013:852.

[84] Ibid, paras 30–31.

[85] Ibid, para 59.

[86] Ibid, para 29.

[87] Ibid, para 59.

In *T & L Sugars and Sidul Açúcares v Commission*[88] The CJEU repeated the interpretation of the "implementing measures" as reasoned in *Telefónica.* Moreover, it ruled that also a measure of "mechanical nature", in this case certificates granted or denied by national authorities, constitute implementing measures in the meaning of Art 263(4) of TFEU[89] - a view to which the AG Villalón did not adhere. He argues that granting certificates do not go beyond simple administrative cooperation or technical management and thus should not be considered as implementing measures.[90] The CJEU has reiterated its interpretation of the implementing measures, as stated in both *Telefónica* and *T & L Sugars and Sidul Açúcares v Commission* later in the case law.[91] It seems that CJEU interpretation measures as "all in" basis: if the addressee of an act serves as an intermediary of an EU act in any sense it means that the act cannot be considered as a regulatory act in the sense of the third limb of Art 263(4) of TFEU. The Compliance Committee also decided that the Aarhus Convention does not allow the parties to exclude acts which entail implementing measures.[92] This, however, does not fully take into account the EU legal order where extensive use of implementing measures are needed for instance, in implementing directives.[93]

All in all, the potential of the third limb of Art 263(4) of TFEU is lost due to the strict interpretation of the conditions. In practice, most of the time, the only way to challenge EU acts is under the "individual concern" – test, which, in turn, seems to be extremely cumbersome.[94] The Compliance Committee, too, finds the third limb of Art 263(4) of TFEU too restrictive to implement the Arts 9(3) and 9(4) of the Aarhus Convention.[95]

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[88] Judgment of 28 April 2015, *T & L Sugars and Sidul Açúcares v Commission,* C-456/13, EU:C:2015:284.

[89]Judgment of 28 April 2015, *T & L Sugars and Sidul Açúcares v Commission,* C-456/13, EU:C:2015:284, paras 32, 40–41.

[90] Opinion of AG Villalón, *T & L Sugars and Sidul Açúcares v Commission,* Case C-456/13 P, EU:C:2014:2283, para 46.

[91] See, eg., judgment of 13 March 2018, *European Union Copper Task Force v European Commission*, C-384/16 P, EU:C:2018:176, paras 35–36.

[92] Compliance Committee (n 77), para 79.

[93] Art 288 of TFEU.

[94] Alexander Kornezov, 'Locus standi of private parties in actions for annulment: has the gap been closed?' [2014] 73 Cambridge Law Journal 25, 26.

[95] Compliance Committee (77), para 79.

3.2 Administrative review mechanism under the Aarhus Regulation

3.2.1 The mechanism only available for certain private applicants

As already mentioned, the Aarhus Regulation introduced a special administrative review procedure that, if successfully triggered, forces the institutions of the EU to reconsider certain acts and omissions of the bodies and institutions of the EU in the field of environmental law.[96] As a result of this internal review procedure, the EU institutions are obliged to conclude a written reply stating their reasons for concluding the initial act – or, in contrary, for not concluding one.[97] The internal review procedure of the Aarhus Regulation can be regarded as an attempt of the legislature to create an administrative review mechanism as prescribed in Art 9(3) of the Aarhus Convention. What is more, this internal review mechanism is supplemented by a direct judicial review before the CJEU.[98] This possibility for the judicial review exists in two situations: when the duly made written reply is considered unsatisfactory on behalf of the applicant triggered the internal review procedure and where the written reply was not submitted in the response of the request.[99] Whether the act can be contested in the internal review procedure is dependent on three issues: firstly, *by whom* the internal review is requested, *which institution* is involved and finally, what *type of act* is concerned.

The Aarhus Regulation prescribes the rules that private applicants must satisfy in order to request an internal review of an act or omission successfully. First of all, only NGOs are entitled to the internal review procedure.[100] Nevertheless, the internal review is not available for all NGOs: there is a cumulative criterion which they need to satisfy. First, an NGO must be an "independent, non-profit-making legal person in accordance with a Member State's national law or practice".[101] Apparently, the reference to the Member State's law applies only to the registration of the legal person and the criteria of "independence" and "non-profit-making" are

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[96] Pallaemaerts (13), 274.

[97] Art 10(2) of the Aarhus Regulation.

[98] Art 12 of the Aarhus Regulation. See also Pallaemaerts (n 13), 291.

[99] Art 12 of the Aarhus Regulation.

[100] Art 10 of the Aarhus Regulation.

[101] Art 11(1)(a)of the Aarhus Regulation.

being evaluated according to the EU law.[102] Secondly, the primary stated objective of the NGO should be "promoting environmental protection in the context of environmental law".[103] This indicates that they can have other objectives, too; however, the objective of environmental protection should be found in the statues of the organization.[104] The NGO must have existed for more than two years and should be "actively pursuing the objective" of environmental protection in the context of environmental law.[105] The wording of this requirement indicates that the NGO must not necessarily have been pursuing the objective in the past; what counts is the objective of the NGO when requesting the internal review.[106] Finally, "the subject matter in respect of which the request of the internal review is made is covered by its objectives and activities."[107] The last requirement indicates a certain manner of specialization, meaning, for instance, that an NGO whose objective is bird protection in Germany could request an internal review on the issue concerning birds in that Member State but not on, for instance, Saimaa ringed seals in Finland. Another issue is whether NGOs dedicated to environmental protection in general, such as Greenpeace, are entitled to the internal review procedure. It would be somewhat questionable, considering the purpose of the Aarhus Convention, to exclude general environmental protection organizations entirely. Scholars, too, support this view.[108] It seems like the general environmental protection organizations are not left out for the Commission has taken account review requests from such organizations.[109]

By subjecting the access to justice to specific criteria, the EU has exercised its discretion available under Art 9(3) of the Aarhus Convention. In fact, in the original proposal for the criteria

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[102] Pål Wennerås, *The Enforcement of EC Environmental Law* (Oxford University Press 2007), 228.

[103] Art 11(1)(b) of the Aarhus Regulation.

[104] Wennerås (n 102)

[105] Art 11(1)(c) of the Aarhus Regulation.

[106] Wennerås (n 102), 228.

[107] Art 11(1)(d) of the Aarhus Regulation.

[108] Wennerås (n 102) 229.

[109] See Commission, 'Reply - Request for internal review under Title IV of the Aarhus Regulation Commission Decision of 29 May 2015 on the Spanish Transitional National Plan (TNP), Ref Ares (2015) 4274787, available at < http://ec.europa.eu/environment/aarhus/requests.htm>, point 33, accessed 4 June 2019.

for NGOs in the Aarhus Regulation would have been stricter: the Commission planned to enable the internal review procedure only for "qualified entities," namely for ENGOs acting at the European level and meeting certain criteria. However, the Council simplified the criteria by dropping the "qualified entities" and the recognition procedure related to it.[110] The established criteria in the Aarhus Regulation[111] is not too restrictive to preclude all or almost all NGOs from challenging the acts and omissions.[112] In that sense, it would satisfy the requirements of Art 9(3) and 9(4) of the Aarhus Convention.

However, as noted before, the meaning of "members of the public" in the Aarhus Convention is very broad, encompassing "one or more natural or legal persons".[113] In contrast, the internal review procedure of the Aarhus Regulation is not open for natural persons.[114] During the drafting process the European Parliament was concerned about that and proposed an amendment opening the review procedure also for natural persons[115] – a view which did not maintain to the second reading[116]. Consequently, it seems like the EU has exceeded its discretion provided for in the Aarhus Convention[117] by leaving natural persons out of the internal review procedure.[118]

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[110] European Council, 'Common position (EC) No 31/2005 adopted by the Council on 18 July 2005 with a view to adopting Regulation (EC) No…/2005 of the European Parliament and the Council of … on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2005] OJ C 264E/25, 26.

[111] Art 11(1) of the Aarhus Regulation.

[112] UNECE (n 50) 35.

[113] Art 2(4) of the Aarhus Convention.

[114] Art 10 of the Aarhus Regulation.

[115] European Parliament, 'Position of the European Parliament adopted at first reading on 13 March 2004 with a view to the adoption of European Parliament and of the Council Regulation (EC) No …/2004 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies' PC_TC1-COD(2003)0242, Art 15.

[116] See European Parliament, 'Position of the European Parliament adopted at the second reading 18 January 2006 with a view to the adoption of Regulation (EC) No …/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, PC_TC2-COD(2003)0242.

[117] Art 9(3) of the Aarhus Convention.

[118] Wennerås (n 102) 227–228.

3.2.2 Institutions able to be involved

As mentioned before, Art 9(3) of the Aarhus Convention refers to "public authorities" that, when reading together with Art 2(2) of the Convention, means institutions of REIOs, such as various institutions of EU. However, the wording of the Aarhus Convention indicates that the term "public authorities" should be interpreted broadly as the functional, not formal status being decisive.[119] As generally known, certain institutions of the EU have a special status. In the EC Treaty, as it was enacted at the moment of the accession of the EU, only the European Parliament, the Council, the Commission, the CJEU and the Court of Auditors were considered as EU institutions.[120] The question is then whether only acts and omissions of those institutions can be contested under the internal review procedure.

Concerning the internal review procedure, the EU institutions did not want to limit it only to the institutions specially mentioned in the Treaties.[121] The Aarhus Regulation allows a review of acts and omissions adopted by "the Community institutions and bodies"[122], meaning "any public institution, body, office, office or agency". Institutions can only be excluded "when acting in a legislative or judicial capacity".[123]

As already mentioned, the only exception not subject to the minimum standard for access to justice under Art 9(3) of the Aarhus Convention are measures enacted by bodies of institutions acting in their legislative or judicial capacity.[124] Consequently, the before mentioned exception of the EU institutions is allowed.

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[119] Art 2(2)(b) of the Aarhus Convention. See also Jonas Ebbesson, 'Public Participation and Privatisation in Environmental Matters: An Assessment of the Aarhus Convention' [2011] 4 Erasmus Law Review 71, 77.

[120] Art 7(1) of the EC Treaty. The successor of this Art is now Art 13(1) of TEU that also provides for the European Council and the European Central Bank status of an EU institution.

[121] Commission, 'Proposal for a Regulation of the European Parliament and the Council on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies' COM(2003) 622 final, para 7. See also Pallaemaerts (n 13) 278.

[122] Art 10(1) of the Aarhus Regulation.

[123] Art 2(1)(c) of the Aarhus Regulation.

[124] Art 2(2) d of the Aarhus Convention.

Moreover, Art 2(2) of the Aarhus Regulation provides for a non-exhaustive list of exemptions in which the internal review is not available although the EU bodies and institutions would be acting in an administrative review capacity. The list includes decisions adopted in a different context, such as under infringement proceedings against the Member States[125]and competition rules[126]. It is dubious whether these exceptions are also allowed since the Aarhus Convention[127] only excludes judicial and legislative decisions. Therefore, exceptions laid down in Art 2(2) of the Aarhus Regulation seem to go further what is allowed. For instance, when delivering a reasoned opinion pursuant to the procedures of Art 258 of TFEU, the Commission is clearly acting in an administrative, not judicial – or legislative - capacity.[128] This is not consistent with the Aarhus Convention.[129]

3.2.3 Acts subject to the internal review

Only “administrative acts” and “administrative omissions” under environmental law are subject to the internal review procedure.[130] The ad hoc meaning of the administrative act is "a measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects[131] First, the term "a measure of individual scope" will be interpreted.

Neither the Aarhus Regulation nor the Treaties define "a measure of individual scope." In the established case law, the CJEU has divided opposite terms of "generally applicable" and "individual applicable" measures adopted in specific areas of the Treaties.[132] Further, the established

[125] Under current Arts 258 and 260 of TFEU.

[126] Under current Arts 101, 102, 106 and 107 of TFEU.

[127] Art 2(2) of the Aarhus Convention.

[128] Wennerås (n 102) 231–232.

[129] Pallaemaerts (n 13) 279.

[130] Art 10(1) of the Aarhus Regulation.

[131]Art 2(1)(g) of the Aarhus Regulation.

[132] See, eg. judgment of 24 October 1989, *Commission v Council,* C-16/88, EU:C:1989:397, paras 9, 11, and 16.

case law defines the "measure of individual scope" as an application of general rules to specific cases. However, it does not require that a measure is addressed to a certain private applicant.[133]

Next, the acts must have "legally binding and external effects", which can be analogously interpreted from the case-law construing the provisions of Art 230 EC Treaty, which is now Art 263 of TFEU.[134] Acts having “legally binding and external effects” exclude preparatory acts[135], such as environmental programs[136] and plans drafted under those programs. Although it is logical to exclude such acts[137] it is worth noticing that there is no exception in Art 9(3) of the Aarhus Convention to allow excluding non-binding acts from the administrative or judicial review.

What are these measures of individual scope having legally binding and external effects? Obviously acts adopted under ordinary or special legislative procedures are excluded from the review.[138] Measures taken by the Commission pursuant to the mandate of the Council or European Parliament, so-called delegated acts, are another issue. Those acts are of "general application"[139] – which are, as established in the case law of the CJEU, regarded as the exact opposite to "a measure of individual scope". The wording laying down the procedure for enacting implementing measures in Art 291 of TFEU does not have the same specification. Thus, their capability for the review of the Aarhus Regulation should be decided upon a case by case.[140]

Finally, regarding the meaning "under environmental law" in the Aarhus Regulation[141]it is defined as “EU legislation which, irrespective of its legal basis, contributes to the pursuit of the

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[133] Pallaemaerts (n 13) 280.

[134] *Ibid.*

[135] Judgment of 11 March 1981, *IBM v Commission,* C-60/81, EU:C:1981:218, paras 10–12.

[136] See judgment of 12 December 1996, *Rovigo v Commission*, C-142/95 P,EU:C:1996:493, paras 32–34.

[137]Art 263(1) of the TFEU prescribes that acts “other than recommendations and opinions (…) that intended to produce legal effect vis-á-vis third parties” can be contested.

[138] When acting under the procedures laid down in Arts 289(1) and 289(2), the European Parliament and the Council are acting in the legislative capacity. See also Pallaemaerts (n 13) 280.

[139] Art 290(1) of TFEU

[140] Pallaemaerts (n 13) 281.

[141] Art 2(1)(g) of the Aarhus Regulation.

objectives of Community policy on the environment as set out in the Treaty".[142] It links the environmental law to specific environmental objectives laid down in Art 191(1) of TEU, previously Art 174(1) of EC Treaty. However, the Decision 2008/50/EC[143] of the Commission specifies how, inter alia, the applicant NGO shall provide evidence clarifying that it satisfies the criteria for entitlement. According to those provisions, the applicant NGO needs to specify the provisions of *environmental law* with which it considers that the EU institution or a body has not complied.[144] The criterion means that the internal review is only available for administrative acts adopted *under* acts of which legal basis is environmental. However, the GC has ruled that the term "environmental law" should be interpreted very broadly, not restrained to the issues concerning the protection of the natural environment in a limited sense adopted under a specific legal basis. In contrary, the term extends to various measures affecting the environment, for instance provisions that are mainly of a fiscal nature, measures that affect town and country planning and measures greatly affecting the energy choices of Member States.[145] Moreover, the request for internal review can be made on both procedural or substantive grounds, as supported by the CJEU in analogous system in Regulation (EC) No 1049/2001[146] that lays down a special internal review procedure in which EU institutions and bodies are obliged to make an internal review of decisions to refuse access to documents.[147]

However, Art 9(3) of the Aarhus Convention stipulates that acts and omissions *contravening* the law relating to the environment – irrespective of whether those acts and omissions have been enacted under environmental law – no matter how broadly defined - should be challengeable. Indeed, the GC has ruled that regardless of the wide interpretation of the environmental law, the challengeable act or omission needs to be adopted under an environmental law with

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[142] Art 2(1)(f) of the Aarhus Regulation, emphasis added.

[143] Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts [2008] OJ L 13/24.

[144] Art 1(1) of the Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and the Council on the Aarhus Convention as regards requests for the internal review of administrative acts [2008] OJ L 13/24, italics added.

[145] Judgment of 14 March 2018, *TestBioTech v Commission*, T-33/16, EU:T:2018:135, paras 41–46.

[146] of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L 145.

[147] See, eg. judgment of 16 January 2008, *Scippacercola,* T-306/05, EU:T:2008:9.

the meaning of Aarhus Regulation.[148] Thus the term "under environmental law" does not sufficiently satisfy Art 9(3) of the Aarhus Convention.

3.2.4 The fairness of the internal review

However, it is dubious whether the internal review mechanism satisfies the quality requirements, especially that it is not fair in the meaning of the Aarhus Convention.[149] It was clear since the very early stage of the drafting process of the Aarhus Convention that the quality standards apply not only to the judicial but also to the administrative review procedures.[150] According to the *travaux préparatoires* the quality standards, including fairness, should be interpreted as in the existing, internationally recognized standards, such as Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended, ECHR).[151] As a reference, Art 6 of ECHR lays down the right for a fair trial by an independent and impartial tribunal. It is sufficient to conclude that in the context of the Aarhus Convention, the fairness requires that both the process and the final ruling should be impartial and free from prejudice or self-interest.[152]

Under the internal review procedure of the Aarhus Regulation, a person who arguably has a direct interest in the outcome of the issue[153] has a vital part in the process because the admissibility will be examined by the Director-General or the head of the department of the contested measure in the Commission.[154] These persons are usually senior officials whose department

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[148] *TestBioTech v Commission* (n 145).

[149] Art 9(4) of the Aarhus Convention.

[150] UNECE, Committee on environmental policy, working group for the preparation of a draft convention on access to environmental information and public participation in environmental decision making, 'Report of the second session' (1996) CEP/AC.3/4 Annex I, 7.

[151] UNECE, Committee on environmental policy, working group for the preparation of a draft convention on access to environmental information and public participation in environmental decision making, 'Report of the fifth session' (1997) CEP/AC.3/10 Annex III, 10.

[152] UNECE (n 14) 201.

[153] Pallaemaerts (n 13) 285.

[154] Art 4(3) of the Annex of 2008/401/EC,Euratom: Commission Decision of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information,

was responsible for the challenged act or omissions.[155] What is more, the senior officials' decision making power includes not only the entitlement of the NGO to make the request and the indication and substantiation of the grounds on which the request is made but also the evaluation of time limits.[156] A Commissioner, or in some cases the Commission as a whole, will only be involved in the second stage of the process. A Commissioner will only be involved in the cases in which the request is deemed inadmissible. In turn, the Commission as whole will only be involved if the Commissioner finds the request well-founded. In those cases, the Commissioner shall refer the request to the College.[157] It means that the Commissioner responsible for the contested provision has the power to decide that the request was substantively ill-founded, namely not in breach of environmental law.[158] This type of procedure seems to minimize the probability that the result of the internal review procedure would differ from the original act or omission for it grants the power for the departmental interests and can rarely lead to a different outcome than the initial decisions.[159] This procedure is not impartial and free from prejudices.

In conclusion, several shortcomings of the internal review procedure in comparison to access to justice under Arts 9(3) and 9(4) of the Aarhus Convention were identified. Firstly, all natural persons are ruled out from the internal review procedure.[160] Secondly, also acts of certain EU institutions are excluded, albeit they are not acting in a judicial or legislative capacity.[161] Only measures "of individual scope under environmental law, having legally binding and external effects"[162] can be subject to internal review. Additionally, the procedure cannot be considered fair in the meaning of the Art 9(4) of the Aarhus Convention.

Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institution and bodies [2008] OJ L140/22 (Rules of the Procedure).

[155] Pallaemaerts (n 13) 285.

[156] Art 4(3) of the Rules of the Procedure.

[157] Art 5(1) of the Rules of the Procedure.

[158] Art 5(2) of the Rules of the Procedure.

[159] Pallaemaerts (n 13) 286.

[160] Wennerås (n 102) 27–228.

[161] Art 2(2) of the Aarhus Regulation.

[162] Art 2(1)(g) of the Aarhus Regulation.

However, the internal review procedure is supplemented with a judicial review before the CJEU.[163] Due to the involvement of the departmental interests in the internal review procedure, the actual impact of the Aarhus Regulation is determined mainly by the possibility of the following judicial review.[164]

3.3 Judicial review under the Aarhus Regulation

3.3.1 Substantive scope of the judicial review

The Aarhus Regulation lays down that the NGO making a request for an internal review can institute proceedings before the CJEU in accordance with the relevant provisions of the Treaty, meaning what is now the action for annulment under the 263(4) of TFEU and the action for failure to act under Art 265 of TFEU.[165] The subject matter is for the judicial review is the "written reply"[166] and thus different than under Art 263(4) of TFEU where the original act or omission is being contested.[167] It needs to be scrutinized whether "a written reply" can be subject to the action for annulment, for instance. The answer is yes for the CJEU has ruled that all legally binding acts adopted by the EU institutions should be challengeable, regardless of their nature or form.[168] Another question is whether an admissible judicial review of a written reply could lead to a full review of the substantive and procedural legality of the requested internal review, meaning the alleged contravention of the EU environmental law and the procedure of the internal review. Some argue that the CJEU could limit its review on the handling the internal review under the Aarhus Regulation. Although the written reply not meeting the requirements of the Aarhus Regulation might be voided, the argument goes, it does not void the original act or omission that contravenes environmental law.[169]

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[163] Art 12 of the Aarhus Regulation.

[164] Pallaemaerts (n 13) 286.

[165] Art 12(1) of the Aarhus Regulation.

[166] Art 10(2) of the Aarhus Regulation.

[167] Wennerås (n 102) 238.

[168] Judgment of 31 March 1971, *ERTA*, C-22/70, EU:C:1971:32, para 31.

[169] Pallaemaerts (n 13) 295–296.

The Art 263(2) of TFEU stipulates four grounds for the action for annulment including, inter alia, infringement of the Treaties or any rule of law relating to their application. The CJEU is allowed to examine the substance of the reasons to determine whether they are vitiated by an error of law. [170] The "Treaties" mean all constitutive Treaties.[171] The phrase "any rule of law relating to their application" has received a broad interpretation by the CJEU and means all rules of EU law not encompassed by the Treaties as such. All EU acts must respect the rules superior to it. Consequently, it is an infringement of the EU rules if it does not do so. This interpretation does not only apply to the legal basis of the law but also all higher-ranking acts.[172] If the CJEU founds an error in the reasoning of a written reply, this will also affect the legality of the original act, namely the act that was challenged under the internal review procedure.[173]

Moreover, an NGO can also raise an incidental plea of illegality under Art 277 of TFEU. The plea of illegality is an incidental plea in law which, when successful, declares the act of general application inapplicable *inter partes.*[174] In other words, it means that the CJEU will review an act of general application underlying the initial act that was subject to internal review. Therefore, the fear that the CJEU would limit its scrutiny only to the procedural illegality is not reasonable. An NGO could, for instance, challenge a Commission decision on the hazardous substance because the underlying directive is illegal.[175] Next two cases in which NGOs attempted to challenge the incompatibility of Art 10(1) of the Aarhus Regulation in light of Art 9(3) of the Aarhus Convention will be scrutinized. The question is whether the ECJ allows the private applicants to challenge the abovementioned shortcomings of the Aarhus Regulation.

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[170] Wennerås (n 102), 242.

[171] Art 1(3) of TEU.

[172] Herwig Hofmann, Gerad Rowe and Alexander Türk, *Administrative Law and Policy of the European Union* (Oxford University Press 2011), 844.

[173] Wennerås (n 102) 242.

[174] Lenaerts, Maselis and Gutman (n 1) 441, 455.

[175] Wennerås (n 102) 243.

3.3.2 Challenging the Aarhus Regulation through the judicial review

The CJEU considered the self-executing effect of Art 9(3) of the Aarhus Convention in two cases *Vereniging Milieudefensie*[176] and *Stichting Natuur en Milieu*[177] In both cases, NGOs brought rejections of their request for internal review by the Commission before the CJEU. The first case concerned the decision of the Commission allowing the Netherlands to postpone a deadline for certain regions to meet specific air quality standards under the Directive 2008/50/EC[178]. The second case was in the context of the Commission rejecting internal review by two environmental NGOs concerning Regulation 149/2008 on certain maximum residue levels for a large number of pesticides[179]. The applicants invoked the objection of illegality under Art 277 of TFEU, claiming that Art 10(1) of the Aarhus Regulation contravenes Art 9(3) of the Aarhus Convention in so far as it restricts the definition of "acts" as "measure(s) of individual scope".[180] The question here is whether Art 9(3) have a self-executing effect, namely whether it the legality of Art 10(1) of the Aarhus Regulation can be reviewed in the light of it.[181]

If a norm has a self-executing effect, it is, due to its precise content, capable of giving the judiciary a benchmark on how to solve a dispute.[182] Typically the CJEU considers whether an international agreement has a self-executing effect by using a two-tier test: Firstly, it scrutinizes the nature and broad logic of an agreement as to whether they are capable of having self-executing character. Second, it examines the wording of the provision of the dispute. It examines

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[176] Judgment of 13 January 2015, *Vereniging Milieudefensie,* C-401-403/12 P, EU:C:2015:4.

[177] Joined cases of 13 January 2015, *Stichting Natuur en Milieu,* C-404/12 P and C-405/12 P, EU:C:2015:5.

[178] of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe [2008] OJ L152/1.

[179] Commission Regulation 149/2008/EC of 29 January 2008 on Certain Maximum Residue Levels for a Large Number of Pesticides [2008] OJ L58/1.

[180] Judgment of 14 June 2012, *Stichting Natuur en Milieu,* T-338/08, EU:T:2012:300, para 26 and judgment of 14 June 2012, *Vereniging Milieudefensie,* T-396/09, EU:T:2012:301, para 20.

[181] Benedikt Pirker, 'Access to Justice in Environmental Matters and the Aarhus Convention's Effects in the EU Legal Order: No Room for Nuanced Self-executing Effect?' [2016] 25 Review of European Community and International Environmental Law 81, 86.

[182] Francesca Martines, 'Direct Effect of International Agreements of the European Union' [2014] 25 The European Journal of International Law 129, 130.

whether the wording is sufficiently clear and precise and does not require the adoption of subsequent measures to be fully implemented.[183]

In both cases, the GC it ruled that Art 9(3) of the Aarhus Convention is capable of having a self-executing effect and therefor Art 10(1) of the Aarhus Regulation could be examined in light of Art 9(3) of the Aarhus Convention.[184] It based its reasoning on the "principle of implementation", which compromises the logic that the provisions of the international agreement need to be precise and should not require the adoption of implementing measures.[185] This compromise has often being used in cases concerning WTO-law[186]. The GC reviewed the legality of the Aarhus Regulation because it, according to its objective, recital and established case-law[187], is an implementing measure of Art 9(3) of the Aarhus Convention. Then it ruled that there was no reason for construing "acts" of Art9(3) of the Aarhus Convention as "measure(s) of individual scope", as it stands in Art 10(1) of the Aarhus Regulation.[188]

However, on appeal, the ECJ overturned the ruling of the GC. It distinguished the present case from established case law concerning the principle of implementation because the EU had discretion when defining the rules for the implementation of the “administrative or judicial procedures”. Therefore, the argument goes, it is not shown that the Aarhus Regulation creates an implementing measure of Art 9(3) of the Aarhus Convention. The ECJ reasoned its ruling on the fact that the question falls “primary within the scope of Member State law”. It follows that Art 9(3) of the Aarhus Convention does not have a self-executing effect and, moreover, the errors of Art 10(1) of the Aarhus Regulation could not be examined in the light of Art 9(3) of the Aarhus Convention.[189] The lack of the self-executing effect of Art 9(3) of the Aarhus Con-

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[183] Pirker (n 181) 83.

[184] *Vereniging Milieudefensie* (n 180)*,* para 59 and *Stichting Natuur en Milieu* (n 180), para 59.

[185] Mario Mendez, *The Legal Effects of EU Agreements* (Oxford Studies in European Law 2013), 119.

[186] See, eg. judgment of 7 May 1991, *Nakajima v Council*, C-69/89, EU:C:1991:186, para 31.

[187] Judgment of 8 October 2011, *Lesoochranárske zoskupenie VLK*, C-240/09, EU:C:2011:125, paras 39,41.

[188] *Vereniging Milieudefensie* (n 180), paras 58–59, 66 and *Stichting Natuur en Milieu* (n 180), paras 59, 77.

[189] *Vereniging Milieudefensie* (n 176) , paras 60–62 and s *Stichting Natuur en Milieu* (n 177), paras 51–54.

vention has been re-established in *Mellifera e. V., Vereinigung für wesensgemäße Bienenhaltung*[190]. Therefore, it follows, that the private applicants unsatisfied with the scope of the review mechanism of the Aarhus Regulation cannot challenge it in light of the Art 9(3) of the Aarhus Convention. The shortcomings of the Regulation need to be amended otherwise.

[190] Judgment of 27 September 2018, *Mellifera e. V., Vereinigung für wesensgemäße Bienenhaltung,* T-12/17, EU:T:2018:616, paras 85–87.

4 INDIRECT ACCESS TO JUSTICE

4.1 Preliminary reference system as a cornerstone of the EU legal order

4.1.1 Enhanced environmental protection under the preliminary reference system

Due to the restrictive jurisprudence of the CJEU private applicants are, in many cases, left to seek justice in the national courts through the preliminary reference system.[1] This "jewel in the crown of the EU law"[2] enables an indirect route to the CJEU by allowing private applicants to contest EU measures via national courts.[3] *Bogojević* argues that the case-law emphasizing the importance of the preliminary reference system is a clear reflection of the power-balancing principle of judicial subsidiarity: legal matters should not be resolved in the CJEU but closer to the citizens, in the national courts.[4] She emphasizes an appreciation of the national courts, alongside the CJEU, as "guardians"[5] of the EU law.[6] There are arguably benefits in adjudicating environmental issues at the national level. First, judges on the national level often use specialists and know the national issues better than their colleagues in the CJEU. Therefore, they are better

[1] Morten Broberg and Niels Fenger, 'Variations in Member States' Preliminary References to the Court of Justice – Are Structural Factors (Part of) the Explanation?' 19 European Law Journal 488, 488.

[2] See, eg. *ibid.*

[3] Art 267 of TFEU. See also Koen Lenaerts, Ignace Maselis and Kathleen Gutman, *EU Procedural Law* (Oxford University Press 2014), 456.

[4] Sanja Bogojević, 'Judicial Protection of Individual Applicants Revisited: Access to Justice through the Prism of Judicial Subsidiarity' [2015] 34 Yearbook of European Law 5, 6–7.

[5] Opinion 1/09 of the Court (Full Court) of 8 March 2011, opinion pursuant to Article 300(6) EC, EU:C:2011:123, para 66.

[6] Bogojević (n 4) 7.

informed than their colleagues in the CJEU. As a result, adjudicating environmental issues before national courts also enhance environmental protection.[7] Also, the decentralized view of judicial protection is generally more cost-efficient.[8]

Typically, the preliminary reference system is used when a legally binding act of the EU, like a regulation, requires national implementation. The private applicant can then challenge the national implementing measure before the national court because of its unlawfulness in the light of the EU law.[9] The national court does not resolve the issue on the EU law by itself but rather refers it to the CJEU. [10] If there is no judicial remedy under national law available, the national court[11] needs to refer the case to the CJEU, whereas if a remedy is available under national law, the court can consider whether to refer the case or not.[12] However, in order to obtain the uniformity of the EU law, the CJEU is the only instance that has the power to declare the EU act void.[13] Although the CJEU addresses the preliminary ruling directly addressed to the national court requesting it, it nevertheless has *erga omens* effects and gives a reason for other national courts to treat the same EU measure void.[14] Therefore the effects of the preliminary ruling being determined unlawful by the CJEU are similar to the successful action for annulment.[15] The preliminary reference procedure, together with the direct challenge through the action for annulment, form "a complete system of judicial protection", as the ECJ announced in its landmark

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[7] Commission, 'Communication from the Commission: implementing Community environmental law' COM(1996) 500 final, para 41.

[8] Daniel Kelem, 'Suing for Europe: Adversarial Legalism and European Governance' [2006] 39 Comparative Political Studies 101, 105–106.

[9] Albertina Albors-Llorens, 'Remedies against the EU institutions after Lisbon: an era or opportunity?' [2012] 71 Cambridge Law Journal 507, 510.

[10] Lenaerts, Maselis and Gutman (n 3).

[11] The Treaty refers to a court or a tribunal; although there is much discussion on its meaning, it is not relevant in the light of the objective of this thesis. Therefore, the term "court" is used instead.

[12] Art 267(2) and (3) of TFEU.

[13] Judgment of 22 October 1987, *Foto-Frost,* C-314/85, EU:C:1987:452, para 17.

[14] Judgment of 23 May 1981, *International Chemical Corporation v Amministrazione delle fianze,* C-66/80, EU:C:1981:102, paras 13–17.

[15]Albors-Llorens (n 9).

case *Les Verts.*[16] In established case law, the ECJ has emphasized that private applicants have a right to challenge the legality of any decision or other national measures of an EU act of general application relative to the application to them. It follows that the preliminary rulings constitute a similar mechanism as the action for annulment in challenging the legality of EU acts.[17] First, it is necessary to scrutinize what are the legal effects of Art 9(3) of the Aarhus Convention in the EU legal order in regard to jurisdiction, namely competence, of the ECJ to rule cases concerning Art 9(3) of the Aarhus Convention. If the ECJ does not have the competence, the effects of the preliminary ruling procedure cannot constitute an alternative to direct access to the CJEU[18] as far as Art 9(3) of the Aarhus Convention is concerned.

4.1.2 Jurisdiction of the ECJ regarding the Art 9(3) of the Aarhus Convention

The provisions of mixed agreements falling into EU competence have the same legal status as agreements conducted solely by the EU. Art 267 of TFEU explicitly stipulates that the preliminary ruling can be sought to test the validity of acts of Union institutions, bodies, offices, and agencies.[19] As noted before, international agreements concluded by the EU form an internal part of the Member States' legal order, too.[20] When this is understood alongside *Costa v ENEL*[21], it follows that whatever is an internal part of the EU is also an internal part of the legal systems of the Member States, and therefore, their courts are bound to follow those measures.

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[16] Judgment of 23 April 1986, *Les Verts,* C-294/83, EU:C:1968:166, 23.

[17] Judgment of 3 October 2013, *Inuit Tapiriit Kanatami*, C-398/13, EU:C:2013:625, paras 94–95 and judgment of 25 July 2002, *UPA*, C-50/00P, EU:C:2002:462, para 42.

[18] Albors-Llorens (n 9).

[19] Art 267(1) of TFEU.

[20] Judgment of 30 April 1974, *Haegeman II,* C-181/73, EU:C:1974:41, paras 4–5.

[21] Judgment of 15 July 1964, *Costa v. ENEL,* C-6/64, EU:C:1964:66. In the case of the ECJ ruled that the Rome Treaty becomes an integral part of the legal order of the Member States and capable of creating direct effects which the national courts must respect, 6–7.

Therefore, the ECJ can also, *in principle*, have the jurisdiction to give preliminary rulings concerning its interpretation.[22] The question is then, whether the ECJ has the authority to interpret Art 9(3) of the Aarhus Convention. This issue was resolved in *Slovak Bear*[23].

In the settled case-law, the basic principle is that in a field in which the EU has not used its legislative power, the national courts of Member States have the jurisdiction to interpret mixed agreements.[24] As mentioned in the subchapter 2.2.2, the EU legislature has enacted measures in some specific sectors by secondary legislation in regard to the *Member States* rules. All in all, the EU measures implementing Art 9(3) of the Aarhus Convention concern only small fragments. As a result, the EU has not yet used its competence in harmonizing the locus standi rules for the proposal of the Commission on the issue was not successful.[25]

In *Slovak Bear*[26] the national court of the Slovak Republic asked ECJ preliminary reference for the question of whether Art9(3) of the Aarhus Convention has a direct effect.[27] The case was about whether an ENGO established under the national law of the Slovak Republic could be considered "a member of public", namely to have *locus standi,* to administrative proceedings concerning granting derogations to the system of protection for species subject to the strict protection under the Annex IV of the Council Directive 92/43/EEC[28] (Habitats Directive).[29] However, firstly the ECJ was obliged to resolve whether it had jurisdiction, namely competence, to rule the case.

Scholars have argued that the general principle of the dividing competences would apply to this case: because the EU has not taken a general legislative action to implement Art 9(3) of the

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[22] *Haegeman II* (n 20).

[23] Judgment of 8 October 2011, *Lesoochranárske zoskupenie VLK,* C-240/09, EU:C:2011:125.

[24] Judgment of 14 December 2000, *Dior and Others*, C-300/98, EU:C:2000:688, para 48 and judgment of 11 September 2007, *Merck Genérious,* C-431/05, EU:C:2007:496*,* para 34.

[25] Commission, 'Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters' COM(2003) 624 final (not in force).

[26] *Lesoochranárske zoskupenie VLK* (n 23).

[27] Ibid, para 28.

[28] of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.

[29] *Lesoochranárske zoskupenie VLK* (n 23), para 37.

Aarhus Convention, the ECJ has no jurisdiction to rule the case.[30] This was also the opinion of the AG Sharpston who stated that the ECJ would be "stepping into legislature's shoes" if it ruled the case.[31] However, the ECJ took another view. Based on the established case-law[32], it noted that if a specific issue has not been legislated by the EU it, however, can fall into the scope of the EU when that issue is regulated in agreements between EU and the Member States, and it concerns a field which is largely regulated. After relying heavily on the Aarhus Regulation, that covers the decisions of European institutions, it ruled that the case falls within the scope of the EU law.[33] This view of resolving the competence question has faced severe criticism.[34] Some scholars argue that the ECJ has, based on vague reasoning, authorized itself to interpret Art 9(3) of the Aarhus Convention.[35] All in all, the *Slovak Bear* made it clear the ECJ has the jurisdiction to interpret that article under the preliminary reference procedure. Consequently, there is an indirect path to the ECJ via preliminary reference system.

4.2 The effects of Art 9(3) of the Aarhus Convention in the Member States

4.2.1 Direct effect, consistent interpretation and *Slovak Bear*

Provisions of international agreements are also, in principle, capable of having direct effects.[36] The answer is not, however, determined solely by the legal criteria developed in the *Van Gend en Loos*[37] and the subsequent case law, meaning that a provision will be accorded direct effect

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[30] Jan H. Jans, 'Who is the Referee? Access to Justice in a Globalised Legal Order: ECJ: Judgment C-240/09 *Lesoochranárske zoskupenie* of 8 March 2011' [2011] 4 Review of European Administrative Law 85, 89.

[31] Opinion AG Sharpston, *Lesoochranáske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky,* Case C-240/09, ECLI:EU:C:2010:436, para 77.

[32] Judgment of 7 October 2004, *Etang de Berre I,* C-239/03, EU:C:2004:598, paras 29–31.

[33] *Lesoochranárske zoskupenie VLK* (n 23), paras 40–43.

[34] One of the arguments is that because there are several hundreds of directives enacted by the EU in the field of environment, this conclusion could be met almost in all environmental disputes. Jans (n 30) 91–92.

[35] Jans (n 30) 96.

[36] Mario Mendez, *The Legal Effects of EU Agreements* (Oxford Studies in European Law 2013), 64.

[37] Judgment of 5 February 1963, *Van Gend en Loos,* C-26/62, EU:C:1963:1.

if it is sufficiently clear, precise, and unconditional to be invoked by individuals.[38] Instead, the ECJ has developed specific criteria that the provision of an international agreement must satisfy in order to create direct effects.[39]

In *International Fruit Company*[40] the Dutch court requested a preliminary ruling from the ECJ, asking whether it had jurisdiction to rule on the validity of Community regulations in light of the provisions of the General Agreement on Tariffs and Trade (GATT). If so, the request continued, whether those regulations in question were contrary to the EU law. In its ruling the ECJ laid down characteristics needed to establish for international agreements to have direct effect: first, the international agreement in question must be capable of conferring rights on citizens of the EU and, second, that the agreement must bind the EU.[41] It went on to rule that the provisions at stake were not able for conferring rights for individuals due to their high flexibility.[42] In other words, the ECJ confirmed the established criteria of direct effect: the provisions of GATT were insufficiently precise and unconditional in a way that the obligations under it might differ and there they contain too great flexibility for conferring rights for individuals.[43] This has been further construed in the case law to mean that the provision in an international agreement concluded by the EU should not be subject, in its implementation or effects, to the adoption of any subsequent measure.[44] Later on, the ECJ added another condition: a provision of an international agreement is capable of creating direct effects where the nature and the broad logic of the international agreement do not preclude it.[45] The ECJ determines case-by-case whether

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[38] Paul Craig and Gráinne de Búrca, *EU law: texts, cases, and materials* (5th edn, Oxford University Press 2015), 192.

[39] Lenaerts, Maselis and Gutman (n 3) 462.

[40] Joined cases of 12 December 1972, *International Fruit Company II,* C-21/72 to C-24/72, EU:C:1972:115.

[41] Ibid, paras 7–8, 18–19.

[42] Joined cases of 9 September 2008, C-120/06 P and C-121/06 P, *FIAMM and Others*, EU:C:2008:476, para 21.

[43] Craig and de Búrca (n 38) 362.

[44] Judgment of 30 September 1987, *Demirel,* C-12/86, EU:C:1987:400, para 14.

[45] *FIAMM and Others* (n 42), para 110.

these conditions are being satisfied.[46] In regards to environmental agreements, the direct effect-criteria were applied for the first time in the *Etang de Berre I.*[47]

In *Slovak Bear* the national court asked whether Art 9(3) of the Aarhus Convention was capable of creating direct effects or how should the national courts treat it? [48] ECJ first reasoned the abovementioned criteria. It referred to the established case-law, stating that in order to have a direct effect, the nature of the international agreement should not preclude it, the provision should contain a clear and precise obligation, and it should not be subject, in its effects or implementation, to the adoption of any other measure.[49] Then it went on to rule that because only the members of the public that meet "the criteria, if any, laid down by national law" are entitled to the administrative or judicial remedies[50], the provision is, in its implementation or effects, subject to the adoption of a subsequent measure. Consequently, the ECJ held that Art 9(3) of the Aarhus Convention does not contain any clear and precise obligation capable of directly conferring rights to individuals and thus has no direct effect.[51]

However, emphasizing the principle of effectiveness, the ECJ ruled that Art 9(3) of the Aarhus Convention should not be "interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law". Next, the ECJ ordered the national court the Slovak Republic to interpret the national law "to the fullest extent possible" in the light of the objectives of the Aarhus Convention, yet only "in so far as concerns species protected by EU law, and in particular the Habitats Directive".[52] Indeed, it follows from the case law that where an act comes within the scope of the application of EU law, it must be construed as far as possible keeping with the international agreements. This type of requirement derives from the principle of primacy. The principle of consistent interpretation applies also the measures enacted by the EU institutions, such as the Habitats Directive. In those cases, the

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[46] Lenaerts, Maselis and Gutman (n 3) 462.

[47] Judgment of 7 October 2004, *Etang de Berre I,* C-239/03, EU:C:2004:598.

[48] *Lesoochranárske zoskupenie VLK* (n 23), para 37.

[49] Ibid, para 44.

[50] Art 9(3) of the Aarhus Convention.

[51] *Lesoochranárske zoskupenie VLK,* (n 48), paras 45,52.

[52] Ibid, paras 49–51.

consistent interpretation derives from the hierarchy of norms: international agreements rank higher than the secondary legislation.[53]

The principle of consistent interpretation can, in some cases, lead close to the consequences of the direct effect.[54] While the ECJ argued that Art 9(3) of the Aarhus Convention is not precise and clear enough to have direct effect, it is simultaneously precise and clear enough to oblige the national court to interpret its laws to enable an ENGO to challenge decisions of the Slovak Ministry. [55] In the EU, the principle of the consistent interpretation follows from the established case law concerning EU Directives. According to the principle, national courts are responsible for fulfilling their EU obligations by interpreting national law, in so far as it is given the discretion to do so under national law, in the light of the wording and the purpose of that directive.[56] The principle of consistent interpretation also applies when there is no implementing legislation that could be construed in light of the EU legislation.[57] As a result, the consistent interpretation is a powerful tool for ensuring the effective application of the international agreements the EU has acceded to in the national law.[58] There are, however, some limitations to this principle: first, it is up to national courts to decide whether the consistent interpretation leads to *contra legem* reading[59], meaning that it results in contradicting the norms of the present in the case. The obligation of the consistent interpretation also should not lead to the criminal liability of an individual.[60]

In practice, the conclusion of the *Slovak Bear* means that national courts are required to interpret their domestic procedural law in such a way as to enable ENGOs to challenge an administrative

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[53] Allan Rosas and Lorna Armati, *EU Constitutional Law: An introduction* (3rd edition, Hart Publishing 2018), 70–71.

[54] André Nollkaemper, *National Rules and the International Rule of Law* (Oxford University Press 2011), 139–140

[55] Jans (n 30) 96.

[56] Judgement of 10 April 1984, *Von Colson,* C-14/83, EU:C:1984:153, paras 26–28.

[57] Judgement of 13 November 1990, *Marleasing*, C-106/89, EU:C:1990:395, paras 7–8.

[58] Nollkaemper (n 54).

[59] Judgement of 16 December 1993, *Teodoro Wagner Miret v Fondo de Garantía Salarial*, C-334/92, EU:C:1993:945, para 22.

[60] Judgement of 8 October 1987, *Kolpinghuis Nijmegen*, C-80/86, EU:C:1987:431, para 14.

decision judicially – or a piece of EU law - because it is contrary to the EU environmental law.[61] The ECJ reached its ruling by highlighting that in the rationale of Art 9(3) of the Aarhus Convention was to ensure environmental protection and that, in the absence of EU rules, it was the duty of the national legal system, under their procedural autonomy, to ensure the procedural rules to safeguard the individual rights deriving from the EU law.[62] This conclusion has a significant effect on how the locus standi rules in environmental matters should be interpreted in the national courts.[63] What is more, it seems that as a matter of EU law, the Member States are obliged to interpret their laws in the light of the Aarhus Convention – even when there is no explicit provision in the national law. [64]

At the time the ENGO in the *Slovak Bear* case would not be able to have locus standi because ENGOs were classified as "interested parties" rather than as "parties to the proceedings". In the light of the consistent interpretation, the national courts of the Slovak Republic were obliged to construe the interested parties as the members of the public. Thus, the *Slovak Bear* has far-reaching consequences. In most Member States, the criteria for locus standi in environmental issues is defined generally, as given to persons with sufficient interest or whose rights are being impaired. According to the *Slovak Bear,* this needs to be amended by the national courts according to the Art 9(3) of the Aarhus Convention. Through the use of consistent interpretation, Art 9(3) of the Aarhus Convention applies to all European environmental law.[65] One can argue that the implementation of Art 9(3) in relation to acts and omissions of EU institutions are ensured in the EU legal order because, on the one hand, the ECJ has the jurisdiction to rule those cases, and on the other hand, the far-reaching principle of consistent interpretation, both first ruled in *Slovak Bear.* The indirect route to the ECJ is open for private applicants.

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[61] Mendez (n 36) 254.

[62] *Lesoochranárske zoskupenie VLK* (n 23) 47.

[63] Marcus Klamert, 'Dark matter: competence, jurisdiction and "the area largely covered by EU law" – comment on Lesoochranarske' [2012] 37 European Law Review 340, 344.

[64] Jans (n 30) 96.

[65] *Ibid.*

4.2.2 "The complete judicial system" – not as complete as it seems?

Already before the *Slovak Bear*, the ECJ favored broad locus standi rules for environmental NGOs before national courts – in contrast to strict rules for access to justice before the CJEU. In *Djurgården*[66] The ECJ rejected a decision of Swedish authorities to condition standing rules to environmental NGOs on a minimum number of members.[67] In her opinion on *Djurgården* AG Sharpston argues that any restrictions hindering the access to review procedures for NGOs must be rejected.[68] Indeed, a study shows that the case-law of the CJEU requiring the Member States to interpret their national law inconsistency with Art 9(3) of the Aarhus Convention has been a driving force in developing locus standi rules in many Member States.[69] This development is also of a significance when private applicants are challenging EU acts indirectly via national courts aiming to make the EU institutions and agencies to comply with their obligations under the Aarhus Convention.[70]

Nevertheless, not all agree with the argument that the effective judicial protection of private applicants is guaranteed by the indirect route to the ECJ via national courts. In his opinion of *UPA,* AG Jacobs criticized the idea of complete judicial protection.[71] In his view, it is inaccurate to call national courts "the ordinary courts of EU law", as the ECJ tends to do, as far as the validity of the EU measures is concerned for the national courts cannot declare measures of EU law invalid. National courts have only the competence to examine whether the private applicant's arguments raise sufficient doubts about the validity of the challenged measure to rationalize a request for a preliminary ruling from the CJEU. Another point is that private applicants do not have a right for access to the CJEU via the preliminary ruling procedure. Instead, the

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[66] Judgment of 15 October 2009, *Djurgården,* C-263/08, EU:C:2009:631.

[67] Ibid, para 45.

[68] Opinion of AG Sharpston, *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, Case C-263/08, EU:C:2009:421, 74.

[69] Jan Darpö, 'Effective Justice? Synthesis Report of the Study on the Implementation of Articles 9(3) and 9(4) of the Aarhus Convention in Seventeen of the Member States and of the European Union' in Jan Jans, Richard Macrory and Ángel-Manuel Moreno Molina (eds) *National Courts and EU Environmental Law* (Europa Law Publishing 2013).

[70] Bogojević (n 4) 19–20.

[71] Opinion of AG Jacobs, *Unión de Pequeños Agricultores v Council of the European Union,* Case C-50/00 P, EU:C:2002:197.

final say is on the judges of national courts.[72] The mere fact that the private applicant relies on the provision of an EU law does not mean that the national court – even of the last instance – shall make the reference to the CJEU.[73] National courts may not refer the case to the CJEU. They might also make mistakes in their preliminary assessment and therefore, erroneously decide not to refer the case.[74] Moreover, there are some concerns regarding the unity of the EU law due to the relatively recent interpretation of the CJEU on *acte clair* in cases *X and Van Dijk*[75] and *Ferreira da Silva e Brito and Others*[76]. Originated from the CLIFIT, the basic principle of the *acte clair* stipulates that when the correct application of EU law is clear enough, the national court of the last instance has no duty to refer the question for a preliminary ruling to the CJEU.[77] Some argue that the interpretation of the *and Van Dijk* and *Ferreira da Silva e Brito and Others* relaxed the principle and enabled national courts of the last instance too wide discretion in not requesting the reference. [78] Others have a slightly different reading of the cases, interpreting them as that the national courts of the last instance have the discretion to invoke *acte clair* even though a lower court had a different interpretation of the EU law in question. The ECJ mainly just clarified some questions arising from the *act eclair* principle, the argument goes, but maintained the normative content of it. All in all, different views on when the national court of the last instance can refrain from requesting a reference from the ECJ exist. Even the CJEU has not applied the criteria consistently.[79]

Although no reliable figures exist on how many cases in the Member States involve EU law the number of requests referred from different Member States varies considerably, which also supports the AG Jacobs' argument on the fact that there is no right for a remedy to the CJEU via

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[72] Ibid, paras 41–42.

[73] Craig and de Búrca (n 38) 471.

[74] Opinion of AG Jacobs (n 71), para 42.

[75] Joined cases of 9 September 2015, *X and Van Dijk*, C-72/14 and C-197/14, EU:C:2015:564.

[76] Judgment of 9 September 2015, *Ferreira da Silva e Brito and Others,* C-160/14, EU:C:2015:565.

[77] Judgment of 6 October 1982, *CLIFIT,* C-283/81, EU:C:1982:335, para 9.

[78] See an article on this issue written by Alexander Kornezov, 'The new format of the acte clair doctrine and its consequences' [2016] 53 Common Market Law Review 1317

[79]Agne Limante, 'Recent Developments in the *Acte Clair* Case Law of the EU Court of Justice: Towards a more Flexible Approach' [2016] 54 Journal of Common Market Studies 1384, 1395.

the preliminary ruling procedure. Part of the variation can be explained by differing locus standi rules in the Member States.[80] Another point is that structural issues, such as the size of the population, and institutional structures of litigation may explain some of the variations.[81]Besides, some national courts, like the German Constitutional Court and the Danish High Court, have been reluctant to accept the supremacy of the ECJ.[82] Indeed, the implementation of Arts 9(3) and 9(4) of the Aarhus Convention in the Member States have resulted in great diversity and been described as "diverging, random and inconsistent".[83]Even though the reference is made, national judges formulate questions included in the preliminary requests, which might sometimes disappoint private applicants. They might have a different view on what should be asked from the ECJ.[84]

Finally, AG Jacobs argues that there are also other disadvantages to the private applicants in the preliminary ruling procedure, such as additional costs and significant delays. The delays itself might be incompatible with the principle of effective judicial protection. All in all, it is plausible to argue that the indirect route to access justice is not capable of ensuring fully effective judicial protection for private applicants.[85] This was also the view of the Compliance Committee.[86]

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[80] Broberg and Fenger (n 1) 491–495.

[81] Ibid 488–489.

[82] Rosas and Armati (n 53) 66–67.

[83] Darpö (n 69) 174.

[84] Opinion of AG Jacobs (n 71), para 42.

[85] Ibid, para 40.

[86] Compliance Committee, 'Findings and recommendations of the Compliance Committee with regard to communication ACC/C/2008/31 (Part II) concerning compliance by the European Union' (2017) ACCC/C/2008/32 (EU), 59.

5 THE WAY FORWARD

5.1 The tension between the EU and the Aarhus Convention compliance mechanism

5.1.1 Of the compliance and the autonomy of the EU legal order

As illustrated above, the arguments of the Compliance Committee on alleging the non-compliance of the EU with its obligations under the third pillar, access to justice, of the Aarhus Convention are well-founded. The failure of the EU to comply with the Aarhus Convention results from, on one hand, restrictive direct locus standi criteria before the CJEU and, on the other, the fact that neither the internal review mechanism of the Aarhus Regulation nor the preliminary ruling procedure via national courts compensates the failure.[1] Moreover, did not allow challenging the provisions of the Aarhus Regulation that, in the light of the Aarhus Convention, can be regarded as shortcomings.

As mentioned in subchapter 2.2.1, the EU is generally committed to its international obligations. Moreover, according to Art 21(2)(f) of the TFEU, one of its aims in international relations is to preserve and improve the quality of the environment in order to ensure sustainable development. As the EU acceded to the Aarhus Convention, it became an internal part of its legal order.[2] On the other hand, the EU has been regarded as "a new kind of legal order" with "a particularly sophisticated institutional structure."[3] In this institutional framework, the ECJ is the highest authority to interpret the EU law, including the Aarhus Convention, and ensure its unity.[4] As the ECJ has in several cases ruled the role of Art 9(3) of the Aarhus Convention in this *sui*

[1] Compliance Committee, 'Findings and recommendations of the Compliance Committee with regard to communication ACC/C/2008/31 (Part II) concerning compliance by the European Union' (2017) ACCC/C/2008/32 (EU), 59, 122–123.

[2] Judgment of 30 April 1974, *Haegeman II,* C-181/73, EU:C:1974:41, paras 4–5.

[3] Opinion 2/13 of the Court (Full Court) of 18 December 2014, Opinion pursuant to Article 218(11) TFEU — Draft international agreement — Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454, para 158.

[4] Art 19 of TEU.

generis order, why should the institutions and bodies of the EU be bothered by external allegations on non-compliance? The question relates to the debate on the characteristics of European constitutionalism: as the EU matures, will it reproduce something called the regional branch of constitutionalism or open up for the possibility for global governance? To live up with its promise of the independent legal order, the EU needs to not only to address its relationship with its Member States but also to the international law.[5]

5.1.2 The new sovereigntist approach of the EU

Two institutions established by the Aarhus Convention are involved in the compliance mechanism: the MOP and the Compliance Committee.[6] The MOP consists of all the parties of the convention[7], meeting at least once every two years.[8] The Compliance Committee, in turn, consists of eight members of nationals of the parties or signatories who will serve in their capacity, declaring their impartiality at the beginning of each meeting.[9] Among the other tasks of reviewing the compliance[10], the Compliance Committee considers any submission, referral, or communication of alleged non-compliance.[11] The outcome of this consideration is a report that it delivers it alongside appropriate recommendations to the MOP for its consideration.[12] Meanwhile, the Compliance Committee can initiate specific measures towards the Parties.[13] These measures are rather advisory, such as recommendations and strategies on the implementation

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[5] Daniel Halberstam, 'Local, global and plural constitutionalism: Europe meets the word' in Gráinne de Búrca and Joseph Weiler (eds) *The worlds of European constitutionalism* (Cambridge University Press 2012), 156. See also Jack Goldsmith and Eric Posner, *The limits of international law* (Oxford University Press 2005), 186.

[6] Veit Koester, 'Review of Compliance under the Aarhus Convention: a Rather Unique Compliance Mechanism' [2005] 2 Journal for European Environmental & Planning Law 32, 35.

[7] UNECE, 'Decision I/1 rules of procedure' (2004) ECE/MP.PP/2/Add.2, rule 2(2).

[8] Art 10(1) of the Aarhus Convention.

[9] UNECE, 'Annex to the Decision I/7 on the Review of Compliance' (2004) ECE/MP.PP/2/Add.8, paras 1–2, 11. More on the requirements and nomination of the Compliance Committee, see Veit Koester (n 6) 3536.

[10] Ibid, para 14.

[11] Ibid, para 13(a).

[12] Ibid, para 35.

[13] Ibid, para 36.

of the Aarhus Convention.[14] It is worth noticing that the CJEU has not yet ruled on the nature of the findings of the Compliance Committee in the EU legal order. In *Mellifera e. V., Vereinigung,* the GC circumvented the question because the contested decision in the case was made before the Compliance Committee had approved its findings[15]

The MOP, in turn, seems to have the power to make binding decisions. Subject to Art 60 of VCLT[16], it can unequivocally suspend the special rights and privileges accorded to the party of the Convention. Additionally, Art 31(3)(a) of VCLT provides that parties to an international agreement can agree on an authoritative interpretation of its provisions. Provided that there is an endorsement, the findings can become an authoritative interpretation of the Aarhus Convention and producing legal effects. Also MOP, in order to ensure the compliance of the Party, to take specific measures.[17]

After the Compliance Committee found the EU in non-compliance the Commission suggested the EU Council to reject the findings in the following MOP in Budva, Montenegro[18], fearing that after the endorsement of the MOP they "would gain the status of official interpretation of the Aarhus Convention, therefore binding upon the Contracting Parties and the Convention Bodies".[19] The Commission's proposal was rejected by the Council.[20] Nevertheless, the Council managed to block the endorsement of the findings in the MOP.[21]

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[14] Ibid, paras 37(b), (c) and (d).

[15] Judgment of 27 September 2018, *Mellifera e. V., Vereinigung für wesensgemäße Bienenhaltung*, T-12/17, EU:T:2018:616, para 86.

[16] Art 60(2) VCLT stipulates as follows: "a material breach of a multilateral convention by one of the parties entitles: (a) the other parties by unanimous agreement to suspend the operation of the convention in whole or in part or to terminate it […] (i) in relations between themselves and the defaulting State."

[17] UNECE (n 9), paras 36–37.

[18] Commission, 'Proposal for a Council decision on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention regarding compliance case ACCC/C/2008/32' COM(2017) 366 final, 7.

[19] Ibid, 6.

[20] Council Decision (EU) 2017/1346 of 17 July 2017 on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention as regards compliance case ACCC/C/2008/31[2017] OJ L 186/15.

[21] See UNECE, 'Report of the sixth session of the Meeting of the Parties' (2017) ECE/MP.PP/2017/2, para 55.

Suffice to say, the EU institutions obviously did not want the MOP to endorse the findings – and succeeded in it. Other parties opposed and criticized the position of the EU but were unable to reach a consensus to endorse the Committee's findings. The MOP has always managed to endorse the findings by consensus – except when determining the compliance of the EU with Art 9(3) and Art 9(4) of the Aarhus Convention.[22] Determined to achieve consensus, the MOP postponed the decision on the case to its next ordinary session in 2021.[23] Taken into account the obligation of the EU to adhere to its international commitments under the 21 TEU it would seem to unsustainable if it did not comply with Art 9(3) of the Aarhus Convention until then. Some scholars argue that with a gradual development of EU external relations it has indeed shown its dependence on the global legal order: put differently, it is in its self-interest to be an active and respected global actor and therefore it is beneficial for it to follow the rules of the game.[24]

The Commission has admitted that the EU must adhere to its obligations, and it explores ways to adhere to the obligations under the Aarhus Convention. It has already taken up an initiative to identify the gaps in the system and make a comprehensive analysis of possible ways to achieve compliance. [25]However, the Commission also clearly expresses that the ways available for compliance are limited by the fundamental principles of the EU legal order and the system of its judicial review.[26] This expression illustrates the Commission's dedication to the approach of postnational constitutionalism in the relationship between the EU and international law. In the globalized world, interconnections between local and global spheres of law are getting blurred.[27] In this postnational era, it is possible to distinguish different independent approaches

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[22] Elena Fasoli and Alistair McGlone, 'The Non-Compliance Mechanism Under the Aarhus Convention as "Soft' Enforcement of International Environmental Law: Not So Soft After All! [2018] 65 Netherlands International Law Review 27, 42–45.

[23] UNECE (n 21), para 62.

[24] Ramses Wessel and Steven Blockmans, 'Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations – An Introduction' in Ramses Wessel and Steven Blockmans (eds) *Between Autonomy and Dependence: The EU Legal Order Under the Influence of International Organisations* (T.M.C. Asser Press 2013), 2.

[25] Commission, 'EU implementation of the Aarhus Convention in the area of access to justice in environmental matters' (Staff working document) Ref. Ares(2018)2432060 - 08/05/2018, 2–3.

[26] UNECE (n 21), para 15.

[27] Neil Walker, 'Beyond boundary disputes and basic grids: Mapping the global disorder of normative orders' [2008] 6 Oxford University Press 373, 378.

trying to solve the conflicting claims of authority.[28] As mentioned before, the EU, driven by the CJEU[29], has dedicated to the approach of postnational constitutionalism. However, another group of scholars flags for the constitutional pluralism in the EU, meaning that it is possible to each institutional normative order to acknowledge the legitimacy of the constitutional order of another while not acknowledging constitutional superiority over another. [30] This discussion began from the so-called Maastricht decision of the Federal Constitutional Court of Germany[31]. This approach is also transferable to the international legal order, but it is not the one adhered to in this thesis since the Compliance Committee did not clearly acknowledge the constitutional rules of the EU in some of its arguments, and, in return, the EU seems willing to settle the issue somehow. In terms to its external relations, the EU, and especially the ECJ, seem to have dedicated to the approach which *Halberstam* calls "new sovereigntist"[32]: the EU should comply with its international obligations only insofar as its own autonomously determined legal norms allow it to do so because the ultimate authority lies in its constitution.[33]

5.2 Possible initiatives for the EU to reach compliance

5.2.1 Amending the internal review procedure of the Aarhus Regulation

In the public consultation, the most private applicants supported the amendment of the Aarhus Regulation as the best option to make the EU comply with its obligations under Art 9(3) of the

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[28] Halberstam (n 5) 155.

[29] Allan Rosas and Lorna Armati, *EU Constitutional Law: An introduction* (3rd edition, Hart Publishing 2018), 2. The CJEU has been the motor of the constitutionalization in the EU, establishing the most crucial principles for the hierarchical order of the rule of law, such as direct effect, supremacy, and horizontal effect. See, eg. Eric Stein, 'Lawyers, Judges and the Making of a Transnational Constitution' American Journal of International Law 75 [1981] 1, 3.

[30] On the constitutional pluralism see and Neil MacCormick, *Questioning Sovereignty* (Oxford University Press 1999), 104.

[31] Judgment of 12 October 1993, *Manfred Brunner and Others v. The European Union Treaty,* Cases 2 BvR 2134/92 & 2159/92, English translation at [1994] 1 C.M.L.R. 57

[32] Haberstam illustrates this in his influential analysis of the joined cases of 3 September 2008, C-402/05 P and C-415/05 P, *Kadi,* EU:C:2008:461, see Halberstam (n 5), 156. See also Jack Goldsmith and Eric Posner, *The limits of international law* (Oxford University Press 2005).

[33] Halberstam (n 5) 156.

Aarhus Convention.[34] The amendment of the Aarhus Regulation is indeed the most suitable option for the EU to attain compliance because, first of all, it does not touch upon the jurisprudence of the CJEU and, second, it also fully satisfies the Compliance Committee. As illustrated in subchapter 3.2, Art 10 of the Aarhus Regulation is too restrictive to implement Art 9(3) of the Aarhus Convention seeing that it only allows environmental organizations meeting specific criteria to contest a measure of individual scope under environmental law.[35] It excludes natural persons, acts of general scope, and acts that have not been adopted under environmental law. Furthermore, the Art 2(2) of the Aarhus Regulation excludes some decisions from the review. The internal review mechanism does not satisfy the condition of fairness, as laid down in Art 9(4) of the Aarhus Regulation.

The EU could attain compliance by amending Art 10(2) of the Aarhus Regulation so that the internal review requests would be available for any ENGO or natural person that meets the criteria set out in other articles of the Aarhus Regulation. Then, for instance, a new Article 11a could be introduced where the criteria for entitlement for natural persons would be, as suggested by AG Jacobs in regard to individual concern – test, that all natural persons that, by reason of his particular circumstances, the administrative act has, or is liable to have, a substantial adverse effect on his interests.[36] The effect could be determined by the geographical proximity to the intervention and the severity of the likely impact.[37] Moreover, in order to achieve compliance, the definition of administrative act laid down in Art 2(1)(g) should be amended as follows: "administrative act means any measure, apart from the legislative acts, contravening environmental law, taken by a Community institution or body." It would mean that all acts that are not adopted under the legislative procedures laid down in Art 289 of TFEU, irrespective of whether adopted under environmental law or not, would be challengeable. Therefore, also the delegated

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[34] Out of 52 delivered feedbacks, altogether 40 entities and natural persons found the amendment of the Aarhus Regulation desirable. Noteworthy, none of the supporting entities were business or company associations. See all feedback in Commission, 'Feedback received: EU implementation of the Aarhus Convention in the area of access to justice in environmental matters' (Commission) <https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2432060/feedback_en?size=10&page=3&p_id=229569> accessed 27 May 2019.

[35] Arts 2(1)(g) and 10 of the Aarhus Regulation.

[36] Opinion of AG Jacobs, *Unión de Pequeños Agricultores v Council of the European Union,* Case C-50/00 P, EU:C:2002:197, para 60.

[37] Opinion AG Cosmas, *Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities,* Case C-321/95P, EU:C:1997:421*,* paras 104–105.

acts would be subject to the internal review procedure.[38] In addition, the exceptions under the Art 2(2) of the Aarhus Regulation should be reconsidered.

Even if the conditions of the internal review procedure were amended, it does not solely implement the criteria of the fair administrative review procedure, as illustrated in subchapter 3.2.4. Therefore, one could also consider amending the rules of the internal review procedure in a way that would exclude the involvement of the persons having interest in the contested act or omission. The EU could, for instance, create a particular body reviewing the requests consisting of more senior officials and members of Commission. The creation of such a body would perhaps also decrease the number of cases ending up in the following judicial review procedure.

In reality, the addressees of written replies or denials of written reply have had no admissibility problems relating to the restrictive interpretation of locus standi rules under Art 263(4) of TFEU. In established case law, the CJEU applies the admissibility rules of the Aarhus Regulation, not the jurisprudence on by whom the action for annulment can be raised under Art 263(4) of TFEU.[39] In a sense, Art 10 of the Aarhus Regulation has already created a parallel system to the direct access to the CJEU. Therefore, constitutional questions should not arise if its scope were widened to the natural persons and acts contravening environmental law.

5.2.2 A new administrative review procedure

The second best option is an establishment of a new administrative review procedure that implements Art 9(3) of the Aarhus Convention.[40] Art 257(1) of TFEU empowers the European Parliament and the Council to establish, in accordance with the ordinary legislative procedure, a specialized court to hear matters brought in particular areas as a court of first instance. They shall also determine the jurisdiction and rules regulating the organization of the specialized court.[41] It would then be possible to create an administrative court dealing with environmental

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[38] Art 290(1) of TFEU.

[39] Judgment of 1 July 2008, *Região autónoma dos Açores*, T-37/04, EU:T:2008:236, para 93. See also, eg. judgment of 13 January 2015, *Vereniging Milieudefensie,* C-401-403/12 P, EU:C:2015:4

[40] Hendrik Schoukens, 'Articles 9(3) and 9(4) of the Aarhus Convention on access to justice before EU courts in environmental cases: balancing on or over the edge of non-compliance?' [2016] 25 European Energy and Environmental Law Review 178, 195.

[41] Art 257(2) of TFEU.

disputes concerning acts and omissions of EU institutions that contravene EU environmental law. As the court would have their own rules, it would not be bound by the established locus standi criteria under Art 263(4) of TFEU. Admittedly, an establishment of such a court would be a major political decision but creating a new mechanism could arguably be easier than amending the Treaty or expecting the CJEU to amend its jurisprudence.[42]

Nevertheless, a creation of a new administrative court would be quite unrealistic, considering the recent structural reforms of the CJEU. Despite the criticism[43] The EU decided to double the number of judges in the GC and abolish the Court of First Instance (CFI) in order to ease the work-load of the GC.[44] Another option would have been the establishment of a specialized court adjudicating intellectual property law cases.[45] The ECJ, however, opposed this option and justified its viewed on, among other things, consistency of EU law.[46] It would be politically unrealistic to assume that the EU would invest in a new specialized court just a few years after ending up the discussion of a creating one.

5.2.3 Relaxation of the criteria of the action for annulment

The CJEU has, in several cases, ruled that the principle of the complete system of judicial protection does not overrule the strict interpretation of the action for annulment. In its view, the relaxation of the strict standing criteria under Art 263(4) of TFEU requires a Treaty amendment

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[42] Marc Pallaemaerts, 'Access to Environmental Justice at EU level: has the Aarhus Regulation improved the situation? In Marc Pallaemaerts (ed) The Aarhus Convention at Ten: interactions and tensions between conventional international law and EU environmental law (Europa Law Publishing 2011), 312.

[43] See, eg., Alberto Alemanno, and Laurent Pech, 'Thinking justice outside the docket: a critical assessment of the reform of the EU's Court system' [2017] 54 Common Market Law Review 129.

[44] See Regulation (EU, Euratom) No 741/2012 of the European Parliament and of the Council of 11 August 2012 amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto [2012] OJ L 228/1 and Regulation (EU,Euratom) 2016/1192 of the European Parliament and of the Council of 6 July 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the EuropeanUnion and its servants [2016] OJ L 200/137.

[45]Alberto Alemanno and Laurent Pech, 'Thinking justice outside the docket: a critical assessment of the reform of the EU's Court system' [2017] 54 Common Market Law Review 129, 134.

[46] CJEU President, 'Draft Amendments to the Statute of the Court of Justice of the European Union and to Annex I thereto, enclosed in Letter to the President of the European Parliament and to the President of the Council of the EU' (28 March 2011) Interinstitutional file: 2011/0901 (COD), 7.

by the legislative. [47] The relaxation of the standing criteria is the third suitable way to comply with the requirements under the third pillar of the Aarhus Convention. However, it would be quite unrealistic to see the Member States gathering together to reconsider amendment of a single Treaty article since they relatively recently did so in the context of the Lisbon Treaty, amending Art 263(4) of the TEU. Moreover, it would be politically difficult to convince the Member States to modify the highest law of the EU only to comply with its obligations under a multinational environmental agreement.[48]

Another point is that the reasoning of the CJEU is somewhat problematic. In reality, the judicatory has certain discretion on how to interpret legal provisions.[49]The CJEU has supplemented other parts of Art 263 of TFEU when required.[50] The AG Jacobs offered a primary example of an interpretation of "individual concern", stating that the person should be regarded as "individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests".[51] The ECJ did not, however, explain the reasons why it considered the interpretation of the AG Jacobs incompatible with the wording of Art 263(3) of TFEU.[52]

Indeed, Art 216(2) of TFEU stipulates that international obligations concluded by the EU are binding to the EU institutions – also to the CJEU. One could argue that the CJEU should interpret the locus standi rules so that it would be possible for it to review environmental cases. Indeed, in requiring consistent interpretation on behalf of the national courts in *Slovak Bear*[53].In the name of consistency of the legal argumentation, there is no reason why the ECJ itself would

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[47] Judgment of 25 July 2002, *UPA*, C-50/00P, EU:C:2002:462, para 44 and Judgment of 3 October 2013, *Inuit Tapiriit Kanatami*, C-398/13, EU:C:2013:625, para 98.

[48] Pallaemaerts (n 42) 312.

[49] Paul Craig and Gráinne de Búrca, *EU law: texts, cases, and materials* (5th edn, Oxford University Press 2015), 536–537.

[50] See, eg. judgment of 22 May 1990, *Chernobyl,* C-70/88, EU:C:1990:217

[51] Opinion of AG Jacobs (n 36), para 60. See also a diverting interpretation of the individual concern in environmental cases offered in opinion of AG Cosmas delivered on 23 September 1997, Case C-321/95P*, Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities*, 104–105.

[52] Craig and de Búrca (n 49).

[53] Judgment of 8 October 2011, *Lesoochranárske zoskupenie VLK,* C-240/09, EU:C:2011:125.

not be subject to interpret Art 9(3) of TFEU as to the fullest extent possible.[54] A more liberal approach to the direct access would also ease the workload of the ECJ because, unlike to the preliminary ruling requests, the GC, that now has more resources due to the doubling of the number of judges[55] , adjudicates the actions proceeded under Art 263 TFEU.[56] The reason for the excessive caseload before the ECJ is arguably the steep rise of preliminary references requested by the national courts.[57]

It is, however, quite unlikely that the ECJ would turn over its jurisprudence – its view on Art 263(4) is well established, and it would already have plenty of occasions to change its cause but refrained from doing so.[58] Moreover, even though it would relax the criteria of "direct and individual concern" or "direct concern" it is not guaranteed that it would suffice the MOP when it considers the issue in 2021 because the Compliance Committee also argued that there is no justification to exclude the review of the acts that entail implementing measures, as specified in the *Microban*[59].[60] In the context of the EU legal order, the reason for this interpretation is straightforward. If the applicant exercised any discretion when implementing an EU measure, the private applicant would be affected by the measure of the addressee rather than the EU. Thus, the private applicant should challenge the acts of the addressee instead.[61] If the CJEU radically changed that, it would go beyond the wording of the third limb of Art 293(4) of TFEU.

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[54] Pallaemaerts (n 42) 311 and Jans, 'Who is the Referee? Access to Justice in a Globalised Legal Order: ECJ: Judgment C-240/09 *Lesoochranárske zoskupenie* of 8 March 2011' [2011] 4 Review of European Administrative Law 85, 96–97.

[55] See Regulation (EU, Euratom) No 741/2012of the European Parliament and of the Council of 11 August 2012 amending the Protocol on the Statute of the Court of Justice of the European Union and Annex I thereto [2012] OJ L 228/1.

[56] Craig and de Búrca (n 49) 537.

[57] Paul Craig, *EU administrative law* (2nd edn, Oxford University Press 2012), 277.

[58] Pallaemaerts (n 42) 311 and Jans (n 54) 311.

[59] Judgment of 25 October 2011, *Microban,* T-262/10, EU:T:2011:623, para 27.

[60] Compliance Committee (n 1), para 79.

[61] Albors-Llorens, 'The Standing of Private Parties to Challenge Community Measures: has the European Court missed the Boat?', [2003] 62 Cambridge Law Journal 72, 75.

5.2.4 Improving the preliminary reference system

The Commission argues that the findings of the Compliance Committee "did not recognize that the EU system of remedies is already complete" due to the complete system of judicial protection secured by both direct and indirect routes to the CJEU. It plans to examine in detail how it is possible to challenge EU acts both directly and indirectly.[62] Many NGOs giving feedback for the Commission's plan objected to the need for the impact assessment, claiming that the Commission has been presented legal analysis and statistics on the issue for many years. [63] There are several studies[64], also conducted by the Commission[65], on the issue. Nevertheless, should hindering constructions to the access to justice be found - which in light of previous studies is highly likely[66] - one option for the Commission is to attempt to harmonize the locus standi rules before national courts again by enacting a new directive implementing Arts 9(3) and 9(4) of the Aarhus Regulation. This approach satisfies the ones who argue that the enhancing the broad standing rules before the national courts should be the focus because the national courts, too, are the guardians of the EU legal order..[67] Alternatively, the CJEU could consider strengthening the effect of the Art 9(3) of the Aarhus Convention by departing from its interpretation of direct effect in *Slovak Bear.*[68]

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[62] Commission (n 25) 1–2.

[63] See, eg., the feedback delivered by EuroNatur Foundation: Commission, 'Feedback from: EuroNatur Foundation' (*EuroNatur* 5 June 2018) <https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2432060/feedback/F11850_en?p_id=229569> accessed 27 May 2019.

[64] See, eg. Jan Darpö, 'Effective Justice? Synthesis Report of the Study on the Implementation of Articles 9(3) and 9(4) of the Aarhus Convention in Seventeen of the Member States and of the European Union' in Jan Jans, Richard Macrory and Ángel-Manuel Moreno Molina (eds) *National Courts and EU Environmental Law* (Europa Law Publishing 2013)

[65] See, eg. Commission, 'Access to justice in environmental matters' (*Commission*) < https://e-justice.europa.eu/content_access_to_justice_in_environmental_matters-300-en.do> accessed 27 May 2019 and Commission, 'Notices from European Union institutions, bodies, offices and agencies: Commission Notice on access to justice in environmental matters' OJ C275/1.

[66] See Darpö (n 64) 174.

[67] See, eg. Sanja Bogojević, 'Judicial Protection of Individual Applicants Revisited: Access to Justice through the Prism of Judicial Subsidiarity' [2015] 34 Yearbook of European Law 5.

[68] *Lesoochranárske zoskupenie VLK* (n 53).

Although strengthening the dialogue between the national courts and the CJEU through the preliminary ruling is desirable[69], this route for obtaining compliance arises several concerns. Therefore, it is the least suitable option to implement Art 9(3) of the Aarhus Convention. To start with, most of the feedback did not express support taking this path – albeit it is worth noticing that 32 out of 52 feedbacks delivered by NGOs. NGOs, in general, have the interest to promote broadening the route for the direct access to the CJEU.[70] The Commission is not bound for the result of the public consultation but neglecting the voice of the majority would strengthen the voices of those who claim that the European civil society is only appreciated in rhetoric speeches. [71]

In general, the Member States have not been willing to give up their procedural autonomy.[72] Therefore, even although the Commission would end up initiating a directive on locus standi rules, there is no guarantee that the Council – of the European Parliament - would approve it. Indeed, Art 9(3) was drafted in the way that it leaves some discretion to the Parties regarding the locus standi rules.

Thirdly, according to the VCLT, parties of an international agreement cannot "invoke the provisions of its internal law as a justification for the failure to perform an agreement".[73] As already explained in subchapter 2.2.1, the EU is not, and cannot become, a party of that international agreement[74] but seems to be open to give it a somewhat authoritative status in the EU

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[69] See, eg. Bogojević (n 67).

[70] Out of 52 successfully delivered feedback, 32 was submitted by an NGO, 12 by EU citizen, seven by a company or business association and one by an academic research institution. See Commission, 'Feedback received on: EU implementation of the Aarhus Convention in the area of access to justice in environmental matters' (*Commission*) <https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2432060/feedback_en?size=10&page=3&p_id=229569> accessed 27 May 2019.

[71] Stijn Smismans asked this question more than fifteen years ago in 'European Civil Society: Shaped Discourses and Institutional Interests' [2003] 9 European Law Journal 473, 490. For a more recent discussion, see, eg. Christian Marxsen, 'Open Stakeholder Consultations at the European Level – Voice of the Citizens?' [2015] 21 European Law Journal 257.

[72] Adam Lazowski and Steven Blockmans, *Research Handbook on EU Institutional Law* (Edward Elgar Publishing 2016), 435.

[73] Art 27 of VCLT.

[74] Art 1 of the VCLT. See also Ramses Wessel, 'The European Union as a Party to International Agreements: Shared Competences, Mixed Responsibilities', in Alan Dashwood and Marc Maresceau (eds) *Law and Practice of EU External Relations* (Cambridge University Press 2008), 179.

legal order.[75] The primary purpose for the rule not to invoke the provisions of internal law as a justification for the failure to perform obligations under international agreements is to ensure that the parties of the international agreement perform their Treaty obligations in good faith, as laid down in Art 26 of the VCLT. In other words, Art 26 confirms a fundamental rule that parties cannot escape their obligations under international law by referring to their domestic situation. The term "internal law" is not defined in the VCLT but has been generally given a broad definition: it means all written and unwritten laws, regulations, decrees, orders and decisions adopted within the institutional framework of the Party, by whatever authority, by whatever level. This means, inter alia, that the rules established by the judicial authority at the constitutional level are regarded as internal law from the international law point of view.[76] Consequently, the EU cannot, from the perspective of the international law, escape its obligations under the Aarhus Convention by the principle of "complete and coherent judicial system"[77]. The Compliance Committee does not approve it as a means of compliance.[78]

[75] Judgment of 10 December 2018, *Wightman,* C-621/18, EU:C:2018:1999.

[76] Oliver Dörr and Kristen Schmalenbach, 'Article 27. Internal law and observance of treaties. In Oliver Dörr and Kristen Schmalenbach (eds) Vienna Convention on the Law of Treaties. (Springer 2012), 453–456.

[77] Judgment of 23 April 1986, *Les Verts,* C-294/83, EU:C:1968:166.

[78] Compliance Committee (n 1), paras 58–59.

6. CONCLUSIONS

In this interconnected world, the EU accedes to more and more international agreements. Considering its special legal order, it is not entirely straight-forward. There are various aspects in the EU legal order, such as the extensive use of implementing measures, that might cause different interpretations when scrutinizing its compliance with various international obligations. Therefore, the EU institutions have a delicate task of balancing between preserving their autonomy and showing commitment to those obligations at the same time. This task should be taken into account already when acceding to international agreements. Further research on how the unique aspects of the EU legal order have been taken into account by various compliance mechanisms is needed.

Regarding the Aarhus Convention, the EU is in non-compliance with its obligations deriving from the third pillar, access to justice. The Aarhus Convention forms an internal part of the EU legal order, and therefore its obligations bind both the EU institutions and the Member States. As the Compliance Committee concluded, the criteria for the action for the annulment for private applicants is too restrictive to implement the Art 9(3) and Art 9(4) of the Aarhus Convention. Moreover, there are several shortcomings in the Aarhus Regulation, rending it incapable of implementing those obligations. Regarding the indirect route to justice, the ECJ has ruled that the Art 9(3) of the Aarhus Convention does not have a direct effect, but the principle of the consistent interpretation applies. However, the indirect route to the CJEU via the preliminary reference system does not compensate for the failure to implement the access to CJEU.

As a way forward, the EU could reach compliance in several different ways. The role of the CJEU as a guardian of the autonomy of the EU legal order is well established. Therefore, it seems to be up to the Commission to initiate actions that implement the Arts 9(3) and 9(4) of the Aarhus Convention. Amendments of the internal review mechanism of the Aarhus Regulation are preferred as the most suitable option to reach compliance. The second-best option is the establishment of a new review procedure. Third, the criteria for the action for annulment could be relaxed by amending the Treaty. Also, the CJEU could take a more relaxed approach to it. The Commission could enhance the indirect route to justice by several means, for instance,

by enacting a new directive. However, it is dubious whether this would bring the EU to compliance. Seeing that the EU is committed to its international law obligations, it shall strive for the compliance – taking into account the restrictions deriving from its *sui generis* legal system.

By delivering its findings, the Compliance Committee engaged in the continuous discussion of the EU locus standi rules, particularly in the field of environmental law. It will be seen whether the Commission, as the result of its assessment on the direct and indirect routes to justice, truly accepts these views coming outside of the EU legal order by accepting initiatives that align with the views of the Compliance Committee. Alternatively, the Commission could take the approach of enhancing the indirect route to the access to justice or seek to postpone the endorsement of the MOP in 2021. In the case of the latter, the approach of the EU towards its international obligations should be carefully re-examined.