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Access to Information and to Justice in EU Environmental Law: the Aarhus Convention

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IN EU ENVIRONMENTAL LAW:
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INTRODUCTION

A. General

Kofi Annan, then Secretary-General of the United Nations, described the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters¹ as the “most ambitious venture in the area of ‘environmental democracy’ so far undertaken under the auspices of the United Nations.”² Yet few outside the circle of European environmental law enthusiasts have any knowledge of this Convention. Given its major importance particularly as regards access to justice, the Convention deserves far wider attention, not least because it may have implications for European and national law outside the environmental field. Since the last few years have seen a raft of crucial legal developments within the EU in relation to the Convention, the time is ripe for an article on this topic for mainstream European lawyers.

Two other factors make this subject an irresistible choice for an article in this issue of the *Fordham International Law Journal*. First, Judge Schiemann made his name at the English Bar as a planning and environmental lawyer and later sat on a number of significant cases decided by the Court of Justice on the Convention. Second, this author has devoted most of the past four years to the Convention, and is thus well placed to discuss the recent developments in this field.

1. See Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, May 17, 2005, 2005 O.J. L 124/4 [hereinafter Aarhus Convention] (displaying the text of the Convention); see also *Public Participation, Environmental Policy*, UNITED NATIONS ECONOMIC COMMISSION FOR EUROPE (Mar. 28, 2013, 10:00 AM), <http://live.unecc.org/env/pp/welcome.html> (describing the Aarhus Convention).

2. ECON. COMM'N FOR EUR., THE AARHUS CONVENTION: AN IMPLEMENTATION GUIDE, at v, U.N. Doc. ECE/CEP/72, U.N. Sales No. E.00.II.E.3 (2000) (addressing the “global” significance of the Aarhus Convention) [hereinafter IMPLEMENTATION GUIDE], available at <http://www.unecc.org/index.php?id=21437>. The second edition which dates from April 2013 may be viewed at <http://www.unece.org/index.php?id=32764>

The Convention was negotiated under the auspices of the UN Economic Commission for Europe. Hence its three official languages: English, French and Russian. It was signed in Denmark's second city in 1998 and came into force in 2001. The European Union concluded the Convention by Council Decision 2005/370.³ When doing so, it did not enter any reservations but, as specifically required by Article 19(5) of the Convention, it did make a detailed declaration as to the extent of its own powers with regard to matters governed by the Convention.⁴

Moreover, all the Member States are also parties to the Convention.⁵ The last of the current Member State to ratify were Croatia⁶ and Germany (2007) and Ireland (2012). No less than 20 other countries – including three in the Caucasus and four in Central Asia, but excluding Russia and Switzerland – have also chosen to be bound by the Convention. The westernmost Contracting Party is Iceland, while the easternmost is Kazakhstan.

Article 1 of the Convention provides: “In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public

3. See 2005 O.J. L 124/1 art. 1 [hereinafter Council Approval of Convention] (approving the Convention on Access to Information on behalf of the Community), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:124:0001:0003:EN:PDF>. Article 17 of the Convention expressly provides that it was open for signature by “regional economic integration organizations constituted by sovereign States’ members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters.” Aarhus Convention, *supra* note 1, art. 17.

4. Council Approval of Convention, *supra* note 3, at Annex; Aarhus Convention, *supra* note 1, art. 19(5) (“In their instruments of ratification, acceptance, approval or accession, the regional economic integration organisations . . . shall declare the extent of their competence with respect to the matters governed by this Convention.”).

5. Since the entry into force of the Treaty of Lisbon, Article 4(2)(e) TFEU has made it plain that environmental policy is a competence shared between the EU and the Member States. However, that provision merely confirmed the pre-existing situation. See Consolidated version of the Treaty on the Functioning of the European Union art. 4(2)(e), 2012 O.J. C 326/47, at 51.

6. Croatia acceded to the EU on July 1 2013; see the Treaty of Accession (2012 O.J. L 112/10).

participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”

As is plain from the title of the Convention and Article 1, the Convention consists of three “pillars”: access to information (Articles 4 and 5); the participation of the public in the decision-making process (Articles 6 to 8); and access to justice (Article 9). As regards the first pillar, the draftsmen of the Convention drew heavily on Council Directive 90/313 on the freedom of access to information on the environment;⁷ but, since the first pillar went beyond that Directive, the Union replaced it by Directive 2003/4 of the European Parliament and the Council on public access to environmental information, prior to ratifying the Convention.⁸ Similarly, the Directive on environmental impact assessment (“the EIA Directive”)⁹ was the model for the second pillar.

This paper relates only to the implementation and the application of the Convention within the scope of the EU Treaties; what the Member States do in other fields will not be considered. At all events, the three pillars will now be examined in turn, concentrating on recent developments. The second pillar will only receive very brief coverage, precisely because the key developments in that field occurred in the 1980s and 1990s. Throughout this article, particular focus will be given to the case

7. See Council Directive 90/313/EEC on Freedom of Access to Information on the Environment, 1990 O.J. L 158/56.

8. See Council Directive 2003/4/EC on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC, 2003 O.J. L 41/26 [hereinafter Environmental Information Directive]. As we shall see, the first pillar was implemented, as regards the Union’s own institutions and bodies, by Articles 3 to 8 of Regulation 1367/2006 of the European Parliament and the Council on the application of the Aarhus Convention to Union institutions and bodies. See Council Regulation No. 1367/2006 on the Application of the Provisions of the Aarhus Convention, arts. 3–8, 2006 O.J. L 264/13 [hereinafter the Aarhus Regulation].

9. Council Directive 85/337/EEC on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. L 175/40, as amended [hereinafter the EIA Directive]. That Directive has now been replaced by Directive 2011/92 of the European Parliament and the Council (2012 O.J. L 26/1), a consolidating measure; and the Commission has recently issued a proposal for the amendment of the latter instrument. See Proposal for a Directive of the European Parliament and of the Council amending Directive 2011/92/EU on the Assessment of the Effects of Certain Public and Private Projects on the Environment, COM (2012) 628 Final (Oct. 2012).

law of the Court of Justice, not only for the reasons set out above: since the Union accounts for twenty-eight of the forty-six Contracting Parties to the Convention, the Court's judgments inevitably carry particular weight. This again shows the particularly close link between the Convention and Union law. At all events, another source of interpretation is the Aarhus Convention Compliance Committee.¹⁰ Accordingly, the penultimate section will contain a succinct overview of the work of that body in so far as it concerns the European Union. The final section is the conclusion.¹¹

Before considering any of these matters, however, we must turn our attention to two preliminary issues: the key definitions enshrined in the Convention; and the scope of EU environmental law.

B. Definitions

In the main, the Convention applies only to acts of "public authorities," a term defined in Article 2(2) in terms which are

10. In addition, the non-binding Aarhus Convention Implementation Guide is frequently of assistance. *Supra* note 2. However, the Court noted that this guide is not always reliable; and in the same case, Advocate General ("AG") Sharpston, pointed out that the guide lacks authoritative status. *Flachglas Torgau GmbH v. Federal Republic of Germany*, Case C-204/09, [2012] E.C.R. I ___, ¶¶ 35–36 (delivered Feb 14, 2012) (not yet published); Opinion of Advocate General Sharpston, *Flachglas Torgau GmbH*, [2012] E.C.R. I ___, ¶ 58 (delivered June 22, 2011). In any case, this guide was drafted in 2000 and is therefore outdated. While the new edition of the Implementation Guide (*supra*, note 2) is a notable improvement on the first, the same caveat applies.

11. The Kiev Protocol on Pollutant Release and Transfer Registers to the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters will not be considered in this article. 2006 O.J. L 32/56, available at http://www.unecce.org/fileadmin/DAM/cnv/pp/prtr/Protocol%20texts/PRTR_Protocol_e.pdf. The Union is a party to this protocol, but some Member States are not. Council Decision 2006/61 on the conclusion, on behalf of the European Community, of the UN-ECE Protocol on Pollutant Release and Transfer Registers, 2006 O.J. L 32/54; see Council Regulation No. 166/2006 concerning the establishment of a European Pollutant Release and Transfer Register, 2006 O.J. L 33/1.

The amendment to the Convention adopted by Decision II/1 of the Meeting of the Parties is not yet in force. See United Nations Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters, Report of the Second Meeting of the Parties, May 25-27, 2005, *Decision II/1 Genetically Modified Organisms*, U.N. Doc. ECE/MP.PP/2005/2/Add.2, Add. 1 (June 20, 2005), available at <http://www.unecce.org/fileadmin/DAM/cnv/documents/2005/pp/ecc/ece.mp.pp.2005.2.add.2.e.pdf>.

broad but expressly exclude “bodies or institutions acting in a judicial or legislative capacity.” This language was taken with a minor modification from Article 2(b) of Council Directive 90/313,¹² which was a source of inspiration for the first pillar of the Convention. Moreover, as the Court noted in *Flachglas Torgau*,¹³ this rule is rooted, insofar as bodies acting in their legislative capacity are concerned, in the provision in the EIA Directive which is now Article 1(4) of Directive 2011/92. According to that provision, that Directive does not apply to “projects the details of which are adopted by a specific act of national legislation, since the objectives of this Directive, including that of supplying information, are achieved through the legislative process.”¹⁴

However, only one provision in the Convention sheds any light on what is meant by “acting in a legislative capacity”: the first paragraph of Article 8, which requires the Contracting Parties to “strive to promote effective public participation . . . during the preparation by public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.” Although this is merely a best endeavours clause, its impact on the scope of the Convention is plain: this provision leaves no room for the suggestion that all acts of general application are to be regarded as “legislative” for the purposes of the Convention.

In *Flachglas Torgau*, the Court of Justice was in effect called upon by Germany’s highest administrative court to decide

12. See Council Directive on Freedom of Access to Information on the Environment, *supra* note 8, 1990 O.J. L 158 art. 2b, at 57.

13. See *Flachglas Torgau GmbH*, [2012] E.C.R. I____, ¶ 44 (delivered Feb 14, 2012).

14. This provision was to be found in Article 1(5) of the original EIA Directive, and is now to be found in Article 1(4) of Directive 2011/92. Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment, 2012 O.J. L 26/1, arts. 1(4), at 3. Where a parliament merely rubber-stamps a Bill without any proper transparency or debate, the exception in Article 1(4) does not apply. See *Boxus v. Walloon Region*, Case C-128/09, [2011] E.C.R. I____ (delivered Oct. 18, 2011, Grand Chamber) (not yet published) (Belgium); *Solvay v. Walloon Region*, Case C-182/10, E.C.R. I____ (delivered Feb. 16, 2012) (not yet published) (Belgium). On the case law of the Belgian Constitutional Court on access to justice under Article 9 of the Convention, see Bombois “La jurisprudence de la Cour constitutionnelle relative à l’article 9 de la Convention d’Aarhus garantissant l’accès à la justice en matière environnementale” 2013/2 *Aménagement et Environnement* 61.

whether the federal Government of that Member State had “acted in a legislative capacity” when it wrote internal memoranda, issued legal opinions and corresponded with the federal environmental authority on the legislative Bill which it had proposed and which became the federal Law on greenhouse gas emissions. The plaintiff company sought access to these documents pursuant to Article 4 of the Aarhus Convention and Directive 2003/4.¹⁵ Since the Bill in question was destined to become primary legislation, there was no doubt that it was “legislative” in nature for the purposes of Article 2(2); but it did not necessarily follow that the federal executive was “acting in a legislative capacity.” The Court recognised that Article 2(2) excludes bodies or institutions acting in a legislative capacity, whether or not they are legislative bodies. Accordingly, the Court held that a Member State was entitled to withhold such documents pursuant to Article 2(2), albeit only up to the end of the legislative process.¹⁶

The sequel is *Deutsche Umwelthilfe v. Federal Republic of Germany*,¹⁷ in which the Court is in effect asked to decide whether the German federal Government was acting in “a legislative capacity” when it conducted correspondence with the motor industry about a proposed regulation amending the

15. See Environmental Information Directive, *supra* note 8. When adopting this Directive, the Union exercised its right under Article 3(5) of the Convention to go beyond the requirements of the Convention. For instance, the final subparagraph of Article 2(2) of the Directive leaves it to the Member States to decide whether to exclude bodies or institutions acting in a legislative capacity from the definition of “public authorities.” See *id.* at 28.

16. In the absence of any provision on the temporal scope of this protection in either the Convention or Directive 2003/4, the Court reached this conclusion on the basis of the objectives of the provisions in question. In paragraph 69 of her Opinion in the same case, in which she reached the same conclusion, AG Sharpston drew an analogy with Case C-528/07P *API v Commission* [2010] E.C.R. I-8533; there, it was held that divulging written pleadings in court proceedings would no longer undermine the protection of such proceedings for the purposes of Article 4(2) of Regulation 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 O.J. L 145/43), once those court proceedings had been closed. Opinion of Advocate General Sharpston, *Flachglas Torgau GmbH v. Federal Republic of Germany*, Case C-204/09, [2012] E.C.R. I ___, ¶ 69 (delivered June 22, 2011) (not yet published).

17. *Deutsche Umwelthilfe eV v. Bundesrepublik Deutschland*, Case C-515/11 (pending case), available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=135468&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1146472>.

legislation on the energy consumption labelling of cars. This case differs markedly from *Flachglas Torgau* which concerned correspondence between the executive and other public authorities; and it also remains to be seen whether an act such as the German regulation in issue may be regarded as “legislative” for the purposes of the Convention and Directive 2003/4, whatever its status in domestic law.

In her Opinion, Advocate General Sharpston took the view that “an executive body is excluded from the exception in the first sentence of Article 2(2) of that directive when adopting regulatory instruments pursuant to enabling powers contained in a legal rule of a higher rank, unless the procedure for adopting such instruments guarantees a right of access to environmental information in such a way that the objectives of Directive 2003/4 have been achieved in a way comparable to that provided by the procedure for adopting legislative acts. The burden of demonstrating that that is so lies with the executive body seeking to rely upon that exception. It is for the national court to verify that the objectives of Directive 2003/4 have been satisfied, taking account in particular of the objectives of transparency and public scrutiny.”¹⁸

In any case, the better view is that bodies and institutions “acting in a judicial or legislative capacity” fall outside the scope of the Convention for all purposes.¹⁹ Having said that, among the matters defined in Article 2(3)(b) as constituting “environmental information” is “legislation . . . affecting or likely to affect the elements of the environment.”²⁰ It is not

¹⁸ *Id.* at para. 71.

19. In *Flachglas Torgau*, the plaintiff in the main case contended that Article 8 of the Convention constituted an exception to the rule in Article 2(2) excluding authorities acting in their legislative capacity, and thus applied to the preparation of legislative proposals. The Court dismissed this argument on the grounds that Article 8 is not expressed to apply to draft “laws.” [2012] E.C.R. I ___, ¶ 35ff (delivered Feb 14, 2012).

20. See Aarhus Convention, *supra* note 1, art. 2(3)(b), at 5-6. The definition covers information relating to (a) the “elements of the environment” (e.g. air, water, soil, biodiversity), (b) “factors, such as substances, energy, noise and radiation, and activities of measures, including administrative measures, environmental agreements, policies, legislation . . . affecting or likely to affect the elements of the environment” and (c) factors such as “the state of health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.” *Id.*

obvious how the apparent contradiction between this provision and the exclusion of authorities “acting in a legislative capacity” from the definition of “public authorities” can be resolved.

Turning to the words “environment” and “environmental”, it is anomalous that these terms are not defined, even though they are crucial to an understanding of the scope of the Convention. However, the definition of “environmental information” in Article 2(3) indicates that this is a broad concept.²¹

The concepts of “the public” and “the public concerned” are especially important; they are defined in Article 2(4) and (5) respectively.²² The crucial point here is that environmental non-governmental organisations (NGOs) are deemed to be part of the public concerned, so long as they meet “any requirements under national law.” Since breaches of environmental law are frequently of concern to the population as a whole without any particular persons being singled out, it is frequently very difficult, if not impossible, to enforce environmental law in judicial proceedings on the basis of the traditional rules of *locus standi*. In other words, the “environment has no voice of its own.”²³ The purpose of this reform, which is arguably the greatest innovation introduced by the Convention, is to

21. See *supra* note 20 and accompanying text (discussing the confines of the Convention’s definition of “environmental information”).

As discussed below, oversimplifying somewhat, human health is “environmental” where it is or may be affected by the “elements of the environment.” *Stichting Natuur en Milieu v. College voor de toelating van gewasbeschermingsmiddelen en biociden*, Case C-266/09, [2010] E.C.R. I-6191, ¶ 47.

22. See Aarhus Convention, *supra* note 1, art. 2(4)-(5), at 6. The first of these terms means “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups.” *Id.*, art. 2(4), at 6. The “public concerned” means: “the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.” *Id.*, art. 2(5), at 6. These definitions are to be read with Article 3(9) according to which the rights enshrined in the Convention are to be exercised “without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.” *Id.*, art. 3(9), at 6.

23. Ludwig Krämer, *The Environmental Complaint in the EU*, 6 J. EUR. ENVTL & PLANNING L. 13, 25 (2009).

surmount this obstacle by granting such NGOs to bring certain judicial proceedings “on behalf of” the environment.

A nice question which appears to have received little or no attention is to what extent, if at all, public authorities may qualify as part of “the public” or “the public concerned.” Although the definitions of “the public” and the “public concerned” in Article 2(4) and (5) are broad enough to include public authorities, the purpose of the Convention is essentially to confer rights on private parties and obligations on public authorities.²⁴ Having said that, local and regional authorities frequently take action in the interests of their residents and in so doing promote environmental protection.²⁵ For this reason, it is not necessarily helpful to have regard to the case law on Article 34 of the European Convention on Human Rights, according to which “any person, non-governmental organisation or group of individuals” may commence proceedings before the European Court of Human Rights. That Court has interpreted these terms so as to exclude “governmental organisations,” namely public authorities, including those which are autonomous of central government such as local and regional authorities.²⁶

C. The Scope of EU Environmental Law

As the reader will be aware, this article is only concerned with the Aarhus Convention insofar as it falls within the scope of Union law. But what is that scope? That question cannot be examined exhaustively here, but some assistance may be derived from the declaration issued by the Union at the time of

24. Article 9(3) of the Convention is an exception since it provides for rights of action against private persons as well as public authorities.

25. *Gemeinde Altrip (Municipality of Altrip) v. Rhineland-Palatinate* is a case in point. Case C-72/12 (pending case).

²⁶ *Radio France and Others v. France*, 2004-II Eur. Ct. H.R. at ¶ 81 (2004). The idea behind this principle is “to prevent a Contracting Party acting as both an applicant and a respondent party before the Court.” *Islamic Republic of Iran Shipping Lines v. Turkey*, 2007-V Eur. Ct. H.R. at ¶ 81 (2007). In any case, the wording of Article 34 ECHR is different from the definition of “the public” in the Aarhus Convention. See also *Bank Mellat v. Council*, Case T-496/10, [2013] E.C.R. I___, ¶ 36ff (judgment of Jan. 29, 2013) (not yet published) (declining to follow the approach of the Strasbourg Court).

concluding the Convention on the extent of its powers in relation to the matters covered by it.²⁷

Mention must also be made of the landmark judgment in the *Slovakian bears* case,²⁸ where an environmental NGO had sought to contest in the national courts the grant by the Slovakian government of licences to hunt brown bears. This prompted the national court to pose three questions for a preliminary ruling on Article 9 of the Convention, a provision which we shall examine when we consider the third pillar. The Court held that, since the species is protected under the Habitats Directive,²⁹ the case fell within the scope of EU law.³⁰

FIRST PILLAR: ACCESS TO INFORMATION

A. General

Ensuring the highest possible degree of transparency is a key aim of the Convention, as is plainly shown by several recitals in its preamble. The importance of transparency for enabling private parties to exercise their rights under the second and third pillars and to hold public authorities legally or politically to account can scarcely be exaggerated.³¹

27. See generally, Council Approval of Convention, *supra* note 3, at Annex.

28. *Lesoochránárske zoskupenie VLK v. Ministerstvo (Slovakian Bears)*, Case C-240/09, [2011] E.C.R. I-1255, ¶ 2.

29. Council Directive 92/43/EEC on The Conservation of Natural Habitats and of Wild Fauna and Flora, 1992 O.J. L 206/7, arts. 12, 16 (read with Annex IV(a) thereto).

30. *Slovakian Bears*, [2011] E.C.R. I-1255, ¶¶32-38; see D. Simon case note, *Europe Mai 2011 Commentaries* n° 5 p. 9-11; see also Marcus Klamert, *Dark Matter – Competence, Jurisdiction and “the Area Largely Covered by EU Law”: Comment on Lesoochránárske*, 37 E. L. REV. 340, 344 (2012); Christophe Hillion and Panos Koutrakos eds., *MIXED AGREEMENTS REVISITED - THE EU AND ITS MEMBER STATES IN THE WORLD* (2010).

31. In extreme cases, the European Court of Human Rights has found that a failure by a State to inform the public about the danger posed by a factory or plant was a breach of Article 8 of the European Convention on Human Rights, which relates to the right to privacy, family life and the home. *Guerra v. Italy*, 116/1996/735/932, (1998, Eur. Cl. H.R.); see *Tatar v. Roumania*, 67021/01 [2009]; NICHOLAS DE SADELEER, *COMMENTAIRE MÉGRET ENVIRONNEMENT ET MARCHÉ INTÉRIEUR 108-09* (3rd ed., Éditions de l'Université de Bruxelles, 2010); Ole W. Pedersen, *The Ties that Bind: the Environment, the European Convention on Human Rights and the Rule of Law*, 2010 16(4) EUR. PUB. L. 571, 575-76 (2010). Article 7 of the Charter of Fundamental Rights of the Union corresponds to Article 8 ECHR (see the Explanations on Article 7 2007 C303/20) and is therefore to be given the same meaning and scope, although it may go beyond Article 8 ECHR. See Charter of the Fundamental Rights of the European Union art. 52(3), 2010 O.J. C 83/389, at 402. However, in view of their general language,

This pillar is governed by Articles 3, 4 and 5 of the Convention. Article 4(1) requires “public authorities” to make available to “the public” copies of documentation held by or for them containing any “environmental information” requested.³² According to the same provision, the applicant need not state any particular interest; the same rule applies under Regulation 1049/2001 of the European Parliament and the Council regarding public access to European Parliament, Council and Commission documents, by virtue of Article 6(1) of that Regulation.³³ Article 4(3) and (4) sets out a series of exceptional cases in which a request for environmental information may be refused; there is never any obligation to refuse such a request. To a considerable extent, these exceptions match those enshrined in Article 4 of Regulation 1049/2001.

According to Article 4(4) (d) of the Convention, a national authority may decline a request for environmental information if disclosure would adversely affect “the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest.” However, the same provision then qualifies this exception to the right of access to information, in the following sentence which reads: “Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed.” For ease of reference, this will be dubbed the “emissions rule.”

On this point, the non-binding Aarhus Convention Implementation Guide³⁴ provides helpful guidance when it states that the word “emissions” is to be understood as emissions within the meaning of Article 3(4) of the Industrial Emissions

reliance on the ECHR and the Charter can usually be expected to lead to less satisfactory results than the Aarhus Convention and the EU legislation considered in the present article. See generally Nicholas De Sadeleer, *Enforcing EUCHR Principles and Fundamental Rights in Environmental Cases*, 2012 *NORDIC J. INT'L L.* 39.

32. See Aarhus Convention, *supra* note 1, art. 2(3)(b), at 5-6 (defining “environmental information” as defined in Article 2(3)). See *supra* note 20 and accompanying text.

33. See *supra* note 16, and accompanying text. In 2008, the Commission made a proposal for an amendment to this Regulation (COM (2008) 229 Final (April 2008)), which it subsequently revised following protracted negotiations with the European Parliament and the entry into force of the Treaty of Lisbon (COM (2011) 137 Final (March 2011)). Negotiations continue.

34. See IMPLEMENTATION GUIDE, *supra* note 2, at 83.

Directive”);³⁵ that Directive only covers emissions from factories and other industrial installations, not from products. This reading of the emissions rule makes good sense: since every product is bound to emit chemical substances at some stage of its life-cycle, the protection of business secrets provided for in Article 4(4)(d) would be wholly undermined if “emissions” were taken to include emissions from products. We shall return to this issue shortly.

Article 5, which relates to the collection and dissemination of environmental information by public authorities, need not detain us here.

The implementation of the first pillar by the Union with regard to information held by or for the Member States must be considered separately from the implementation with respect to information in the possession of the Union’s own institutions and bodies, since different provisions apply. As we shall see, in both cases, the Union has made ample use of the possibility set out in Article 3(5) of the Convention for Contracting Parties to grant broader access to information than is required by the Convention.

B. Information Held by or for Member States

As already mentioned, access to environmental information is now governed by Directive 2003/4. This instrument is supplemented by a host of provisions relating to different specific sectors, which cannot be considered here.³⁶ Attention

35. Directive 2010/75 of the European Parliament and the Council on industrial emissions (2010 OJ L334/17). This instrument replaces the Council Directive 2008/1/E concerning integrated pollution prevention and control, 2008 O.J. L 24/8 (replacing 1996 O.J. L 257/26) [hereinafter IPPC Directive].

36. The Court has accepted that Directive 2003/4 is not the only Directive by which the Union legislator had implemented the first pillar of the Convention: *Commune de Sausheim v. Azelvandre*, Case C-552/07, [2009] E.C.R. I-987, ¶ 52 (concerning Directive 2001/18/EC of the European Parliament and of Council on the deliberate release into the environment of genetically modified organisms, 2001 O.J. L 106/1 art. 25); see *Ville de Lyon v. Caisse des Depots et Consignations*, Case C-524/09, [2010] E.C.R. I-14115 (employing Directive 2003/87/EC of the European Parliament and the Council on greenhouse gas emissions trading, 2003 O.J. L 275/32 art. 19). A plethora of other provisions are scattered amongst a number of Directives. See Directive 1107/2009/EC of the European Parliament and the Council on the placing of plant protection products on the market, 2009 O.J. L 309/1 art. 63; Directive 2012/18/EC of the European Parliament and the Council on the control of major-

should be drawn to the unique or almost unique nature of these provisions: outside the environmental field, there is a dearth of legislation requiring the Member States to divulge information or documents – in stark contrast to the obligation imposed on the institutions of the Union by Regulation 1049/2001 and reinforced by Article 15(3) TEU and Article 42 of the Charter of Fundamental Rights of the Union.³⁷

A definition of “environmental information” is set out in Article 2(1) of Directive 2003/4. This definition is even more lengthy and detailed than that in Article 2(3) of the Convention³⁸ on which it is of course based and which itself is very broad.

Some light was shed on the meaning of this term by the ruling in *Stichting Natuur en Milieu*.³⁹ The case related to a request from an environmental NGO for access to studies consisting of field trials on residues of a particular plant protection product (“PPP”) on lettuce. This data had been submitted by a subsidiary of the Bayer group to the Dutch authorities with a view to their amending the maximum permissible residue for the PPP. The subsidiary maintained that these documents did not fall within the concept of “environmental information.” This argument was dismissed by the Court on the basis that the studies were carried out as part of a procedure for obtaining an authorisation of the PPP, the purpose of that procedure being precisely to prevent risks and hazards for humans, animals and the environment. The Court held that the documentation sought contained environmental information since this information “aims, by making it possible to verify the level at which the MRL was set, to limit the risk that

accident hazards involving dangerous substances, 2012 O.J. L 197/1 art. 22 [hereinafter *Seveso III Directive*]; see also EUROPEAN COMMISSION, REPORT FROM THE COMMISSION TO THE COUNCIL AND THE EUROPEAN PARLIAMENT ON THE EXPERIENCE GAINED IN THE APPLICATION OF DIRECTIVE 2003/4/EC On Public Access to Environmental Information, COM (2012) 774 Final, Information 774, ¶ 9 (Dec. 2012).

37. Charter of Fundamental Rights of the European Union art. 42, 2007 O.J. C 303/1, at 11.

38. See *supra* note 20 and accompanying text (discussing the confines of the Convention’s definition of “environmental information”).

39. Case C-266/09, [2010] E.C.R. I-6191; see *supra* note 21 and accompanying text (referring to *Stichting Natuur en Milieu* in support of the proposition that human health is “environmental” where it is or may be affected by the “elements of the environment”).

a component of biological diversity will be affected and the risk that those residues will be dispersed in particular in soil or groundwater . . .”⁴⁰ The Court emphasised that information relating to human health is “environmental information” only so long as it relates to, or may be affected by, the elements of the environment or factors or activities affecting or likely to affect those elements.⁴¹

Article 4 of the Directive sets out a series of circumstances in which a request for information “may” be refused, which corresponds to that in Article 4 of the Convention. However, a number of the exceptions set out in Article 4(2) of the Directive such as the protection of personal data and intellectual property relate to fundamental rights protected by the Charter (*in casu* Articles 8 and 17(2) thereof). Accordingly, there are strong grounds for thinking that, where the need to protect such interests clearly outweighs the public interest in divulging the information concerned, the public authorities are *compelled* to withhold such information. If so, then the word “may” in Article 4(2) of the Directive is to be understood to mean “must” in those instances.

The time has come to return to the “emissions rule.” As we noticed earlier, it is important to construe this rule narrowly if the protection of business secrets provided for in Article 4(4) (d) of the Convention is not to be wholly undermined. Within the Union, three further considerations arise:

First, account must be taken of the ruling in *Interseroh*, where the Court appeared to suggest that the protection of business secrets is covered by Articles 15, 16 and 17 of the Charter.⁴² While those provisions are subject to the general

40. Opinion of Advocate General Kokott, *Stichting Natuur en Milieu*, [2010] E.C.R. I-6191, ¶ 42.

41. *Id.* ¶ 40.

42. *Interseroh Scrap and Metals Trading GmbH v. Sonderabfall-Management-Gesellschaft*, Case C-1/11, [2012] E.C.R. I____, ¶ 43 (not yet published). Of these three articles of the Charter, Article 16, which relates to the freedom to conduct a business, appears to be the most relevant. *See generally*, Peter Oliver, *What Purpose does Article 16 of the Charter Serve?* in GENERAL PRINCIPLES OF EU LAW AND EUROPEAN PRIVATE LAW (Kluwer, forthcoming). Article 17 is applicable in so far as business secrets are to be regarded as property; for the purposes of the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) (1994 OJ L336/214), certain business secrets are treated as intellectual property (see Articles 1(2) and 39 of that Agreement). In

exception in Article 52(1), it is self-evident that this exception cannot be applied without good reason.

Second, the Union legislator has exercised its right under Article 3(5) of the Convention to adopt more stringent provisions than those enshrined in the Convention: the second subparagraph of Article 4(2) of Directive 2003/4 applies the emissions rule to a number of the exceptions to the right of access set out in the first subparagraph such as the confidentiality of the personal data of natural persons, quite apart from the protection of commercial and industrial secrets. Article 8 of the Charter protects the personal data of natural persons.

Third, the Union is a party to the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”),⁴³ Article 39(3) of which provides for the protection of data submitted with a view to obtaining market authorisation of pharmaceutical or agricultural chemicals products in certain circumstances. Although the scope of the latter provision is rather limited, it must still be observed.

To date, the Court has not ruled on this issue, but Advocate General Kokott has expressed her views on it on two occasions. In *Stichting Natuur en Milieu*,⁴⁴ she dismissed the above-mentioned reading of the emissions rule, preferring to define “emissions” to mean “the direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources into the air, water or land”.⁴⁵ In the circumstances, one might be forgiven for finding her position a little radical, although it should be said that the matters mentioned in the previous paragraph of the present article were not before the Court in that case. Also worthy of note is the statement in the same Opinion to the effect that the “emissions rule” applies to “information on the release [of emissions into the environment]

contrast, it is not clear that Article 15, which pertains to the right to choose an occupation and to engage in work, is in point.

43. Council Decision 94/800/EC Concerning the Conclusion on Behalf of The European Community, as Regards Matters Within its competence, of the Agreements Reached in the Uruguay Round Multilateral negotiations 1994 O.J. L 336/214. *See infra* note 44.

44. *See* [2010] E.C.R. I-6191.

45. *Id.* at ¶ 91.

as such.”⁴⁶ This appears to be an acknowledgement on the Advocate General’s part that the “emissions rule” must not be construed widely.

More recently, in *Ville de Lyon*,⁴⁷ the same Advocate General proved to be more sympathetic to a narrow reading of the emissions rule. She found that that rule only covered information about actual, not potential emissions. Consequently, the rule did not apply to information about greenhouse gas emissions licences owned by a particular person, because that person would not necessarily make use of those licences.

At all events, it is expected that the General Court will rule on the meaning and scope of the emissions rule in *Stichting Greenpeace Nederland and another v. Commission*.⁴⁸ As will now be explained, that case relates to documents held by the Commission and Directive 2003/4 itself is therefore not engaged; but that ought not to be of any consequence, since the emissions rule is also enshrined in the provisions governing documents held by the Union’s institutions and bodies.

C. Information Held by the Union’s Institutions and Bodies

At Union level, Regulation 1049/2001⁴⁹ applies as adapted by Articles 3 to 8 of Regulation 1367/2006 of the European Parliament and the Council on the application of the Aarhus Convention to Union institutions and bodies (“the Aarhus

46. *Id.* at ¶ 93.

47. See Case C-524/09, [2010] E.C.R. I-14115.

48. *Stichting Greenpeace Nederland v. European Commission*, Case T-545/11, [2011] E.C.R. I___ (pending). In this case, the applicant NGOs seek the annulment of a Commission decision refusing to divulge documents on an active substance contained in a plant protection product; the Commission maintains that these documents contain business secrets.

49. This Regulation has been extended to the Union’s various executive agencies. See e.g. Council Regulation No. 1907/2006 Concerning the Registration, Authorization and Restriction of Chemicals (REACH), 2006 O.J. L 396/1 [hereinafter REACH Regulation]. Thus, by virtue of Article 118(1) of the REACH Regulation of the European Parliament and the Council as amended (2006 OJ L396/1), it applies to the European Chemicals Authority, which administers REACH.

For the 2008 Commission proposal for recasting Regulation 1049/2001, see COM (2008) 229 Final (April 2008). Following protracted negotiations with the Parliament and the Council, the Commission revised its proposal: see COM (2011) 137, (March 2011). Negotiations are still under way.

Regulation”).⁵⁰ These provisions go well beyond the Aarhus Convention in one crucial respect: whereas documents emanating from public authorities acting in a legislative capacity fall outside the scope of the Convention, nothing in these Regulations requires or even permits documents to be withheld on these grounds. Indeed, the sixth recital in the preamble to Regulation 1049/2001 even states that wider access should be given to documents when institutions are acting in their legislative capacity.⁵¹

Furthermore, one of the effects of Article 6(1) of the Aarhus Regulation is to extend the “emissions rule” beyond the protection of business secrets so as to override the exceptions in Article 4(2) of Regulation 1049/2001 relating to the protection of intellectual property and the protection of inspections and audits. The proceedings in *Greenpeace Nederland*,⁵² in which a ruling on the meaning and scope of the emissions rule is anticipated, relates to these provisions.

SECOND PILLAR: INVOLVEMENT IN DECISION-MAKING

The second pillar of the Convention comprises Articles 6 to 8, of which Article 6 is by far the most important. Article 6 closely resembles the EIA Directive as it stood in 1998.⁵³ Article

50. The Aarhus Regulation, *supra* note 1, art. 1, at 27-28. Other specific measures on access to documents are to be found in a number of other Union acts, including Article 118 of the REACH Regulation. *Supra* note 49.

51. See Kingdom of Sweden and Maurizio Turco v. Council of the European Union, Case C-39/05P, [2008] E.C.R. I-4723, ¶ 46 (“The possibility for citizens to find out the considerations underpinning legislative action is a precondition for the effective exercise of their democratic rights.”); see also *Muñiz v. Commission*, Case T-144/05, [2008] E.C.R. II-0335.

52. Case T-545/11 (pending).

53. The EIA Directive, *supra* note 9; see DE SADELEER, COMMENTAIRE MÉGRET, *supra* note 31, at 167ff; JAN H. JANS & HANS H.B. VEDDER, EUROPEAN ENVIRONMENTAL LAW 346-54 (4th ed., 2012) (describing the EIA directive); LUDWIG KRÄMER, EU ENVIRONMENTAL LAW 155ff (7th ed., 2011); Bilun Müller, Die Öffentlichkeitsbeteiligung im Recht der Europäischen Union und ihre Einwirkungen auf das deutsche Verwaltungsrecht am Beispiel des Immissionschutzrechts (Nomos, 2010); ÁINE RYALL, EFFECTIVE JUDICIAL PROTECTION AND THE ENVIRONMENTAL IMPACT DIRECTIVE IN IRELAND (2009). Specifically on the case law, see Marc CLÉMENT, DROIT EUROPÉEN DE L'ENVIRONNEMENT (2d ed., 2012); EUROPEAN COMMISSION, ENVIRONMENTAL IMPACT ASSESSMENT OF PROJECTS: RULINGS OF THE COURT OF JUSTICE (2013) (discussing case law pertaining to the Convention), available at http://ec.europa.eu/environment/eia/pdf/eia_case_law.pdf.

6(1)(a) requires the Parties to carry out an EIA with respect to the projects listed in Annex I to the Convention, while by virtue of Article 6(1)(b) they are obliged to do likewise for other projects which “may have a significant impact on the environment.”⁵⁴

Article 7 requires Parties to make appropriate provision for the public to “participate during the preparation of plans and programmes relating to the environment.” Whereas Article 6 concerns the construction of individual projects such as airports, cables or roads, Article 7 concerns plans or programmes; these may be area plans covering a particular district or region, or plans covering the whole territory of a Contracting Party but relating to a specific subject-matter such as the reduction in the use of nitrates in agriculture. A number of the procedural provisions in Article 6 are incorporated into Article 7 by reference.⁵⁵

Article 8 of the Convention has already been discussed in Part I.B above.

54. Aarhus Convention, *supra* note 1, art. 6(1)(b), at 8. In relation to the EIA, the Aarhus Convention was preceded by the Espoo Convention, which was signed in 1991, came into force in 1997 and is still in force. See Espoo Convention on Environmental Impact Assessment in a Transboundary Context, 2008 O.J. L 308/33 [hereinafter The Espoo Convention], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:308:0033:0034:EN:PDF>. Like the Aarhus Convention, the Espoo Convention was negotiated under the auspices of the UN Economic Commission for Europe and the EU, and all its Member States are parties. The Union approved the Espoo Convention by a decision of June 27, 1997. The decision is unpublished but for a reference in an explanatory memorandum. See Council Decision on the Approval of the First and Second Amendments to the Espoo Convention, COM (2007) 470 Final (Aug. 2007). The Espoo Convention only requires the environmental impact assessment of projects which have significant adverse transboundary impact, and its enforcement mechanisms are relatively weak. See generally Jonas Ebbesson, *A Modest Contribution to Environmental Democracy and Justice in Transboundary Contexts: the Combined Impact of the Espoo Convention and the Aarhus Convention*, 20(3) REV. OF EUR. COMMUNITY & INT'L ENV'T'L L. 248 (2011).

55. Before the EU concluded the Aarhus Convention, the European Parliament and the Council adopted Council Directive 2001/42/EC on the Assessment of the Effects of Certain Plans and Programmes on the Environment, 2001 O.J. L 197/30. See also Article 2 of Council Directive 2003/35/EC Providing for Public Participation in Respect of the Drawing Up of Certain Plans and Programs Relating to the Environment, 2003 O.J. L 156/17 [hereinafter Public Participation Directive]. The Espoo Convention was approved on behalf of the Union by Council Decision of October 20, 2008 (2008 O.J. L 308/33) and came into force on July 11, 2010. See The Espoo Convention, *supra* note 54.

*THIRD PILLAR: ACCESS TO JUSTICE**A. General*

Access to justice is undoubtedly the *pièce de résistance* of the Convention and the area which gives rise to the most delicate questions.

All the provisions of the Convention relating to the third pillar are enshrined in Article 9. Paragraph 1 provides in essence that a review procedure must be made available to disappointed applicants for access to information. This review procedure is to be carried out “by a court of law or another independent and impartial body established by law.” If the Contracting Parties opt to confer jurisdiction over such review procedures on law courts, they must ensure that applicants also have “access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.”

Article 9(2) relates exclusively to projects covered by Article 6. Since this provision has been reproduced with only minor amendments in the Directives which we will consider below, there is no need to set out the terms of Article 9(2) itself. Suffice it to say at this juncture that the rights of action laid down by Article 9(2) are akin to those deriving from the principle of effectiveness enshrined in Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the Union, but with a major additional dimension: by virtue of Articles 2(5) and 9(2) of the Convention, these rights of action extend to environmental NGOs, as long as they fulfil certain conditions and are recognized by a Contracting State. As already mentioned, this is perhaps the greatest innovation introduced by the Aarhus Convention.

Article 9(3) reads as follows:

“In addition, and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down by 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 laws relating to the environment.”

This provision applies to all disputes relating to matters outside both the first pillar and Article 6. Thus even disputes relating to Article 7 are caught by Article 9(3), even though Article 7 is part of the second pillar. Unlike most of the provisions of the Convention, Article 9(3) applies not merely to the acts and omissions of public authorities, but also to those of private persons.

According to Article 9(4), “the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.”

Article 9(5) provides that the Parties are required to ensure that the public receives information on access to the review procedures. In addition, it requires them to “consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.”

At this juncture, it is once again necessary to consider the implementation of Article 9 by the Union at national level separately from implementation with regard to the acts of the Union’s own institutions and bodies.

B. At National Level

1. Article 9(1) of the Convention

Article 9(1) was implemented with respect to the Member States by Article 6 of Directive 2003/4. As required by Article 9(1) of the Convention, Article 6(1) of the Directive requires that in any event an administrative review procedure must be available and that it must be expeditious and either free of charge or inexpensive. In addition, Article 6(2) of the Directive imposes an obligation on Member States to “ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law.”

While the language of Article 6(2) is faithful to the wording of Article 9 of the Convention, it is arguable that this language cannot be taken at face value: insofar as it appears to allow Member States to preclude access to the courts altogether, it

would seem to be at variance with the principle of effectiveness enshrined in Article 19(1) TEU and the right of access to justice laid down in Article 47 of the Charter of Fundamental Rights of the Union.⁵⁶ We shall return to this issue in the next section.

2. Article 9(2) of the Convention

With a view to implementing certain provisions of the Convention, the Parliament and the Council adopted Directive 2003/35.⁵⁷

Article 3(1) inserted into Article 1(2) of the EIA Directive definitions of the terms “public” and “public concerned” which reproduce with minor adjustments those in Article 2(4) and 2(5) of the Convention.⁵⁸ Article 3(7) inserted a provision, Article 10a, into the EIA Directive; in the current EIA Directive, namely Directive 2011/92,⁵⁹ that provision has become Article 11. In view of its very considerable importance, it must reproduced here *in extenso*. This provision reads as follows:

“1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned:

- (a) having a sufficient interest, or alternatively;
- (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition;

have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts

56. See *Rosalba Alassini v. Telecom Italia SpA*, Case C-317/08, [2010] E.C.R. I-2213, ¶ 54 (“[T]he outcome of the settlement procedure is not binding on the parties concerned and thus does not prejudice their right to bring legal proceedings.”); *Union Nationale des Entraîneurs v. Heylens*, Case C-222/86, [1987] E.C.R. I-4097; *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case C-222/84, [1986] E.C.R. I-1651. For recent literature on the principle of effectiveness, see Anthony Arnall, *The Principle of Effective Judicial Protection in EU Law: an Unruly Horse?*, 36 *EUR. L. REV.* 51, 55-56 (2011); TAKIS TRIDIMAS, *THE GENERAL PRINCIPLES OF EU LAW* 418-76 (2d ed. 2006) (describing the principle of effectiveness).

57. See Public Participation Directive, *supra* note 55.

58. See Aarhus Convention, *supra* note 1, art. 2(4)-(5). For definitions see *supra* note 20 and accompanying text.

59. The EIA Directive, *supra* note 9.

or omissions subject to the public participation provisions of this Directive.

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.

3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any non-governmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.

4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

5. In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.”⁶⁰

Article 4(4) of Directive 2003/35 inserts the same provision *mutatis mutandis* into the IPPC Directive.⁶¹ For ease of reference,

60. *Id.* art. 11. These provisions closely match Article 9(2), (4) and (5) of the Aarhus Convention. However, for some reason, Article 11 does not reproduce the part of Article 9(4) of the Convention which lays down a right to interim relief in appropriate cases. But it was never in doubt that such relief must be available in appropriate cases. See *The Queen v. Secretary of State for Transport ex parte: Factortame*, Case C-213/89, [1990] E.C.R. I-2433; *Unibet Ltd. v. Justitiekanslern*, Case C-432/05, [2007] E.C.R. I-2271, ¶ 67 (finding that this right was held to form part of the principle of effectiveness). This has now been confirmed in *Jozef Križan and Others v. Slovenská inšpekcia životného prostredia*, Case C-416/10, [2013] E.C.R. I ___, ¶¶ 105 (delivered Jan. 15, 2013) (not yet published) (stating that this right is enjoyed under the EIA Directive).

61. See Public Participation Directive, *supra* note 55, art. 4(4). See IPPC Directive, *supra* note 35; Seveso III Directive, *supra* note 36, arts. 15(1), 23(b) (incorporating article 11 of the EIA Directive).

we shall consider only the provision which is now Article 11 of the EIA Directive.

Like Article 6(2) of Directive 2003/4, Article 11(1) purports to give Member States a choice of forum: such disputes can either be heard by courts of law or by other “independent and impartial [bodies] established by law.” Again, this language comes straight from Article 9 of the Convention and again it is questionable whether access to national courts can lawfully be excluded in view of the principle of effectiveness enshrined in Article 19(1) TEU and of the right of access to justice laid down in Article 47 of the Charter.

However, this time we also have the first subparagraph of Article 11(4), which has no counterpart in Directive 2003/4 and which reproduces the final subparagraph of Article 9(2) of the Convention. Conveniently enough, the Court held in *Alassini*, a case quite unconnected with the environment and concerning disputes between telephone companies and their customers, that it is compatible with the principle of effectiveness for a Member State to require parties to attempt to reach a settlement out of court prior to commencing judicial proceedings, provided that certain conditions are met: the mediation procedure must be reasonably affordable, speedy and generally accessible.⁶² These conditions are strikingly similar to those set out in the second subparagraph of Article 11(4). What is more, there is every reason to suppose that the principle in *Alassini* is also to be applied to a compulsory prior procedure of administrative review. Accordingly, the first subparagraph of Article 11(4) appears to be fully compatible with the principle of effectiveness.

According to the second and third sentences of Article 11(3), environmental NGOs are deemed to have *locus standi*, whether the Member State opts for the test in Article 11(1)(a) or that in Article 11(1)(b). This reflects Articles 2(5) and 9(2) of the Convention.⁶³

In recent years, the Court has delivered a raft of judgments on this Article, which are as important as they are interesting.

62. Case C-317/08 [2010] E.C.R. I-2213, ¶ 45 (“[S]uch legislation, in so far as it ensures that out-of-court procedures are systematically used for settling disputes, is designed to strengthen the effectiveness of the Universal Service Directive.”).

63. For the text of Article 2(5) of the Convention, see *supra* note 20.

Before considering this case law, it is as well to point out that the Court ruled in *Delena Wells*⁶⁴ that the principle of effectiveness required Member States to ensure that an adequate judicial remedy was available in the event of a failure to carry out an EIA required by the EIA Directive – even though the facts arose before Directive 2003/35 had been enacted. According to this ruling, wherever possible, the national court should revoke or suspend the development consent or, failing that, it appears to suggest that compensation must be awarded.⁶⁵ We shall now focus on a number of judgments delivered since the deadline for implementing Directive 2003/35 expired.

Consequently, subject to one major exception, Article 11 did not break new ground in Union law: it merely lent greater precision to the obligation on Member States to respect the principle of effectiveness in relation to the environmental impact assessments. That exception is the standing conferred on environmental NGOs to bring judicial proceedings in the interests of the environment.

*Mellor*⁶⁶ raised the issue as to whether a so-called “screening decision” taken under the EIA Directive must be accompanied by a statement of the reasoning on which it is based. Projects falling within Annex I to that Directive require an EIA *per se*, whereas those caught by Annex II only require an EIA if, by virtue of their nature, size or location, they are likely to have significant effects on the environment. Where the Member State evaluates the need for an EIA for Annex II projects on a case by case basis, that is known as a “screening decision.” In *Mellor*, the competent English authority had granted planning permission

64. *The Queen on the Application of Delena Wells v. Secretary of State for Transport*, Case C-201/02, [2004] E.C.R. I-723.

65. *Id.* at ¶ 66 (stating that a Member State is “required to make good any harm caused by the failure to carry out an environmental impact assessment..”); see *Leth v. Austria*, Case C-420/11, [2013] E.C.R. I____ (delivered Mar. 14, 2013) (not yet published). The findings resulting from an EIA are not binding, as the responsible body is merely bound to take those findings into account in the development consent procedure. Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment, 2012 O.J. L 26, art. 8. Thus, generally speaking, where a project is realised without the requisite EIA, it is not obvious that a causal link can be established between the breach of the EIA Directive and any damage or less resulting from the project, as the Court recognised in *Leth*.

66. *Mellor v. Secretary of State for Communities and Local Government*, Case C-75/08, [2009] E.C.R. I-3799.

for a particular project some weeks after the deadline for implementing Directive 2003/35 had expired, without making available either the requisite screening decision or the reasons on which it was based.

As the reader will be aware, Article 41(2)(c) of the Charter of Fundamental Rights read with Article 41(1) requires the institutions and bodies of the Union to state the reasons on which their legal acts are based; but these provisions are not expressed to apply to the Member States.⁶⁷ Moreover, some EU legislative provisions require certain acts of the Member States to be reasoned;⁶⁸ but screening decisions are not governed by any such provision. Consequently, it is necessary to cast our minds back to 1987 when the Court delivered its judgment in *Heylens*.⁶⁹ In that case, which was quite unrelated to environmental law, it was held that, for national courts to be in a position to carry out effective judicial control, either the individual decision of a national authority must contain the reasons on which it is based or those reasons must subsequently be communicated to the person concerned.⁷⁰

In *Mellor*, Advocate General Kokott found that the statement of reasons must in principle be communicated to the person concerned at the same time as the measure which adversely affects him.⁷¹ In support of this proposition, she relied

67. In view of its specific wording, Article 41 constitutes an exception to Article 51(1), which states that the Charter extends to the Member States when they act within the scope of EU law. Nevertheless, the Court appears to consider that the Member States, when so acting, are bound by Article 41(2)(a) laying down a person's right to be heard, before they take an individual measure which would affect him or her adversely – or more probably by a general principle to the same effect. See Case C-277/11 *M.M. v Minister for Justice* (judgment of 22 November 2012), paras. 81ff., and 36 of AG Kokott's Opinion in Case C-276/12 *Sabou* (pending).

68. Some examples are to be found in Opinion of Advocate General Jacobs, *Mellor*, [2009] E.C.R. I-3799, ¶ 45.

69. *Union Nationale des Entraîneurs v. Heylens*, Case C-222/86, [1987] E.C.R. I-4097.

70. *Id.* ¶ 15 (“[T]he competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request.”); *Vlassopoulou v. Ministerium für Justiz, Bundes*, Case C-340/89, [1991] E.C.R. I-2357, ¶ 22 (stating that “the person concerned must be able to ascertain the reasons for the decision.”); *Sodemare and others v. Regione Lombardia*, Case C-70/95, [1997] I-3395, ¶ 19, 20 (holding that this requirement does not extend to “national rules of general scope.”).

71. Opinion of Advocate General Kokott, *Mellor*, [2009] E.C.R. I-377, ¶ 45.

on a wealth of case law to the effect that in principle the absence of an adequate statement of reasons could not be cured during the proceedings before the Court of Justice or the General Court, as the case may be.⁷² The Court confirmed its position in *Heylens*, finding that it was unnecessary for the screening decision itself to contain the reasoning, adding: “However, if an interested party so requests, the competent administrative authority is obliged to communicate to him the reasons for the determination”⁷³

More recently, the Court ruled to the same effect in *Solvay*,⁷⁴ which concerned the final decision granting development consent. The Belgian Constitutional Court asked whether Article 6(9) of the Convention and Article 9(1) of the EIA Directive required such an act to contain all the information necessary to establish whether it was based on an adequate prior evaluation. The wording of Article 6(9) of the Convention, which had not been mentioned in *Mellor*, arguably suggests that the statement of reasons must be made available at the same time as the decision itself;⁷⁵ and the same might perhaps be said of Article 9(1) of the EIA Directive which implements that provision in Union law. Nevertheless, ruling without the benefit of an Opinion from the Advocate General, the Court reached the same conclusion in *Solvay* as in *Mellor*.

For the public authorities, the rulings in *Mellor* and *Solvay* present an obvious advantage: those authorities are not put to

72. *Id.* at n.45

73. *Mellor v. Secretary of State for Communities and Local Government*, Case C-75/08, [2009] E.C.R. I-3799, ¶ 61. This ruling might appear to be a step back from the judgment in *Commission v. Italy*. Case C-87/02, [2004] E.C.R. I-5975, ¶ 49 (“[A] decision by which the national competent authority takes the view that a project’s characteristics do not require it to be subjected to an [EIA] must contain or be accompanied by all the information that makes it possible to check that it is based on adequate screening.”). See *Mellor*, [2009] E.C.R. I-3799, ¶ 56 (declining to confirm *Commission v. Italy* on the grounds that it “does not follow ... that a determination not to subject a project to an EIA must, itself, contain the reasons for which the competent authority determined that an assessment was unnecessary.”).

74. *Solvay and Others v. Région wallonne*, Case C-182/10, [2012] E.C.R. I____ (delivered February 16, 2012) (not yet published).

75. Aarhus Convention, *supra* note 1, art. 6(9), at 9 (providing that “Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision *along with the reasons and considerations on which the decision is based.*”) (emphasis added).

the trouble and expense of supplying the reasoning unless an interested party requests it. The only difficulty posed by these two rulings concerns timing: if the opponent of the project requests the reasoning promptly but the public authority fails to supply it with due speed, it may be impossible or at least extremely difficult for the opponent to commence judicial proceedings within the limitation period set in national law. Plainly, that would run counter to the principle of effectiveness.⁷⁶ However, it seems clear that the limitation period cannot begin to run until the putative litigant is informed of the content of the act concerned and is given sufficient knowledge of the reasoning on which it is based to enable him or her to reach an informed decision as to whether or not to contest it.⁷⁷ Broadly speaking, that approach appears to be in line with that followed by Advocate General Kokott in *Mellor*.

At all events, the Court's rulings in *Djurgården*⁷⁸ and *Trianel*⁷⁹ have understandably attracted far more attention.

Djurgården related *inter alia* to a provision of Swedish law according to which the only NGOs entitled to seek judicial review of a decision on development consent were those with at least 2,000 members. Sweden acknowledged that only two NGOs in the entire country met this requirement. As already mentioned, it follows from what are now Articles 1(2) and 11 of the EIA Directive that environmental NGOs "meeting any requirements under national law" are to be regarded as having *locus standi* to challenge such a decision. Although this language does not in terms fetter the discretion of the Member States in

76. *Manfredi and Others v. Lloyd Adriatico Assicurazioni SpA and Others*, Joined Cases C-295-298/04, [2006] E.C.R. I-6619 (prescribing limitation periods for seeking compensation for harm caused by an agreement or practice prohibited by the principle of effectiveness).

77. In effect, that is the position taken by the Court of Justice and the General Court in relation to what is now the final paragraph of Article 263 TFEU. *Könecke v. Commission*, Case 76/79, [1980] E.C.R. 665, ¶ 7; *Evropaiki Dynamiki v. Commission*, Case T-442/11, [2012] E.C.R. I____, ¶ 79 (delivered October 12, 2012) (not yet reported).

78. *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholmskommun genom dess marknämnd*, Case C-263/08, [2009] E.C.R. I-9967, with annotation by *Áine Ryall*, 47 COMMON MKT. L. REV. 1511 (2010).

79. *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg*, *intervening party: Trianel Kohlekraftwerk*, Case C-115/09, [2011] E.C.R. I-3673.

any way, the Court held in effect that the Member States could not impose requirements which frustrated the purpose of these provisions.

The Court recognised that Article 11 gives Member States some latitude in laying down the conditions under which NGOs may bring judicial proceedings; but it also pointed out that, according to that provision, Member States must ensure “wide access to justice.”⁸⁰ The Court found it to be “conceivable” that such a minimum membership requirement might be “relevant” in order to ensure that the NGO “does in fact exist and that it is active.”⁸¹ However, the number of members required could not be fixed at such a level that it ran counter to the objectives of the EIA Directive and in particular the objective of “facilitating judicial review of projects which fall within its scope.”⁸²

Moreover, it did not suffice for members of the public concerned to be allowed to participate in the EIA process in conformity with Article 6(4) of the Directive: they must also enjoy access to the courts, if need be.⁸³ Finally, the Court pointed out that the Directive does not exclusively concern projects on a national or regional scale, but also projects more limited in size which locally based associations are better placed to deal with; and it concurred with AG Sharpston’s finding that the Swedish rule in issue deprived such local associations of any judicial remedy.⁸⁴

80. *Djurgården*, [2009] E.C.R. I-9967, ¶ 45.

81. *Id.* ¶ 47.

82. *Id.*

83. *Id.* ¶ 48.

84. *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd*, Case C-263/08, [2009] E.C.R. I-9967, ¶ 50 (referring to Advocate General’s opinion).

Frequently, Member States require NGOs to have existed for a certain period of time before they can exercise rights under Articles 1(2) and 11 of the EIA Directive; the purpose is to avoid conferring rights on an association formed on an *ad hoc* basis to combat a particular project. Where the requisite period of activity is two years or less, it is hard to argue that such a condition is repugnant to the Directive: the Aarhus Regulation itself requires NGOs to have existed for more than two years if they are to seek an internal review of an administrative act pursuant to Article 10 of that Regulation. *See supra* note 47; *infra* note 115 and accompanying text. However, if a Member State were to lay down a significantly longer minimum period, that would surely be contrary to the Directive on the same basis as the Swedish measure in issue in *Djurgården*. Ryall argues that a three-year minimum period is too long. Ryall, *supra* note 78, at 1520.

As to *Trianel*, the ruling by the Grand Chamber has been very much in the limelight, at least in Germany.⁸⁵ *Trianel* was a company which intended to construct a power station close to five areas designated as special areas of conservation within the meaning of the Habitats Directive.⁸⁶ The plaintiff before the national court, an environmental NGO which was duly recognised in German law pursuant to Article 2(5) of the Convention and Article 1(2) of the EIA Directive, contested the decision of the local authority to grant a permit for the operation of the power station, on the basis that it was in breach of the Habitats Directive and various other environmental laws.⁸⁷ However, the NGO was unable to show that its own rights had been impaired in consequence of the alleged illegality of the contested act, as required by German law; and it therefore lacked *locus standi* in national law. The German court therefore made a reference for a preliminary ruling in which it asked in effect whether this requirement was compatible with what is now Article 11 of the EIA Directive.

Following Advocate General Sharpston, the Court of Justice replied in the negative. It held that Member States cannot, when determining what rights can give rise, when infringed, to an action concerning the environment “deprive environmental protection organisations which fulfil the conditions laid down in Article 1(2) of [the EIA Directive] of the opportunity of playing the role granted to them both by [that Directive] and by the

85. Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg, *intervening party: Trianel Kohlekraftwerk*, Case C-115/09, [2011] E.C.R. I-3673. The sheer wealth of case notes on this judgment is a testimony to its importance, e.g., Appel, 33 *NATUR UND RECHT* (NUR) 414 (2011); Gassner NUR 37 (2012); Brita Henning, *Erweiterung der Klagerechte anerkannter Umweltverbände – Chance auf mehr Umweltschutz oder Investitionshindernis?*, 38 *NEUE JURISTISCHE WOCHENSCHRIFT* 2765 (2011); Eva Julia Lohse, *Surprise? Surprise! – Case C-115/09 (Kohlekraftwerk Lunen) – A victory for the Environment and a Loss for Procedural Autonomy of the Member States?*, EUR. PUB. L. 249 (2012); Meitz 33 NUR 420 (2011); Bilun Müller, *Access to the Courts of the Member States for NGOs in Environmental Matters under European Union Law*, 23 *J. ENVTL. L.* 505 (2011); Alexander Schmidt, Zschiesche and Tryjanowski (2012) 34 *NuR* 77, *Schwerdtfeger* 2012 *Europarecht* 80.

86. Council Directive 92/43/EEC on the Conservation of Natural Habitats and Wild Fauna and Flora, 1992 O.J. L 206/7.

87. The referring court and the Court of Justice worked on the premise that the case fell under Article 9(2) of the Convention and what is now Article 11 of the EIA Directive, not Article 9(3) of the Convention.

Aarhus Convention.”⁸⁸ While it was open to Member States to require individuals to show that they personally had suffered the impairment of a right, the final sentence of what is now Article 11(3) precluded such a limitation being applied to environmental NGOs.⁸⁹ Moreover, the “rights capable of being impaired” which environmental NGOs enjoy pursuant to the last sentence of what is now Article 11(3) of the Directive “must necessarily include the rules of national law implementing EU environmental law and the rules of EU environmental law having direct effect.”⁹⁰

Finally, the Court ruled that, taken as a whole, what is now Article 11 of the EIA Directive lacks direct effect, since it gives the Member States “a significant discretion both to determine what constitutes impairment of a right and, in particular, to determine the conditions for the admissibility of actions and the bodies before which such actions may be brought.”⁹¹ However, the same was not true of the last two sentences of Article 11(3) which were precise and not subject to any further conditions.⁹²

In short, rules of *locus standi* such as those in force in Germany were held to run counter to the last two sentences of Article 11(3), according to which nationally recognised environmental NGOs automatically have *locus standi* before national courts; and those two sentences were held to be directly effective. On both points, this ruling is scarcely surprising, given the clear wording of the two sentences.

Some further poignant issues have arisen in *Altrip*,⁹³ a reference for a preliminary ruling from Germany’s Supreme Administrative Court. First of all, it would seem that only the complete failure to carry out an EIA, where it is required, would lead the German courts to annul a decision granting development consent; but this remedy would be denied where

88. *Bund*, [2011] E.C.R. I-3673, ¶ 44

89. *Id.* ¶ 45.

90. *Id.* ¶ 48.

91. Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg, *intervening party: Trianel Kohlekraftwerk*, Case C-115/09, [2011] E.C.R. I-3673, ¶ 55

92. *Id.* ¶¶ 56-57.

93. Gemeinde Altrip, Gebrüder Hört GbR, Willi Schneider v. Rheinland-Palatinate, Case C-72/12, [2012] E.C.R. I___ (delivered February 13, 2012) (not yet reported).

an EIA, however seriously flawed, had been carried out. The referring court asked *inter alia* whether this state of affairs is consonant with what is now Article 11(1) of the EIA Directive.

The answer to this question must surely be that it must be possible for a litigant to obtain the annulment of such a decision where it is based on a seriously defective EIA. For a start, Article 11(1) clearly states that parties must be in a position to challenge “the *substantive* or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.”⁹⁴ Moreover, it was held in *Trianel* that this provision does not “in any way [limit] the pleas that could be put forward in support of such an action.”⁹⁵ In addition, Germany’s approach is surely at odds with the principle of effectiveness enshrined in Article 19(1) TEU. Accordingly, the recent Opinion of Advocate General Cruz Villalón in which he reached the same conclusion deserves a warm welcome.⁹⁶

The next question posed by the Supreme Administrative Court is whether a procedural defect in an EIA can only lead to the annulment of the ensuing develop consent where there is a “definite possibility” that the contested decision would have been different in the absence of that defect.

This is considerably more delicate. It should be recalled that, in the absence of a good reason to do otherwise, the Court of Justice takes its own remedies and procedures as a yardstick for determining whether national judicial remedies and procedures are compatible with the principle of effectiveness.⁹⁷ This appears to be the appropriate approach to take in this context. On this basis, it is submitted that procedural errors should be divided into three separate categories: those which are so grave that they must lead automatically to the annulment of the contested decision;⁹⁸ those which only lead to that result where the contested act might have been different if they had

⁹⁴ Emphasis added

⁹⁵ *Bund*, [2011] E.C.R. I-3673, ¶ 37.

⁹⁶ Opinion of 20 June 2013.

⁹⁷ *Brasserie du Pêcheur v. Federal Republic of Germany*, Cases C-46/93, [1996] E.C.R. I-1029, ¶¶ 40-42; *Upjohn Ltd. v. The Licensing Authority*, C-120/97, [1999] E.C.R. I-223, ¶ 34.

⁹⁸ *Roquette Frères v. Council*, Case 138/79, [1980] E.C.R. I-3333.

not been committed;⁹⁹ and those which are so trivial that they must be disregarded altogether.¹⁰⁰ Broadly speaking, in Advocate General Cruz Villalón has endorsed this approach,¹⁰¹ and again this should be warmly welcomed. The judgment is awaited with considerable interest.

Finally, another issue which may well come before the Court in the coming years relates to the rule known in Germany as *Präklusion*.¹⁰² According to this rule, a party may only advance arguments before the courts which it has previously advanced, or had the opportunity to advance, during the EIA leading to the contested decision on development consent. The analogy with the case law of the General Court on the same issue where a party has failed to raise an argument during the administrative phase leading to a Commission decision on a State aid would strongly suggest that *Präklusion* is at variance with the principle of effectiveness: in that context, the Court has consistently held that “nothing prevents the interested party from raising against the final decision a legal plea not raised at the stage of the administrative procedure.”¹⁰³

On the other hand, it is surely lawful for a national legal system to treat as inadmissible a court action lodged by a party who failed to intervene during the EIA procedure at all, even though it had a genuine opportunity to do so. After all, the whole purpose of the EIA is to give members of the public concerned the opportunity to voice their opinions on a project *before* the decision on development consent is taken.¹⁰⁴

99. Thyssen Stahl v. Commission, Case C-194/99P, [2003] E.C.R. I-10821, ¶ 31 and rulings cited there.

100. Kingdom of Spain v. Commission, Case 128/86, [1987] E.C.R. 4171.

¹⁰¹ *Id.* paras. 79 - 106.

102. See Umwelt-Rechtsbehelfsgesetz [Law on judicial remedies in environmental matters], July 12, 2006, Bundesanzeiger, art. 2(3). The Netherlands appears to have a similar rule. See Jans & Vedder, *supra* note 50, at 233 (noting that according Dutch law, “a party may not rely on a breach of a legal rule before a court of law unless this was first raised during the preceding public participation procedure.”).

103. See Kneissl Dachstein Sportartikel AG v. Commission, Case T-110/97, [1998] E.C.R. II-2881, ¶ 102 and Saxonia Edelmetalle GmbH v. Commission, Case T-111/01, [2005] E.C.R. II-1579, ¶ 68 (discussing how legal pleas not raised at the Commission stage of State aid proceedings are not barred during the proceedings before the General Court).

¹⁰⁴ It would of course be otherwise if a party was not given a genuine right to participate in the EIA (e.g. where the deadline for intervening in the EIA is excessively short or where the project is changed after the EIA is concluded).

3. Article 9(3) of the Convention

In 2003, with a view to implementing Article 9(3) of the Convention at national level, the Commission submitted a proposal for a Directive on the European Parliament and the Council on access to justice in environmental matters.¹⁰⁵ Like Article 9(3) itself, this proposal addressed the acts and omissions of private persons as well as those of public authorities. In any case, it fell on stony ground in the Council and has never been adopted. However, the Commission has recently indicated that it might take steps to revive this proposal in its present form or to replace it with a revised proposal.¹⁰⁶ With this in mind, the Commission's Directorate-General for the Environment has commissioned a study of the implementation of Article 9(3) and (4) in all the Member States.¹⁰⁷

As to the case law, the judgment in *Janecek v. Bavaria* merits particular attention, even though the Aarhus Convention was not even mentioned in that ruling.¹⁰⁸ The proceedings turned on Council Directive 96/62 on ambient air quality assessment and management.¹⁰⁹ That Directive sets maximum limits for certain pollutants in the air. In so far as is material, Article 7(3) reads: "Member States shall draw up action plans indicating the

105. See European Commission, Proposal for a Directive of the European Parliament and Council on Access to Justice in Environmental Matters, COM (03) 624 Final, ¶ 3.3 (Oct. 2003) (discussing how this proposal aims to "establish a general framework for access to justice in environmental matters").

106. See European Commission, Communication to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions on Improving the Delivery of Benefits From EU Environment Measures: Building Confidence Through Better Knowledge and Responsiveness, COM (2012) 95 Final, 9 (Mar. 2012) (discussing the importance of access to environmental justice going forward); see also European Commission, Proposal for a Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020, COM (2012) 710 Final, ¶¶ 60, 63 (Nov. 2012).

107. See JAN DARPO, EUROPEAN COMMISSION, EFFECTIVE JUSTICE? SYNTHESIS REPORT ON THE IMPLEMENTATION OF ARTICLES 9.3 AND 9.4 OF THE AARHUS CONVENTION IN SEVENTEEN OF THE MEMBER STATES OF THE EUROPEAN UNION (2012) (explaining that this report was commissioned to determine the implementation of these articles in specific EU Member States), available at http://ec.europa.eu/environment/aarhus/pdf/2012_access_justice_report.pdf.

108. See *Janecek v. Bayern*, Case C-237/07, [2008] E.C.R. I-6221 (the material facts occurred in 2005 and 2006, and both the Aarhus Convention and Directive 2003/35 were applicable for part of that period).

109. See Council Directive 96/62/EC on Ambient Air Quality Assessment and Management, 1996 O.J. L 296/55.

measures to be taken in the short term where there is a risk of the limit values and/or alert thresholds being exceeded, in order to reduce that risk and to limit the duration of such an occurrence.” The applicant in the main case resided in an area of Munich for which no action plan had been established, even though the data produced by the local air quality measuring station showed that the maximum limits were regularly exceeded. Mr Janecek therefore turned to the courts to obtain an order that an action plan be drawn up. The case reached Germany’s highest administrative court, which made a reference for a preliminary ruling. In reply, the Court of Justice ruled that, where there was a risk that the limits would be exceeded, “persons directly concerned” must be in a position to compel the authorities to draw up an action plan, if necessary by means of court proceedings; but that the purpose of action plans was merely to reduce to a minimum the risk that the limits would be exceeded. The Court did not specify what it meant by “persons directly concerned,” a term which was not in Directive 96/62; but then in the circumstances it was not necessary to do so.

What is especially striking about this judgment is the low-key manner in which the Court approached this issue. The Court treated it as a question of interpretation of Directive 96/62 rather than of access to justice; and it even chose to dispense with the assistance of an Advocate General. Yet there can be little doubt that this ruling is likely to constitute an important precedent in the future.

In contrast, great prominence has been given to the *Slovakian Bears* case,¹¹⁰ where the Court of Justice was asked to rule on whether Article 9(3) of the Convention is directly effective. The facts have already been set out in this article in Part C of the Introduction. The Grand Chamber held that this provision lacked direct effect, since it only applied where “the criteria, if any, laid down by . . . national law” are met.¹¹¹ However, having regard to its case law on the principle of effectiveness, the Court went on to rule that:

110. See *Lesoochránárske v. Ministerstvo (Slovakian Bears)*, Case C-240/09, [2011] E.C.R. I-1255.

¹¹¹ *Id.* ¶ 45

“if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.”¹¹²

This passage is hard to fathom. Since the principle of effectiveness only applies to directly applicable provisions, why did the Court invoke it here? And what is meant by “to the fullest extent possible”?¹¹³

4. Article 9(4) of the Convention

As the reader will be aware, Article 9(4) requires that judicial proceedings in environmental matters must not be “prohibitively expensive”; and this requirement is implemented by what is now Article 11(4) of the EIA Directive. To date, the only authority on the meaning of the term “prohibitively expensive” is the judgment in *Edwards*.¹¹⁴

The facts arose out of proceedings for judicial review of a decision to grant a permit for the operation of a cement factory in Rugby in the English Midlands. Mr Edwards, a local resident, claimed that that decision was in breach of the EIA Directive. Subsequently, another local resident, a Mrs. Pallikoroupos, took over the action, although she was not legally aided. The case ultimately reached the House of Lords, then England’s highest court, which dismissed the appeal. For the proceedings in the House of Lords she was ordered to pay over £88,000 to the respondents in addition to the costs due to her own lawyers. Subsequently, the Supreme Court of the United Kingdom,

112. *Id.* ¶¶ 49-50.

113. See Simon, *supra* note 30 (describing this passage as a “*session de ratrapage*”).

114. *The Queen, on the application of David Edwards v. Environment Agency*, Case C-260/11, [2013] E.C.R. I___ (delivered on 11 April 2013) (not yet reported).

which by then had replaced the House of Lords as the highest court in the land, posed a series of preliminary questions as whether such costs were compatible with the “prohibitively expensive” rule.

In a remarkable judgment, which breaks totally new ground, the Court found that the requirement that judicial proceedings should not be prohibitively expensive means that the persons concerned must not be “prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of [the provisions in issue] by reason of the financial burden that might arise as a result.”¹¹⁵ When assessing this, the national courts “cannot act solely on the basis of [the] claimant’s financial situation but must also carry out an objective analysis of the amount of the costs”.¹¹⁶ In so doing, the national courts “may also take into account the situation of the parties concerned, whether the claimant has a reasonable chance of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection scheme.”¹¹⁷

At the same time, the Commission brought infringement proceedings against the United Kingdom, complaining of a systemic failure in England and Wales as well as in Scotland and Northern Ireland to comply with the “prohibitively expensive” rule.¹¹⁸

An unusual feature of these cases is that the Commission and Mrs. Pallikaropoulos have been able to rely on two reports drafted by a committee chaired by a senior member of the English judiciary which bluntly stated that the costs awarded by the English courts are regularly in breach of the Aarhus Convention.¹¹⁹

¹¹⁵ Para. 35

¹¹⁶ Para. 46

¹¹⁷ *Ibid.*

¹¹⁸ *Commission v. United Kingdom*, Case C-530/11, (action brought on Oct. 18, 2011) (pending)

¹¹⁹ . The Sullivan Report entitled WORKING GROUP ON ACCESS TO ENVIRONMENTAL JUSTICE, ENSURING ACCESS TO ENVIRONMENTAL JUSTICE IN ENGLAND AND WALES, (2008), available at <http://www.wwf.org.uk/>

C. *At Union Level*

1. Article 9(1) of the Convention

It has always been plain that, where information has been requested from a Union institution or body pursuant to Regulation 1049/2001, an action lies directly to the General Court against a total or partial refusal of that request. What is more, an administrative review is built into Regulation 1049/2001 (Article 7(2)). Accordingly, there was no need for the Union to take any steps to implement Article 9(1) at the level of the Union.¹²⁰

2. Article 9(2) of the Convention

As we noticed earlier, Article 9(2) of the Convention provides for rights of action to challenge decisions granting development consent for projects covered by Article 6(1) and (2). Such decisions are taken by the Member States, not the institutions of the Union.

Perhaps the only exception to this rule would arise where the Union funds a construction project despite the fact that the requisite EIA or IPPC procedure has not been carried out. That was precisely the situation which occurred in *Greenpeace International and others v. Commission*, decided before the Convention entered into force.¹²¹

The Court held there that the Commission's decision to finance the construction of two power stations in the Canary Islands did not concern the NGOs or the individual local residents either directly or individually. In the unlikely event of an EU institution or body adopting a similar decision today, the NGOs would be able to seek a review of the financing decision pursuant to Article 10 of the Aarhus Regulation which is discussed below.

wwf_articles.cfm?unewsid=1754; *see id.* at para. 5. In August 2010, the committee published an update to that report, available on the same website.

120. As already mentioned, Regulation 1049/2001 was adapted by Articles 3 to 8 of the Aarhus Regulation to take account of the first pillar of the Aarhus Convention. However, these provisions do not concern access to justice, the subject matter of Article 9(1) of the Convention.

121. Case C-321/95P, [1998] E.C.R. I-1651.

3. Article 9(3) of the Convention

Plainly, the principles laid down in the *Slovakian Bears* judgment apply equally to the Court of Justice itself. However, it is equally manifest that the mere fact that Article 9(3) of the Convention lacks direct effect in no way absolves the Union from complying with that provision.

As is well known, the rules on *locus standi* for annulment actions brought by parties other than Member States or Union institutions enshrined in Article 230 EC were widely regarded as excessively restrictive. As the reader will also be aware, the Treaty of Lisbon addressed this problem by adding a final limb to what is now Article 263, paragraph 4 TFEU. According to that limb, natural and legal persons have standing to seek the annulment of a “regulatory act which is of direct concern to them and does not entail implementing measures.”¹²² Where these conditions are fulfilled, the applicant need not show that he or she is individually concerned by the contested act. Although natural and legal persons will frequently be in a position to challenge the legality of several “regulatory acts” under that limb, it is of no avail to NGOs, unless they can show that their own legal situation is directly affected by the contested act.¹²³

122. Consolidated version of the Treaty on the Functioning of the European Union art. 263(4), 2012 O.J. C 326/47, at 162. In *Inuit Tapiriit Kanatami v. European Parliament and Council*, the Court held that the term “regulatory act” covered acts of general application other than legislative acts. Case T-18/10, [2011], E.C.R. II____, ¶ 56 (delivered Sept. 6, 2011) (not yet reported). The appeal against this judgment is still pending. See *Inuit Tapiriit Kanatami and Others v. European Parliament and Council of the European Union*, Case C-583/11P (pending case). Advocate General Kokott has urged the Court to uphold the General Court’s judgment on this point. Opinion of Advocate General Kokott, *Inuit Tapiriit Kanatami*, [2013] E.C.R. I____, ¶¶ 26-61, but in his Opinion of 29 May 2013 in Case C-132/12P *Stichting Woonpunt* (pending) Advocate General Wathelet advocated a radically different approach. In any case, the exclusion of legislative acts is of no consequence as regards the Aarhus Convention since, by virtue of Article 2(2) thereof, the acts of public authorities acting “in their legislative capacity” are excluded from its scope. See *supra*, Part B of the Introduction. As to what is meant by “does not entail implementing measures,” see *Telefónica v Commission*. Case T-228/10, [2012] E.C.R. I____ (delivered March 21, 2012) (not yet reported). The case is now on appeal. See *Telefónica v. Commission*, Case C-274/12P (pending).

123. See *Microban v. Commission*, Case T-262/10, [2011], E.C.R. II____, ¶ 27 (delivered Oct. 25, 2011) (not yet published); see also *Inuit Tapiriit Kanatami v. European Parliament and Council*, Case T-18/10, [2011] E.C.R. II____, ¶ 71 (delivered Sept. 6, 2011) (not yet published) (confirming earlier case law). In her Opinion on the

Theoretically, of course, an NGO could always attempt to argue, when contesting an act of environmental law, that its own legal situation is indeed directly at stake since it is deemed by virtue of Articles 2(5) and 9(3) of the Aarhus Convention to have an interest in environmental decision-making. However, in the unlikely event that the Court were to accept such an argument, that would clearly amount to admitting the direct effect of Article 9(3) by the back door, thereby reversing the ruling in *Slovakian Bears* and creating considerable legal uncertainty.

To obviate these problems, Article 10 of the Aarhus Regulation, which predated the Treaty of Lisbon, created a mechanism whereby NGOs – but not other parties – can request the internal review of an “administrative act under environmental law,” or the alleged failure to adopt such an act.¹²⁴ Crucially, Article 2(1)(g) defines “administrative act” to mean “any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects.”¹²⁵

According to Article 10, the request must be addressed to the Union institution or body which adopted the act, or should have adopted it, within six weeks of its adoption, notification or publication, whichever is the latest. In case of an alleged omission, the six-week period begins to run on the date on which the administrative act was required. The Commission is

appeal against the latter ruling (Case C-583/11P), Advocate General Kokott has in essence endorsed the traditional test. See Inuit Opinion of Advocate General Kokott, *Inuit Tapiriit Kanatami*, [2011] E.C.R. II ___, ¶¶ 68-72 (pending case). See generally Nicolas De Sadeleer & Charles Poncelet, *Protection Against Acts Harmful to Human Health and the Environment Adopted by the EU Institutions*, 14 CAMBRIDGE Y.B. EUR. L. STUD. 177 (2012).

124. For the Aarhus Regulation, *supra* note 8, art. 10, at 18. see *supra* note 50. The Commission has adopted Decision 2008/401/EC amending its Rules of Procedure with regard to such requests. 2008 O.J. L 140/22; see Decision 2008/50/EC laying down detailed rules in relation to this matter, 2008 O.J. L 13/24.

125. See Aarhus Regulation, *supra* note 8, art. 2(1)(g), at 16. Article 2(2) of the Aarhus Regulation excludes “measures taken or omissions by a Community institution or body in its capacity as an administrative review body such as under” competition and State aids rules, infringement proceedings, the proceedings of the European Ombudsman and proceedings for combatting fraud on the Union budget. See *id.*, art. 2(2), at 16. Some authors object to this provision on the grounds that it creates legal uncertainty, particularly because the list of exceptions is not exhaustive. See De Sadeleer & Poncelet, *supra* note 123, at 199 (citing several sources to that effect).

required to respond within twelve weeks, although it can extend this deadline by a further six weeks in certain circumstances. To be eligible to make such a request, an NGO must fulfil the conditions set out in Article 11.¹²⁶

Article 12(1) provides: “The non-governmental organisation which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.”¹²⁷

The final somewhat Delphic limb of this paragraph may owe something to the cryptic *obiter dictum* of the Court of First Instance in *European Environmental Bureau v Commission* about the internal review procedure set out in what was then the Aarhus Regulation proposal: “[t]he Court notes that the principles governing the hierarchy of norms (see, *inter alia*, Case C-240/90 *Germany v Commission* [1992] ECR I-5383, paragraph 42) preclude secondary legislation from conferring standing on individuals who do not meet the requirements of the fourth paragraph of Article 230 EC.”¹²⁸ Subsequently, however the Court of Justice took a very different position when it held in Opinion 1/09 that “an international agreement concluded with third countries may confer new judicial powers on the Court provided that in so doing it does not change the essential character of the function of the Court as conceived in the EU and FEU Treaties.”¹²⁹ Indeed, even before Opinion 1/09, the General Court appeared to have abandoned the objection which it had voiced in EEB. In the *Azores* case it appeared to give its

126. Article 11 provides that the NGO must (a) be an independent non-profit-making legal person in accordance with a Member State’s national law or practice, (b) have the primary stated objective of promoting environmental protection in the context of environmental law, (c) have existed for more than two years and be actively pursuing the objective referred to under (b), and (d) have objectives and activities which cover the subject matter of the request for internal review. See Aarhus Regulation, *supra* note 8, art. 11, at 19.

127. Aarhus Regulation, *supra* note 8, art. 12(1), at 19. For a detailed analysis of Articles 10 to 12 and a discussion of their drafting history going back to the Commission’s proposal (COM (2003) 622), see Marc Pallemmaerts, *Access to Environmental Justice at EU Level. Has the ‘Aarhus Regulation’ Improved the Situation*, in THE AARHUS CONVENTION AT TEN 271, 287 (Marc Pallemmaerts ed., 2011).

128. *European Environmental Bureau (EEB) v. Commission*, Joined Cases T-236/04 & T-241/04, [2005] E.C.R. II-4945, ¶ 71.

129. Opinion 1/09 delivered pursuant to article 218(11) TFEU, [2011] E.C.R. I-1137, ¶ 75 (discussing the creation of a unified patent litigation system).

bleasing to Articles 10 to 12.¹³⁰ More recently, in *Stichting Natuur en Milieu*¹³¹ and *Vereniging Milieudéfensie*¹³² it held even Article 10 of the Aarhus Regulation partially invalid for not going far enough!

The facts of *Stichting Natuur en Milieu* were that the two applicant environmental NGOs asked the Commission, pursuant to Article 10 of the Aarhus Regulation, to conduct an internal review of Commission Regulation 149/2008 which set out maximum residue levels for a large number of pesticides.¹³³ In *Vereniging Milieudéfensie*, two other NGOs did likewise with respect to a Commission Decision authorising the Netherlands to postpone the deadline, in certain regions, for meeting certain air purity standards laid down by Directive of the European Parliament and the Council on ambient air quality and cleaner air for Europe.¹³⁴ In both cases, the Commission rejected the requests for internal review as being inadmissible on the grounds that the targeted acts were not acts of individual scope. In their actions, the NGOs contested the Commission's position on the latter point. In the alternative, they entered what amounted to a plea of illegality under what is now Article 277 TFEU to the effect that, by restricting the internal review procedure to acts of individual scope, the Union legislator was in breach of Article 9(3) of the Convention.

130. *Região autónoma dos Açores v. Council of the European Union*, Case T-37/04, [2008] E.C.R. II-00103 (noting that because the procedural conditions of Articles 10 and 12 were "manifestly not satisfied in the present case, it is not for the Court to substitute itself for the legislature and to accept, on the basis of the Aarhus Convention, the admissibility of an action which does not meet the conditions laid down in Article 230 EC.>").

131. *Stichting Natuur en Milieu v. European Commission*, Case T-338/08, [2012] E.C.R. I_ (delivered June 14, 2012) (not yet reported).

132. *Vereniging Milieudéfensie v. Commission*, Case T-396/09, [2012] E.C.R. I_ (delivered June 14, 2012).

133. *Stichting Natuur en Milieu*, [2012] E.C.R. I_ __, ¶ 3 (delivered June 14, 2012); see Commission Regulation No 149/2008 on Establishing Annexes II, III and IV Setting Maximum Residue Levels for Products Covered by Annex I thereto, 2008 O.J. L 58/1.

134. *Vereniging Milieudéfensie v. Commission*, Case T-396/09, [2012] E.C.R. I_ __ (not yet published) (delivered June 14 2012); see Council Directive 2008/50/EC on Ambient Air Quality and Cleaner Air for Europe, 2008 O.J. L 152/1. The Commission Decision in question was Decision C(2009) 2560 final, which was based on Article 22 of that Directive. *Vereniging Milieudéfensie*, [2012] E.C.R. I_ __, ¶ 3 (delivered June 14 2012).

In both cases, the General Court dismissed the first plea, but found for the NGOs on the second plea. As to the latter issue, the Commission relied on the fact that, in the *Slovakian Bears* case, the Court had found that that provision lacked the requisite clarity and precision to be directly applicable. However, leaving aside the question of direct applicability, the General Court focused instead on the ruling in the *Nakajima v. Council*,¹³⁵ which concerned the GATT Anti-Dumping Code. In that case, the Court of Justice had held that, where the Community had intended to implement a “particular obligation” assumed under an international agreement, or where the measure in effect incorporated particular provisions of that agreement by reference, it would review the compatibility of a measure with the agreement concerned. The General Court found that the Aarhus Regulation was in breach of Article 9(3) of the Convention, as the applicants had claimed.

Probably the epithet most appropriate to describe the *Nakajima* case law, which has only ever been applied to the GATT, is “nebulous.” That is not least because the concept of a “particular obligation” is shrouded in mystery. More importantly, the result of these judgments is that Article 9(3) of the Convention may be relied upon before the courts even though that provision is not sufficiently clear or precise to be directly applicable. That raises an acute problem of legal certainty.

The Council and the Commission have therefore lodged appeals against both judgments, while the Parliament has appealed against the judgment in *Vereniging Milieufensie*.¹³⁶ Understandably, the three institutions’ decisions to appeal triggered criticism from the NGOs.¹³⁷ Nevertheless, it is

135. *Nakajima v. Council*, Case C-69/89, [1991] E.C.R. I-02069, ¶¶ 30-31. This principle is quite separate from direct applicability. *See id.* ¶ 28; *see also* EEC Seed Crushers’ and Oil Processors’ Federation v. Commission, Case 70/87, [1991] E.C.R. I-1781, ¶¶ 19-21.

136. *Council, Parliament and Commission v. Vereniging Milieufensie and Stichting Stop Luchtverontreiniging Utrecht*, Joined Cases C-401-03/12P (3 Cases C-404/12P and C-405/12P *Council and Commission v Stichting Natuur en Milieu* and another.

137. Two NGOs, namely (i) ClientEarth and (ii) Justice and Environment even lodged a request for internal review of the Commission’s decision to appeal. EUROPEAN COMMISSION, *The Aarhus Convention, Requests for Internal Review*, (Jan. 25, 2013), <http://ec.europa.eu/environment/aarhus/requests.htm>. Citing Reynolds Tobacco v.

important to understand that the repercussions of these cases extend far beyond environmental law since, if the Court of Justice upholds the judgments of the Court below, the circumstances in which provisions of agreements concluded by the Union may be relied on in judicial proceedings will be radically extended across the board.¹³⁸

Finally, what is the scope of judicial review of a decision by which the Union institution or body accepts the admissibility of a request for an internal review and gives a negative response to the NGO on the substance? Manifestly, the Court can only consider the legality of that negative decision on the request for an internal review, not the legality of the initial “administrative act” which is the subject of the NGO’s request, as the latter act does not concern the NGO either directly or individually.¹³⁹ Consequently, the Court can be expected to focus primarily on the reasoning set out in the negative decision.¹⁴⁰

THE AARHUS CONVENTION COMPLIANCE COMMITTEE

This article would not be complete without a brief mention of the Aarhus Convention Compliance Committee. Article 15 of the Convention provides for the establishment “on a consensual

Commission, Case C-131/03P, [2006] E.C.R. I-7795, ¶ 58, the Commission replied that that decision lacked “legally binding and external effects” within the meaning of Article 2(1)(g) of the Aarhus Regulation. Letter from Luis Romero Requena, Director-General, Legal Service, European Commission, to ClientEarth (Jan 15, 2013), *available at* <http://ec.europa.eu/environment/aarhus/pdf/requests/17.Reply.letter.to.ClientEarth.Jan.2013.pdf>.

138. In addition, the Commission is appealing against the General Court’s finding in paragraph 65ff of its judgment in *Stichting Natuur en Milieu* that the Commission had not acted in a legislative capacity within the meaning of Article 2(2) of the Convention when it adopted Regulation 149/2008. *See* *Stichting Natuur en Milieu v. European Commission*, Case T-338/08, [2012] E.C.R. I___, ¶ 65ff (delivered June 14, 2012) (not yet reported).

139. Sadeleer & Poncelet, *supra* note 123, at 205; *accord* Pallemacris, *supra* note 116, at 295-96.

140. The first case of this kind to come before the General Court is Case *Stichting Natuur en Milieu v Commission*, Case T-574/12, [2012] E.C.R. I___ (filed Dec. 18, 2012) (case in progress) (sequel to *Stichting Natuur en Milieu*, [2012] E.C.R. I___, (delivered June 14, 2012)). Although the Commission and the Council lodged appeals, those appeals did not have suspensive effect. Accordingly, the two applicant NGOs renewed their request of 2008 that the Commission review their initial request for a review of Commission Regulation 149/2008. On October 16, 2012, the Commission replied that, having carried out an internal review, it saw no need to amend that Regulation. In Case T-574/12, the NGOs are now contesting that reply.

basis” of “optional arrangements of a non-confrontational, non-judicial and consultative nature” for reviewing compliance with the provisions of the Convention, which “may include the option of considering communications from members of the public on matters related to the Convention.” In accordance with Article 15, “members of the public” are entitled to lodge a communication without having to show any particular interest.¹⁴¹ As is clear from Article 15, the Committee is not a court of law and its proceedings are deemed to be consensual. By the same token, its rules of procedure are far more flexible than any rules which might be familiar to the judiciary, and the procedure is marked by great informality.¹⁴² The Committee is composed essentially of experts on environmental law chosen from among nationals of the Contracting Parties; several are professors of environmental law.¹⁴³ In themselves, findings of the Committee are not binding but, once they are endorsed by the Meeting of the Parties, they acquire some force.¹⁴⁴

Eighty-three “communications” had been lodged since the Committee began its work in 2004.¹⁴⁵ Of these, five have been

141. As we noticed earlier, the “public” as defined in Article 2(4) covers natural and legal persons and NGOs, but it is doubtful if this term extends to public authorities. See *supra* note 20 and accompanying text. In any case, Article 16 read with Annex II to the Convention provides for separate mechanisms for the settlement of disputes between Contracting Parties. For EU Member States to resort to those mechanisms in disputes with one another would be a breach of Article 344 TFEU insofar as the subject-matter falls within the scope of the Union Treaties. See *Commission v. United Kingdom (MOX Plant)*, Case C-459/03, [2006] E.C.R. I-4635.

142. To view these rules of procedure, see U.N., Econ. Comm’n for Europe, U.N. Econ. and Soc. Council, Decision I/7 on Review of Compliance Meeting of the Parties, annex, U.N. Doc ECE/MP.PP/2/Add.8 (Apr. 2, 2004) [hereinafter Decision I/7], available at <http://www.unecce.org/fileadmin/DAM/cnv/pp/documents/mop1/cce.mp.pp.2.add.8.c.pdf>. Meetings of the Committee are held at the Palais des Nations, the UN’s premises in Geneva.

143. The President of the Committee is Professor Jonas Ebbeson, Dean of the Law Faculty of Stockholm University. For copies of the Curricula Vitae of the current members, see *Committee Members*, U.N. Econ. Comm’n for Europe, (last visited Apr. 6, 2013), <http://www.unecce.org/cnv/pp/ccmembership.html>.

144. See Decision I/7, *supra* note 142, at Annex, Art. 37 (additionally empowering the Meeting of the Parties to “decide upon appropriate measures to bring about full compliance with the Convention..”). Virtually all the Compliance Committee’s reports have been endorsed unconditionally by the Meeting of the Parties.

145. To underscore the consensual nature of the proceedings, complaints are termed “communications” and complainants are referred to somewhat quaintly as “communicants”; similarly, the Contracting Party whose acts or omissions are the subject of a communication is known as the “Party concerned.” For an overview of its

directed against acts or omissions of the Union. For the EU, the most important by far is the communication lodged by ClientEarth and others in which they claim that the rules on *locus standi* in annulment actions for non-privileged litigants were in breach of Article 9 of the Convention.¹⁴⁶ The latter communication was lodged prior to the entry into force of the Treaty of Lisbon. Even though that Treaty has liberalised the rules on standing by introducing the fourth paragraph of Article 263 TFEU, it is not yet clear how far that reform goes.¹⁴⁷

In response, the Commission, representing the Union, relied *inter alia* on the fact that the General Court and the Court of Justice are not by any means the only courts administering

decisions, see generally Jerry Jendroska, *Recent Case-Law of the Aarhus Convention Compliance Committee*, 8.4 J. FOR EUR. & ENVTL. PLAN. L. 375 (2011) and the compendium EUROPEAN ECO FOURM, CASE LAW OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE 2004-2011 (A. Andruscyh, T. Alge, C. Konrad, eds., 2d ed.), available at <http://www.unece.org/environmental-policy/treaties/public-participation/publications.html>.

146 . Communication from ClientEarth, (ACCC/C/2008/32) European Community (Dec. 1, 2008). The others are: U.N. Economic Commission for Europe, *Compliance By The European Community With Its Obligations Under The Convention*, ACCC/C/2005/17 (May 2, 2008) (finding that the Union had not breached the Convention when it financed a landfill in Lithuania); U.N. Economic Commission for Europe, *Findings with regard to communication ACCC/C/2007/21 concerning compliance by the European Community*, ACCC/C/2007/21 (Feb. 8, 2011) (financing of a power plant by the European Investment Bank (an EU body) in Albania found not be in breach of the Convention); U.N. Economic Commission for Europe, *Findings and recommendations with regard to communication ACCC/C/2010/54 concerning compliance by the European Union*, ACCC/C/2010/54 (Oct. 10, 2012) (holding that the Union breached the Convention by failing to ensure that Ireland, which had not yet ratified the Convention, acted in accordance with that instrument when implementing Union legislation on renewable energy; that decision of the Committee has yet to be endorsed by the meeting of the parties); Communication from Avich & Kilchrenan Community Council to Aarhus Convention Compliance Committee, ACCC/C/2012/68 (Feb. 12, 2012) (not yet decided) (this communication, which is directed against the United Kingdom as well as against the EU, also concerns renewable energy).

147. Another element of uncertainty concerned the scope and standard of judicial review of decisions taken pursuant to Article 10 of the Aarhus Regulation. At the time, the proceedings in *Stichting Natuur en Milieu and Pesticide Action Network Europe v. European Commission* (Case T-338/08, [2012] E.C.R. I___, (delivered June 14, 2012) (not yet reported)) and *Vereniging Milieudéfensie and Stichting Stop Luchtverontreiniging Utrecht v. European Commission* (Case T-396/09, [2012] E.C.R. I___ (delivered June 14 2012) (not yet reported)) were still pending before the General Court. Accordingly, the Commission asked that proceedings on ClientEarth's communication be suspended on the grounds that the matter was *sub judice*. The Compliance Committee decided to proceed with the case, while leaving aside the aspects relating to the internal review procedure under the Aarhus Regulation.

Union law, since the courts of the Member States are the “‘ordinary’ courts within the European Union legal order” whose task is to “implement European Union law”¹⁴⁸ The Commission also pointed out that, even if the Committee found against the Union, the latter would be in no position to implement the Committee’s findings without amending Article 263 TFEU itself, which would be a Herculean task.¹⁴⁹

On April 14, 2011, the Committee concluded its deliberations on ClientEarth’s communication. Its key finding reads: “While the Committee is not convinced that the Party concerned [i.e. the Union] fails to comply with the Convention, given the evidence before it, it considers that a new direction of the jurisprudence of the EU Courts should be established in order to ensure compliance with the Convention.”¹⁵⁰ Since these findings have yet to be endorsed by the Meeting of the Parties, they have no legal force.

CONCLUSION

The Aarhus Convention has brought novel solutions to governance issues, notably by conferring special powers on NGOs. To what extent it will be a source of inspiration outside

148. Opinion 1/09, [2011] E.C.R. I-1137, ¶ 80 (delivered pursuant to Article 218(11) TFEU) (regarding the creation of a unified patent litigation system).

149. Pallemmaerts has suggested that there is no need to amend the Treaty, since it would suffice to use the legal basis of Article 257 TFEU, which provides for the establishment of specialised courts. See Pallemmaerts, *supra* note 116, at 312. Yet it is not at all obvious how this provision could be used to confer jurisdiction on a specialized court over matters for which the Court of Justice itself enjoys no jurisdiction under the Treaty. Rather, the purpose of Article 257 must be to empower the Union legislator to carve out certain matters currently falling under the jurisdiction of the Court of Justice (in reality the General Court) and confer them on a specialized court, as has already occurred with the Staff Tribunal.

150. Findings & Recommendations of the Compliance Committee with Regard to Communication ACCC/C/2008/32 (Part I) Concerning Compliance by the European Union, ¶ 97 (Apr. 14, 2011). The Committee is nothing if not transparent: all the communications and correspondence relating to them are available on Communications from the Public, U.N. ECON. COMM’N FOR EUROPE, <http://www.unece.org/env/pp/pubcom.html> (last visited Apr. 6, 2013). The Commission has objected to these findings on procedural grounds. See *generally* letter from Jean-François Brakeland, Director, Compliance Promotion, Governance & Legal Issues, Legal Affairs & Cohesion, Directorate General Environment, European Commission, to Aphrodite Smagadi, Secretary to the Aarhus Convention, Compliance Committee, Environment Division (July 20, 2011), available at <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/correspondence/frParty20.07.11.pdf>

the environmental field remains to be seen. In any event, what is clear beyond doubt is that the Court of Justice has played a key role in the interpretation of the Convention and that its case law on the Convention can be expected to have a major impact beyond the confines of Union. What is equally plain is that this is still work in progress: many crucial issues still need to be clarified.