

Access to Justice in European Union Law

A Legal guide on
Access to Justice
in environmental
matters



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Introduction

This guide contains an overview of the EU legal framework providing for access to justice in environmental matters. It focuses in particular on the interpretation of the Aarhus Convention (AC) and relevant pieces of EU secondary legislation by the Court of Justice of the EU (CJEU) and refers to the relevant findings of the Aarhus Convention Compliance Committee (the "Aarhus Committee"). It is addressed to lawyers, public authorities, judges and NGOs to assist them in their research, litigation, advocacy and other actions targeted at ensuring the correct implementation and enforcement of access to justice rules.

Despite the fact that the body of EU environmental policy and regulation is very advanced and comprehensive, Europe's environment is rapidly deteriorating. Strong legislative and policy frameworks are not providing the results they should because they are not properly implemented. This is both an environmental and socio-economic problem. The estimated cost of poor implementation of EU environmental law is around €50 billion a year.¹ The lack of implementation of EU environmental laws also erodes the rule of law and public trust in both national authorities and EU institutions.

Experience across the EU Member States has shown that relying solely on public authorities to overcome the implementation deficit will not yield the required outcome. Therefore, active citizens, either acting on their own or via NGOs, are essential to support or even substitute actions from the authorities. This enforcement involves access to judicial review.

Access to justice rights are provided throughout a number of pieces of EU legislation; the UNECE Convention on Access to information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 1998 (the "Aarhus Convention"); The EU Charter of Fundamental rights; and the case-law of the Court of Justice of the EU (CJEU). The Aarhus Convention requires its Parties to provide members of the public with access to justice in environmental matters. All 28 Member States, as well as the EU itself, are Parties to the Convention. It is legally binding upon the EU institutions and its Member States, including the courts. An interpretation of the Convention's provisions is also provided by the implementation guide

published by the UNECE². Despite the fact that it is not legally binding, it gives a good indication of how to implement the Convention's provisions. The CJEU has relied on the interpretation provided in the guide on several occasions.³

Based on the Convention, the EU has adopted and amended a number of legal acts containing rules on access to justice that are analysed in this guide, such as the Environmental Impact Assessment and Industrial Emissions Directives. However, contrary to the access to information and public participation provisions of the Convention, where the EU has undertaken some legislative action, the provisions relating to access to justice have not been implemented in EU legislation. Due to the absence of such legislation, great disparities persist in access to justice among the Member States and considerable challenges remain in many (if not all) Member States to obtain access to justice as envisaged by Article 9(3) of the Aarhus Convention. These challenges have been well documented in a number of studies.⁴ The number of referrals for preliminary rulings from national courts to the CJEU asking for the Court's interpretation of access to justice rights demonstrates the need for harmonisation of the rules throughout the EU. The CJEU has developed a significant bulk of case-law interpreting Article 9 of the Convention, the access to justice provisions enshrined in EU directives, and the directly effective provisions of directives not containing such provisions, to ensure members of the public have access to courts. Despite these rulings of the

¹ European Commission report, "The costs of not implementing the environmental acquis" (ENV.G.1/FRA/2006/0073, September 2011), available online: <http://ec.europa.eu/environment/enveco/economics_policy/pdf/report_sept2011.pdf>.

² UNECE, *The Aarhus Convention, An Implementation Guide* (authors: J. Ebbeson, H. Gaugitsch, J. Jendroska F. Marshall, S. Stech), second edition 2014, available online: <https://www.unece.org/env/pp/implementation_guide.html>.

³ See for instance, cases C-279/12 *Fish Legal and Shirley*, ECLI:EU:C:2013:853, paras 46 and 50 and C-570/13 *Gruber*, ECLI:EU:C:2015:231, para. 35.

⁴ Jan Darpö, 2012/2013 access to justice studies, available online: <http://ec.europa.eu/environment/aarhus/access_studies.htm> and Milieu Ltd., *Inventory of EU Member States' measures on access to justice in environmental matters* (2007), available online: <http://ec.europa.eu/environment/aarhus/study_access.htm>.

CJEU, which have clarified some of the obligations and rights stemming from the Convention and EU directives, there is still a lack of awareness of the existing rules and rights among national judges, public authorities, lawyers and NGOs.

In 2017, in order to address the lack of legislative initiative from the EU, the Commission decided to adopt an interpretative communication on access to justice in environmental matters (the Commission Notice).⁵ The Commission Notice recalls that the recently adopted Commission Communication 'Better results through better application'⁶ stresses that, where obligations or rights under EU law are affected at national level, there has to be access to national courts in line with the principle of effective judicial protection set out in the EU Treaties and with the requirements enshrined in Article 47 of the Charter of Fundamental Rights of the European Union. Due to its non-binding nature, the Notice does not have the same harmonizing effect as an EU directive. Nonetheless, it has an important function in compiling the rather dispersed, but concrete, elements of EU law that implement Article 9 of the Aarhus Convention. It is accordingly a useful tool to ensure that the case law of the CJEU is known and complied with by national judiciaries and public authorities and relied on by members of civil society seeking access to justice.

EU law is an integral part of the legal systems of Member States. It includes the EU Treaties, the Charter of Fundamental Rights and secondary law, as well as non-binding legal acts of EU institutions such as opinions, recommendations and communications. The implementation and enforcement of EU law takes place primarily at national level. Article 4(3) of the Treaty on European Union (TEU) establishes the principle of sincere cooperation that requires EU Member States to take measures to ensure compliance with obligations arising from EU law. Article 19 TEU requires Member States to provide sufficient remedies that ensure

effective legal protection in the fields covered by EU law. The Notice and the case law of the CJEU interpreting the Convention and relevant pieces of EU legislation are therefore also an integral part of national legal systems and must be treated as such by national judiciaries and public authorities.

The scope of the Notice is, however, limited to access to justice in relation to decisions, acts and omissions by public authorities of Member States and it only relies on the case law of the Court of Justice of the EU. This guide addresses both access to justice at national and EU level and refers to the case law of the CJEU and the findings of the Aarhus Committee, which (along with the case-law of the CJEU) constitutes the most important source of interpretation of the Convention and covers issues that are not necessarily addressed by the CJEU. This means that, in order to reach a complete and accurate understanding of the Convention provisions and their application, regard must be had to the interpretation of both the EU Courts and the Aarhus Committee.

In this spirit, this guide aims at raising awareness of existing rules and case law on access to justice among judges, public interest lawyers, public administrators and NGOs. We hope it will lead to an increased understanding of the importance of ensuring proper access to justice for the implementation of EU environmental laws and will address the challenges and obstacles to proper access to justice both at national as well as at EU level.

This guide does not consider cases in which natural or legal persons are granted standing because they are concerned in the economic sense, for instance as a competitor in a state aid case. The analysis focuses instead on cases in which applicants seek standing in order to bring a challenge in the public interest, which relates to the environment or human health.

While this guide is not limited to the scope of the Convention, the elements of this right, as defined in Article 9, serve as the basis for the structure of the guide.

⁵ Communication from the Commission - Commission Notice on Access to Justice in Environmental Matters C/2017/2616, OJ C 275, 18.8.2017, p. 1-39.
⁶ Communication from the Commission – EU law: Better results through better application C/2016/8600, OJ C 18, 19.1.2017, p. 10-20.

Glossary

AC = Aarhus Convention
ACCC = Aarhus Convention
Compliance Committee
Commission Notice = Commission Notice on
Access to Justice in Environmental Matters
CJEU = Court of Justice of the European Union
ECHR = European Convention of Human Rights
EIA = Environmental Impact Assessment
ELD = Environmental Liability Directive

EU = European Union
IED = Industrial Emissions Directive
Implementation Guide = *The Aarhus
Convention: An Implementation Guide*
NGO = Non-governmental organization
SEA = Strategic Environmental Assessment
TEU = Treaty of the European Union
TFEU = Treaty for the Functioning
of the European Union

Chapter 1

Access to justice concerning requests for access to environmental information

CJEU	ACCC findings	Legal provisions
<p>C-204/09, <i>Flachglas Torgau GmbH v Bundesrepublik Deutschland</i> and C-279/12, <i>Fish Legal and Emily Shirley v Information Commissioner and Others</i>: Definition of "public authority";</p> <p>C-673/13 P, <i>Commission v Stichting Greenpeace Nederland and PAN Europe</i> and C-442/14, <i>Bayer CropScience SA-NV and Stichting</i>: Definition of "emissions into the environment";</p> <p>C-71/14, <i>East Sussex County Council v Information Commissioner and Others</i>: Charges for supplying information.</p>	<p>ACCC/C/2007/21 (European Community): financing agreements as environmental information and public interest in disclosure;</p> <p>ACCC/C/2010/51 (Romania): confidentiality of proceedings, internal communications and public security;</p> <p>ACCC/C/2013/93 (Norway): Duty to state reasons and timely appeals;</p> <p>ACCC/C/2008/30 (Republic of Moldova): binding effect of court judgements.</p>	<p>Directive 2003/4/EC – Access to Environmental Information Directive - 28 January 2003</p>

Introduction

Article 9(1) AC establishes a right for any person who requests access to environmental information in accordance with Article 4 AC, to challenge the public authority's handling of such request.

Article 9(1) Aarhus Convention

Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

In the circumstances where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

Final decisions under this paragraph 1 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this paragraph. Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.

Article 4 AC provides the public with a right to request and to receive environmental information. It contains detailed provisions on how public authorities must deal with such requests, including procedural requirements such as deadlines;⁷ the substantive grounds upon

which requests may be refused;⁸ the obligation to separate confidential information and to disclose the remaining information;⁹ and the information that must be included in a refusal to grant access.¹⁰ Article 4(8) AC

⁷ Article 4(2) AC.

⁸ Articles 4(3) and 4(4) AC.

⁹ Article 4(6) AC.

¹⁰ Article 4(7) AC.

allows public authorities to charge a reasonable sum for supplying the environmental information. If they choose to levy a charge they must make available to the applicant information on matters such as the rate of the charge and the circumstances in which it will apply.

Article 2(3) AC provides a broad and non-exhaustive definition of the term “environmental information”.¹¹

EU Directive 2003/4 on public access to environmental information¹² (the “Environmental Information Directive”)

11 See the Aarhus Convention Interpretation Guide, p. 50.

12 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, Official Journal L 041,14/02/2003 P. 0026 - 0032.

was adopted to ensure that EU law is compatible with the Convention.¹³ The Directive implements the requirements of the Aarhus Convention faithfully and has been transposed by all EU Member States.¹⁴ Therefore, the rest of this chapter refers primarily to the Directive; the Aarhus Convention is referenced only where there are important divergences between the Directive and the Convention.

13 C-279/12, *Fish Legal and Emily Shirley v Information Commissioner and Others*, ECLI:EU:C:2013:853, para. 36.

14 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/2012/0774 final

1. Access to what information?

Article 6(1) of the Environmental Information Directive requires Member States to put in place a procedure to review “the acts or omissions of the public authority concerned...”

In many EU Member States, the legal regime for making requests for access to environmental information is distinct from the one for general freedom of information requests. This is because the Aarhus Convention and the Environmental Information Directive impose specific and different obligations on public authorities when responding to requests for environmental information. Therefore, it is important to ensure that a request for environmental information is handled in line with the relevant requirements, as discussed below.

1.1. What is environmental information?

Article 2(1) of the Environmental Information Directive provides a broad and non-exhaustive definition of environmental information. It is defined as:

“any information in written, visual, aural, electronic or any other material form on:

- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*
- (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);*
- (c) measures (including administrative measures), such as policies, legislation, plans, programmes,*

environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a) and (b) as well as measures or activities designed to protect those elements;

- (d) reports on the implementation of environmental legislation;*
- (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c); and*
- (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c).”*

Significantly, the term is not limited to documents. Rather, it refers to information in any material form, including paper documents, photographs, illustrations, video and audio recordings and computer files and leaves room for material forms still to be invented.¹⁵

The Directive’s definition of “environmental information” contains some additions in comparison to the definition in Article 2(3) of the Aarhus Convention. It includes information on “emissions, discharges and other releases into the environment”¹⁶, “waste, including radioactive waste”¹⁷, and “the contamination of the food chain”¹⁸ - this is however not to suggest that this kind of information would not be encompassed by the Convention, which also contains a non-exhaustive lists of examples.¹⁹

15 Aarhus Convention Implementation Guide, p. 51.

16 Article 2(1)(b) of the Access to Environmental Information Directive.

17 Ibid.

18 Article 2(1)(f) of the Access to Environmental Information Directive.

19 The lists in Article 4(3)(a) and (b) are preceded by the phrase “such as”. See also Aarhus Convention Implementation Guide, p. 51.

In fact, the Aarhus Committee has adopted a range of findings demonstrating an expansive approach to the interpretation of environmental information.²⁰

1.2. Obligation to disclose environmental information

Article 3(1) of the Environmental Information Directive requires that public authorities make available environmental information held by or for it to any applicant at his request and without an interest having to be stated. Requests for access to information shall be responded to as soon as possible and, in any event, within one month after receipt,²¹ unless the volume and complexity of the requested information justifies an extension to two months.²² The Directive further requires public authorities to provide adequate reasons for refusing access to environmental information.²³ Examination of information on site shall be free of charge and public authorities may not charge more than a reasonable amount for supplying information, which is known to the applicant beforehand.²⁴

20 For example, the Committee has held that the following information constitutes environmental information: a feasibility study related to draft legislation that would allow the import and disposal of low- and medium-level radioactive waste (ACCC/C/2004/01 (Kazakhstan), ECE/MP.PP/C.1/2005/2/Add.1, paras 8 and 18), rental contracts for lands administered by the State Forestry Fund (ACCC/C/2008/30 (Republic of Moldova), ECE/MP.PP/C.1/2009/6/Add.3), financing agreements dealing, for instance, with specific measures concerning the environment, such as the protection of a natural site (ACCC/C/2007/21 (European Community), ECE/MP.PP/C.1/2009/2/Add.1, para. 122), information on the categorization of land, associated leases and maps as well as the size of a land parcel (ACCC/C/2004/08 (Armenia), ECE/MP.PP/C.1/2006/2/Add.1, paras 13 and 20 & ACCC/A/2014/1 (Belarus), ECE/MP.PP/C.1/2017/11, para. 24); "raw data on the state of the air and the atmosphere" (ACCC/C/2010/53 (UK), ECE/MP.PP/C.1/2013/3, para. 75), an "archaeological discharge certificate" and documentation substantiating it including an "archaeological study" and "mining licenses and other mining-related information" (ACCC/C/2012/69 (Romania), ECE/MP.PP/C.1/2015/10, paras 49-51), a Preliminary Safety Report and Basic Design document for a nuclear reactor and "information about facilities for the supply of raw water for a power plant, nuclear materials, radioactive waste and chemicals" (ACCC/C/2013/89 (Slovakia), ECE/MP.PP/C.1/2017/13, paras 80 and 83 and a legal assessment on the relationship between a Nature Diversity Act and rules of international law (ACCC/C/2013/93 (Norway), ECE/MP.PP/C.1/2017/16, paras 23 and 67).

21 Article 3(2)(a) of the Environmental Information Directive.

22 Article 3(2)(b) of the Environmental Information Directive. The Aarhus Committee has held with regard to the corresponding provision under the Convention, "[t]he right to information can be fulfilled only if public authorities actively respond to the request and provide information within the time and form required. Even establishment of a system which assumes that the basic form of provision of information is by putting all the available information on publicly accessible websites does not mean that Parties are not obliged to ensure that any request for information should be individually responded to by public authorities, at least by referring them to the appropriate website" (ACCC/C/2009/36 (Spain), ECE/MP.PP/C.1/2010/4/Add.2, para. 57).

23 Article 3(4) of the Environmental Information Directive. In this respect, the Aarhus Committee has emphasised that "the duty to state reasons is of great importance, not least to enable the applicant to be in a position to challenge the refusal for information under the procedures stipulated in article 9, para. 1, of the Convention. It is, therefore, inadequate if these reasons are only provided at a very late stage, as the applicant will potentially only then be able to fully formulate the grounds for challenging the decision." (ACCC/C/2013/93 (Norway), para. 82).

24 Article 5 of the Environmental Information Directive. See also C-71/14 - East Sussex County Council v Information Commissioner and Others, ECLI:EU:C:2015:656. Concerning the corresponding provision in the Aarhus Convention, see ACCC/C/2008/24 (Spain), ECE/MP.PP/C.1/2009/8/Add.1, para. 75 onwards.

1.3. Exceptions to disclosure of environmental information

Articles 4(1) and (2) of the Environmental Information Directive provide the lawful grounds on which requests for access to environmental information may be refused. The list of exceptions to disclosure is exhaustive, i.e. Member States are not permitted to withhold environmental information on other grounds than those indicated.²⁵ Public authorities do however have the discretion not to refuse access to information on these grounds.

The exceptions in Article 4(1)(a) - (c) of the Directive allow requests to be refused when:

- The public authority does not hold the environmental information requested;
- The request is manifestly unreasonable or formulated in too general a manner.

Article 4(1) also allows a request to be refused if it concerns material in the course of completion or concerns internal communications of public authorities. For this to apply there must be such an exception in the national law or customary practice and the public authority must take into account the public interest in disclosing the information. With regard to the corresponding provision in the Aarhus Convention, the Implementation Guide suggests that the "course of completion" exception does not automatically cover draft documents. It states, "[t]he words 'in the course of completion' suggest that the term refers to individual documents that are actively being worked on by the public authority. Once those documents are no longer in the 'course of completion' they may be released, even if they are still unfinished and even if the decision to which they pertain has not yet been resolved."²⁶ With regard to internal communications, the Aarhus Committee held that not every document that is communicated internally can be considered as an internal communication: "For instance, factual matters and the analysis thereof may be distinguished from policy perspectives or opinions."²⁷

The exceptions in Article 4(2) of the Directive are intended to protect certain interests that could be harmed by disclosure of the environmental information concerned. Requests can be refused if disclosure will adversely affect:

(a) the confidentiality of the proceedings

25 The same applies to the exceptions under Article 4(3)-(4) of the Aarhus Convention. See in this regard ACCC/C/2008/30 (Moldova), para. 31, where the Aarhus Committee held that national public authorities could not withhold environmental information on the ground that the requests relates to a large volume of documents as no such exception exists under the Convention.

26 Aarhus Convention Implementation Guide, p. 85. The Aarhus Committee has further held: "the phrase material in the course of completion relates to the process of preparation of information or a document and not to an entire decision-making process for the purpose of which given information or documentation has been prepared." (ACCC/C/2010/51 (Romania), ECE/MP.PP/C.1/2014/12, para. 85).

27 ACCC/C/2013/93 (Norway), para. 71. The Aarhus Committee also held that a public authority could not refuse access to Study that had been submitted to it by a "somehow-related-to-it-but-separate entity" on the basis of this exception (ACCC/C/2010/51 (Romania), para. 89).

of public authorities, where such confidentiality is provided for by law;

- (b) international relations, public security or national defence;
- (c) the course of justice, the ability of any person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature;
- (d) the confidentiality of commercial or industrial information where such confidentiality is provided for by national or Community law to protect a legitimate economic interest, including the public interest in maintaining statistical confidentiality and tax secrecy;
- (e) intellectual property rights;
- (f) the confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for by national or Community law;
- (g) the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned;
- (h) the protection of the environment to which such information relates, such as the location of rare species."

Article 4(2) specifies that the exceptions shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment. It also requires that, "[i]n every particular case, the public interest served by disclosure shall be weighed against the interest served by the refusal."²⁸

Moreover, where only part of the requested information is covered by an exception, public authorities are required to disclose the remainder of the information.²⁹

1.4. The special case of information on emissions into the environment

According to the first sub-paragraph of Article 4 of the Environmental Information Directive, if a request for access to environmental information concerns information on emissions into the environment, it must not be refused on the basis of the following exceptions:

- confidentiality of the proceedings of public authorities (Article 4(2)(a));
- the confidentiality of commercial or industrial information (Article 4(2)(d));

- personal information (Article 4(2)(f));
- the interests of the person who supplied the information (Article 4(2)(g)); and
- the protection of the environment (Article 2(2)(h)).

This goes further than the Aarhus Convention. Article 4(4)(d) AC only provides that information on emissions into the environment cannot be kept confidential on the basis of the exception applicable to commercial and industrial information.

In addition, every decision to refuse a request on the basis of Article 4(2) of the Environmental Information Directive must take into account whether the information relates to emissions into the environment.

Neither the Directive nor the Aarhus Convention provides a definition of the term "information on emissions into the environment." The Implementation Guide refers as an example of a definition to Article 3(4) of the Industrial Emissions Directive, which defines emissions as, "direct or indirect release of substances, vibrations, heat or noise from individual or diffuse sources in the installation into air, water or land".

However, the Court of Justice has ruled that the definition includes much more than information on emissions from industrial installations. In *Bayer Crop Science*³⁰, the Court of Justice considered whether information on releases from herbicides and biocides, as well as the evaluation of those releases, fall within the definition of information on emissions into the environment. The Court concluded that the definition, among other things, "covers information concerning the nature, composition, quantity, date and place of the 'emissions into the environment' of plant protection products and biocides and substances contained therein, and data concerning the medium to long-term consequences of those emissions on the environment, in particular information relating to residues in the environment following application of the product in question, and studies on the measurement of the substance's drift during that application, whether those data come from studies performed entirely or in part in the field or from laboratory or translocation studies."³¹ The Court also emphasised that the concept of emissions into the environment "must nevertheless be limited to non-hypothetical emissions, that is to say actual or foreseeable emissions from the product or substance in question under normal and realistic conditions of use."³²

This is a wide and inclusive definition of the term "information on emissions into the environment" that has the potential to be applied to information in other contexts than the evaluation of emissions

²⁸ The Aarhus Committee has held in that regard that the failure to consider the public interest in disclosure vitiates a decision by a public authority on an access to information request (ACCC/C/2010/51 (Romania), para. 95). It also held that "in situations where there is a significant public interest in disclosure of certain environmental information and a relatively small amount of harm to the interests involved, the Convention would require disclosure" (ACCC/C/2007/21 (European Community), para. 30(c)).

²⁹ Article 4(4) of the Environmental Information Directive. The Aarhus Committee found in ACCC/C/2010/69 (Romania), para. 68, that the public authorities had in practice failed to observe the corresponding requirement under the Convention (article 4(6)).

³⁰ C-442/14 *Bayer CropScience SA-NV and Stichting De Bijenstichting v College voor de toelating van gewasbeschermingsmiddelen en biociden*, ECLI:EU:C:2016:890. See also case C-673/13 P *Commission v Stichting Greenpeace Nederland and PAN Europe*, ECLI:EU:C:2016:889.

³¹ *Ibid*, para. 96.

³² *Ibid*, para. 77.

from herbicides and biocides. For example, it could apply in the context of evaluating emissions from substances of very high concern under Regulation (EC) No 1907/2006 of the European Parliament and

of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), if the emissions are foreseeable under normal conditions of use.

2. What measures can be challenged?

Article 2(2) AC: “Public authority” means:

- (a) Government at national, regional and other level;
- (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
- (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
- (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity;

The acts or omissions of a public authority in relation to a request for environmental information can be challenged.³³ The term “public authority” is defined widely in Article 2(2) of the Environmental Information Directive, which faithfully transposes the definition in Article 2(2) AC. However, the final sub-paragraph of the definition in the Directive has the potential to exclude certain public bodies in breach of the Convention. This is discussed further below.

2.1. State administrative authorities

Article 2(2)(a) of the Environmental Information Directive defines the term “public authority” in the traditional sense, i.e. government bodies. According to the CJEU, *“Entities which, organically, are administrative authorities, namely those which form part of the public administration or the executive of the State at whatever level, are public authorities for the purpose of Article 2(2)(a)”*.³⁴

2.2. Entities performing “public administrative functions”

Article 2(2)(b) of the Environmental Information Directive defines public authorities in functional terms, i.e. natural or legal persons that are authorised by law to perform “*public administrative functions*” that would normally be performed by governmental authorities.³⁵

In case C-279/12 *Fish Legal*³⁶, the Court of Justice held that the determining factor in deciding whether certain entities are public authorities under Article 2(2)(b) of the Environmental Information Directive is, *“whether those entities are vested, under the national law which is applicable to them, with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.”*³⁷

This case concerned water companies in the UK. Ultimately, the Court concluded that it was for the relevant national court to assess whether the specific rules applying to them under UK law could be classified as “special powers”. Nevertheless, it listed a number of factors that were relevant to such a determination, including the fact that the water companies were entrusted under national law with services of public interest, including the maintenance and development of water and sewerage infrastructure, water supply and sewage treatment, which entail compliance with EU environmental directives. In addition, the water companies benefited from certain powers under national law to help them perform that function, including the power of compulsory purchase, the power to impose temporary hosepipe bans and to make bylaws in relation to waterways and land in their ownership.³⁸

2.3. Entities performing public functions under the control of another public authority

Article 2(2)(c) of the Environmental Information Directive captures any other natural or legal person *“having public responsibilities or functions, or providing public services, in relation to the environment”*, if they are under the control of any of the entities falling under sub-paragraphs (a) or (b) mentioned above. The Implementation Guide notes that there are two key differences between the entities covered by subparagraphs (b) and (c) of the

33 The requirement that the act or omission must be appealable was at stake in Aarhus Committee findings ACCC/C/2010/48 (Austria), ECE/MP.PP/C.1/2012/4. Under the Austrian system at that time, an applicant would receive a letter that would inform him/her of a refusal to provide the requested information. This letter did, however, not qualify as a challengeable act/omission under the Austrian law. An applicant was therefore required to request a separate “official notification”, which could then be appealed to the courts. The Aarhus Committee found that such a requirement was not in accordance with article 4(7) of the Convention basing itself on the need for “effective” and “timely” review procedures under Article 9(4). The Austrian federal and provincial laws were amended in 2016-2017 so that an applicant is immediately provided with an appealable decree.

34 C-279/12, *Fish Legal and Emily Shirley v Information Commissioner and Others*, para. 51.

35 Aarhus Convention Implementation Guide, p. 46.

36 C-279/12, *Fish Legal and Emily Shirley v Information Commissioner and Others*.

37 Ibid, para. 56.

38 Ibid, paras 53-55.

corresponding provisions in the Aarhus Convention.

The first difference is the source of the entity's authority to perform public functions. While entities falling within subparagraph (b) derive their authority directly from national law, the entities under subparagraph (c) derive their authority indirectly from the control exerted on them by another public authority.³⁹

The second key difference sets paragraph (c) apart from both subparagraphs (a) and (b). While subparagraphs (a) and (b) define public authorities without limitation to their field of activities, subparagraph (c) requires that their activities relate to the environment.⁴⁰

The *Fish Legal* case also provided an opportunity for the Court of Justice of the European Union to elaborate on the concept of control in the context of Article 2(2) (c) of the Environmental Information Directive. The Court held that the concept of "control" refers to the fact that the entity in question "does not determine in a genuinely autonomous manner the way in which it performs the functions in the environmental field which are vested in it, since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on the entity's action in that field."⁴¹

According to the Court, the manner in which influence is exerted is irrelevant. Such influence "may take the form of, *inter alia*, a power to issue directions to the entities concerned, whether or not by exercising rights as a shareholder, the power to suspend, annul after the event or require prior authorisation for decisions taken by those entities, the power to appoint or remove from office the members of their management bodies or the majority of them, or the power wholly or partly to deny the entities financing to an extent that jeopardises their existence."⁴²

The Court added that control may also be by way of a specific system of regulation, if it involves "a particularly precise legal framework which lays down a set of rules determining the way in which such companies must perform the public functions related to environmental management with which they are entrusted, and which, as the case may be, includes administrative supervision intended to ensure that those rules are in fact complied with". This is the case even if a public authority does not determine the day-to-day management of the entity concerned.⁴³

As to the question of control, the Aarhus Committee has found that a company wholly owned by the State would meet this criterion.⁴⁴ The Implementation

Guide also suggests that "subparagraph (c) covers entities performing environment-related public services that are subject to regulatory control"

Therefore, the scope of sub-paragraph (c) is wide. As long as an entity performs environment-related services and does not enjoy full discretion in doing so, either because of the way it is regulated or because an entity falling within sub-paragraphs (a) or (b) exerts influence, its acts/omissions in relation to requests for access to environmental information may be subject to review.

2.4. The special case where there are no constitutional provisions for review

When the EU ratified the Aarhus Convention, it made the following declaration in respect of Article 2(2) and Article 6 of the Environmental Information Directive:

"In relation to Article 9 of the Aarhus Convention, the European Community invites Parties to the Convention to take note of Article 2(2) and Article 6 of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on Public Access to Environmental Information. These provisions give Member States of the European Community the possibility, in exceptional cases and under strictly specified conditions, to exclude certain institutions and bodies from the rules on review procedures in relation to decisions on requests for information.

*Therefore the ratification by the European Community of the Aarhus Convention encompasses any reservation by a Member State of the European Community to the extent that such a reservation is compatible with Article 2(2) and Article 6 of Directive 2003/4/EC."*⁴⁵

Indeed, the second sentence of the second subparagraph of Article 2(2) of the Environmental Information Directive states: "If their constitutional provisions at the date of adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions from that definition."

In *Flachglas Torgau* the Court of Justice observed that "that provision was intended to deal with the specific situation of certain national authorities, and in particular authorities acting in an administrative capacity, whose decisions, at the date of adoption of Directive 2003/4, could not, according to the national law in force in certain Member States, be subject to review in accordance with the requirements of that directive."⁴⁶

The authors are aware that this provision has been used in Sweden to refuse access to justice in

³⁹ Implementation Guide, p. 47.

⁴⁰ Ibid

⁴¹ C-279/12 *Fish Legal and Emily Shirley v Information Commissioner and Others*, para. 68.

⁴² Ibid, para. 69.

⁴³ Ibid, paras 70-71.

⁴⁴ ACCC/C/2004/1 (Kazakhstan), para. 17; ACCC/C/2004/4 (Hungary), ECE/MP.PP/C.1/2005/2/Add.4, para. 10.

⁴⁵ Available at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en#EndDec>

⁴⁶ C-204/09, *Flachglas Torgau GmbH v Bundesrepublik Deutschland*, ECLI:EU:C:2012:71, para. 46.

respect of decisions of central government to reject requests for environmental information⁴⁷, although whether this is in compliance with the Aarhus Convention is highly questionable. We do not have knowledge of its use in any other Member State.

2.5. Bodies or institutions acting in a judicial or legislative capacity

Article 2(2) of the Environmental Information Directive states that Member States may provide that the definition of a public authority “shall not include bodies or institutions when acting in a judicial or legislative capacity”. According to the Implementation Guide, “there is nothing in the Convention that would prevent a Party from deciding to extend legislation to cover these bodies and institutions, even if it is not obligated by the Convention to do so.”⁴⁸

The CJEU has adopted a functional approach to the question of whether a public body is acting in a legislative capacity.⁴⁹ The Court established in *Deutsche*

Umwelthilfe that the exception in Article 2(2) of the Environmental Information Directive “may not be applied to ministries when they prepare and adopt normative regulations which are of a lower rank than a law”.⁵⁰

The Aarhus Committee has also held that the label in the domestic law of a State Party is not decisive in determining whether an act is legislative in nature⁵¹, nor is the constitutional status of the entity adopting the act (e.g. legislature versus executive).⁵² Rather, the decisive question is whether the authority in question acted in the capacity of a public authority when adopting the specific act.⁵³ For instance, the Committee found that the UK Parliament had not acted in a legislative capacity when permitting a high-frequency railway by way of a hybrid bill.⁵⁴

With regard to “judicial capacity”, this exemption takes account of the special procedures applied to judicial bodies and has not been the subject of much controversy.

47 See the judgment of the Supreme Administrative Court of Sweden of 16.05.2017, summarily dismissing Greenpeace Nordic’s application for judicial review of the government’s refusal to grant access to environmental information.

48 P. 49.

49 C-204/09 *Flachglass Torgau*, para. 49.

50 C-515/11, *Deutsche Umwelthilfe*, ECLI:EU:C:2013:523, para. 36.

51 ACCC/C/2008/32 (European Union), Part I, ECE/MP.PP/C.1/2011/4/Add.1, para. 71.

52 Implementation Guide, p. 49.

53 ACCC/C/2008/32 (European Union), Part I, paras 72-73.

54 ACCC/C/2011/61 (United Kingdom), ECE/MP.PP/C.1/2013/13, para. 54.

3. Review by whom?

Article 6(1) of the Environmental Information Directive requires Member States to put in place a procedure in which a public authority’s acts and omissions can be reconsidered by the same or another public authority, or be subject to administrative review by an independent and impartial body established by law. Such procedure must be expeditious and free or inexpensive. The Directive thereby implements the second sub-paragraph of Article 9(1) AC.⁵⁵

This provision ensures that long and relatively expensive court proceedings are not the only means of accessing a review procedure. It introduces a prior administrative procedure where decisions can be either “reconsidered” by the same public authority that took the original decision or “reviewed by an independent and impartial body”. Such additional procedures must be established by law and must be “expeditious” and “free of charge or inexpensive”, which are additional to the requirements that review procedures are “timely” and “not prohibitively expensive” as required by Article 9(4) AC (see Chapter 4). This is intended to allow any member of the public to access the procedures and specifically

recognizes that time is an essential factor in access to information requests.⁵⁶ For example, the Aarhus Committee has found the Norwegian Parliamentary Ombudsman to fall under article 9(1), second sentence, because Ombudsman decisions were not binding and there was the possibility that an applicant could still appeal to the courts after the procedure.⁵⁷ The Committee held that in the specific case before it, the Parliamentary Ombudsman had not provided for an “expeditious” procedure (overall nearly 2.5 years), also because the Ministry took too long to reconsider its decision in response to an Ombudsman request.⁵⁸

Article 6(2) of the Environmental Information Directive further requires that applicants have access to a review procedure before a court of law or another independent and impartial body established by law, whose decisions may become final. Article 6(3) requires that the final decisions in such a review procedure are binding on the public authority concerned, and that reasons are stated in writing, at least where access to information is refused.⁵⁹

55 Article 9(1) requires that an applicant, “also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law”. The Directive makes this procedure obligatory in any case, while under the Convention it is only required if there is also a possibility for later court review, not if there is access to an independent and impartial body that issues binding decisions.

56 Aarhus Convention Implementation Guide, p. 190 and ACCC/C/2013/93 (Norway), para. 88.

57 ACCC/C/2013/93 (Norway), paras 38 and 86.

58 Ibid, paras 90-91. The Committee refrained, however, from presenting recommendations because there was no indication that there was an underlying systemic issue (paras 92 and 95).

59 The Aarhus Committee held with regard to the corresponding provision under the Convention (last sentence of Article 9(1)) that this requirement was not complied with where a public authority had the possibility not to comply with a court judgement in practice (ACCC/C/2008/30 (Moldova), para. 35).

These provisions implement faithfully Article 9(1) AC, which requires that the review must be by a court or, in the alternative, “another independent and impartial body established by law.” According to the Implementation Guide, alternative independent

and impartial bodies that are not courts “must be at least quasi-judicial, with safeguards to guarantee due process, independent of influence by any branch of government and unconnected to any private entity.”⁶⁰

60 Aarhus Convention Implementation Guide, p. 191.

4. What is the required scope and standard of review?

According to Article 6 of the Environmental Information Directive, applicants must have access to a review procedure to challenge public authorities on the following grounds:

- The public authority ignored the request for access to environmental information;
- The request was wrongly refused, whether in part or in full;
- The request was inadequately answered, or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5 of the Directive.

These grounds cover both the substantive legality of the public authority’s decision or omission (i.e. what information was refused and on what grounds) as well as the procedural legality (i.e. whether the decision fulfilled the requirements relating to the procedure by which the decision was taken, or how the information is disclosed).⁶¹ In other words, applicants can seek review of acts or omissions in relation to requests for environmental information on the basis that they breach

the procedural or substantive requirements of the Environmental Information Directive (and, where relevant, the Aarhus Convention) discussed in section 1 above.

As regards the intensity or standard of review under the Environmental Information Directive, the CJEU has held that national review procedures in relation to applications for access to environmental information must allow the competent court or tribunal “to apply effectively the relevant principles and rules of EU law”.⁶² In the specific context of that case, the Court concluded that this meant reviewing at least whether the conditions for charging for the supply of environmental information set out in Article 5(2) of the Environmental Information Directive were met.

The Commission Notice suggests that the logical conclusion of this case is that the competent court or tribunal must review the, “specific conditions that a public authority must fulfil under binding EU provisions on access to environmental information.”⁶³

61 See the Aarhus Convention Implementation Guide, p. 191 and the Commission Notice, para. 64.

62 Case C-71/14 East Sussex, ECLI:EU:C:2015:656, para. 58.

63 Commission Notice, section 3.3.1.

5. What are the conditions of standing?

Article 6 of the Environmental Information Directive states that “any applicant” for access to environmental information must have access to a review procedure. The term “applicant” is defined very simply in Article 2(5) of the Directive, as “any natural or legal person requesting environmental information.”

It is significant that, under both the Aarhus Convention and the Environmental Information Directive, there are no standing requirements linked to citizenship, residence or centre of activities.

Chapter 2

Access to justice concerning public participation rights

CJEU	ACCC findings	Legal provisions
<p>C-75/08 <i>Mellor</i>: challenging the absence of an EIA;</p> <p>C-115/09 <i>Trianel</i>, C-137/14 <i>European Commission v Germany</i>, C-72/12 <i>Gemeinde Altrip</i>, C-570/13 <i>Gruber</i>: limitations to standing & scope of challenges under the EIA Directive;</p> <p>C-128/09 <i>Boxus and others</i>: permitting decisions following EIA adopted by legislative act;</p> <p>C-72/95 <i>Kraaijeveld & C-416/10 Križan and Others</i>: standard of review under the EIA Directive;</p> <p>C-243/15 <i>Lesoochránárske zoskupenie VLK (Slovak Bears II)</i>: standing and scope of challenges under the Habitats Directive;</p> <p>C-127/02 <i>Waddenzee</i>: standard of review under the Habitats Directive;</p> <p>C-664/15 <i>Protect</i>: challenging water permits under the Water Framework Directive;</p> <p>C-263/08 <i>Djurgarden</i>: prior public participation no precondition for standing and NGO standing criteria.</p>	<p>ACCC/C/2010/50 (Czech Republic) and ACCC/C/2011/58 (Bulgaria): challenging EIA screening decisions and subsequent permits;</p> <p>ACCC/C/2013/91 (United Kingdom): identifying the public concerned by an activity;</p> <p>ACCC/C/2008/31 (Germany): scope of a challenge</p> <p>ACCC/C/2005/11 (Belgium): general test on standing;</p> <p>ACCC/C/2013/81 (Sweden): standing in interest-based systems;</p> <p>ACCC/C/2010/48 (Austria) & ACCC/C/2010/50 (Czechia): standing in rights-based systems;</p> <p>ACCC/C/2012/76 (Bulgaria): prior public participation no precondition for standing;</p> <p>ACCC/C/2009/43 (Armenia): NGO standing criteria.</p>	<p>Directive 2014/52/EU, EIA Directive, 16 April 2014;</p> <p>Directive 2010/75/EU, IED Directive, 24 November 2010;</p> <p>Directive 2012/18/EU, Seveso III Directive, 4 July 2012;</p> <p>Directive 92/43/EEC, Habitats Directive, 21 May 1992;</p> <p>Directive 2000/60/EC, Water Framework Directive, 23 October 2000;</p> <p>Directive 2008/98/EC, Waste Framework Directive, 19 November 2008;</p> <p>Directive 2001/42/EC, SEA Directive, 27 June 2001;</p> <p>Directive 2003/35/EC, Public Participation Directive, 26 May 2003;</p> <p>Directive 2009/147/EC, Birds Directive, 30 November 2009.</p>

Introduction

In addition to the right to challenge decisions in respect of environmental information, the Aarhus Convention lays down two further rights to access to justice. Firstly, access to justice is complementary to public participation rights in environmental decision-making, i.e. where persons have a right to be consulted and contribute to a decision, they should also be able to challenge any aspect of the resulting decision in court. Secondly, access to justice is needed to challenge breaches by public and private bodies of laws relating to the environment. The Aarhus Convention incorporates these rights in two separate provisions, Article 9(2) and 9(3).

Article 9(2) AC

Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest or, alternatively,

(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above. The provisions of this paragraph 2 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.

Article 9(2) AC establishes the right of the public concerned to challenge decisions, acts and omissions that are subject to the public participation obligations contained in its Article 6. According to Article 6 AC, the public participation provisions apply to decisions on whether to permit the specific activities or projects listed in Annex I to the Convention⁶⁴, as well as other activities not listed in Annex I but which may have a significant effect on the environment.⁶⁵

Article 7 AC, which concerns public participation in plans and programmes, includes specific references to Article 6 AC. This raises the question of whether Article 9(2) AC also applies to decisions relating to plans and programmes. While this should arguably be the case, the more accepted interpretation is that Article 9(2) is limited to challenging decisions on specific activities. Of course, this does not prevent a State Party from extending the application of Article 9(2) AC to plans and programmes (Article 7 AC) or executive regulations (Article 8 AC).

Article 9(3) AC encompasses all cases in which an alleged violation of national law relating to the environment has taken place. These can include permitting decisions that do not have a significant negative impact on the environment and thus do not fall within the remit of Article 9(2) AC. The CJEU's judgment in *Protect* illustrates this point.⁶⁶ However, Article 9(3) AC is, of course, much broader than permitting decisions, and may concern

any act or omission of public and private persons that violates national laws relating to the environment.⁶⁷

This chapter deals exclusively with the access to justice requirements arising from Article 9(2) AC and the EU law provisions that implement them, most notably the EIA Directive,⁶⁸ the IED⁶⁹ and the Seveso III Directive⁷⁰. However, these Directives do not cover all of the decisions, acts and omissions that may come within the scope of Article 9(2) AC. As will be explained below, Article 9(2) AC also covers certain decisions under the Habitats Directive, the Water Framework Directive and, possibly, other EU environmental laws that provide a right of public participation in relation to activities and projects, such as the Waste Framework Directive.⁷¹ The chapter also covers CJEU case law prior to ratification of the Aarhus Convention by the EU, which had already established the right of access to national courts to invoke the public participation rights laid down in EU environmental directives.⁷²

⁶⁴ Article 6(1)(a) AC.

⁶⁵ Article 6(1)(b) AC. Article 6(1)(c) allows the Parties not to apply these provisions to proposed activities undertaken for national defence purposes.

⁶⁶ C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, ECLI:EU:C:2017:987 (*Protect*), paras 42 and 54-55.

⁶⁷ As the Aarhus Committee has clarified, "article 9, para. 3, of the Convention is not primarily directed at the licensing or permitting of development projects; rather it concerns acts and omissions that contravene provisions of national law relating to the environment. Moreover, the concept of "acts" under article 9, para. 3, of the Convention, is to be given a broad interpretation, the decisive factor being whether the act or omission in question can potentially contravene provisions of national law relating to the environment" (Report of the Aarhus Committee to the 6th MoP on compliance by Germany with its obligations under the Convention, ECE/MP.PP/2017/40, para. 50).

⁶⁸ Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment (as amended by Directive 2014/52/EU) (the "EIA Directive").

⁶⁹ Directive 2010/75/EU on industrial emissions (the "IED").

⁷⁰ Directive 2012/18/EU on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC (the "Seveso III Directive").

⁷¹ Communication from the Commission of 28/4/2017: Commission Notice on Access to Justice in Environmental Matters. C(2017) 2616 final, para. 70.

⁷² See, for example, Cases C-72/95, *Kraaijeveld* ECLI:EU:C:1996:404, para. 56; C-435/97 *WWF and Others* ECLI:EU:C:1999:418, para. 69; C-201/02 *Wells v Secretary of State for Transport*, Local Government and the Regions, ECLI:EU:C:2004:12, paras 54 - 61, and C-127/02 *Waddenzee*, ECLI:EU:C:2004:482, paras 66 - 70.

1. What public participation requirements?

The public participation provisions of the Aarhus Convention are divided into three parts, according to the type of administrative processes concerned. Article 6 requires mandatory public participation in the context of decisions on specific activities (activities listed in Annex I and other activities that may have a significant effect on the environment). Specifically, Article 6 includes the following requirements:

- That the public concerned⁷³ is informed of the proposed activity by public notice or individually, early in the decision-making process, in an adequate, timely and effective manner;⁷⁴
- That reasonable time-frames are provided for, allowing for the public to prepare and participate effectively during the decision-making;⁷⁵
- Early public participation, when all options are open;⁷⁶
- That applicants for specific activities are encouraged to enter into discussions with the public concerned and provide information before applying for a permit;⁷⁷
- That the public concerned can access all information relevant to the decision-making;⁷⁸
- That the public can submit comments, information, analyses or opinions in writing or at a public hearing or inquiry;⁷⁹
- That the decision takes due account of the outcome of the public participation;⁸⁰
- That the public is informed of the final decision promptly and given access to the text of the decision along with the reasons and considerations on which it is based.⁸¹

Article 7 requires public participation concerning plans, programmes and policies relating to the environment, to the extent appropriate. Article 7 provides that some of the public participation provisions contained in Article 6 shall apply in the context of plans, programmes and policies.⁸²

Article 8 states that each party should “*strive to promote effective public participation*” during the preparation of executive regulations and/or generally applicable legally binding normative instruments.

1.1. Specific activities falling within the scope of Article 6 and Article 9(2) AC

Article 6(1) sets certain requirements for public participation during decision-making on specific activities.

Each Party:

- (a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;
- (b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions.

Article 6(1) AC establishes a test for determining whether decisions on certain proposed activities should be subject to the public participation requirements in Articles 6(2) - (9). Article 6(1)(a) AC makes use of an annex of listed activities that are presumed to have a potentially significant effect on the environment. It includes activities in the energy sector, production and processing of metals, the mineral industry, the chemical industry, waste management, waste-water treatment, specific industrial plants, road construction, ports, groundwater abstraction or artificial groundwater recharge, transfer of water resources, extraction of petroleum and natural gas, etc.⁸³

Article 6(1)(b), by contrast, requires State Parties, in accordance with their national law, to also apply Article 6 to other activities not contained in annex I that may nonetheless have a significant effect on the environment. This provision requires State Parties to establish a mechanism in their national legal framework to determine whether the activities not listed in the annex must still be subject to the public participation requirements in Article 6 by virtue of the fact they have a significant effect on the environment.⁸⁴ This requirement has been implemented in EU law by way of the EIA Directive⁸⁵ and other EU environmental directives, such as the Habitats Directive⁸⁶ and the Water Framework Directive⁸⁷, which require Member States to provide for public participation and access to justice in respect of projects likely to have a significant effect on the environment. This is discussed in greater detail in the next section.

73 The “public concerned” is defined in Article 2(5) AC and is discussed in detail in section 4.1 of this chapter.

74 Article 6(2) AC. The details of what information is to be provided are contained in Articles 6(2)(a) to (e).

75 Article 6(3) AC.

76 Article 6(4) AC.

77 Article 6(5) AC.

78 Article 6(6) AC. Articles 6(6)(a) to (f) provides a minimum list of the items of information that must be made available to the public concerned.

79 Article 6(7) AC.

80 Article 6(8) AC.

81 Article 6(9) AC.

82 Specifically, Articles 6(3), 6(4) and 6(8) AC apply to decisions falling within the scope of Article 7 AC.

83 Annex I to the Aarhus Convention.

84 UNECE, Maastricht Recommendations on Public Participation in Decision-making (December 2015), available online: <<https://www.unece.org/index.php?id=49142>>, para. 43 as also referred to by the Aarhus Committee in ACCC/A/2014/1 (Belarus), para. 47.

85 C-72/95 *Kraaijeveld and Others*.

86 C-243/15, *Lesoochrannárske zoskupenie VLK v Obvodný úrad Trenčín*, ECLI:EU:C:2016:838 (*Slovak Bears II*)

87 C-664/15, *Protect*.

2. What measures can be challenged?

2.1. Acts and omissions in relation to projects having a significant effect on the environment

As stated above, Article 9(2) AC ensures that the public concerned has access to justice to challenge any decision, act or omission subject to the provisions in Article 6 AC. In the EU, many of the decisions that fall within the scope of Article 9(2) are taken in accordance with the EIA Directive, first adopted in 1985. A codified version was adopted in 2011 (Directive 2011/92/EU)⁸⁸, which was subsequently amended by Directive 2014/52/EU.⁸⁹ Its aim is to subject projects likely to have a significant impact on the environment to development consent and the carrying out of an environmental impact assessment. The projects for which an EIA must be carried out are listed in Annex I of the EIA Directive. Annex II contains a list of projects for which the Member States must determine whether an EIA should be carried out according to certain criteria.

The EIA directive did not contain specific provisions on access to justice until 2003 following the adoption of the Aarhus Convention. Nevertheless, as early as 1996 the CJEU confirmed the principle of access to justice for “concerned” individuals to invoke provisions of the EIA directive in national courts. In *Kraaijeveld*, a company challenged the decision authorising a zoning plan to carry out dyke reinforcement, which had been adopted without an EIA. The Court held that:

“As regards the right of an individual to invoke a directive and of the national court to take it into consideration, the Court has already held that it would be incompatible with the binding effect attributed to a directive by Article 189 to exclude, in principle, the possibility that the obligation which it imposes may be invoked by those concerned. In particular, where Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national court.”⁹⁰

The Court therefore confirmed that “concerned individuals” must have access to a court to challenge a permitting decision on the basis that an EIA should have been carried out.

Following the adoption of the Aarhus Convention, a specific access to justice provision was inserted in the EIA Directive.⁹¹ The current Article 11 of the EIA Directive

faithfully transposes Article 9(2) AC. It states that Member States shall ensure that the public concerned “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 or omissions subject to the public participation provisions of this Directive.” It also requires Member States to determine at what stage decisions, acts or omissions may be challenged.

Both the Aarhus Committee and the CJEU have confirmed that Article 9(2) AC and Article 11 EIA Directive are not confined to challenging the EIA or the procedure leading up to its adoption. In its findings on Communication ACCC/C/2010/50 (Czech Republic), the Committee found that the Czech Republic was in violation of Article 9(2) AC because NGOs had only limited standing to challenge final permitting decision.⁹²

Rather, these provisions provide a right of access to justice in relation to all kinds of decisions that are or should be subject to public participation under the EIA Directive, or which affect the concerned public’s right to participate in such decisions. These include the following:

- An EIA that is vitiated by errors⁹³,
- decisions not to submit a particular project to an EIA (screening decisions)⁹⁴,
- final permitting decision;⁹⁵
- final permitting decisions that are ratified by a legislative act.⁹⁶

2.2. Decisions related to permits regarding industrial emissions

Directive 2010/75 on industrial emissions (the “IED”)⁹⁷ regulates pollutant emissions from industrial installations. It requires installations carrying out the industrial activities listed in its Annex I to operate in accordance with a permit granted by Member State authorities.

88 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, p. 1-21.

89 Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, OJ L 124, 25.4.2014, p. 1-18.

90 C-72/95, *Kraaijeveld and Others*, para. 56.

91 Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003.

92 ACCC/C/2010/50 (Czech Republic), ECE/MP.PP/C.1/2012/11, para. 78.

93 C-137/14, *European Commission v Germany*, ECLI:EU:C:2015:683 paras 47 - 51.

94 *Ibid*, para. 48. See also cases C-570/13 Gruber, para. 44, and C-75/08 Mellor, ECLI:EU:C:2009:279, para. 59 and ACCC/C/2010/50 (Czech Republic), para. 82.

95 See ACCC/C/2010/50 (Czech Republic), in which the Aarhus Committee stated: “...the rights of such NGOs under Article 9, para. 2 of the Convention are not limited to the EIA procedure only, but apply to all stages of the decision-making to permit an activity subject to article 6.” Also, ACCC/C/2011/58 (Bulgaria), ECE/MP.PP/C.1/2013/4, paras 72 - 81 in which the Committee clarifies that the public concerned must be able to challenge final permits where no EIA has taken place in breach of the law, or where the conclusions of the EIA have not been taken into account in the final permit decision. See also, CJEU cases C-72/95 *Kraaijeveld*; C-435/97 *WWF and others*; C-201/02 *Wells*; C-263/08 *Djurgarden*, ECLI:EU:C:2009:631, paras 37-39; C-115/09 *Trianel*, ECLI:EU:C:2011:289 para. 59, C-72/12 *Gemeinde Altrip*, ECLI:EU:C:2013:712.

96 C-128/09 *Boxus and others*, ECLI:EU:C:2011:667.

97 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010, p. 17-119.

Article 24 IED ensures that the public concerned can participate in the following permitting procedures:

- the granting of a permit for new installations;
- the granting of a permit for any substantial change;
- the granting or updating of a permit for an installation where a derogation from the usual emissions limits is proposed in accordance with Article 15(4) IED;
- the updating of a permit or permit conditions for an installation due to its causing pollution of significance in accordance with Article 21(5)(a) IED.

Article 25 faithfully transposes the access to justice provisions in Article 9(2) AC (in identical terms to Article 11 EIA Directive). It requires Member States to ensure that *“the public concerned 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 or omissions subject to Article 24...”*

It is therefore clear that the public concerned must have access to justice to challenge the permitting decisions listed in Article 24 IED.

2.3. Measures relevant to the prevention or limiting the consequences of major accidents involving dangerous substances

The Seveso III Directive⁹⁸ aims at the prevention of major accidents involving dangerous substances and limiting their consequences when such accidents do occur. Article 13 establishes the obligation on Member States to ensure that the objectives of preventing major accidents and limiting the consequences of such accidents for human health and the environment are taken into account in their land-use policies or other relevant policies. Article 15 then provides for public consultation during the decision-making process related to specific projects, which are related to the plans falling under the scope of Article 13. Article 23 contains a specific provision on access to justice to challenge decisions subject to public consultation under Article 15. It states that, *“in their respective national legal system, members of the public concerned have access to the review procedures set up in Article 11 of Directive 2011/92/EU [the EIA Directive] for cases subject to Article 15(1) of this Directive.”* In principle, the same access to justice guarantees as discussed in section 2.1 should therefore apply.

2.4. Decisions relating to projects likely to have a significant effect on Natura 2000 sites

The CJEU has confirmed that individuals must have access to justice to challenge certain decisions related to specific activities and projects that do not fall within the scope of the EIA Directive

and the IED. These include projects permitted in accordance with Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the “Habitats Directive”).⁹⁹

The Habitats Directive aims to maintain biodiversity by, among other measures, establishing the EU wide Natura 2000 ecological network of protected sites. Article 6(3) requires any plan or project likely to have a significant effect on a Natura site to be subject to an assessment of its implications for the site’s conservation objectives. Significantly, having carried out the assessment, a plan or project can only be approved *“after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.”*¹⁰⁰

Prior to ratification of the Aarhus Convention, the CJEU established a right for individuals to invoke the obligations in Article 6(3) of the Habitats Directive before national courts based on the doctrine of direct effect.¹⁰¹ In other words, the Court held that individuals must be able to challenge before national courts decisions to permit plans or programmes likely to have a significant effect on Natura sites.

More recently, in *Slovak Bears II*¹⁰², the CJEU held that decisions under Article 6(3) of the Directive are subject to Article 9(2) AC. The case concerned a legal challenge brought by environmental NGO, LZ, against an application for authorisation of a project for the construction of an enclosure that would extend a deer reserve on a Natura site. The Court of Justice held that Article 6(3) of the Habitats Directive, read in conjunction with Article 6(1)(b) of the Aarhus Convention, provided LZ with a right to participate in the procedure for authorisation of a project likely to have a significant effect on the environment.¹⁰³ This being the case, the Court confirmed that Article 9(2), read in conjunction with the right to an effective remedy in Article 47 CFR, gave LZ the right to challenge decisions falling within the framework of Article 6(3) of the Directive before a national court. Such decisions may concern, *“a request to participate in the authorisation procedure, the assessment of the need for an environmental assessment of the implications of a plan or project for a protected site, or the appropriateness of the conclusions drawn from such an assessment as regards the risks of that plan or project for the integrity of the site”*.¹⁰⁴ The Court also clarified that it is immaterial whether such decisions are autonomous or integrated in a decision granting authorisation.¹⁰⁵

98 Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC, OJ L 197, 24.7.2012, p. 1-37.

99 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7-50.

100 Habitats Directive, Article 6(3).

101 C-127/02, *Waddenzee*, paras 66 - 70. See chapter 3 for a more detailed discussion of the doctrine of direct effect in the context of environmental law.

102 C-243/15, *Lesoochrannárske zoskupenie VLK v Obvodný úrad Trenčín* (Slovak Bears II)

103 *Ibid*, paras 46-49

104 *Ibid*, para. 56

105 *Ibid*

2.5. Decisions relating to water management

The CJEU has also confirmed that decisions taken under Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy (the “Water Framework Directive”)¹⁰⁶ may also fall within the scope of Article 9(2) AC. The Water Framework Directive aims to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater. Article 4 lays down a number of requirements for Member States to prevent the deterioration of water quality and ensure its protection. Article 14 requires Member States to “encourage the active involvement of all interested parties in the implementation of this Directive...”

In case C-664/15 *Protect*¹⁰⁷, an NGO in Austria sought to challenge the extension of a permit allowing a private company to remove water from a river for the purpose of making snow on the grounds that it breached Article 4 of the Water Framework Directive. The Court of Justice confirmed that a permitting decision to which Article 4 of the Water Framework Directive applies may fall under Article 6(1)(b) and Article 9(2) of the Convention if it cannot be ruled out that the project at issue will not have a significant adverse effect on the state of the water forming the subject of the permit.¹⁰⁸ However, where it has been verified that there would be no such significant adverse effect, thereby excluding the application of Article 9(2) AC, the public concerned must still have access to justice in accordance with Article 9(3) of the Convention (this case is discussed further in Chapter 3). *Ibid.*, para 43.

This case serves as a good example of the fact that the delineation between decisions falling under Article 9(2) and those falling under 9(3) can be unclear. Often, it is impossible for the public concerned, including NGOs, to understand in advance whether they benefit from the more detailed provisions in Article 9(2) before bringing a case.

2.6. Decisions relating to waste management

The Commission Notice suggests that the rationale behind the CJEU’s judgment in *Slovak Bears II* also

¹⁰⁶ Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy, OJ L 327, 22.12.2000, p. 1-73.

¹⁰⁷ C-664/15 *Protect*.

¹⁰⁸ *Ibid.*, para. 42.

“lends itself to be applied by analogy to decision-making processes in other sectors of EU environmental law such as water and waste”.¹⁰⁹ Decisions in the water sector have been dealt with above.

With regard to waste related activities, it should be noted that some of these activities are included in Annex I or Annex II of the EIA Directive, for example regarding certain waste disposal installations.¹¹⁰ Decisions taken in the procedure for the approval of such activities already fall squarely within the scope of Article 9(2). Waste incineration plants must also hold a permit in accordance with the IED.

But what of other waste related activities that are not mentioned in the EIA Directive or the IED? Using the rationale of *Slovak Bears II*, it is possible to argue that such activities also fall within the scope of Article 9(2) AC.

Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (the “Waste Framework Directive”)¹¹¹ lays down measures to protect the environment and human health by preventing or reducing the adverse impacts of waste generation and management.

Article 4 of the Directive states that, “Member States shall ensure that the development of waste legislation and policy is a fully transparent process, observing existing national rules about the consultation and involvement of citizens and stakeholders.” In addition to this, Article 13 obliges Member States to “take the necessary measures to ensure that waste management is carried out without endangering human health, without harming the environment”. Further, Article 23 requires “any establishment or undertaking intending to carry out waste treatment to obtain a permit from the competent authority.”

It is plausible that the CJEU would interpret these provisions to ensure that Article 6(1)(b) AC and Article 9(2) AC apply to decisions taken within a procedure for the approval of specific activities falling within the scope of the Waste Framework Directive.

¹⁰⁹ Commission Notice, para. 70.

¹¹⁰ The term “waste disposal installations” in the EIA Directive also covers waste recovery installations, as confirmed by the CJEU in case C-486/04 *Commission v Italy*, ECLI:EU:C:2006:732.

¹¹¹ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives (Text with EEA relevance), OJ L 312, 22.11.2008, p. 3-30.

3. What is the required scope and standard of review?

The scope of review refers to the range of legal arguments and provisions of law that national courts must consider in the proceedings described above, while the standard of review refers to the level of scrutiny applied by the judge.

3.1. Scope of review

3.1.1. Procedural and substantive legality

Article 9(2) AC specifies that members of the public concerned have the right to “challenge the substantive or procedural legality” of decisions, acts or omissions.¹¹² The Commission Notice and Implementation Guide define procedural legality as the violation of a procedure set out in law,¹¹³ while substantive legality relates to the fact that the substance of the law is violated.¹¹⁴ As opposed to Article 9(3), which refers to contraventions of national law relating to the environment, Article 9(2) does not include any such limitation to the scope of review.

Article 11 of the EIA Directive and Article 25 of the EID implement Article 9(2) AC in almost identical terms, giving members of the public the right to “challenge the substantive or procedural legality” of decisions, act or omissions subject to the public participation provisions of the respective directives.

In *Trianel*¹¹⁵, the Court of Justice considered the meaning of procedural and substantive legality in Article 11 of the EIA Directive in the context of an NGO applicant. The judgment arose from a preliminary reference from a German administrative court in a case filed by the NGO “BUND”. The Court used this opportunity to clarify that Article 11 of the EIA Directive “has in no way restricted the pleas that may be put forward in support of [...] an action.”¹¹⁶ Therefore, Article 11 gives members of the public concerned the right to challenge such decisions, acts or omissions on the basis that they conflict with rules of national law implementing EU environmental law, including national rules flowing from the Habitats Directive and the rules of EU environment law having direct effect.¹¹⁷

Article 11 of the EIA Directive accordingly only serves as the basis for entry to the courts; during the court proceedings NGO applicants are free to challenge the decision, act or omission on EU law grounds that go beyond the Directive. Moreover, since Article 15(1) of the Seveso III Directive applies

Article 11 of the EIA Directive directly, the same logic would apply to challenges based on this provision.

Faced with a dispute involving an NGO in *Slovak Bears II*¹¹⁸, the Court subsequently extended this reasoning to challenges brought under Article 6(3) of the Habitats Directive. Therefore, in all of the challenges referred to in this chapter, the applicants must be able to allege that the act, decision or omission conflicts with:

- rules of national law implementing EU environmental law and/or
- rules of EU environment law having direct effect.

The Aarhus Committee has gone further than this. In its findings on a complaint against Germany, it found that national rules that limit the grounds of review to breaches of provisions that “serve environmental protection” is not permissible under Article 9(2) AC:

*“While the Convention relates to environmental matters, there may be legal provisions that do not promote protection of the environment, which can be violated when a decision under article 6 of the Convention is adopted, for instance, provisions concerning conditions for building and construction, economic aspects of investments, trade, finance, public procurement rules, etc. Therefore, review procedures according to article 9, paragraph 2, of the Convention should not be restricted to alleged violations of national law “serving the environment”, “relating to the environment” or “promoting the protection of the environment”, as there is no legal basis for such limitation in the Convention.”*¹¹⁹

It follows that decisions falling within the scope of Article 6 AC can be challenged on the basis that they contravene provisions of any national law implementing EU law¹²⁰ and any EU law having direct effect, even if such laws do not have a connection to the environment.

3.1.2. Procedural defects do not have to impact the final decision to be subject to review

One possible ground to challenge a decision falling under Article 11 of the EIA Directive is non-compliance with the procedural requirements contained in the EIA Directive itself. In this regard, the Court of Justice held that applicants must be able to not only challenge the complete absence of an EIA¹²¹ but also challenge an EIA on the basis that it was defective or irregular.¹²²

¹¹² The Aarhus Committee has for instance held on that basis that NGOs could not be limited to seeking review of only the substantive, and not procedural, legality of decisions (ACCC/C/2010/50 (Czech Republic), para. 81).

¹¹³ Commission Notice, para. 132 and Aarhus Implementation Guide, p. 196.

¹¹⁴ Commission Notice, para. 136.

¹¹⁵ C-115/09 *Trianel*.

¹¹⁶ C-115/09 *Trianel*, para. 37 and C-72/12 *Gemeinde Altrip*, para. 36 referring both to the equivalent provision in the preceding EIA Directive, Article 10a of Directive 85/337.

¹¹⁷ C-115/09 *Trianel*, paras 48-49 and C-137/14, *Commission v Germany*, para. 92.

¹¹⁸ C-243/15 *Lesoochrannárske zoskupenie VLK v Obvodný úrad Trenčín (Slovak Bears II)*

¹¹⁹ ACCC/C/2008/31 (Germany), ECE/MP.PP/C.1/2014/8, para. 78.

¹²⁰ Based on the fact that Member States are separately also Parties to the Convention, this would also extend to substantive and procedural national rules but this matter falls outside of the scope of EU law and therefore this guide.

¹²¹ Concerning the right to challenge decisions to not conduct an EIA, see C-75/08 *Mellor* and C-570/13 *Gruber*, paras 42-50.

¹²² C-137/14, *Commission v Germany*, paras 48-49; C-72/12 *Altrip*, para. 37.

In addition, the scope of a national legal challenge may not be limited to alleged procedural defects in the EIA that affect the resulting decision.¹²³ Procedural defects that do not go to the heart of the decision but only vitiated the EIA procedure must also be challengeable. According to the Court, this would only be different where the national court can establish, *“without in any way making the burden of proof of causality fall on the applicant, but by relying, where appropriate, on the evidence provided by the developer or the competent authorities and, more generally, on the case-file documents submitted to that court or body, that the contested decision would not have been different without the procedural defect invoked by that applicant.”*¹²⁴ Accordingly, national courts may not categorically refuse to consider a claim by an applicant that a decision was vitiated by a procedural defect during the EIA because the applicant did not sufficiently establish that the decision would otherwise have been different.

The Aarhus Committee concurred but without the qualification mentioned by the CJEU. It found that, *“[i]t would not be compatible with the Convention to allow members of the public to challenge the procedural legality of the decisions subject to article 6 of the Convention in theory, while such actions were systematically refused by the courts in practice, as either not admissible or not well founded, on the grounds that the alleged procedural errors were not of importance for the decisions (i.e., that the decision would not have been different, if the procedural error would not take place)”*.¹²⁵ In the context of Article 6 of the Habitats Directive, in *Slovak Bears II*, the Court of Justice held that applicants must be able to challenge *“not only a decision not to carry out an appropriate assessment of the implications for the site of the plan or project in question but also, as the case may be, the assessment carried out inasmuch as it is alleged to be vitiated by defects.”*¹²⁶ Based on the same logic, restricting the grounds of challenge to elements of the appropriate assessment that affected the resulting decision would breach Article 9(2) AC.

Logically, the same case law should be applicable to allegations concerning the procedural requirements under the Seveso III Directive. Specifically, if a project falls under Article 15(1) of the Seveso III Directive and accordingly was preceded by public participation under this provision, applicants should be able to challenge non-compliance with specific procedural requirements without having to demonstrate that it influenced the final decision on the project.

3.1.3. Prohibition of material preclusion

In *Commission v Germany*, the Court further addressed a specific issue concerning the scope of review required under both Article 11(4) of the EIA Directive and Article 25(4) of the IED. The Court held that a rule which limited applicants in court proceedings to the arguments they had already raised in the preceding administrative proceedings (material preclusion) was not compliant with these provisions.¹²⁷ The Court further stated that, if the national legislature were concerned with the efficiency of the legal proceedings, other appropriate mechanisms could be adopted such as laying down a procedural rule according to which arguments are inadmissible if they are *“submitted abusively or in bad faith”*.¹²⁸ However, such rules may not make it impossible to challenge the substantive and procedural legality of the decision concerned.¹²⁹

Even though the Court has not pronounced on this point yet, the reasoning in this case would again appear to apply to any challenge covered by article 9(2) AC which is preceded by a participation procedure.

3.1.4. The specific case of individuals in a right-based system

The Commission Notice points out that the requirements as to the scope of review are of particular relevance in systems which traditionally require a violation of a right as a precondition for standing (discussed in more detail in section 4.2.2. below).¹³⁰ This is because in such systems the right on which standing is based usually determines the scope of review. On the other hand, in systems where standing is based on sufficient interest, the question of access to the courts is principally distinct from the scope of review. The relevant CJEU case law on this question was therefore also driven by references from legal systems adopting a rights based approach to standing (see case law in the preceding sections).

Due to the fact that the right of NGOs to obtain standing is separate from their substantive public law rights, the scope of review is not affected for NGO applicants. However, for individuals in a rights-based system, the CJEU has held that it is permissible under EU law to limit the scope of review to arguments based on the subjective public law rights that the applicant holds.¹³¹ As stated in the Commission Notice, this creates a potential difference in the scope of review for challenges when the applicant is an individual as opposed to an NGO, which can bring a challenge on any grounds (see section 3.1.1. above).¹³²

123 C-137/14, *Commission v Germany*, paras 55-58 and C-72/12 *Altrip*, paras 47-48.

124 C-137/14, *Commission v Germany*, para. 60, C-72/12 *Altrip*, para. 53.

125 ACCC/C/2008/31 (Germany), para. 83.

126 C-243/15 *Lesoochrannárske zoskupenie VLK v Obvodný úrad Trenčín* (Slovak Bears II), para. 61 referring, by analogy, to C-72/12 *Altrip*, para. 37.

127 C-137/14, *Commission v Germany*, paras 79-80.

128 *Ibid.*, para. 81.

129 Commission Notice, para. 122.

130 *Ibid.*, para. 110.

131 C-137/14, *Commission v Germany*, para. 91, see also C-115/09 *Trianel*, paras 36 and 45 and C-570/13 *Gruber*, para. 40.

132 Commission Notice, paras 113-115.

Article 9(2) AC does not distinguish between individuals or NGOs as regards the scope of review so it would appear that such a limitation is not compliant with the Aarhus Convention. The effect of this limitation to the scope of review for individuals under Article 11 of the EIA Directive may be somewhat mitigated by the CJEU's case law on direct effect, discussed in chapter 3. According to the CJEU, those "*directly concerned*" by a directly effective EU law obligation must have standing to enforce them in court, even when they do not affect a subjective public law right.¹³³ However, this does not ensure that individuals can benefit from the full scope of review discussed in section 3.1.1. above and is therefore not a satisfactory implementation of Article 9(2) requirements.

3.2. Standard of review

As opposed to the scope of review, which concerns the grounds on which an act or omission can be challenged; the standard of review concerns the level of scrutiny applied by the judge in his assessment of those grounds. In practice, this will often concern the judge's appraisal of the degree of discretion enjoyed by the public authority.

The Commission Notice¹³⁴ points out that neither the AC nor EU secondary legislation impose specific requirements as to the standard of review to be applied in challenges under Article 9(2) and 9(3) AC. Nonetheless, previous findings of the Aarhus Committee and judgments of the CJEU impose certain minimum requirements.

3.2.1. Requirements under the Aarhus Convention

The Aarhus Committee considered the standard of review of "substantive legality" in communication ACCC/C/2008/33 which concerned, among other issues, the standard applied by the courts of England and Wales when reviewing the decisions of public authorities. The Committee stated that it was not convinced that the test applied by the English and Welsh courts "*meets the standards for review required by the Convention as regards substantive legality.*"¹³⁵ The Committee referred in this regard specifically to the "*Wednesbury unreasonableness*" test,¹³⁶ according to which a decision is illegal as to its substance only if the public authority has "*come to a conclusion so unreasonable that no reasonable authority could ever have come to it*".¹³⁷

In its findings on this communication, the Aarhus Committee only expressed concern but did not find non-compliance with the Convention because it had

insufficient evidence before it to make a general finding.¹³⁸ However, two new Communications on the standard of review by the UK courts are currently pending before the ACCC.¹³⁹

Consequently, even though the Aarhus Committee is yet to adopt definitive findings on this point, it is clear from the Committee's argumentation in case ACCC/C/2008/33 that courts are required to assess the substantive merits of the public authority's decision and not simply defer to their discretion. This is also apparent from the Committee's expressed preference for the so-called "proportionality" test, which requires the courts to assess whether relevant interests in the case have been given adequate weight.¹⁴⁰

3.2.2. Requirements under EU law

As a matter of EU law, it is in principle left to the Member States to lay down the procedural rules governing legal actions to safeguard the rights individuals derive from EU law. Nevertheless, this procedural autonomy is also limited by the case law of the CJEU. Notably, the Court of Justice has held that "*it must not be made impossible in practice or excessively difficult to exercise rights conferred by EU law*"¹⁴¹, i.e. the national procedural law must ensure that effective legal remedies are available. Therefore, the standard of review applied by the national system must enable the court "*to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness*" of a decision.¹⁴² It must be possible for the court to uphold the rights granted by EU law and ensure the objectives of the relevant legislation.¹⁴³

As noted in the Commission Notice, this obligation is three-fold. First, national courts must be able to assess whether mandatory EU procedural requirements are implemented in national law and complied with by the public authorities.¹⁴⁴ Second, national judges must be able to review the facts on which a public authority based its decision.¹⁴⁵ Third, the national court must be able to scrutinize whether the national law and relevant evaluations and assessments of the decision-making authorities complied with the content of the provisions and objective of the EU legislation in question.¹⁴⁶

More specifically, the standard of review is determined by the degree of discretion enjoyed by the national

¹³³ See for instance, C-237/07, *Janecek*, ECLI:EU:C:2008:447.

¹³⁴ Commission Notice, para. 124.

¹³⁵ ACCC/C/2008/33 (United Kingdom), ECE/MP.PP/C.1/2010/6/Add.3, para. 125.

¹³⁶ *Ibid.*

¹³⁷ *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* [1948] 1 K.B. 223.

¹³⁸ ACCC/C/2008/33 (United Kingdom), para. 127 citing also to the criticism of Lord Cooke in *R v. Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, [2001] 2 AC 532 para. 32 and to the judgement of the European Court of Human Rights in *Smith and Grady v. United Kingdom* (1999) 29 EHRR 493, para. 138.

¹³⁹ See pending communications ACCC/C/2013/90 (United Kingdom) and ACCC/C/2017/156 (United Kingdom).

¹⁴⁰ ACCC/C/2008/33 (United Kingdom), para. 126.

¹⁴¹ C-71/14 *East Sussex*, ECLI:EU:C:2015:656, para. 52.

¹⁴² *Ibid.*, para. 58.

¹⁴³ Commission Notice, paras 130-131.

¹⁴⁴ *Ibid.*, para. 134.

¹⁴⁵ *Ibid.*, paras 138-139.

¹⁴⁶ *Ibid.*, paras 140-141.

legislator and the public authority in question under the directly effective provision of EU environmental law relied on. As the Court held in *Waddenzee*, national courts must not be prevented from taking a directly effective provision of a directive into consideration to determine:

- where a directive has been implemented into national law, whether “*the national legislature, in exercising the choice open to it as to the form and methods for implementation, has kept within the limits of its discretion set by the directive*” or
- where a directive has not been implemented into national law, whether “*the national authority which has adopted the contested measure has kept within the limits of its discretion set by [the provision of the directive]*.”¹⁴⁷

Therefore, whether the act under review is a national measure implementing EU environmental law or a specific act or omission of a public authority, the degree of discretion enjoyed will depend on the provision of EU law on which the claimant relies.

The CJEU has provided some further guidance specifically for the EIA Directive, the IED and the Habitats Directive, which are discussed next.

3.2.3. Assessment requirements for activities affecting the environment (EIA Directive and IED)

With regard to environmental impact assessments (EIA), the Court held in *Kraajveld* that the limits of the Member States’ discretion is to be found in the core obligation of the EIA Directive, namely to require an environmental impact assessment for “*projects that are likely, by virtue inter alia of their nature, size or location, [...] to have a significant effect on the environment.*”¹⁴⁸ However, as illustrated by *Krizan*, the standard of review by the courts can also be defined by a specific procedural provision, such as Article 15 of the Industrial Emissions Directive, which requires that the public concerned are given early and effective opportunities to participate in the procedure for issuing a permit.¹⁴⁹

First, this means that the national court must be able to assess whether implementing measures or specific decisions of public authorities comply with the mandatory procedural requirements set by the directive in question.¹⁵⁰ This is first and foremost an objective test as to whether the procedure was respected or not, with the public authority enjoying very little discretion. However, it may also require the national judge to scrutinize the procedure more substantively, to ascertain whether it respects the underlying objective of the relevant EU law provision and the AC. This is again illustrated by *Krizan*, where the Court of Justice held that it was for

the national judge to determine whether the national procedure, which provided for the regularization of a decision where information had been provided at a later stage than required, allowed the public “*effectively to influence the outcome of the decision-making process*”, as required by Article 15(1) of the Industrial Emissions Directive and Article 6(4) AC. The latter provision requires that public participation must be conducted at an early stage, when “*all options are open and effective public participation can take place.*”¹⁵¹

Another example of the scrutiny required in a substantive review concerns decisions on whether a project falling under Annex II of the EIA Directive should be subject to an assessment. Courts must assess whether national criteria are set in a manner that exempts in advance whole categories of projects falling under Annex II of the EIA Directive from the requirement of an environmental impact assessment.¹⁵² Moreover, judicial review of a specific assessment as to whether an Annex II project is likely to have a significant effect on the environment must “*cover the legality of the reasons for the contested [screening] decisions*”;¹⁵³ meaning that the court must be able to review the reasons given by the public authority in their screening decision.

3.2.4. Activities affecting natural habitats

In *Waddenzee*, the Court of Justice addressed an authorization of mechanical cockle fishing in a Natura 2000 site.¹⁵⁴ The Court held with regard to the limits of discretion under article 6(3) of the Habitats Directive that:

“the competent national authorities, taking account of the conclusions of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site’s conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site, that being the case if there remains no reasonable scientific doubt as to the absence of such effects”.

*“Such a condition would therefore not be observed were the national authorities to authorise that activity in the face of uncertainty as to the absence of adverse effects for the site concerned.”*¹⁵⁵

The Court’s judgment appears to be applicable to any specific activity affecting a conservation site. National courts are therefore required to assess whether the scientific evidence relied upon by the decision-making authority to authorize the activity leaves no reasonable scientific doubt.¹⁵⁶ This is an objective assessment and not one that is left to the subjective discretion of the authority.¹⁵⁷

¹⁴⁷ C-127/02, *Waddenzee*, para. 66.

¹⁴⁸ C-72/95, *Kraajveld*, para. 50. See also C-255/05 *Commission v Italy*, para. 53 and C-75/08 *Mellor*, para. 50.

¹⁴⁹ C-416/10, *Krizan*, ECLI:EU:C:2013:8, para. 88.

¹⁵⁰ For examples of the review of relevant legislation, see for instance C-348/15 *Stadt Wiener Neustadt*, ECLI:EU:C:2016:882.

¹⁵¹ C-416/10, *Krizan*, paras 88-89.

¹⁵² C-72/95, *Kraajveld*, paras 51 and 53.

¹⁵³ C-75/08, *Mellor*, para. 59. See also Commission Notice, para. 143.

¹⁵⁴ C-127/02 *Waddenzee*.

¹⁵⁵ *Ibid*, para. 67.

¹⁵⁶ See also Commission Notice, para. 144.

¹⁵⁷ *Ibid*, para. 145.

4. What are the conditions of standing?

The Commission Notice defines standing as “the entitlement to bring a legal challenge to a court of law or other independent and impartial body in order to protect a right or interest of the claimant regarding the legality of a decision, act or omission of a public authority”.¹⁵⁸ The central question to be answered in this section is accordingly which natural and legal persons have such an entitlement under EU law.

First, it should be noted that neither the Aarhus Convention nor EU law prevents Member States from allowing everyone to challenge decisions related to specific activities without distinction.¹⁵⁹ Some EU Member States come close to this, for example the right to *actio popularis* in Portugal¹⁶⁰ and Latvia.¹⁶¹ Nevertheless, most Member States have rules restricting standing to certain categories of persons. Therefore, it is important to understand when restrictions to standing comply with the Aarhus Convention and EU law, and when such restrictions go beyond what is allowed.

As a minimum, Article 9(2) AC requires standing to be granted to persons and NGOs meeting the following criteria:

- They must be a member of the “public concerned”, which is defined in Article 2(5) AC;
- They must either have “a sufficient interest” OR maintain “impairment of a right”.

It should be noted that these criteria are replicated word for word in the EIA Directive, the IED and are referred to in the Seveso III Directive.

This section will look at each of these criteria in turn, as well as how they are applied to NGOs. We will also look at how these provisions have been transposed into EU law and their interpretation by the CJEU and the Aarhus Committee. Finally, it will consider the standing criteria laid down by the CJEU in cases that do not apply the Aarhus Convention.

4.1. Public concerned

Article 2(5) AC “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.

According to Article 9(2), the “public concerned”, provided they meet further criteria discussed below, have the right to challenge the acts and omissions referred to in section 2 above. The term is defined in Article 2(5) AC. According to the Implementation Guide, it “refers to a subset of the public at large who have a special relationship to a particular decision-making procedure” by virtue of the fact that they are affected or likely to be affected by, or have an interest in, the decision to be taken.¹⁶²

The Aarhus Committee has confirmed that the question of whether a person has been affected or is likely to be affected depends on the nature and size of the activity in question. For example “the construction and operation of a nuclear power plant may affect more people within the country and in neighboring countries than the construction of a tanning plant or a slaughterhouse.”¹⁶³ Indeed, the Implementation Guide suggests that the public concerned may be as many as several hundred thousand people across several countries for the construction of nuclear power plants. This was the subject of the Committee’s findings against the UK concerning the construction of nuclear power station, Hinkley Point C. The Committee first clarified that, “the public may be concerned either because of the possible effects of the normal or routine operation of the activity in question or because of the possible effects in the case of an accident or other exceptional incident, or both.”¹⁶⁴ It also pointed out that this is the case even where the risk of an accident occurring is very small.¹⁶⁵ In addition, the activity in question, “may not only impact the measurable factors, such as the property or health of the public concerned, but also less measurable aspects, like their quality of life.”¹⁶⁶ Therefore, when determining the public concerned, the magnitude of effects of an accident must be taken into account, including possible range of adverse effects and the perceptions and worries of persons living within the possible range.¹⁶⁷ The Committee therefore recommended that, in identifying the public concerned by the decision-making on ultra-hazardous activities,

¹⁵⁸ Commission Notice, para. 58.

¹⁵⁹ Aarhus Convention Implementation Guide, p. 194.

¹⁶⁰ See Aragão, A. “Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Portugal”, available at: <http://ec.europa.eu/environment/aarhus/access_studies.htm>.

¹⁶¹ Aarhus Convention Implementation Guide, p. 195.

¹⁶² Implementation Guide, p. 57.

¹⁶³ ACCC/C/2010/50 (Czech Republic), para. 66.

¹⁶⁴ ACCC/C/2013/91 (United Kingdom), ECE/MP.PP/C.1/2017/14, para. 73.

¹⁶⁵ Ibid, para. 75.

¹⁶⁶ Ibid, para. 73.

¹⁶⁷ Ibid, para. 75.

the UK should take into account the precautionary principle and the potential effects if an accident were indeed to occur, even if the risk thereof is small.¹⁶⁸

Regarding whether a person has an interest, the Aarhus Committee has confirmed that, “*whether members of the public have an interest in the decision-making depends on whether their property and other related rights (in rem rights), social rights or other rights or interests relating to the environment may be impaired by the proposed activity.*”¹⁶⁹ For example, tenants whose social and environmental rights are impaired by a specific activity should be considered as coming within the definition of ‘the public concerned’, despite their property rights being unaffected.

In addition, the Implementation Guide notes that Article 2(5) makes no distinction between a factual and a legal interest and accords them the same status.¹⁷⁰ This was confirmed by the Aarhus Committee in its decision against the UK regarding Hinkley Power Plant C:

*“the notion of having an interest in the environmental decision-making should include not only members of the public whose legal interest or rights guaranteed under law might be impaired by the proposed activity, but also those who have a mere factual interest (for example, in the case of a proposed activity that may affect a waterway, bird watchers interested in keeping nests intact or anglers interested in keeping waters fishable). It may also include, as is the case in many jurisdictions, persons who have expressed an interest in a given case without having stated any specific reason for their interest.”*¹⁷¹

The Implementation Guide further states that, “[b]ecause article 9, paragraph 2, is the mechanism for enforcing rights under article 6 however, ... it is arguable that any person who participates as a member of the public in a hearing or other public participation procedure under article 6, paragraph 7, should have an opportunity to make use of the access to justice provisions in article 9, paragraph 2.”¹⁷² This is only logical because a person that participates in a public participation procedure under Article 6 AC has clearly shown “interest” and should therefore also be considered to form part of the “public concerned” and have access to the courts under Article 9(2) AC.

4.2. Sufficient interest or impairment of a right

Article 9(2): What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.

If the status of public concerned can be demonstrated, there may still be a requirement under national law that the party wishing to challenge a decision, act or omission relating to a specific activity can demonstrate either sufficient interest or impairment of a right. Article 9(2) states: “*What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention.*” Thus, the State Parties’ discretion in defining the criteria for standing is constrained by the requirement of giving the public concerned wide access to justice within the scope of the Convention.¹⁷³ According to the Aarhus Committee, “[t]his means that the Parties in exercising their discretion may not interpret these criteria in a way that significantly narrows down standing and runs counter to its general obligations under article 1, 3 and 9 of the Convention.”¹⁷⁴

Notably, Article 3(9) AC provides that the public shall have access to justice in environmental matters 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. This requirement shall be discussed in more detail in the context of NGOs as members of the public concerned (see section 4.4. below).

4.2.1. Sufficient interest

Under an interest-based approach, Member States may impose general requirements regarding the interest of the applicant.¹⁷⁵ However, these requirements must not effectively bar access to justice. To illustrate this, the Aarhus Committee has held that a general requirement that “*the decision affects him adversely and is subject to appeal*” is permissible, as long as it is not interpreted in a way that excludes individuals “*who may be harmed, or exposed to other kinds of inconvenience by an environmentally harmful activity*”

168 Decision VI/8k of the Meeting of the Parties, ECE/MP.PP/2017/2/Add.1, para. 8(b).

169 ACCC/C/2010/50 (Czech Republic), para. 66

170 Implementation Guide, p. 57.

171 ACCC/C/2013/91 (United Kingdom), para. 74.

172 Implementation Guide, p. 58.

173 ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, para. 33.

174 ACCC/C/2010/48 (Austria), ECE/MP.PP/C.1/2012/4, para. 61 and ACCC/C/2010/50 (Czech Republic), para. 75.

175 ACCC/C/2005/11 (Belgium), para. 40, ACCC/C/2006/18 (Denmark), ECE/MP.PP/2008/5/Add.4, para. 31, ACCC/C/2013/81 (Sweden), ECE/MP.PP/C.1/2017/4, para. 85.

allowed by a permit decision.”¹⁷⁶ In addition, the Aarhus Committee specified that the applicable criteria must not depend on one isolated factor, in this case distance from the permitted activity.¹⁷⁷

It follows that Member States must consider all relevant aspects of a specific act/omission that could affect the interest of an applicant and not limit it to only certain isolated factors, be it distance to an activity or another aspect.

4.2.2. Impairment of a right

The Commission’s Notice on Access to Justice in Environmental Matters rightly identifies that the application of standing criteria which relate to the impairment of a right, “has presented challenges because environmental protection usually serves the general public interest and does not usually aim at expressly conferring rights on the individual.”¹⁷⁸

The Commission notes that criteria relating to a sufficient interest are generally less problematic.

Indeed, the application of criteria which follow a rights based approach has given rise to a number of Aarhus Committee findings and CJEU case-law.

Case ACCC/C/2010/48 concerned a communication submitted by an NGO, Ökobüro, against, among other things, the Austrian standing rules which apply to individuals who wish to challenge permits subject to the EIA Directive and (what is now) the IED. The Austrian system follows a rights based approach for individuals and Ökobüro objected to the fact that only “neighbours” may challenge the permitting procedures to the extent that the activities affect their private well-being or their property. The Aarhus Committee considered whether the definition of “neighbours” in the relevant Austrian law was consistent with the objective of giving wide access to justice. It found that the definition should not exclude persons who are temporarily in the vicinity of the proposed project, such as tenants or workers. Although it did not have the necessary evidence to adopt a finding on this question, the Committee found that Communication raised serious concern as to how the Austrian law on standing may be interpreted and applied and urged the Courts to interpret the provision in accordance with the objectives of the Convention.¹⁷⁹

In case ACCC/C/2010/50, the Aarhus Committee noted that, “if Czech courts systematically interpret section 65 of the Administrative Justice Code in such a way that the “rights” that have been “created, nullified or infringed” by the administrative procedure refer

only to property rights and do not include any other possible rights or interests of the public relating to the environment (including those of tenants), this may hinder wide access to justice and run counter to the objectives of article 9, paragraph 2, of the Convention”.¹⁸⁰

In the context of the EIA Directive, the CJEU has recognised that “Member States have a significant discretion to determine what constitutes ‘sufficient interest’ or ‘impairment of a right’”.¹⁸¹ Nevertheless, that discretion is qualified by the need to ensure respect for the objective of ensuring wide access to justice for the public concerned.¹⁸² In addition, the provisions on legal standing should not be interpreted restrictively.¹⁸³

The rights based approach has traditionally also been applied in Germany. As discussed in more detail in the context of scope of review in section 3.1 above, in *Trianel*¹⁸⁴, the Court found that it was consistent with (what is now) Article 11 of the EIA Directive that the standing of individuals is limited to the public law rights that have been impaired, while this is not the case for NGOs (the particular case of NGOs is discussed in more detail in section 4.4. below). However, the Court of Justice has in some instances drawn a line where it considers national standing rules to be overly restrictive. As also discussed in more detail in section 3.1 above, in *Altrip*¹⁸⁵ the Court of Justice considered the German requirement that for the relevant court to recognise impairment of a right in order to challenge a decision on the basis of a procedural defect, the applicant had to prove that the contested decision would have been different without the procedural defect invoked. The Court found that, Member States could only maintain such a system if the national court could establish “without in any way making the burden of proof of causality fall on the applicant [...] that the contested decision would not have been different without the procedural defect invoked by that applicant.”¹⁸⁶ This was not the case in Germany, where the burden of proof was on the applicant. This was confirmed by the Court of Justice in *European Commission v Germany*.¹⁸⁷

It is regrettable that both the CJEU and the Aarhus Committee have not gone further in restricting the Member States’ discretion to afford standing to individuals on the basis of impairment of a right. The risk is that standing is not provided to persons whose rights are likely to be impaired. Thus, Member States should take a more expansive approach to the rights that are capable of being impaired by decisions and failures to act with respect to specific activities. The

176 ACCC/C/2013/81(Sweden), paras 86-87. Although this communication was decided on the basis of Article 9(3) AC, it is equally applicable to the context of Article 9(2) AC.

177 Ibid, para. 101.

178 Commission Notice, para. 102.

179 ACCC/C/2010/48 (Austria), para. 63.

180 ACCC/C/2010/50 (Czech Republic), para. 76.

181 C-115/09 *Trianel*, para. 55; C-72/12, *Gemeinde Altrip*, para. 50; and C-570/13 *Gruber*, para. 18.

182 C-570/13 *Gruber*, para. 39

183 Ibid para. 40.

184 C-115/09, *Trianel*.

185 C-72/12, *Gemeinde Altrip*.

186 C-72/12 *Gemeinde Altrip*, para. 52.

187 C-137/14 *European Commission v Germany*, para. 60.

Commission makes reference to such an approach in its Notice on Access to Justice, which states:

*“EU environmental law does not establish a general right to a healthy and intact environment for every individual. However, a natural or legal person may have obtained the right to use the environment for a specific economic or non-profit activity. An example could be an allocated and acquired fishing right in specific waters. This may give rise to the need to challenge any decision, act or omission which impacts that specifically allocated right to use the environment.”*¹⁸⁸

Indeed, as the Commission Notice acknowledges, the Birds Directive and the Habitats Directive in particular “refer to a broad range of possible uses of nature, including recreational pursuits (such as hunting), research and education. For these different uses, it is reasonable to suppose that, besides interests, issues concerning rights could also come to the fore.”¹⁸⁹

Advocate General Bobek seems to support such an approach in his opinion on *Gert Folk*.¹⁹⁰ When considering the standing criteria in the Environmental Liability Directive (discussed in Chapter 3, section 3.2.1), he emphasised that a holder of fishing rights should be considered as having a right capable of being impaired.

4.3. Prior participation in the decision-making process

As mentioned above, according to the Implementation Guide, prior participation in the decision-making process leading to the adoption of a decision on a specific activity indicates that a person is a member of the public concerned. However, the inverse situation, that to have standing to challenge a decision a person must have participated in the decision-making process, is too restrictive to comply with Article 9(2) AC.

In any case, as a matter of EU law, Member States may not restrict standing to those members of the public concerned who participated in the decision-making process leading to the adoption of the contested decision.

In *Djurgården*, in the context of the access to justice provisions of the EIA Directive, the Court of Justice held that, “participation in an environmental decision-making procedure is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure.”¹⁹¹

The Aarhus Committee concurred, stating that: “The Convention does not make participation in the administrative procedure a precondition for access to justice to challenge the decision taken as a result of that procedure, and introducing such a general requirement for standing would not be in line with the Convention.”¹⁹²

4.4. Standing for NGOs

4.4.1. NGOs as the public concerned

Article 2(5) AC: “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.

The definition of “the public concerned” in Article 2(5) AC includes NGOs promoting environmental protection provided they meet any requirements under national law.

According to the Aarhus Committee, “[w]hether or not an NGO promotes environmental protection can be ascertained in a variety of ways, including, but not limited to, the provisions of its statutes and its activities.”¹⁹³ Environmental protection is understood as any purpose consistent with the “implied definition of environment found in article 2, paragraph 3” of the Convention.¹⁹⁴ In this respect, the Committee has stated that the German requirement for NGOs to demonstrate that the challenged decision affects the NGO’s objectives, as defined in its by-laws, is compatible with the Convention.¹⁹⁵

State Parties to the Convention may then define further requirements, which must be satisfied by NGOs in order to have standing. For example, in Germany there is a requirement that for NGOs to be recognised as members of the public concerned, they must be set up in the legal form of an association, which effectively requires them to be membership organisations.¹⁹⁶ The Commission Notice on Access to Justice cites other examples, including the requirements to demonstrate the independent or non-profit-making character of the organisation, or a minimum duration of existence.¹⁹⁷

But how much discretion do governments have in setting such requirements? The Aarhus Committee has stated that any requirements must not be inconsistent with the

¹⁸⁸ Commission Notice, para. 55.

¹⁸⁹ *Ibid.*, para. 56.

¹⁹⁰ AG Bobek opinion on case C-529/15, *Folk*, ECLI:EU:C:2017:419, para. 77. For further discussion of this point, please see “Comments on the Commission’s Notice on Access to Justice in Environmental Matters”, Justice & Environment, March 2018.

¹⁹¹ C-263/08 *Djurgården*, para. 38.

¹⁹² ACCC/C/2012/76 (Bulgaria), ECE/MP.PP/C.1/2016/3, para. 68. See also Report of the Compliance Committee to the sixth Meeting of the Parties on compliance by Armenia, ECE/MP.PP/2017/33, paras 58-59.

¹⁹³ ACCC/C/2009/43 (Armenia), ECE/MP.PP/2011/11/Add.1, para. 81.

¹⁹⁴ Implementation Guide, p. 57.

¹⁹⁵ ACCC/C/2008/31 (Germany), para. 72.

¹⁹⁶ This requirement is currently the subject of a communication to the ACCC made by WWF, an environmental NGO that does not meet this requirement and is therefore refused standing under Article 9(2) - ACCC/C/2016/137 (Germany)

¹⁹⁷ Commission Notice, para. 80.

principles of the Convention, meaning that they should be “clearly defined, should not cause excessive burden on environmental NGOs and should not be applied in a manner that significantly restricts access to justice for such NGOs.”¹⁹⁸ The Implementation Guide develops this principle, stating that such discretion should be seen in the context of the important role the Convention assigns to NGOs with respect to its implementation¹⁹⁹ and the clear requirement of article 3 (4) AC, to provide “appropriate recognition” for NGOs.²⁰⁰ This means that, “Parties should ensure that these requirements are not overly burdensome or politically motivated, and that each Party’s legal framework encourages the formation of NGOs and their constructive participation in public affairs. Moreover, any requirements should be consistent with the Convention’s principles, such as non-discrimination and the avoidance of technical and financial barriers.”²⁰¹ The Implementation Guide suggests some examples of further requirements that would not be consistent with the Convention, for example a requirement for NGOs to have been active in a specific country for a certain number of years, for the reason that it may discriminate against foreign NGOs in breach of Article 3(9) AC.²⁰²

In *Djurgarden*, the Court of Justice found that a Swedish standing requirement for NGOs to have at least 2,000 members went beyond the limits of the State’s discretion because it effectively barred all but two NGOs in Sweden from the courts. The Court held that:

“While it is true that Article 10a of Directive 85/337 [now Article 11 of the EIA Directive], by its reference to Article 1(2) thereof, leaves to national legislatures the task of determining the conditions which may be required in order for a non-governmental organization which promotes environmental protection to have a right of appeal under the conditions set out above, the national rules thus established must, first, ensure ‘wide access to justice’, and, second, render effective the provisions of Directive 85/337 on judicial remedies.

Accordingly, those national rules must not be liable to nullify Community provisions which provide that parties who have a sufficient interest to challenge a project and those whose rights it impairs, which include environmental protection associations, are to be entitled to bring actions before the competent courts”²⁰³.

“The number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its scope”²⁰⁴.

198 ACCC/C/2009/43 (Armenia), para. 81.

199 This role was explicitly recognised by the Aarhus Committee in its findings on communication ACCC/C/2004/05 (Turkmenistan), ECE/MP.PP/C.1/2005/2/Add.5, when it held that “Non-governmental organizations, by bringing together expertise and resources, generally have greater ability to effectively exercise their rights under the Convention than individual members of the public.”

200 Implementation Guide, p. 58.

201 Ibid.

202 Ibid.

203 C-263/08, *Djurgarden*, para. 45.

204 Ibid, para. 47.

The Commission Notice notes that these considerations apply to all requirements which NGOs must meet to be considered members of the public concerned.²⁰⁵

4.4.2. Sufficient Interest or impairment of right – *de lege* standing for NGOs

Article 9(2) AC: “... the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.”

NGOs that meet the criteria in Article 2(5) AC and any national requirements discussed above automatically have standing under Article 9(2) AC and the EU legislation that transposes it. This is because they are deemed to have sufficient interest or to have rights capable of being impaired so that they do not have to satisfy any further requirements. This is often referred to as *de lege* standing for NGOs.

The Aarhus Committee considered the Belgian rules on standing as applied to NGOs seeking to challenge decisions falling under Article 9(2) AC.²⁰⁶ NGOs had previously been refused standing because the Belgian courts had applied the general criteria for standing, meaning that they had to show a direct, personal and legitimate interest as well as a “required quality”. Therefore, the Aarhus Committee found that the criteria, as applied by the Belgian courts, was too restrictive to meet the requirements of the Convention. However, since the case law cited by the communicant pre-dated Belgian ratification of the Convention, the Committee found that there would only be a breach if the same reasoning continued in future case law.²⁰⁷

In the *Trianel* case, the Court of Justice made it clear that, although the EIA Directive allows Member States to require individuals to demonstrate the impairment of an individual public law right to have standing, this cannot be required of NGOs recognised as the public concerned.²⁰⁸ It also confirmed that when challenging a decision under the EIA Directive, NGOs may rely on infringements of EU law which protect the general interest.

The CJEU has also recognised *de lege* standing for NGOs in the context of EU environmental legislation which does not contain specific provisions on access to justice. In *Slovak Bears II*²⁰⁹, the Court of Justice found that environmental organisations meeting the requirements of Article 2(5) to be recognised as a member of the public concerned, must be able to challenge a decision

205 Commission Notice, para. 77.

206 ACCC/C/2005/11 (Belgium)

207 Ibid, para 40.

208 C-115/09 *Trianel*, para. 45. See also section 3.1 above.

209 C-243/15 *Lesoochrannárske zoskupenie VLK v Obvodný úrad Trenčín* (Slovak Bears II).

taken on the basis of the Habitats Directive not to carry out an appropriate assessment of the implications for a Natural 2000 site of a specific plan or project, as well as such an assessment to the extent that it is vitiated by errors. The Court held that this right derives from Article 47 CFR read in conjunction with Article 9(2) AC. As noted in the Commission Notice, this reasoning is capable of being applied to decisions falling within the scope of other EU environmental directives without access to justice provisions²¹⁰ - this would include for instance decisions relating to water and waste management as discussed above in sections 2.5 and 2.6.

4.4.3. Non-discrimination against foreign NGOs

Article 3(9) AC: “the public shall have access to justice in environmental matters 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.”

The consequence of Article 3(9) AC is that the conditions applied to NGOs to have *de lege* standing must not prevent or render it excessively difficult for a foreign NGO to obtain that status.²¹¹ This is particularly important where a specific activity has a transboundary impact.

There is no specific CJEU case law on this issue as of yet. The Aarhus Committee has adopted so far one finding of non-compliance with Article 3(9) of the Convention concerning a law of Turkmenistan which prohibited foreigners to be founders and members of a registered association, while at the same time preventing unregistered associations to work in Turkmenistan.²¹² The combined effect of these provisions had been that foreign environmental NGOs could not be active in Turkmenistan.

As mentioned above, the Implementation Guide moreover suggests that a requirement for environmental NGOs to have been active in a specific country for a certain number of years might not be consistent with Article 3(9) AC.²¹³ Also, even the requirement “to have been active” in itself might not comply, for example in countries that have permitted recently established NGOs to have standing. The provision should prevent Member States from requiring NGOs to have their centre of activities in a certain geographic location, or for NGOs to be established in accordance with specific national laws.

²¹⁰ Commission Notice, para. 70.

²¹¹ Commission Notice, paras 82 and 83.

²¹² ACCC/C/2005/5 (Turkmenistan), ECE/MP.PP/C.1/2005/2/Add.5, paras 16 and 21. While the specific issue raised in this communication has been addressed in the meanwhile, given concerns that Turkmenistan had reintroduced equivalent restrictions through other acts, review of the implementation on this requirement continues based on a request of the Meeting of the Parties under file no. ACCC/M/2017/2 (Turkmenistan).

²¹³ Implementation Guide, p. 58.

Chapter 3

Access to justice concerning acts, decisions and omissions affecting the environment

CJEU	ACCC findings	Legal provisions
<p>C-237/07 <i>Janecek</i>, and C-404/13 <i>ClientEarth</i> : Plans under the Air Quality Directive;</p> <p>C-165 to C-167/09 <i>Stichting Natuur en Milieu</i>: Programmes under the National Emissions Ceiling Directive;</p> <p>C-529/15 <i>Folk</i> and C-129/16 <i>Túrkevei Tejtermelő Kft</i>: Environmental damage under the Environmental Liability Directive;</p> <p>C-41/11 <i>Inter-Environnement Wallonie</i>: Assessments under the SEA Directive;</p> <p>C-664/15 <i>Protect</i> : Permits under the Water Framework Directive and standing;</p> <p>C-240/09 <i>Lesoochranárske zoskupenie, (Slovak Bears)</i>: Standing;</p> <p>C-243/15 <i>Lesoochranárske zoskupenie, (Slovak Bears II)</i>: Standing.</p>	<p>ACCC/2005/11 (Belgium): Definition of challengeable acts and criteria for standing;</p> <p>ACCC/C/2011/58 (Bulgaria): challenging plans and programmes;</p> <p>ACCC/C/2011/63 (Austria) and ACCC/C/2013/85 & 86 (United Kingdom): Definition of "national law related to the environment";</p> <p>ACCC/C/2006/18 (Denmark): EU law as "national law related to the environment";</p> <p>ACCC/C/2008/33 (United Kingdom): scope and standard of review;</p> <p>ACCC/C2008/31 (Germany): Standing in rights-based systems;</p> <p>ACCC/C/2013/81 (Sweden): Standing in interest-based systems.</p>	<p>Directive 2004/35/EC Environmental Liability Directive (ELD), 21 April 2004;</p> <p>Directive 2000/60/EC, Water Framework Directive, 23 October 2000;</p> <p>Directive 2008/50/EC, Air Quality Directive, 21 May 2008;</p> <p>Directive 2016/2284/EU, National Emissions Ceiling Directive (NEC), 31 December 2016;</p> <p>Directive 92/43/EEC, Habitats Directive, 21 May 1992;</p> <p>Directive 2001/42/EC, SEA Directive, 27 June 2001.</p>

Introduction

Individuals and organizations possess a right of access to justice if public authorities and private persons do not comply with national law relating to the environment. This right is based on the understanding that environmental law protects not only individual interests but everyone and the environment itself. It is established in Article 9(3) of the Aarhus Convention (AC).

Article 9(3) AC

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 in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Upon signature of the Aarhus Convention, the European Union made a declaration that Member States will remain responsible for the performance of obligations under Article 9(3) AC concerning acts and omissions by private persons or public authorities other than the EU institutions, unless and until the European

Union adopts EU law covering these obligations.²¹⁴ In 2003, the EU Commission tabled a proposal for a Directive to implement the application of Article 9(3)

²¹⁴ Article 19(4) and (5) of the Aarhus Convention requires regional integration organizations to declare the extent of their competence with respect to matters covered by the Convention. The relevant part of the Declaration reads: "[...] the European Community also declares that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations." Available online at: <<https://treaties.un.org>>.

of the Convention in the Member States.²¹⁵ However, the proposal did not progress beyond the European Parliament's first reading and was eventually withdrawn by the EU Commission on 21 May 2014. Therefore, at the time of finalization of this Guide, no such general act aimed at implementing Article 9(3) AC has been adopted.

The absence of such a directive results in great disparities in the way access to justice rights are implemented among the Member States and considerable challenges remain in many Member States to obtain access to courts in accordance with Article 9(3) AC. These challenges have been well documented in a number of studies.²¹⁶

The Commission Notice on Access to Justice aims at addressing the lack of legislative initiative from the EU. Due to its non-binding nature, it does not have the same harmonizing effect as an EU directive and the adoption of a legislative act should remain the goal. Nonetheless, the Notice has an important function in collating and providing analysis of the rather dispersed, but concrete, elements of EU law that implement Article 9.

However, this does not mean that Article 9(3) AC has not been implemented at all at EU level. Firstly, the European Union has adopted the Environmental Liability Directive (ELD), which includes a specific access to justice provision for individuals and environmental organizations. This approach could, in the future, also be replicated in other sectoral areas of EU law related to the environment.

Secondly, over the last decade the CJEU has had the opportunity in a number of cases to interpret the requirements of Article 9(3) AC as they apply to EU Member States within the area of application of EU law.

Article 9(3) provides that members of the public must be granted access to *administrative or judicial* procedures. Concerning administrative procedures, the Aarhus Committee clarified that *"Article 9(3) requires more than*

a right to address an administrative agency about an illegal activity".²¹⁷ Rather, members of the public who meet the standing criteria under national law, if any, must have *"access to administrative or judicial procedures to directly challenge"* acts/omissions of private persons or public authorities which they allege contravene national environmental law.²¹⁸ Accordingly, a right to ask an authority to take action does not amount to a challenge,²¹⁹ nor does the right to appeal to an Ombudsman if he/she has the discretion to refuse to pursue a given case.²²⁰ Moreover, applicants must be able to participate in the process of review.²²¹ Note also that if a Party chooses to opt for administrative procedures, these must fully compensate for the absence of judicial procedures and fulfil all the requirements of Article 9(3) and (4) AC.²²²

If during these national proceedings questions arise as to the correct interpretation of EU law, lower national courts may and the highest national court must make a preliminary reference to the CJEU (Article 267 TFEU).²²³ However, as this concerns the interpretation and validity of acts of EU institutions, such references are discussed in chapter 5.

The vast majority of the CJEU's decisions on Article 9(3) AC stem from questions referred by national courts through the preliminary reference procedure. This demonstrates the important role these courts play in generating case law that clarifies and sometimes furthers the implementation of access to justice rights. This is all the more true considering the lack of standing for individuals and NGOs to bring cases directly before the CJEU (see chapter 5).

215 Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM/2003/0624 final - COD 2003/0246.

216 See for instance, Jan Darpö, 2012/2013 access to justice studies, available online: <http://ec.europa.eu/environment/aarhus/access_studies.htm> and Milieu Ltd., Inventory of EU Member States' measures on access to justice in environmental matters (2007), available online: <http://ec.europa.eu/environment/aarhus/study_access.htm>.

217 ACCC/C/2006/18 (Denmark), para. 28 and ACCC/C/2013/85 & ACCC/C/2013/86 (United Kingdom), ECE/MP.PP/C.1/2016/10, para. 83.

218 ACCC/C/2013/85 & ACCC/C/2013/86 (United Kingdom), para. 83.

219 Ibid, para. 84.

220 ACCC/C/2010/48 (Austria), paras 74-75.

221 ACCC/C/2013/85 & ACCC/C/2013/86 (United Kingdom), para. 84.

222 Ibid and ACCC/C/2008/32 (European Union), para. 92.

223 Article 267 TFEU reads: The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; [...] Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court."

1. What measures can be challenged?

Article 9(3) AC permits "members of the public"²²⁴ to challenge acts and omissions of private persons and public authorities that contravene provisions of national law relating to the environment. This section first analyses the requirements under the Aarhus Convention and then considers how these are implemented in EU law.

1.1. Requirements under the Aarhus Convention

1.1.1. "Acts and omissions"

As the Aarhus Committee has consistently held, Article 9(3) "is applicable to all acts and omissions by private persons and public authorities contravening national law relating to the environment" (emphasis

224 See section 3.1 below.

added).²²⁵ Accordingly, as long as an act has been adopted, i.e. it is no longer in draft form, it must be susceptible to judicial review. This means, for instance, that the concept of “acts” is not limited to acts of general application,²²⁶ to acts adopted under environmental law,²²⁷ acts with legally binding or external effects²²⁸ or to decisions related to the licensing or permitting of development projects.²²⁹ Equally, plans and programmes are considered acts for the purpose of Article 9(3) AC.²³⁰ In essence, Article 9(3) “does not allow Parties any discretion as to the acts or omissions that may be excluded from implementing laws.”²³¹

1.1.2. “by private persons and public authorities”

Under Article 9(3), members of the public must be able to challenge acts and omissions of both private persons and public authorities. As discussed in chapter 1, section 2, “public authorities” are defined in Article 2(2) of the Convention. Since Article 9(3) AC covers acts of both private and public authorities, in many cases it should (in theory) not even be necessary to determine whether the act was adopted by a public authority. However, Article 2(2) AC is important for Article 9(3) AC because of its final sentence, which states that the term “public authorities” does not encompass bodies or institutions acting in a “judicial or legislative capacity.”

Acts and omissions of bodies and institutions acting in a legislative capacity

Concerning the review of acts adopted in a legislative capacity, EU law does not usually apply any distinction, i.e. legislative acts must also be subject to review and set aside if they conflict with applicable EU law.²³² EU law is therefore more demanding than the Aarhus Convention on this point. However, in its case law on standing (see section 3 below) the CJEU has relied heavily on Article 9(3) AC. The exact consequences of this for standing to challenge legislative acts are not immediately clear. In any event, it is important to understand the definition of an act adopted in a legislative capacity in order to determine whether Article 9(3) AC can be invoked directly before national courts. This is discussed in detail in chapter 1, section 2.5.

For acts that are not considered to be adopted in a legislative capacity, the case law and requirements discussed in section 1.2. will therefore fully apply.

Acts and omissions of bodies and institutions acting in a judicial capacity

As discussed in chapter 1, section 2.5, the exemption for acts adopted in a “judicial capacity” has not been the subject of much controversy. Nevertheless, an important point emphasized by the Aarhus Committee is that an entity acting in the capacity of an “administrative review body” is not considered to be acting in a judicial capacity.²³³ This would, for instance, apply to an institution which checks compliance by industry with requirements of law relating to the environment or approves applications for derogations from applicable regulations.

1.1.3. “Contravening national law relating to the environment”

It is not necessary for the purposes of Article 9(3) to demonstrate *prima facie*, i.e. before standing is granted, that there has been a violation of higher-ranking law.²³⁴ This is reflected in the findings of the Aarhus Committee, which refer to situations where acts and omissions “may contravene” national laws relating to the environment.²³⁵

One issue that has arisen is whether “internal acts”, that is, acts applicable only internally or addressed to a public authority, should be subject to review under Article 9(3) AC. This question arose in the context of the administrative review mechanism provided in the Aarhus Regulation²³⁶ in respect of the acts and omissions of EU institutions and bodies, which excludes from review acts that do not have “legally binding and external effects”. The Aarhus Committee made it clear that it was unconvinced that all internal acts can be categorically excluded.²³⁷ This is also a matter of contention in certain civil law Member States, such as Poland²³⁸ or Bulgaria.²³⁹ It is therefore important to emphasize that Article 9(3) is applicable to all situations in which an act or omission has legal effects.

Concerning the term “national”, EU law forms part of national law of the Member States for the purposes of the AC.²⁴⁰ The Aarhus Committee accordingly held that acts and omissions that may contravene EU regulations or directives, but not the national laws implementing

225 ACCC/2005/11 (Belgium), para. 28. See also ACCC/C/2008/32 (European Union), Part II, paras 98-99 stating that the requirement of Article 9(3) “is to provide a right of challenge where an act or omission - any act or omission whatsoever by a Community institution or body, including any act implementing any policy or any act under any law - contravenes law relating to the environment”

226 ACCC/C/2008/32 (European Union), Part II, paras 51 and 94.

227 Ibid, para. 99.

228 Ibid, para. 103.

229 Report of the Aarhus Committee to the sixth session of the Meeting of the Parties on compliance by Germany with its obligations under the Convention, ECE/MP.PP/2017/40, para. 50.

230 See for instance, ACCC/C/2005/11 (Belgium) or ACCC/C/2011/58 (Bulgaria).

231 ACCC/C/2008/32 (European Union), Part II, paras 52 and 101.

232 See for instance, C-106/77 *Amministrazione delle Finanze dello Stato v Simmenthal*, ECLI:EU:C:1978:49, para. 21 and C-158/80 *Rewe v Hauptzollamt Kiel* ECLI:EU:C:1981:163, para. 43.

233 ACCC/C/2008/32, (European Union), part II, para. 110.

234 Implementation Guide, p. 197.

235 ACCC/C/2006/18 (Denmark), para. 27 and ACCC/C/2011/63 (Austria), ECE/MP.PP/C.1/2014/3, para. 53.

236 Regulation 1367/2006.

237 ACCC/C/2008/32, (European Union), part II, para. 103 referring to communicant’s comments of 23 February, 2015, paras 62-68 as relevant examples of acts that should likely be challengeable.

238 Supreme Administrative Court judgement, file no. II OSK 3218/17, 23 January 2018.

239 Sofia Supreme Administrative Court judgement, No. 6541 - Sofia, 25 September 2017.

240 ACCC/C/2006/18 (Denmark), para. 27.

those instruments, may also be challenged under Article 9(3) AC.²⁴¹ With regard to the notion of national “law”, this does not imply any limitation as to the level at which the law in question has been adopted. The Aarhus Committee has held that the term includes constitutional law at national level²⁴² and there is nothing to suggest that the same would not apply at EU level, i.e. the EU Treaties, general principles and international agreements that form part of EU primary law.

As regards “relating to the environment”, it is important to note that Article 9(3) does not refer to environmental law (i.e. laws which explicitly mention the environment in their title or provisions or which promote environmental protection) but instead to the broader notion of law that “somehow relates to the environment”.²⁴³

The Aarhus Committee has interpreted the term “relating to the environment” in light of the object and purpose of the Convention and the broad definition of environmental information.²⁴⁴ It clarified that the term encompasses any law under any policy, such as chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, energy, taxation or maritime affairs, which may relate in general to, or help to protect, or harm or otherwise impact on the environment.²⁴⁵ The Aarhus Committee has for instance held that this encompasses private nuisance law if the nuisance affects the environment (e.g. in the context of noise, odours, smoke, dust, vibrations, chemicals, waste or other similar pollutants),²⁴⁶ legislation on noise and health,²⁴⁷ urban and land-planning standards and acts,²⁴⁸ nuclear laws²⁴⁹ and laws on protection of wildlife species and trade in endangered species.²⁵⁰

1.2. Implementation in EU law

As stated in the introduction to this chapter, the EU has implemented Article 9(3) AC in just one legislative act, the Environmental Liability Directive, which is concerned with damage (or a threat of damage) to the environment. This specific area is therefore discussed first (section 1.2.1.), followed by the case law of the CJEU (section 1.2.2.), which has established that certain categories of decisions adopted under EU directives are subject to judicial scrutiny even where no access to justice provisions are foreseen in these directives.

241 ACCC/C/2011/63 (Austria), para. 53.

242 ACCC/C/2004/8 (Armenia), para. 37.

243 ACCC/C/2011/63 (Austria), para. 52 and ACCC/C/2013/85 & ACCC/C/2013/86 (United Kingdom), para. 71 referring to Aarhus Convention Implementation Guide, pp. 187 and 197.

244 Ibid, paras 69-70.

245 ACCC/C/2011/63 (Austria), para. 52.

246 ACCC/C/2008/23 (United Kingdom), ECE/MP.PP/C.1/2010/6/Add.1, para. 45 and ACCC/C/2013/85 and ACCC/C/2013/86 (United Kingdom), paras 72-73.

247 ACCC/C/2010/50 (Czech Republic), paras 84 and 89(f).

248 Ibid, paras 85 and 89(f) and ACCC/C/2008/27 (United Kingdom), para. 43.

249 ACCC/C/2010/50 (Czech Republic), para. 86. While the ACCC did not address the allegation in its findings, the claim was not rejected as falling outside of article 9(3) of the Convention. As further indication is the reference to “radition” in article 3(b) AC. On EU level, article 2(1)(d)(ii) of Regulation 1367/2006 and article 2(1)(b) of Directive 2003/4 both also specifically refer to “radioactive waste”.

250 ACCC/C/2011/63 (Austria), para. 55.

1.2.1. (Imminent threat of) damage to protected species, land and water – Environmental Liability Directive

The ELD establishes strict liability for damage or the imminent threat of environmental damage of certain occupational activities defined in annex III of the ELD.²⁵¹ The ELD limits “environmental damage” to damage to protected species, land and water²⁵² but the Court has already established that other damage may be covered, for instance air pollution.²⁵³ Secondly, the ELD provides for fault or negligence liability for damage to protected species from any other occupational activities.²⁵⁴

Article 12 gives certain natural and legal persons (see section 3.2.1 below) the right to request that a public authority take action in any such cases of (imminent threat of) damage. Article 13 gives the same persons the right to access a court or other independent and impartial public body to review the procedural and substantive legality of decisions, acts and omissions of the public authorities under the Directive. The functioning of the ELD in practice is demonstrated by *Folk*.²⁵⁵ The case concerned an application by an individual holding fishing rights downstream from a hydroelectric power station, which allegedly caused fish to die along extended stretches of the river. The Court held that it was not permissible under the ELD to generally exclude environmental damage because it resulted from the operation of a permitted facility.²⁵⁶ The national court was accordingly required to assess substantively whether environmental damage had arisen. Since the case concerned water damage, this required the national court to determine whether the public authorities had complied with the requirements of the Water Framework Directive in authorizing the project.²⁵⁷

1.2.2. Other provisions of EU environmental law that can be relied on in court

Other legal acts that do not include explicit provisions on access to justice are nonetheless binding on the Member States and their courts. As early as 1963, the CJEU accordingly held that:

*“[...] the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage.”*²⁵⁸

251 Article 3(a) ELD.

252 As defined in Article 1 ELD.

253 C-129/16 *Türkevei Tejtermelő Kft*, ECLI:EU:C:2017:547, paras 40-44.

254 Article 3(b) ELD.

255 C-529/15 *Folk*.

256 Ibid, para. 34.

257 Ibid, paras 36-39.

258 C-26/62, *van Gend den Loos*, ECLI:EU:C:1963:1, p. 12.

Based on this landmark decision, the CJEU has developed case law doctrine known as “direct effect”. Essentially, a provision of EU law that is considered to have “direct effect” can be relied on by natural and legal persons in national courts. The Court has established a test with two elements:

1. Does the specific provision under the Directive impose unconditional and sufficiently precise obligations on the Member States (direct effect)?
2. Does the Directive aim to protect a public interest?

First, the Court tests whether the specific provision relied upon is unconditional and sufficiently precise to impose an obligation on the Member States,²⁵⁹ as opposed to provisions that are “purely programmatic in nature” and “merely lay down an objective to be obtained, leaving the Member States wide flexibility as to the means to be employed in order to reach that objective.”²⁶⁰ In cases in which a Member State enjoys some discretion as to how to implement a specific obligation, this does not mean that the provision does not have direct effect; the courts must assess whether the national authority has acted “within the limits of discretion set by the provision” in adopting the decision being challenged.²⁶¹ It should be noted that direct effect only applies to directives for which the time limit for implementation has expired, as otherwise directives do not produce full legal effects yet.

Second, in determining whether the aim of the Directive is to protect a public interest, the Court refers to the objective set out in the Directive and relevant recitals.²⁶² In the context of the Water Framework Directive and the Air Quality Directive, the Court has established that an aim to protect public health is a particularly relevant factor²⁶³ and this rationale appears to be applicable to other directives, for example, the Waste Framework Directive. However, the Court has also made clear that a relationship to “health” is not a necessary criterion, so in the context of the Water Framework Directive, the Court referred to the aim of “protecting the environment” and, more specifically, to maintaining and improving “the quality of the aquatic environment”.²⁶⁴

The CJEU has established that a number of provisions give rise to obligations that can be relied upon before a national court. A non-exhaustive list of EU law that fulfils the two-step test with a summary of the relevant case law by subject matter follows next, with a discussion of the additional EU law requirements applicable to any standing criteria at section 3.

Air quality plans and programmes

In *Janecek*, the CJEU was faced with a preliminary reference from a German court based on an application by an individual living close to an air quality measuring station. Measurements from this station demonstrated that local emissions of particulate matter PM10 had exceeded applicable limit values much more often than the annual number of exceedance permitted by the applicable national law, which was based on the requirements of the Air Quality Directive.²⁶⁵ A public authority had drawn up an action plan, as required by the Directive but the applicant alleged that this plan was insufficient because limit values continued to be exceeded.²⁶⁶

The Court held that the Directive imposes a clear obligation to draw up action plans “both where there is a risk of the limit values being exceeded and where there is a risk of the alert thresholds being exceeded”.²⁶⁷ The Court moreover held that these were measures “which relate to air quality and drinking water, and which are designed to protect public health” and failure to draw up a plan “could endanger human health”.²⁶⁸ In *ClientEarth*, the Court confirmed its ruling and applied it to the then amended Air Quality Directive – it held:

“If the limit values for nitrogen dioxide are exceeded after 1 January 2010 in a Member State that has not applied for a postponement of that deadline under Article 22(1) of Directive 2008/50, the second subparagraph of Article 23(1) of that directive imposes a clear obligation on that Member State to establish an air quality plan that complies with certain requirements.”²⁶⁹

The Court therefore considered Article 23(1) of the Air Quality Directive to be a directly effective provision serving a public interest. Accordingly, natural and legal persons affected by limit values being exceeded must be able to challenge in court a failure of national authorities to draw up an air quality plan that complies with the requirements of the Directive.

National programmes for the progressive reduction of emissions under the National Emissions Ceiling Directive

In *Stichting Natuur en Milieu*, the CJEU considered jointly three preliminary references from Dutch courts arising from challenges brought by NGOs against permits for the construction and operation of three different power stations. The Court was called upon to clarify whether Articles 4 and 6 of the National Emissions Ceiling (NEC)

259 Joined cases C-165 to C-167/09 *Stichting Natuur en Milieu* ECLI:EU:C:2011:348, paras 98-99.

260 *Ibid.*, para. 97. See also C-664/15 *Protect*, para. 32.

261 C-127/02, *Waddenzee*, paras 67-69. See also C-51/76 *Verbond van Nederlandse Ondernemingen v Inspecteur der Invoerrechten en Accijnzen*, ECLI:EU:C:1977:12, para. 29.

262 C-664/15 *Protect*, para. 33; and C-237/07 *Janecek*, para. 35.

263 C-237/07 *Janecek*, para. 37 and Joined cases C-165 to C-167/09 *Stichting Natuur en Milieu*, para. 94.

264 C-664/15 *Protect*, para. 33.

265 At the time of the *Janecek* case, article 7(3) of Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management (OJ 1996 L 296, p. 55). This obligation is now to be found in article 23(1) of Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p. 1).

266 C-237/07 *Janecek*, paras 15-16.

267 *Ibid.*, para. 35.

268 *Ibid.*, para. 38.

269 C-404/13 *ClientEarth*, ECLI:EU:C:2014:2382, para. 53.

Directive²⁷⁰ could be relied upon by individuals.²⁷¹ As regards the objective of the Directive, the Court quoted *Janecek* (see section above) stating that the NEC Directive also had the objective of controlling and reducing atmospheric pollution and was therefore designed to protect public health.²⁷² The Court then went on to hold that Article 4 was purely programmatic in nature, merely laying down objectives and leaving Member States wide discretion.²⁷³ It held that Article 6 of the NEC Directive is unconditional and sufficiently precise regarding the following requirements:

1. Article 6(1) and (3): to draw up national programmes for the progressive reduction of national emissions of, among other things, SO₂ and NO_x in order to comply with the ceilings laid down in Annex I to the directive by the end of 2010 at the latest and,
2. Article 6(4): to make those programmes available to the public and to appropriate organisations such as environmental organisations by means of clear, comprehensible and easily accessible information.²⁷⁴

The Court therefore considered Article 6(1), (3) and (4) of the NEC Directive to be directly effective provisions serving a public interest. Accordingly, natural and legal persons affected by limit values being exceeded must be able to challenge in court a failure of national authorities to draw up and make available national programmes for the progressive reduction of national emissions that comply with the requirements of the Directive.

Permits under the Water Framework Directive

*Protect*²⁷⁵ concerned a preliminary reference from an Austrian court regarding an NGO's right to challenge a permit to extend a snow-production facility which included a reservoir fed by the river "Einsiedlbach". The NGO applicant argued that the permit was in breach of the Water Framework Directive²⁷⁶ (2000/60). The Court first recalled that Article 4(1)(a) of the Directive:

*"does not simply set out, in programmatic terms, mere management-planning objectives, but imposes an obligation to prevent deterioration of the status of bodies of water that has binding effects on Member States once the ecological status of the body of water concerned has been determined, at each stage of the procedure prescribed by that directive and, in particular, during the process of granting permits for particular projects pursuant to the system of derogations set out in Article 4."*²⁷⁷

The Court then emphasized that the objective pursued by the Directive was (based on Article 1 and recitals

11, 19 and 27 thereof) to "protect the environment and, in particular, to maintain and improve the quality of the aquatic environment of the European Union."²⁷⁸

The Court therefore considered Article 4 of the Water Framework Directive to be of direct effect. Accordingly, natural and legal persons affected by the deterioration of the status of bodies of water must be able to challenge the failure of national authorities to impose a permit that complies with the requirements of the Directive.

Derogations provided under the Habitats Directive

Appropriate assessment under article 6 of the Habitats Directive has already been addressed in the previous chapter. However, the Habitats Directive has further directly effective provisions. Article 12 of the Habitats Directive establishes a system of protection for certain species listed in Annex IV(a) of the Directive. Article 16 establishes certain permissible derogations from this system of protection. In *Slovak Bears*,²⁷⁹ the CJEU did not specifically address the question whether these provisions had direct effect. However, the Court nonetheless held that the applicant (an environmental NGO) derived rights from these provisions of the Directive.²⁸⁰ It follows that natural and legal persons directly affected by the granting of a derogation under Article 16 of the Habitats Directive must be able to challenge this derogation. This will certainly be the case for environmental protection organizations but it is not clearly established which natural persons would be considered affected.

The SEA Directive and the Public Participation Directive

Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment (the "SEA Directive") and Directive 2003/35²⁸¹ implement Article 7 AC, which requires detailed public participation requirements. As explained in chapter 2, the more accepted view is that because it deals with plan and programmes, as opposed to specific activities and projects, Article 9(3) AC applies to challenging acts and omissions that fall within its scope.²⁸²

The SEA Directive applies to plans and programmes prepared or adopted by public authorities at national, regional or local level, and that are required by legislative,

270 Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants (OJ 2001 L 309, p. 22).

271 Joined cases C-165 to C-167/09 *Stichting Natuur en Milieu*, para. 92.

272 *Ibid.*, para. 94.

273 *Ibid.*, para. 97.

274 *Ibid.*, para. 99.

275 C-664/15 *Protect*. See also C-461/13, *Bund für Umwelt und Naturschutz Deutschland* EU:C:2015:433, para. 43.

276

277 C-664/15 *Protect*, para. 32 referring to C-461/13, *BUND*, paras 43 and 48.

278 C-664/15 *Protect*, para. 33.

279 C-240/09, *Lesoochránárske zoskupenie*, ECLI:EU:C:2011:125 (*Slovak Bears I*).

280 *Ibid.*, para. 37 read together with para. 45.

281 Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197, 21.7.2001, p. 30-37 and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25.6.2003, p. 17-25.

282 See, for example ACCC/C/2011/58 (Bulgaria), in which the Committee found that General Spatial Plans requiring a Strategic Environmental Assessment do not have such legal functions or effects so as to qualify as 'decisions on whether to permit a specific activity' in the sense of Article 6, and thus are not subject to Article 9, para. 2, of the Convention.

regulatory or administrative provisions. Article 3(2) requires an environmental assessment to be carried out for plans and programmes which “set the framework for future development consent of projects listed” in the annexes to the EIA Directive or which require an assessment under Articles 6 and 7 of the Habitats Directive (see chapter 2, section 2). The detailed public participation provisions that apply to the SEA procedure are laid down in Article 6 of the Directive.

The public participation provisions under the SEA Directive could be seen as procedural rights that natural and legal persons derive from EU law. In *Inter-Environment Wallonie*, the Court of Justice stated that, “[i]n the absence of provisions in [the SEA Directive]

on the consequences of infringing the procedural provisions which it lays down, it is for the Member States to take, within the sphere of their competence, all the general or particular measures necessary to ensure that all ‘plans’ or ‘programmes’ likely to have ‘significant environmental effects’ are subject to an environmental assessment prior to their adoption in accordance with the procedural requirements and the criteria laid down by that directive”²⁸³. The Commission Notice suggests that this implies that Member States must ensure that individuals can rely on these provisions before national courts.²⁸⁴

²⁸³ C-41/11 - *Inter-Environnement Wallonie and Terre wallonne*, ECLI:EU:C:2012:103, para. 42.

²⁸⁴ Commission Notice, para. 47.

2. What is the required scope and standard of review?

2.1. Scope of review

Article 9(3) AC provides the right to challenge acts and omissions contravening national law related to the environment. Accordingly, the Aarhus Committee has held that courts must, as a minimum, ensure that the scope of review covers “*whether the act or omission in question contravened any provision – be it substantive or procedural – in national law relating to the environment*”.²⁸⁵

Thus, although Article 9(3) AC does not specifically refer to substantive and procedural legality, the Aarhus Committee has interpreted the provision to mean that both substantive and procedural contraventions fall within its scope. The Commission Notice²⁸⁶ also confirmed that Article 9(2) and Article 9(3) AC have, in this regard, the same requirements as to the scope of review.

However, there is one significant difference in comparison to the scope of review under Article 9(2) AC: the grounds of challenge under Article 9(3) AC are limited to contraventions of national law relating to the environment.

As a matter of EU law, the minimum scope of review will be determined by the provisions which have allegedly been contravened. In other words, national courts are required, at a minimum, to assess whether the public authority or the legislator stayed within the “limits of discretion” set by that provision (see further the section on standard of review below).²⁸⁷ However, a special situation arises under the Environmental Liability Directive, as it has a specific access to justice provision.

2.1.1. Liability for environmental harm (Environmental Liability Directive)

Article 13(1) of the Environmental Liability Directive determines the scope of a potential challenge as “*the*

procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Directive”. Article 13(2) ELD permits Member States to make access to courts conditional on the prior exhaustion of administrative remedies. Usually, this requires an applicant to first make a request to the public authorities under Article 12 ELD, the resulting act or failure to act being challengeable under Article 13 ELD.

However, whether or not the decision, act or omission is in fact preceded by such an administrative procedure, the ELD does not formally delimit the scope of the challenge that can be brought. Rather, the provision is drafted very closely to Article 11 of the EIA Directive and accordingly only states that applicants must be able to challenge “*the procedural and substantive legality*” of the decisions concerned. As appears to also be confirmed by the Commission Notice,²⁸⁸ the CJEU case law on standing under Article 11 of the EIA Directive would therefore be equally applicable to challenges under Article 13(1) of the ELD. This would mean that the ELD would serve to establish standing and challenges could then allege non-compliance of the decision not only with the requirements of the ELD itself but also allege that the act, decision or omission:

- conflicts with rules of national law implementing EU environmental law and/or;
- the rules of EU environment law having direct effect.

2.1.2. Prohibition of material preclusion

As also highlighted by the Commission Notice, the prohibition of “material preclusion” discussed in Chapter 2, section 3.1.3., is equally applicable to challenges under Article 9(3) AC.²⁸⁹ To recap, this requirement entails that the scope of review by the courts may not be limited to objections which have already been raised within the time limits set during a preceding administrative procedure.²⁹⁰

²⁸⁵ ACCC/C/2008/33 (United Kingdom), para. 124.

²⁸⁶ Commission Notice, para. 121.

²⁸⁷ Compare Commission Notice, box on p. 34.

²⁸⁸ Commission Notice, para. 89.

²⁸⁹ Commission Notice, para. 121.

²⁹⁰ C-137/14 *Commission v Germany*, para. 80.

2.2. Standard of review

As explained in chapter 2, section 3.2 the standard of review differs from the scope of review as it concerns the level of scrutiny by the judge of the grounds relied on by the applicant. Neither the Aarhus Convention nor EU secondary legislation provide any specific directions. However, the findings of the Aarhus Committee and the case law of the CJEU give some indications as to the applicable minimum requirements.

As regards the Aarhus Convention, the Aarhus Committee's findings on communication ACCC/C/2008/33 (United Kingdom) have already been discussed in Chapter 2, section 3.2.1. As a quick recap, the Committee expressed concerns with regard to the British *Wednesbury reasonableness* test and made clear that national judges are required to assess the substantive merits of the public authority's decision and not simply defer to their discretion.

The general requirements under EU law have already been discussed in chapter 2, section 3.2.2. Again as a quick recap, the standard of review is principally left to the procedural law of the Member States but EU law also imposes a minimum requirement based on the "decree of discretion" left to the Member States.

2.2.1. Environmental damage and effects on water bodies

In *Folk*, the Court of Justice addressed a situation where national authorities had granted an authorisation under the Water Framework Directive that was alleged to have caused damage to the environment.²⁹¹ The Court held that in such a case, the national courts must assess if the national authorities had examined whether the conditions laid down in Article 4(7)(a)-(d) of the Directive had been complied with. The absence of such an assessment should lead to a finding that the measure was unlawful.²⁹² Moreover, even if the national authorities did examine the conditions laid down in this provision, the national courts "may review whether the authority which issued the authorisation complied with the conditions laid down in Article 4(7)(a) to (d) of that directive, by determining:

1. whether all practicable steps were taken to mitigate the adverse impact of the activities on the status of the body of water concerned;
2. whether the reasons behind those activities were specifically set out and explained;
3. whether those activities serve an overriding general interest and/or the benefits to the environment and society linked to the achievement of the objectives set out in Article 4(1) are outweighed by the benefits to human health, the maintenance

of human safety or the sustainable development resulting from those activities; and

4. *whether the beneficial objectives pursued by that project cannot, for reasons of technical feasibility or disproportionate cost, be achieved by other means which are a significantly better environmental option*".²⁹³

The case gives very specific instructions concerning compliance with the requirements of the Water Framework Directive. Moreover, it demonstrates that, in the context of the Environmental Liability Directive, national judges are required to assess substantively compliance with applicable legislation to determine whether decisions under the Water Framework Directive are lawful.

2.2.2. Air quality plans and national air pollution control programmes

As regards the obligation to draw up air quality plans under the Air Quality Directive, the Court of Justice held in *ClientEarth* that national courts must not only review whether an air quality plan has been drawn up by the national authorities but also whether this plan complies with the requirements of the second subparagraph of Article 23(1) of the Directive.²⁹⁴ The Court further specified that, while Member States retain some degree of discretion as to which measures to adopt, "those measures must, in any event, ensure that the period during which the limit values are exceeded is as short as possible".²⁹⁵ This means that, where a Member State has failed to secure compliance with the requirements of the second subparagraph of Article 13(1) of Directive 2008/50 and has not applied for postponement of the deadline, as provided for by Article 22 of the Directive, national courts must first ascertain whether the public authority has adopted an air quality plan, and, if it has, whether the plan is adequate in light of the requirements of the Directive.²⁹⁶

In *Stichting Natuur en Milieu*, the Court applied the same logic to the National Emissions Ceiling Directive. The Court held that applicants may be able to request the national court to assess whether the body of policies and measures adopted or envisaged by the national programme is appropriate to the objective of keeping emissions of pollutants below the ceilings laid down for each Member State within the time limit set by the Directive.²⁹⁷ Again, national courts are therefore required to assess whether the exercise of discretion was appropriate in light of the objective and requirements of the Directive.

²⁹³ Ibid, para. 37 and C-43/10 *Nomarchiaki Aftodioikisi Aitoloakarnanias and Others*, EU:C:2012:560, para. 67.

²⁹⁴ C-404/13, *ClientEarth*, para. 56. See also C-237/07, *Janecek*, para. 46.

²⁹⁵ Ibid, para. 57.

²⁹⁶ See also Commission Notice, para. 146.

²⁹⁷ Joined Cases C-165 to C-167/09 *Stichting Natuur en Milieu*, para. 103.

²⁹¹ C-529/15, *Folk*.

²⁹² Ibid, para. 38.

3. What are the conditions of standing?

The Commission Notice defines standing as “the entitlement to bring a legal challenge to a court of law or other independent and impartial body in order to protect a right or interest of the claimant regarding the legality of a decision, act or omission of a public authority”.²⁹⁸ The central question to be answered in this section is accordingly, which natural and legal persons have such an entitlement under EU law.

3.1. Aarhus Convention requirements

In accordance with Article 9(3) AC, the right is granted to “members of the public [...] where they meet the criteria, if any, laid down in [...] national law”. Once again, the elements of this definition are used to structure this section.

3.1.1. Members of the public

Article 2(4) AC defines the “public” as “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups.” This definition encompasses both individuals and organizations, such as NGOs.

As the Implementation Guide clarifies:

“[...] associations, organizations or groups without legal personality may also be considered to be members of the public under the Convention. This addition is qualified, however, by the reference to national legislation or practice. Thus, ad hoc formations can only be considered to be members of the public where the requirements, if any, established by national legislation or practice are met. Such requirements, if any, must comply with the Convention’s objective of securing broad access to its rights.”²⁹⁹

A common aspect of Articles 9(1), 9(2) and 9(3) AC is the non-discrimination obligation under Article 3(9) of the Convention. Accordingly, an individual or an association, organization or group shall be accorded standing without discrimination as to citizenship, nationality or residence (or registered seat or effective centre of activities as regards legal persons). Nevertheless, individuals and entities based in another country must still comply with the standing criteria laid down in national law.

3.1.2. Criteria, if any, laid down in national law

While the phrasing “criteria, if any” allows the Parties a certain discretion as to who has standing, it can in no circumstance allow a Party to define criteria in such a way as to effectively exclude all or almost all members of the public. To that end, the Aarhus Committee

has established a test to ascertain compliance with Article 9(3), as best summarized in its findings on communication ACCC/C/2008/31 (Germany):

*“Unlike Article 9, paragraphs 1 and 2, Article 9, paragraph 3, of the Convention applies to a broad range of acts or omissions and also confers greater discretion on Parties when implementing it. Yet, the criteria for standing, if any, laid down in national law according to this provision should always be consistent with the objective of the Convention **to ensure wide access to justice**. The Parties are not obliged to establish a system of popular action (*actio popularis*) in their national laws to the effect that anyone can challenge any decision, act or omission relating to the environment. **On the other hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining such strict criteria that they effectively bar all or almost all members of the public, including environmental NGOs, from challenging acts or omissions that contravene national law relating to the environment.** Access to such procedures should be the presumption, not the exception, as Article 9, paragraph 3, should be read in conjunction with Articles 1 and 3 of the Convention and in the light of the purpose reflected in the preamble, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced” (emphasis added).³⁰⁰*

This general statement of the Committee applies to any kind of criteria that needs to be met by an individual or an organization seeking to challenge a specific act or omission. Such “criteria” can be distinguished from any provisions concerning the acts and omissions subject to challenge, for which there is no discretion (see section 1 above).

So what are the criteria that can be imposed? In this regard, Article 9(2) AC is certainly instructive. For one, States may impose criteria based on having a sufficient interest or on the infringement of a right (see chapter 2, section 4). Moreover, States may impose certain “formal” criteria to be met by NGOs (i.e. related to their constitution, experience etc.) Some of the relevant statements of the Aarhus Committee in this regard are discussed first to provide an idea of the criteria imposed by States, before turning to the implementation in EU law.

Sufficient interest (interest based approach)

As discussed in chapter 2, sections 4.2.1., under an interest based approach, standing is granted to anyone

²⁹⁸ Commission Notice, para. 58.

²⁹⁹ Implementation Guide, p. 55.

³⁰⁰ ACCC/C2008/31 (Germany), para. 92. See also ACCC/C/2005/11 (Belgium), paras 34–36; ACCC/C/2006/18 (Denmark), paras 29–30; ACCC/C/2008/32 (European Community) (Part I), paras 77–80; ACCC/C/2010/48 (Austria), paras 51 and 68–70; ACCC/C/2010/50 (Czech Republic), para. 85 and ACCC/C/2011/58 (Bulgaria), para. 65.

who can show that the act or omission (sufficiently) affects his or her interests. Member States may impose general requirements to substantiate the applicant's interest in the measure being challenged.³⁰¹ However, such criteria must consider all relevant aspects of a specific act/omission that could affect the applicant's interest and must not be limited to certain isolated factors, be it a requirement for residence within a certain distance from an activity or similar.³⁰²

Infringement of a right (rights based approach)

As discussed in chapter 2, section 4.2.2., under a rights based approach, access to court is granted if the act or omission in question has the potential to infringe the applicant's subjective rights. As highlighted by the Aarhus Committee in its findings on communication ACCC/C/2008/31 (Germany), a strict application of an impairment of rights approach would imply non-compliance with Article 9(3), "*since many contraventions by public authorities and private persons would not be challengeable unless it could be proven that the contravention infringes a subjective right*".³⁰³ The Aarhus Committee emphasized that such an approach almost always bars environmental NGOs from accessing review procedures, as their subjective rights are generally unaffected, given that they engage in litigation in order to protect the public interest in environmental protection.³⁰⁴

Rights-based systems will therefore usually require the adoption of specific standing provisions or the recognition by the courts that environmental NGOs possess specific rights in the field of environmental law and therefore must have standing where these rights are infringed. In Germany, these considerations have led to the introduction (and subsequent amendment) of the Environmental Appeals Act.³⁰⁵ Whether or not the Act in its current form covers all acts/omissions that can contravene national law relating to the environment, the approach of adopting a specific act that gives NGOs a separate legal basis for standing is certainly one useful approach to implementing Article 9(3) AC. The decisive challenge will be to cover all acts/omissions that can contravene national law relating to the environment.

Formal criteria for NGOs

A State may also impose express criteria for NGOs, comparable to those in Article 9(2) AC, discussed

in chapter 2, section 4.4.³⁰⁶ For example, the Aarhus Committee did not object to the requirements that members of an association demonstrate that their purpose is to promote nature conservation or environmental protection, that they have been active for three years in the Member State concerned and that they have at least 100 members or otherwise have "*support from the public*".³⁰⁷ However, the Aarhus Committee will also scrutinize any such conditions on a case-by-case basis if the issue arises in a communication.³⁰⁸

3.2. Implementation in EU law

Under EU law, the right to access review procedures derive from two sources. The first is where there is a specific access to justice provision in a directive. In the context of Article 9(3), there is currently only one example, the Environmental Liability Directive (ELD). The second is where EU environmental legislation bestows procedural and substantive rights on individuals and NGOs, which can be enforced in courts. In this area, the CJEU has provided guidance through its case law.

3.2.1. Standing in case of (imminent threat of) damage to protected species, land and water – Environmental Liability Directive (ELD)

To recall, outside of the context of permitting procedures described in the previous chapter, the only directive that contains specific standing provisions is the Environmental Liability Directive.

Article 12(1) of the ELD gives natural or legal persons meeting one of the three alternative criteria the right to request the public authorities to take action against environmental damage. Article 13 ELD then gives these persons access to courts to challenge "*decisions, acts and omissions of the competent authority*" under the ELD (see section 1.2.1 above).

The persons referred to in paragraph 12(1) are natural or legal persons:

- (a) "*affected or likely to be affected by environmental damage or*
- (b) "*having a sufficient interest in environmental decision making relating to the damage or, alternatively,*
- (c) "*alleging the impairment of a right, where*

301 ACCC/C/2005/11 (Belgium), para. 40, ACCC/C/2006/18 (Denmark), para. 31, ACCC/C/2013/81 (Sweden), para. 85.

302 ACCC/C/2013/81 (Sweden), paras 86-87.

303 ACCC/C/2008/31 (Germany), para. 94.

304 Ibid, para. 94

305 See Aarhus Committee Report to the Meeting of the Parties on compliance by Germany with its obligations under the Convention (ECE/MP.PP/2017/40) for a discussion of the implementation of Article 9.3 AC by the Environmental Appeals Act and recent amendments, available online at: <https://www.unece.org/fileadmin/DAM/env/pp/mop6/English/ECE_MP.PP_2017_40_E.pdf>, paras 31-65.

306 Under Article 9(2) AC, Parties "non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest" to bring a challenge (based on Article 2(5) AC). This is comparable to Article 9(3) AC, which gives standing to associations, organizations and group which meet the criteria, if any, laid down in national law. A difference arises only from the fact that 9(2) AC concerns non-governmental organizations while 9(3) AC also encompasses associations and groups, so also for the latter any restrictions to their right to bring proceedings (i.e. criteria) must be justified.

307 ACCC/C/2013/81 (Sweden), para. 85.

308 See in this regard the documentation on the currently pending communication ACCC/C/2016/137 (Germany), which has been declared admissible at the 61st Committee meeting: <<https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2016137-germany.html>>.

*administrative procedural law of a Member State requires this as a precondition,*³⁰⁹

Criteria (b) and (c) are, in their formulation, almost identical to the criteria for standing defined in the EIA Directive and Article 9(2) AC discussed in the previous chapter. The Commission Notice suggests that the case law on standing under these provisions should therefore be taken into account in interpreting the criteria in Article 12(1)(b) and (c) ELD.³¹⁰

Criterion (a), provides that *"the right to a review procedure for those persons affected or likely to be affected by environmental damage"*,³¹¹ does not allow Member States the same margin of discretion as criteria (b) and (c). This was clarified by the CJEU in *Folk* when it held:

*"Although the Member States have discretion to determine what constitutes a 'sufficient interest', a concept provided for in Article 12(1)(b) of Directive 2004/35, or 'impairment of a right', a concept laid down in Article 12(1)(c) of that directive, they do not have such discretion as regards the right to a review procedure for those persons affected or likely to be affected by environmental damage, as follows from Article 12(1)(a) of that directive."*³¹²

The Court accordingly held that:

*"An interpretation of national law which would deprive all persons holding fishing rights of the right to initiate a review procedure following environmental damage resulting in an increase in the mortality of fish, **although those persons are directly affected by that damage**, does not respect the scope of Articles 12 and 13 and is thus incompatible with that directive"* (emphasis added).³¹³

Under Article 12(1)(a) ELD, the only factor is, accordingly, the effect or likely effect of the environmental damage on the applicant. Member States are not permitted to impose any additional requirements. This is therefore to be distinguished from the situation under Article 11 of the EIA Directive and Article 9(2) AC because, under the ELD, Member States are not allowed to make the standing of persons conditional on them possessing a legal interest or a right that can be infringed.

3.2.2. Standing based on directly effective provisions of EU environmental law

As we have seen in the previous section, the CJEU has identified a number of directly effective provisions of EU environmental law that are enforceable in national courts. Yet, in the absence of specific EU rules regulating access to justice in relation to these

provisions, it is in principle left to the domestic legal systems of the Member States to lay down the detailed rules on standing.³¹⁴ Nevertheless, there are clear limitations to Member States' procedural autonomy in defining standing criteria on the basis of the principle of effective judicial protection and Article 9(3) AC.

As the Commission's Notice states, *"Member States are obliged to provide for legal standing to ensure access to an effective remedy for the protection of procedural and substantive rights conferred by EU environmental law even if the EU environmental legislation at stake does not contain specific provisions on the matter"*.³¹⁵ Examples of procedural and substantive rights that individuals and natural persons derive from EU environmental legislation have been listed in the previous section.

Therefore, the natural or legal persons holding rights conferred by EU environmental law must have standing to rely upon them before national courts. In this regard, the CJEU has held that *"it would be incompatible with the binding effect attributed to a directive by Article 288 TFEU to exclude, in principle, the possibility that the obligations which it imposes may be relied on by those concerned"*.³¹⁶ Taken together with the principle of effective judicial protection as reflected in article 4(3) TEU and article 19(1) TEU,³¹⁷ the CJEU has held that individuals or, where appropriate, a duly constituted environmental organization must be able to rely on directives that have the aim of protecting the environment in legal proceedings. In a series of rulings, the CJEU held that NGOs and natural persons must have standing to challenge:

- air quality plans, or the lack thereof, in breach of the Air quality Directive (*Janecek*³¹⁸ and *ClientEarth*³¹⁹);
- permits under the NEC Directive (*Stichting*³²⁰); and
- derogations under the Habitats Directive (*Slovak Bears*³²¹)
- permits adopted under the Water Framework Directive (*Protect*³²²).

For instance, in *ClientEarth* the CJEU held that:

*"[...] natural or legal persons directly concerned by the limit values being exceeded after 1 January 2010 must be in a position to require the competent authorities, if necessary by bringing an action before the courts having jurisdiction, to establish an air quality plan which complies [with the Air Quality Directive] [...]"*³²³

³⁰⁹ Article 12(1)(a)-(c) ELD.

³¹⁰ Commission Notice, para. 89. See also Jan Darpö, "The EU Commission's Notice on access to justice in environmental matters" (2017) *Journal of European Environmental and Planning Law* 373 at 382, available online at: <<http://jandarpö.se/articles-reports/>>.

³¹¹ C-529/15 *Folk*, para. 47.

³¹² *Ibid*, para. 47.

³¹³ *Ibid*, para. 49.

³¹⁴ C-240/09 *Lesoochránárske zoskupenie*, (*Slovak Bears I*), para. 47. This is based on long-standing case law of the CJEU. See for instance, C-268/06 *Impact* [2008] ECR I-2483, paras 44 and 45.

³¹⁵ Notice, para. 95. This statement is based on the Implementation Guide, p. 197 and ACCC/C/2006/18 (Denmark).

³¹⁶ C-243/15 *Slovak Bears II*, para. 44 ; and C-664/15 *Protect*, para. 34.

³¹⁷ C-243/15 *Slovak Bears II*, para. 50.

³¹⁸ C-237/07 *Janecek*.

³¹⁹ C-404/13 *ClientEarth*.

³²⁰ Joined cases C-165 to C-167/09 *Stichting Natuur en Milieu*.

³²¹ C-240/09 *Lesoochránárske zoskupenie*, (*Slovak Bears*).

³²² C-664/15 *Protect*

³²³ C-404/13 *ClientEarth*, para. 56.

Based on this statement, the Brussels first instance court issued an interim judgment on 17 December 2017 holding that any resident of an area or zone where air quality values are exceeded is to be considered as “directly concerned”.³²⁴ This line of reasoning has the potential to apply to other directly effective provisions of EU environmental law that have not already been the subject of a preliminary reference before the CJEU.

In its case law, the CJEU does not further restrict this category of natural and legal persons who derive rights from EU environmental law. It has made clear that environmental organizations derive rights from EU environmental law,³²⁵ as do individual complainants.³²⁶ The category of persons who derive such rights is therefore very broad.

In two preliminary references that focused specifically on standing for NGOs before national courts, the Court clarified how these CJEU rulings concretely affect the procedural autonomy of Member States to set specific criteria for standing.

In the *Slovak Bears* case, the CJEU specifically relied on Article 9(3) AC for the first time. It initially noted the lack of EU legislation implementing Article 9(3) AC across the EU³²⁷ and found that Article 9(3) was not sufficiently precise and unconditional to have direct effect. Despite these factors, it held that national procedural law must be interpreted, so far as possible, in a manner that is consistent with the objectives of Article 9(3) AC that is to provide standing to NGOs.

The Court held that:

*“it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation, such as the Lessochranárske zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European environmental law”.*³²⁸

Regarding the question of whether Article 9(3) AC has direct effect, the judgment is certainly questionable. The provision is precise and unconditional as regards the “acts and omissions” that can be challenged and concerning the basis for the challenge, i.e. “national law relating to the environment.” The Aarhus Committee

has moreover confirmed that with regard to these elements, the AC does not give any discretion.³²⁹ Moreover, the existence of a certain discretion to implement the provision, as introduced by the reference to “national criteria”, has not previously prevented the Court from finding that a provision is sufficiently precise and unconditional to have direct effect. As already discussed above, the national court must then assess whether this discretion was adequately exercised.³³⁰

Nevertheless, *Slovak Bears* confirmed that EU law requires national courts to interpret their national procedural law in accordance with Article 9(3) AC. This makes the findings of the Aarhus Committee directly relevant in determining the content of this EU law obligation.

The *Protect* judgment clarified that Article 9(3) of the Convention, “read in conjunction with Article 47 of the Charter of Fundamental Rights, imposes on Member States an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law.”³³¹ The Court has further held that the right to an effective remedy and a fair hearing under Article 47 of the Charter constitutes a reaffirmation of the principle of effective judicial protection.³³² This means not only that courts must interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring proceedings in compliance with Article 9(3) AC and Article 47 of the Charter but also that courts must disapply any such laws where a compliant interpretation is impossible. This holds even where “any conflicting provision of national legislation were adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provision by legislative or other constitutional means.”³³³

3.2.3. Resulting degree of discretion for Member States to impose “criteria” for standing

With regard to Member States’ discretion to set standing criteria, three clear conclusions can be drawn from the decisions of the Aarhus Committee and the CJEU:

- *Standing as the assumption, restrictions must be justified*

As the Court has clarified in *Protect*, the right to an effective remedy under Article 47 CFR presupposes the ability to enter into judicial proceedings. This is similar to the recognition of the Aarhus Committee that access to justice should not be the exception but the rule. Accordingly, any “precondition” imposed on “natural or legal person directly concerned” constitutes a limitation to the right to an effective remedy and must be justified under the conditions of Article 52(1)

324 See <<https://www.clientearth.org/preliminary-question-from-belgian-court-provides-opportunity-to-set-binding-precedent-on-the-right-of-citizens-and-ngos-to-enforce-air-quality-monitoring-rules/>>.

325 See for instance C-240/09, *Lesoochranárske zoskupenie*, (*Slovak Bears I*), para. 52 and C-664/15 *Protect*, paras 45, 54, 87, 92 and 98 referring to “rights conferred by” EU law on NGOs.

326 C-237/07, *Janecek* was a case brought by an individual living in the vicinity of an air quality measuring station.

327 C-240/09, *Lesoochranárske zoskupenie*, (*Slovak Bears*), paras 40-41.

328 *Ibid*, para. 51.

329 ACCC/C/2008/32, (European Union), (Part II), para. 52.

330 Joined cases C-165 to C-167/09 *Stichting Natuur en Milieu*, para. 97.

331 C-664/15 *Protect*, para. 45.

332 C-73/16 *Puškár*, EU:C:2017:725, para. 59 and C-664/15 *Protect*, para. 87.

333 C-664/15 *Protect*, para. 56.

of the Charter.³³⁴ Such limitations must meet the formal criteria of Article 52(1) CFR, namely: (a) they must be provided for by law, (b) they respect the essence of that law, (c) they are necessary, subject to the principle of proportionality, and (d) they genuinely meet the objectives of the public interest recognised by the EU or the need to protect the rights and freedoms of others.³³⁵

In *Protect*, the criterion concerned was the requirement that an NGO needed to file observations within a certain period of time in order not to lose its status as “party to the proceedings” and accordingly its right to obtain access to court. Because the NGO had been factually prevented from submitting comments as a “party to the proceedings” it had also been prevented from having access to justice. The Court found that this was an unacceptable restriction of the right to an effective remedy. While this case concerned an NGO and a very specific national rule, the requirement would equally apply with regard to any precondition on access to courts.

- *Criteria may not exclude categories of claimants (both NGOs and individuals)*

Moreover, as the CJEU held in *Protect*, “Article 9(3) of the Aarhus Convention would be deprived of all useful effect, and even of its very substance, if it had to be conceded that, by imposing those conditions, certain categories of ‘members of the public’, a fortiori ‘the public concerned’, such as environmental organisations that satisfy the requirements laid down in Article 2(5) AC, were to be denied of any right to bring proceedings.”³³⁶

As noted above, the term ‘members of the public’ is defined broadly. It also includes private persons, as well as “the public concerned”, which is defined as the “public affected or likely to be affected by, or having an interest in, the environmental decision-making”. Accordingly, private persons and, a fortiori, persons affected or likely to be affected or otherwise having an interest in the alleged breach are “categories of the members of the public”, which may not be denied of the right to bring proceedings.

The judgment in *Protect* went on to analyse the situation of NGOs as one of these “categories of ‘members of the public’”. It found that criteria on standing imposed by national law “must not deprive environmental organisations in particular of the possibility of verifying that the rules of EU environmental law are being complied with, given also that such rules are usually in the public interest, rather than simply in the interests of certain individuals, and that the objective of those organisations is to defend the public interest.”³³⁷ Accordingly, standing of environmental organizations may not be restricted to cases in which the individual

interests or rights of its members are affected or violated. Rather, environmental organizations must be able to base their standing rights on defending the public interest. This is a fundamental point, in particular in Member States that have adopted a rights based approach to standing (see section 3.1.2 above).

It is very clear that a Member State is not in compliance with Article 9(3) of the Convention if “all NGOs acting solely for the purposes of promoting environmental protection are excluded” from obtaining redress,³³⁸ nor is it permissible to exclude all natural persons from challenging an act or omission.³³⁹ Thus, when criteria are designed and imposed, they must not be so strict that it would effectively be impossible for these categories of the members of the public to contest acts or omissions falling under Article 9(3) AC.³⁴⁰

- *Prior participation in a permit proceeding as a precondition for standing other than under Article 9(2) of the Aarhus Convention and the EIA and SEA Directives*

In the *Protect* case the CJEU had to decide whether the NGO’s right of standing should be assessed in light of its right to and actual participation in a permit proceeding. The Court ruled that a requirement that a party must raise its objections in a timely manner during the administrative procedure, and no later than the oral phase, to not lose its status as “party to the proceedings”, and thus be able to challenge a decision, is not in principle contrary to Article 9(3) of the Aarhus Convention.³⁴¹ The Court then held, however, that in the specific case such a requirement could not be applied because the applicant’s right to become a party to the proceedings in the first place was not adequately ensured.³⁴² Therefore, this requirement was not in compliance with Article 9(3) and 9(4) AC read in conjunction with Article 47 of the Charter.³⁴³

As stated above, the Aarhus Committee has held that the Convention “does not make participation in the administrative procedure a precondition for access to justice to challenge the decision taken as a result of that procedure, and introducing such a general requirement for standing would not be in line with the Convention.”³⁴⁴ It is, therefore, doubtful whether such a requirement as recognized in the *Protect* case could ever comply with Article 9(3) AC.

334 Ibid, para. 90.

335 Ibid, para. 90 and, by analogy, C-73/16 *Puškár*, paras 61-71.

336 C-664/15 *Protect*, para. 46.

337 Ibid, para. 47.

338 ACCC/C/2005/11 (Belgium), paras 35 and 39 and ACCC/C/2008/32 (European Union) (Part II), para. 73.

339 ACCC/C/2008/32 (European Union) (Part II), para. 93.

340 C-664/15 *Protect*, para. 48. Note that in this paragraph the Court refers to “environmental organizations” but, as mentioned above, the case more generally refers to “members of the public and, a fortiori, the public concerned” (para 46), which are both categories that also include natural persons.

341 C-664/15, *Protect*, para. 82.

342 Ibid, paras 95-96.

343 Ibid, para. 101.

344 ACCC/C/2011/58 (Bulgaria), para. 68. See also Committee’s report on ACCC/C/2004/8 (Armenia), paras 58-59 (<https://www.unecce.org/fileadmin/DAM/env/pp/mop6/English/ECE_MP_PP_2017_33_E.pdf>).

Chapter 4

General requirements for all review procedures

CJEU

C-201/02 *Wells*: Remedies for unlawful acts (EIA)
C-41/11, *Inter-Environnement Wallonie and Terre wallonne* : Remedies for unlawful acts (SEA)
C-399/14 *Grüne Liga Sachsen and Others*: Remedies for unlawful acts (Habitats)
C-420/11 *Leth*: State liability
C-416/10 *Križan and Others*: Interim relief
C-348/15 *Stadt Wiener Neustadt* : Effectiveness and equivalence
C-379/15 *Association France Nature Environment* : Maintaining irregular acts in force to prevent further harm
Case C-470/16 *North East Pylon Pressure Campaign and Sheehy*: indirect effect of Article 9(4)
C-260/11 *Edwards and Pallikaropoulos*: Article 47 of the Charter and effective remedies
C-427/07 *Commission v Ireland* and C-530/11 *Commission v UK*: limits to court discretion on costs
C-276/01, *Steffensen*: fair court procedures
C-279/09 *DEB*: legal aid

ACCC findings

ACCC/C/2012/76 (Bulgaria): Interim relief
ACCC/C/2008/24 (Spain), ACCC/C/2012/69 (Romania) and ACCC/C/2013/81 (Sweden): timely court procedures
ACCC/C/2011/57 (Denmark): objective assessment of costs
ACCC/C/2008/33 (UK) and ACCC/C/2014/111 (Belgium): limits to court discretion on cost awards
ACCC/C/2008/23 (United Kingdom): contribution of the defendant to costs
ACCC/C/2004/06 (Kazakhstan): fair court procedures
ACCC/C/2009/36 (Spain): legal aid

Introduction

Article 9(4) AC

In addition and without prejudice to paragraph 1 above, 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. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

Article 9(5) AC

In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

Article 9(4) and 9(5) AC set out requirements applicable to all the procedures discussed in the preceding chapters (Article 9(1)-(3) AC). The main elements of these requirements are that:

1. Remedies are adequate and effective (Article 9(4) AC, Article 19(1) TEU and Article 47(1) CFR, Article 13 ECHR);
2. Procedures are fair, equitable, timely and not prohibitively expensive (Article 9(4) AC, Article 47 CFR, Article 6 ECHR);
3. Information on administrative and judicial review procedures is disseminated to the public and appropriate assistance mechanisms are established to remove or reduce financial and other barriers (Article 9(5) AC).

1. Adequate and effective remedies, including injunctive relief as appropriate

Article 9(4) AC requires that the review procedures under Article 9 AC, “provide adequate and effective remedies, including injunctive relief as appropriate.”

As explained in the Implementation Guide:

“Adequacy requires the relief to ensure the intended effect of the review procedure. This may be to compensate past damage, prevent future damage and/or to provide for restoration. The requirement that the remedies should be effective means that they should be capable of real and efficient enforcement. Parties should try to eliminate any potential barriers to the enforcement of injunctions and other remedies.”³⁴⁵

As also set out in the Commission Notice,³⁴⁶ based on the principle of sincere cooperation (Article 4(3) TEU), the central requirements for remedies in case of non-compliance with EU law are:

- Member States must refrain from taking any measures that can seriously compromise the attainment of a result prescribed by EU environmental law.³⁴⁷
- Every organ of a Member State must nullify the unlawful consequences of a breach of EU law.³⁴⁸

The manner in which this is ensured under national procedural law is left to be determined by the Member States (procedural autonomy). However, remedies must always comply with the general EU law principles of effectiveness and equivalence.³⁴⁹ As the Court has consistently held:

“it is settled case-law that, in the absence of relevant European Union rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under European Union law are a matter for the domestic legal order of each Member State, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness).”³⁵⁰

Additionally,³⁵¹ national procedural rules are also to be interpreted in light of the right to an effective remedy, as enshrined in Article 19(1) TEU and Article 47(1) CFR. As confirmed by the Court, Article 47(1) CFR is based on Article 13 ECHR³⁵² and the case law of the European Court of Human Rights is therefore relevant to the interpretation of the right to effective remedies as well.

Moreover, national procedural law must also be interpreted consistently with the requirements of Article 9(4) AC that remedies be adequate and effective. This was confirmed by the CJEU in *Slovak Bears II* in the context of a claim brought under Article 9(2) AC.³⁵³

Ensuring the right standard of review by national courts is adopted also contributes to ensuring effective remedies are provided. In particular, the Court of Justice has held that “it must not be made impossible in practice or excessively difficult to exercise rights conferred by EU law”³⁵⁴, meaning that the standard of review must be adequate to ensure that an applicant can obtain adequate remedies. For a more detailed discussion of the required standard of review under EU law see chapter 2, section 3.2., and chapter 3, section 2.2 above.

The foregoing considerations are applicable to any of the challenges discussed in this Guide. Through its case law, the CJEU has established specific requirements that follow from these overarching principles, discussed in more detail below:

1.1. Suspension, revocation and annulment of unlawful decisions and acts

Many environmental cases challenge a specific administrative decision, such as a decision to deny a request to access environmental information (Article 9.1 AC), a decision to permit an activity with harmful effects on the environment (Article 9.2 AC) or an action plan, which sets out insufficient measures to achieve prescribed environmental standards (Article 9.3 AC). In such cases, an effective remedy may be the suspension, revocation or annulment of the challenged decision or act.

The CJEU’s judgment in *Wells* illustrates this approach. The case concerned a situation in which a development consent had been granted for a mining operation without first conducting an environmental impact assessment as required by the EIA Directive.

³⁴⁵ Implementation Guide, p. 200.

³⁴⁶ Commission Notice, para. 155.

³⁴⁷ Case C-129/96, *Inter-Environnement Wallonie v Région wallonne*, para. 45.

³⁴⁸ C-201/02 *Wells*, paras 64-65. This requirement derives from the principle of loyal cooperation (Article 4(3) TEU) and the right to effective judicial remedies (Article 47 of the Charter).

³⁴⁹ C-201/02 *Wells*, para. 67 and C-420/11 *Leth*, ECLI:EU:C:2013:166, para. 38 for the applicability of this requirement in environmental cases.

³⁵⁰ C-378/10, *Vale Epitesi kft*, ECLI:EU:C:2012:440, para. 48. See also case law cited therein and Cases C-261/95 *Palmisani v INPS*, ECLI:EU:C:1997:351 and C-118/08 *Transportes Urbanos y Servicios Generales*, ECLI:EU:C:2010:39.

³⁵¹ The Court treats the right to an effective remedy separately from the principle of effectiveness – see for instance Case C-93/12 *Agrokonstulting-04*, ECLI:EU:C:2013:432 or, in the environmental sphere, Case C-243/15 *Lesoochranárske zoskupenie (Slovak Bears II)*.

³⁵² C-334/12 *RX-II*, ECLI:EU:C:2013:134, para. 42.

³⁵³ C-243/15 *Lesoochranárske zoskupenie (Slovak Bears II)*, para. 62.

³⁵⁴ C-71/14 *East Sussex*, ECLI:EU:C:2015:656, para. 52.

The CJEU recalled that every organ of the Member State is required to nullify the unlawful consequences of a breach of EU law.³⁵⁵ The CJEU then applied this general test to the case at hand holding that:

*"[...] it is for the competent authorities of a Member State to take, within the sphere of their competence, all the general or particular measures necessary to ensure that projects are examined in order to determine whether they are likely to have significant effects on the environment and, if so, to ensure that they are subject to an impact assessment [...] Such particular measures include, subject to the limits laid down by the principle of procedural autonomy of the Member States, the revocation or suspension of a consent already granted, in order to carry out an assessment of the environmental effects of the project in question as provided for by [the EIA Directive]" (emphasis added).*³⁵⁶

This case demonstrates that national courts are required to take all available measures to ensure the intended effect of the EU law obligation in question (in this case the assessment of environmental effects). Moreover, the case shows that a legally required procedure under EU law which preceded an administrative decision (such as EIA) does not become redundant once the decision is adopted. Rather, the national courts are required to do everything in their power to ensure that the procedure can still be carried out, including by revoking or suspending the already adopted final decision. This applies whether the procedure was irregular or omitted altogether.³⁵⁷

In addition, in *Krizan*, the Court of Justice confirmed that the annulment of a permit on the basis of an infringement of EU law does not, in itself, constitute "an unjustified interference with the developer's right to property enshrined in Article 17 of the Charter."³⁵⁸

The same logic applies not only to a permitting decision which needed to be preceded by an EIA as in *Wells*, but also to decisions adopted under the Industrial Emissions Directive (IED), the Habitats Directive and the SEA Directive. As regards SEA, the Court of Justice held that "where a 'plan' or 'programme' should, prior to its adoption, have been subject to an assessment of its environmental effects in accordance with the requirements of Directive 2001/42, the competent authorities are obliged to take all general or particular measures for remedying the failure to carry out such an assessment"³⁵⁹ and "[c]onsequently, courts before which actions are brought in that regard must adopt, on the basis of their national law, measures to suspend or annul the 'plan' or 'programme' adopted in breach of the obligation to carry out an environmental assessment."³⁶⁰ The judgement in *Grüne Liga Sachsen* reflects the same underlying logic

for the Habitats Directive, even though the permit in the case at hand was not subject to challenge any longer.³⁶¹

As recognized by the Commission Notice,³⁶² national courts may face a dilemma if the legal vacuum created by annulling the contested act will lead to greater environmental damage than allowing it to remain, even partially, in force. In two cases dealing with breaches of the SEA Directive, the Court confirmed that national courts may limit the effects of annulment of a contested provision if certain conditions are met,³⁶³ namely:

1. that the contested provision constitutes a measure correctly transposing EU law on environmental protection (notwithstanding the breach of the SEA Directive on which annulment is based);³⁶⁴
2. that the adoption and entry into force of a new provision of national law does not make it possible to avoid the damaging effects on the environment arising from the annulment of the contested provision of national law;
3. that annulment of the contested provision of national law would have the effect of creating a legal vacuum concerning the transposition of EU law on environmental protection which would be more damaging to the environment, in the sense that that annulment would result in lesser protection and would thus run counter to the essential objective of the EU law; and
4. that any exceptional maintaining of the effects of the contested provision of national law lasts only for the period strictly necessary for the adoption of the measures making it possible to remedy the irregularity found.

1.2. Instructions requiring adoption of omitted measures

Where a public authority has failed to adopt an act required by EU law, the CJEU has established that national courts can require the public authority to adopt the omitted act. This kind of remedy is best illustrated by the CJEU's judgment in *Janecek* concerning a failure to draw up an appropriate air quality plan under the Air Quality Directive.³⁶⁵

Equally, in the situation where a public authority has adopted an act that fails to meet the requirements prescribed by EU law, the CJEU has held that the

355 C-201/02 *Wells*, para. 64.

356 *Ibid.*, para. 65.

357 C-72/12 *Gemeinde Altrip and Others*, para. 37.

358 C-416/10 *Krizan*, para. 116.

359 C-41/11 *Inter-Environnement*, para. 44.

360 *Ibid.*, para. 46.

361 The questions referred for a preliminary ruling in Case C-399/14 *Grüne Liga Sachsen and Others*, ECLI:EU:C:2016:10, were premised on the fact that the structure concerned (a bridge) had already been built and the permit had become final and could no longer be challenged. However, the Court's statement that even in such a case the requirements of the Directive could not be evaded (para 68) confirms that annulment, suspension or revocation should have been available remedies had a possibility to challenge still existed.

362 Commission Notice, para. 161.

363 C-41/11 *Inter-Environnement Wallonie*, para. 63 and C-379/15 *Association France Nature Environment*, ECLI:EU:C:2016:603, para. 43.

364 For example, in C-41/11 *Inter-Environnement Wallonie*, the Court held that this first condition would be met if the contested provision correctly implemented Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, despite being in breach of the SEA Directive.

365 C-237/07 *Janecek*.

role of national courts is to ensure that such EU law requirements are met. For example, in *ClientEarth*, which concerned a deficient air quality plan, the Court held that the national court was required, “to take, with regard to the national authority, any necessary measure, such as an order in the appropriate terms, so that the authority establishes the plan required by the directive in accordance with the conditions laid down by the latter.”³⁶⁶ According to the Commission Notice, “effective remedies therefore need to include steps that address content deficiencies, for example an instruction requiring an already adopted air quality plan to be revised.”³⁶⁷

1.3. Preventing and remedying harm

A central issue in many environmental cases is the risk or occurrence of environmental harm. As the Aarhus Committee highlighted with reference to the Implementation Guide, “[a]dequacy requires the relief to ensure the intended effect of the review procedure. This may be to compensate past damage, prevent future damage and/or to provide for restoration” and “although monetary compensation is often inadequate to remedy the harm to the environment, it may still provide some satisfaction for the persons harmed”.³⁶⁸

Under EU law, there are three different mechanisms to ensure the prevention and remediation of environmental damage: the Environmental Liability Directive, the (general) requirement to nullify unlawful consequences of breaches of EU law and (more specifically) state liability.

1.3.1. Environmental Liability Directive

The Environmental Liability Directive (see chapter 3) establishes a special regime requiring the operator of activities to take specific preventive and remedial measures (Articles 5 and 6 ELD) for the categories of environmental damage covered by the Directive.³⁶⁹ Operators are required to take, without delay, necessary preventive measures where there is an imminent threat of damage occurring.³⁷⁰ If environmental damage has already occurred, the operator must, without delay, inform the competent authority and take:

- (a) “all practicable steps to immediately control, contain, remove or otherwise manage the relevant contaminants and/or any other damage factors in order to limit or to prevent further environmental damage and adverse effects on human health or further impairment of services”³⁷¹ and
- (b) identify potential remedial measures and submit them to the competent authority for its approval.³⁷²

³⁶⁶ C-404/13 *ClientEarth*, para. 58.

³⁶⁷ Commission Notice, para. 164.

³⁶⁸ ACCC/C/2013/85 & ACCC/C/2013/86 (United Kingdom), para. 99.

³⁶⁹ As noted above, this Article 1 ELD limits environmental damage to damage to protected species, land and water. However, in C-129/16 *Türkevei Tejtermelő Kft*, the Court established that also other damage may be covered, for instance air pollution.

³⁷⁰ Article 5 ELD.

³⁷¹ Article 6(a) ELD.

³⁷² Article 6(b) and 7 ELD. Annex II of the ELD sets out the detailed rules governing remedial measures.

The operator must bear the costs of these preventive and remedial measures taken,³⁷³ which reflects the polluter pays principle.³⁷⁴

1.3.2. Harm to the environment

The general obligation to refrain from taking any measures that can seriously compromise the attainment of a result prescribed by EU environmental law³⁷⁵ requires national courts to take action that prevents environmental harm. Similarly, the obligation to nullify the unlawful consequences of a breach of EU law³⁷⁶ requires the compensation of harm caused by the breach. The CJEU confirmed this in the environmental context in *Wells*, where it held that Member States must “make good any harm caused by the failure to carry out an [EIA].”³⁷⁷

These obligations derive from the fact that the overarching goal of EU environmental legislation is to “preserve, protect and improve the quality of the environment” and “human health” and is based on the “principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay”.³⁷⁸

A specific situation arises in the context of the Habitats Directive, which imposes specific requirements to prevent damage to special designated protected sites. In *Grüne Liga Sachsen*, the Court held that the requirements of Article 6(3) of the Directive “may not be amended” solely because the activity in question had already started or because, under national law, the underlying planning decision could no longer be challenged in court.³⁷⁹

The CJEU therefore held that the assessment under Article 6(2) of the Directive still needed to be carried out. Should it be found that the construction had already caused significant deterioration or disturbance or that there would be risk thereof, if the works continued, Article 6(4) was to be applied by analogy.³⁸⁰ This means that the following elements need to be assessed:

- Whether the project should still be carried out for imperative reasons of public interest;³⁸¹
- If yes, whether there are viable alternative solutions while “weighing the environmental consequences of maintaining or restricting the use of the works at issue, including closure or even demolition, on the one hand, against the important public interest that led to their construction, on the other.”³⁸²

³⁷³ Article 8(1) ELD subject to the exceptions set out in Article 8(2)-(4) ELD.

³⁷⁴ The “polluter pays” principle is, in accordance with Article 191(2) TFEU, one of the objects of the EU’s policy on the environment.

³⁷⁵ C-129/96 *Inter-Environnement Wallonie*, para. 45.

³⁷⁶ C-201/02 *Wells*, paras 64-65.

³⁷⁷ *Ibid*, para. 66.

³⁷⁸ Article 191(1) and (2) TFEU.

³⁷⁹ C-399/14 *Grüne Liga Sachsen*, ECLI:EU:C:2016:10, para. 68.

³⁸⁰ *Ibid*, paras 70-71.

³⁸¹ *Ibid*, para. 72.

³⁸² *Ibid*, paras 72 and 74-77. The Court emphasized that within this assessment the economic costs of the steps taken, including for demolition, may not alone be the determining factor because they are not of equal importance to the objective of conserving natural habitats and wild fauna and flora pursued by the Habitats Directive.

- If there are no alternative solutions, all compensatory measures must be taken to ensure the overall coherence of the Natura 2000 site.³⁸³

1.3.3. State liability

In addition to the foregoing, EU law also provides for the possibility of compensation for personal harm arising from a breach of EU law. The CJEU applied this general principle of its case law in *Leth* in the context of the EIA Directive. The CJEU confirmed that the three-pronged test for a liability claim needs to be met, namely:

- The breached rule of EU law must be intended to confer rights on the claimant;
- The breach must be sufficiently serious; and
- There must be a causal link between the breach and the loss or damage sustained by the claimant.³⁸⁴

With regard to factor (a), the Court of Justice found that the EIA Directive imposes an obligation on the Member States (namely to carry out an EIA) which could be relied on by individuals. Accordingly, the Directive “confers on the individuals concerned a right to have the environmental effects of the project under examination assessed by the competent services and to be consulted in that respect.”³⁸⁵ The Court secondly assessed whether the EIA Directive was intended to confer rights for compensation on an individual. In this regard, the Court referred to the objectives of the Directive and of conducting an EIA and found that it fell within the objectives of the Directive to prevent pecuniary damage, “in so far as that damage is the direct economic consequence of the environmental effects of a public or private project”.³⁸⁶

This dual test to establish whether the rule is intended to confer rights on the claimant would appear to be fulfilled by all the Directives discussed in the context of chapters 2 and 3 of this Guide. All provisions of Directives that can be relied on by individuals confer rights on the individual concerned and impose an obligation on the Member States.³⁸⁷ Moreover, by contributing to environmental protection, the Directives are also aimed at preventing environmental damage and, by extension, to affected individuals.

In *Leth*, the Court expressed reservations that liability could be established because of factor (c), i.e. it found that it could not be established that the absence of the EIA would have directly resulted in the decrease in property value complained of. It held that the fact that an EIA was not carried out “does not, in principle, by itself confer on

an individual a right to compensation for purely pecuniary damage.”³⁸⁸ While the assessment was ultimately left to the national courts, which may apply stricter standards of liability, the CJEU’s judgement suggests that the claim was bound to fail on that basis. In environmental cases, the causal link is likely to always constitute the main obstacle in establishing state liability, in particular as it is necessary to link the infringement of environmental protection requirements with a harmed individual.

The seriousness of the breach (factor (b)) will depend largely on the degree of discretion left to the Member States in implementing the obligation. The most clear-cut cases of a serious breach are if a directive has not been implemented altogether or where the breach concerns settled CJEU case law. However, liability can also be established where the Member State has some discretion, in particular if there is a manifest/grave exceedance of powers.³⁸⁹

1.4. Interim measures

1.4.1. Convention requirements

Article 9.4 AC explicitly refers to “injunctive relief” as one element of effective remedies. The Convention requires injunctive relief to be made available “as appropriate.” The Aarhus Committee has accordingly established that it is permissible for national courts to assess whether granting injunctive relief is appropriate in the specific case.³⁹⁰ However, the Committee also emphasized that “in a review procedure within the scope of article 9 of the Convention the courts are **required to consider** any application for injunctive relief to determine whether the grant of such relief would be appropriate, bearing in mind the requirement to provide fair and effective remedies” (emphasis added).³⁹¹

Moreover, the Aarhus Committee held that an automatic suspension of enforcement of a decision granting a permit until after the time limit for the appeal of the EIA/SEA decision or until the pertinent appeal has been resolved constitutes an example of good practice of how to implement Article 9(4)AC and how to prevent irreversible environmental damage before a final court judgement has been reached.³⁹² However, under such a system, a court order that allows for preliminary enforcement contrary to the suspension must also only be applied if appropriate. Specifically, the Committee

383 Ibid, para. 72.

384 C-420/11 *Leth*, paras 40-42 and the case law referred to therein. See also Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame*, ECLI:EU:C:1996:79 paras 55 to 57; Case C-392/93 *The Queen v H.M. Treasury, ex parte British Telecommunications*, ECLI:EU:C:1996:131 para. 411; Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit and Others*, ECLI:EU:C:1996:387, para. 49, and Case C-302/97 *Konle*, ECLI:EU:C:1999:271 para. 58.

385 C-420/11 *Leth*, paras 32 and 44.

386 Ibid, paras 36 and 44.

387 While conceptually the question whether a provision has direct effect and whether it confers rights on individuals is arguably separate, the Court has not drawn such a distinction in any of the cases discussed above.

388 C-420/11 *Leth*, para. 47.

389 As the Court clarified in C-278/05 *Robins and Others*, ECLI:EU:C:2007:56, para. 77: Relevant factors to establish that there was a manifest/grave exceedance of powers “include, in particular in addition to the clarity and precision of the rule infringed and the measure of discretion left by that rule to the national authorities, whether the infringement or the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable, and the fact that the position taken by a Community institution may have contributed towards the adoption or maintenance of national measures or practices contrary to Community law”. See also C-392/93, *The Queen v H.M. Treasury, ex parte British Telecommunications*, paras 42-45 on incorrect implementation of a Directive, as opposed to a complete failure to implement a Directive.

390 ACCC/C/2007/22 (France), ECE/MP.PP/C.1/2009/4/Add.1, para. 48 onwards.

391 ACCC/C/2013/89 (Slovakia), para. 97.

392 ACCC/C/2012/76 (Bulgaria), para. 59.

stated that national courts are required to conduct “*their own assessment of the risk of environmental damage in the light of all the facts and arguments significant to the case, taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm.*”³⁹³ This requirement is not only applicable to a decision on whether to uphold the suspensive effect of a decision but equally to the assessment of whether injunctive relief should be granted.

The Aarhus Committee also stated that, if financial guarantees are used as a factor to allow for preliminary enforcement, these must be set at an adequately high level.³⁹⁴ Again, this would equally apply in cases in which a decision is not suspended but the operator is instead required to provide a financial guarantee.

1.4.2. EU law implementation

Under EU law, the requirement that injunctive relief be available is a generally well-established feature of the CJEU’s case law.³⁹⁵ The CJEU applied this case law in the environmental context in *Krizan* which concerned a permit granted under the Industrial Emissions Directive. The Court held that, while the IED does not explicitly provide for injunctive relief, “*effective prevention of pollution*” as envisaged by the IED “*requires that the members of the public concerned should have the right to ask the court or competent independent and impartial body to order interim measures such as to prevent that pollution, including, where necessary, by the temporary suspension of the disputed permit.*”³⁹⁶

The fact that the IED does not specifically refer to injunctive relief or interim measures demonstrates the applicability of these findings to all cases covered in chapters 2 and 3. The CJEU based its judgement on the general requirement regarding the availability of interim measures applicable to all disputes governed by EU law³⁹⁷ and the objective of the IED to prevent or reduce emissions.³⁹⁸ The Court’s reasoning would accordingly apply to all disputes concerning directives which serve an environmental objective.

The case law of the CJEU does not offer more detailed guidance for national courts on granting interim relief. Principally, decisions on interim relief are left to the procedural autonomy of Member States, as long as the national injunctive relief system ensures remedies that are equivalent and effective.³⁹⁹ However, as suggested by the

Notice,⁴⁰⁰ the CJEU’s case law on interim measures under its own jurisdiction, can be instructive for national courts deciding on whether to grant interim relief.⁴⁰¹ The CJEU will order interim measures where “*an order is justified, prima facie, in fact and in law and that it is urgent in so far as, in order to avoid serious and irreparable harm to the applicant’s interests, it must be made and produce its effects before a decision is reached in the main action.*”⁴⁰² The Court will also weigh up the interests involved, “*where appropriate*”.⁴⁰³ The Court accordingly applies a three-pronged, cumulative test: (1) *prima facie* case, (2) urgency and, where appropriate, (3) weighing of interests.

The application of these criteria is illustrated by the recent order of the CJEU in Case C-441/17 R *Commission v Poland* concerning logging in the Białowieża forest.⁴⁰⁴ In this case, the national Ministry of Environment had approved an increase in logging at the Białowieża Natura 2000 site in response to the spread of the spruce bark beetle. It is noteworthy that in the assessment of whether a *prima facie* case existed (1), the CJEU took account of the precautionary principle to establish that the action in the main proceedings was not “*without reasonable substance*”.⁴⁰⁵ Concerning urgency (2), the CJEU based its decision on the “*prima facie lack of scientific information excluding beyond all reasonable doubt*” that the activities concerned had damaging and irreversible effects,⁴⁰⁶ thus partially shifting the burden of proof on the defendant. With regard to the weighing of interests (3), the Court considered the Polish authorities’ claim that the measures were taken to fight the spreading of the spruce bark beetle but found that it was not adequately substantiated⁴⁰⁷ and, more specifically with regard to arguments based on the economic usage of the forest, that such concerns “*do not appear to be of greater value than the interest of preserving the habitats and species at issue.*”⁴⁰⁸

These considerations can also be useful for a national judge faced with an application for interim relief in an environmental dispute.

1.5. Disapplication of legislation and regulatory acts preventing remedies

With regard to the remedies set out in section 1.1.-1.4., national judges are in principle only required to impose

393 Ibid, para. 77.

394 Ibid, para. 80.

395 C-213/89, *Factortame*, ECLI:EU:C:1990:257, para. 21, and C-432/05 *Unibet*, ECLI:EU:C:2007:163, para. 67.

396 C-416/10 *Krizan*, para. 109.

397 Ibid, para. 107.

398 Ibid, para. 108.

399 Commission Notice, para. 172.

400 Ibid, para. 173.

401 The CJEU will not order interim measures in the context of a preliminary reference under article 267 TFEU, as in these cases the Court only gives judgement on a specific point while the proceedings are pending in the national courts. However, the CJEU will grant interim measures, where appropriate, in proceedings for the annulment of EU legal acts (under Article 263 TFEU) and in infringement proceedings initiated by the Commission (under Article 258 TFEU).

402 See Order in C-441/17 R *Commission v Poland*, ECLI:EU:C:2017:877, para. 29 and case law referred to therein.

403 Ibid.

404 Ibid.

405 Ibid, para. 42.

406 Ibid, para. 61.

407 Ibid, paras 73-76.

408 Ibid, para. 77.

those measures that are available to them on the basis of their procedural law (national procedural autonomy).⁴⁰⁹ However, what if the national judge is prevented from granting a remedy by national procedural requirements, for instance by the existence of a time limit?

The CJEU has, in the specific contexts of state liability (section 1.3.3 above) and interim relief (section 1.4), established minimum criteria that apply independently of national procedural autonomy. For state liability, the Court of Justice has established independent criteria, which national courts must apply even if they have discretion to apply less stringent criteria.⁴¹⁰ In *Factortame*, the Court of Justice held (without reference to national procedural autonomy) that “a national court which, in a case before it concerning Community law, considers that the sole obstacle which precludes it from granting interim relief is a rule of national law must set aside that rule.”⁴¹¹

Beyond these specific criteria, the national courts are generally bound by the principles of equivalence and effectiveness. As an example, in *Stadt Wiener Neustadt* the Court firstly held that in principle national procedural law could impose a time limit of three years to challenge a consent for a project subject to EIA.⁴¹² However, it held that such a time limit could not lead to the fact that after its expiry a project is to be considered as “lawfully authorised as regards the obligation to assess [its] effects on the environment”.⁴¹³ In other words, the obligation to conduct an EIA continued to apply. Citing *Wells*, the Court further held that Member States likewise continued to be required to make good any resulting environmental damage.⁴¹⁴

The Court then turned to the procedural rules applicable to such an action for damages. It firstly held that the conditions to establish whether public authorities are required to make good environmental damage depends on national law.⁴¹⁵ Moreover, national procedural law can, in principle, impose procedural limitations, such as a time limit within which damages can be obtained.⁴¹⁶ However, the Court held that the principles of effectiveness and equivalence nonetheless apply and, accordingly, it must be possible to bring such a claim to remedy environmental damage “on reasonable conditions.”⁴¹⁷ On this basis, the Court also held that as long as an applicant was in time to apply for a remedy, the applicant also needed to be considered in time to claim a remedy for the failure to carry out an environmental impact assessment.⁴¹⁸

This case demonstrates that national courts are required to set aside conflicting national procedural rules that prevent them from providing an effective or equivalent remedy but whether this is the case requires an assessment of “reasonableness” and will be highly context dependent. As the Court held in *Peterbroek*, “[...] each case which raises the question whether a national procedural provision renders application of Community law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure, must, where appropriate, be taken into consideration.”⁴¹⁹

409 See for instance, C-201/02 *Wells* para. 68 (also quoted above).

410 C-46/93 and C-48/93 *Brasserie du Pecheur and Factortame*, para. 66.

411 C-213/89 *Factortame*, para. 23.

412 C-348/15 *Stadt Wiener Neustadt*, para. 42.

413 *Ibid.*, para. 43.

414 *Ibid.*, paras 45-46.

415 *Ibid.*, para. 47.

416 *Ibid.*

417 *Ibid.*

418 *Ibid.*, para. 48.

419 C-312/93 *Peterbroeck, Van Campenhout & Cie v Belgian State*, ECLI:EU:C:1995:437, para. 14.

2. Fair, equitable, timely, and not prohibitively expensive procedures

Article 9(4) AC further requires that procedures under Article 9 be fair, equitable, timely and not prohibitively expensive.

These requirements have been implemented word-for-word in Article 11(4) of the EIA Directive, Article 25(4) of the IED and Article 23 of the Seveso III Directive.

For claims alleging a violation of other EU directives that do not implement Article 9(4) AC, the requirements as to fairness, equitability and timeliness flow from three distinct sources: (1) the obligation to interpret national procedural law consistently with Article 9(4) AC in accordance with the logic of *North East Pylon*;

(2) the general EU law principles of effectiveness and equivalence; and (3) fundamental rights, such as Article 47 CFR, in accordance with the logic of *Edwards*.

As regards point (1), the CJEU specifically confirmed the applicability of Article 9(4) AC to all challenges under Article 9(2) and 9(3) AC in the context of cost proceedings in *North East Pylon*. In this case, the Court confirmed that even though neither Article 9(3) nor Article 9(4) AC have direct effect, “it is for the national court to give an interpretation of national procedural law which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention, so that judicial procedures are not

prohibitively expensive.⁴²⁰ Based on *Klohn*⁴²¹, essentially the same situation applies whether the claimant relies on a provision in a directive implementing Article 9(4) AC (e.g. Article 11(4) EIA Directive) or, in the absence of such a provision, the claimant relies directly on Article 9(4) AC. Further, there is nothing to suggest that the same logic would not apply to the requirement that procedures be “timely” and “fair”. While the requirement that procedures are “timely” is not in itself sufficiently precise and unconditional to be directly effective,⁴²² national courts must interpret their national procedural law in a way that complies with Article 9(4) AC.

Turning to points (2) and (3), in *Edwards* the Court of Justice held that:

*“the requirement that the cost should be ‘not prohibitively expensive’ pertains, in environmental matters, to the observance of the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, and to the principle of effectiveness, in accordance with which detailed procedural rules governing actions for safeguarding an individual’s rights under European Union law must not make it in practice impossible or excessively difficult to exercise rights conferred by European Union law.”*⁴²³

The Court thereby confirmed that the obligation of “not prohibitively expensive” applies as part of the general principles of EU law and is not limited to the cases in which the wording is explicitly enshrined in a directive. While the Court’s statement in *Edwards* is limited to the “not prohibitively expensive” element of the procedural requirements of Article 9(4) AC, it appears that the same conclusion can be drawn for the requirement that procedures be “fair, equitable, timely” as well.

First, requirements of fairness, equity and timeliness relate to the fact that the exercise of rights may not be in practice “impossible or excessively difficult”, namely the principle of effectiveness. Equally, these considerations could form part of an assessment of whether the applicable procedural rules are less favourable than those governing domestic actions. For instance, in *Steffensen* the Court of Justice held that national procedural rules concerning the admissibility of evidence needed to be considered in light of the principles of effectiveness and equivalence.⁴²⁴

Second, Article 47 CFR also encompasses elements as to the fairness and timeliness of procedures. For one, the requirement that effective remedies be provided already presupposes fair and timely procedures. Moreover, Article 47(2) CFR and Article 6(1) ECHR

explicitly establish that “everyone is entitled to a fair and public hearing within a reasonable time”. Again, in *Steffensen*, the Court applied Article 6(1) ECHR and referred to the relevant ECHR case law on a fair hearing with regard to rules on evidence.⁴²⁵ Moreover, the fact that procedures are to apply equally to all persons, forms part of the non-discrimination obligation reflected in Article 21(1) CFR and the prohibition of any discrimination on grounds of nationality reflected in Article 18 TFEU.

In the following sections, these requirements are explained in more detail:

2.1. Fair and equitable

The requirement that review procedures be fair and equitable impacts on the costs and duration of review procedures, which is discussed in the following two sections. Additionally, the terms have been interpreted to encompass a range of specific requirements, as set out below.

The Implementation Guide lists a number of aspects of the requirement that procedures be “fair”:

- the review procedure and final decision or judgment is “impartial and free from prejudice, favouritism or self-interest”;⁴²⁶
- procedures apply “equally to all persons, regardless of economic or social position, ethnicity, nationality or other such criteria”;⁴²⁷
- the public must be duly informed about the review procedure and the outcome of the review.⁴²⁸

In its findings, the Aarhus Committee has further added:

- time limits in which review procedures must be initiated are clearly defined.⁴²⁹
- informing the applicant of any upcoming court hearing;⁴³⁰
- the review body must address all relevant claims raised by the applicant;⁴³¹
- communicating the final decision of the review procedure in timely fashion;⁴³²
- making known the reasons for the decision of the review body.⁴³³

With regard to the requirement that processes be “equitable”, the Implementation Guide states that this requires Parties to “avoid the application of the law in an unnecessarily harsh and technical manner.”⁴³⁴

⁴²⁵ C-276/01 *Steffensen*, paras 69-70.

⁴²⁶ Implementation Guide, p. 201 also referring to article 3(9) AC but emphasizing that the non-discrimination requirement of article 9(4) AC go beyond the criteria addressed in that provision.

⁴²⁷ Implementation Guide, p. 201.

⁴²⁸ *Ibid.*, p. 201.

⁴²⁹ ACCC/C/2008/33 (UK), para. 139.

⁴³⁰ ACCC/C/2004/06 (Kazakhstan), ECE/MP.PP/C.1/2006/4/Add.1, para. 28.

⁴³¹ *Ibid.*, para. 26.

⁴³² *Ibid.*, para. 29.

⁴³³ ACCC/C/2013/81 (Sweden), para. 96.

⁴³⁴ Implementation Guide, p. 201.

⁴²⁰ C-470/16 *North East Pylon Pressure Campaign and Sheehy*, ECLI:EU:C:2018:185, paras 52 and 57.

⁴²¹ Case C-167/17 *Klohn*, ECLI:EU:C:2018:833.

⁴²² Commission Notice, para. 200.

⁴²³ C-260/11 *Edwards and Pallikaropoulos*, ECLI:EU:C:2013:221, para. 33. See also Commission Notice, para. 177.

⁴²⁴ C-276/01 *Steffensen*, ECLI:EU:C:2003:228, paras 63-68.

These factors cannot be seen as an exhaustive list but rather give an idea of the wider meaning of the terms “fair” and “equitable”.

2.2. Timely

Article 9(4) AC requires that procedures are “timely”. In order to ascertain whether review procedures are to be considered excessively long, the Aarhus Committee has stated that it is relevant to assess “*the complexity of the factual or legal issues raised by the case or the issue at stake for the applicant*”.⁴³⁵ The Committee has borrowed these criteria from the ECHR case law, while emphasizing, however, that the ECHR jurisprudence was not “directly applicable” in the AC context.⁴³⁶ The Committee has further recognized that there are some differences concerning the requirements for timeliness for procedures under Article 9(1) AC and Article 9(2) and (3) AC.

2.2.1. Access to information (Article 9(1) AC)

Article 9(1) AC, first indent, requires recourse not only to a court procedure but also “*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*”. The same requirement is reflected in Article 6(1) of the Environmental Information Directive, which regulates national review proceedings on access to information requests. In some Member States, such a review is conducted by an Information Commissioner or an Ombudsman. The Aarhus Committee recognized that in such a procedure (in this case before a Parliamentary Ombudsman), there was an additional need to act “without undue delay” and that the time limits set under article 4(2) and (7) AC (i.e. 15 working days or 30 working days in case of complex cases) were “indicative” as to the appropriate time for such a review procedure.⁴³⁷ The Committee therefore held that a review procedure, which had taken 2.5 years before the Ombudsman (reconsideration by the Ministry of 11-months- and a period of 8 months for the Ombudsman) to issue his final decision, was non-compliant with the Convention.⁴³⁸

Secondly, the Committee has also highlighted more generally that “*time is an essential factor in many access to information requests, because the information may have been requested to facilitate public participation in an ongoing decision-making procedure*”.⁴³⁹ In applying the test described above, the Committee held that, “*an access to environmental information case would generally be neither factually nor legally complex*” and secondly, if the requested

information could help the applicants to participate more effectively, this requires a timely final decision.⁴⁴⁰

2.2.2. Other challenges (Article 9(2) and (3) AC)

These specific requirements for access to information requests are also justified by the fact that in such proceedings, as opposed to claims brought under Article 9(2) and (3) AC, interim relief is generally not available. In turn, the requirement that review procedures are “timely” is, in respect of Article 9(2) and (3), intertwined with the requirement to provide “injunctive relief as appropriate”. In the absence of interim measures, the requirement for the review procedure to be “timely” is stricter than usual in order to ensure that remedies can still be effective. This is illustrated by the Aarhus Committee’s findings on communication ACCC/C/2008/24 (Spain), which clarified that a decision on whether to grant suspension must be issued before construction has started, i.e. the review procedure must ensure that it is completed before the environmental effects of the project occur⁴⁴¹.

Moreover, even if there is no necessity to grant interim relief or to have a timely judgment to prevent irreversible environmental damage, court procedures should still not be of excessive length. This is to be ascertained again in the light of “*the complexity of the factual or legal issues raised by the case or the issue at stake for the applicant*”, as well as any other relevant factors.⁴⁴²

2.3. Costs

The final procedural requirement under Article 9(4) AC concerns the costs of the judicial procedure. Costs may not be “prohibitively expensive” and cost awards must be “fair”. The Aarhus Committee and the CJEU have generally adopted a similar interpretation of this requirement and the case law of both bodies is therefore considered jointly below. While both the Aarhus Committee and the CJEU recognize that a reasonable cost order can be made,⁴⁴³ they have developed stringent requirements in this regard.

First, both the Aarhus Committee and the CJEU have held that the question of whether costs are prohibitively expensive must be assessed with reference to all the costs incurred by the applicant as a whole.⁴⁴⁴

Second, both the Aarhus Committee and the CJEU have emphasized the need to give adequate weight to the protection of the environment in the assessment. The Committee held: “*the public interest nature of*

435 ACCC/C/2012/69 (Romania), para. 87.

436 Ibid.

437 ACCC/C/2013/83 (Norway), ECE/MP.PP/C.1/2017/16, paras 88 and 90.

438 Ibid, para. 91.

439 Ibid, para. 88.

440 ACCC/C/2012/69 (Romania), para. 87.

441 ACCC/C/2008/24 (Spain), ECE/MP.PP/C.1/2009/8/Add.1, para. 112.

442 ACCC/C/2012/69 (Romania), para. 87.

443 For the CJEU, see Cases C-427/07 *Commission v Ireland*, ECLI:EU:C:2009:457, para. 92 and C-530/11 *Commission v UK*, ECLI:EU:C:2014:67, para. 25. For the Aarhus Committee, see: ACCC/C/2008/33 (UK), para. 135.

444 ACCC/C/2012/77 (UK), ECE/MP.PP/C.1/2015/3, para. 72; C-260/11 *Edwards*, para. 28.

*the environmental claims should be given sufficient consideration by the courts with respect to the apportioning of costs.*⁴⁴⁵ The CJEU has been somewhat less clear on that point but held that national courts are required to take into account “*both the interest of the person wishing to defend his rights and the public interest in the protection of the environment.*”⁴⁴⁶

Finally, both the Aarhus Committee and CJEU concurred that there is an objective and a subjective element to the cost protection afforded by Article 9(4) AC.

2.3.1. Objective analysis

The Aarhus Committee has established the following objective factors to be taken into account in deciding whether a cost system is non-compliant with Article 9(4) AC:

- the contribution made by challenges brought by NGOs to improving environmental protection and implementation of environmental legislation;
- the expected result of the introduction of a new fee on the number of challenges brought by NGOs; and
- the fees for access to justice in environmental matters as compared with fees for access to justice in other matters.⁴⁴⁷

Employing this test in the specific communication against Denmark, the Aarhus Committee held that a filing fee of 3000 Danish krone (at the time of the findings approximately 400€) was generally non-compliant with the requirement that filings should not be prohibitively expensive.⁴⁴⁸

The test set out by the CJEU in this regard is whether the costs are “objectively unreasonable”, independently of the personal situation of the applicant. The Court held in that regard:

*“[The cost] assessment cannot, therefore, be carried out solely on the basis of the financial situation of the person concerned but must also be based on an objective analysis of the amount of the costs, particularly since [...] members of the public and associations are naturally required to play an active role in defending the environment. To that extent, the cost of proceedings must not appear, in certain cases, to be objectively unreasonable. Thus, the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable.”*⁴⁴⁹

In *Commission v UK*, the Court of Justice found that national courts must be obliged to grant protection where the cost of the proceedings is objectively

unreasonable, i.e. independent of the personal situation of the applicant. The fact that there was no possibility for a national judge in the UK to make such an order was found to be non-compliant with the requirement that proceedings should not be prohibitively expensive.⁴⁵⁰

2.3.2. Subjective analysis

Concerning the “subjective” element of the requirement that costs be not prohibitively expensive, the Aarhus Committee held that it is necessary to consider the individual situation of the applicant. With regard to the personal situation of NGOs, the Committee held that relevant factors include:

*“[...] the amount of the membership fee, the number of members and the amount of resources allocated for access to justice activities in comparison with other activities.”*⁴⁵¹

The Aarhus Committee also recognized that it was relevant to consider the defendant’s contribution to the costs incurred in the proceedings, in this case because of the defendant’s failure to engage in the selection of an independent expert.⁴⁵² The Danish court had issued an interim injunction, which stated that the operator of a recycling and composting site was prohibited from causing odours at harmful levels. The court entrusted two local public authorities (Environment Agency and local Council) with determining when appropriate levels were exceeded. The public authorities expressed concerns as to their impartiality in the matter and proposed that the parties instead agree on an independent expert to take over this function. The claimants accordingly invited the operator to propose an expert but the operator objected to the proposal. This finally led to the interim injunction being struck down and the claimants being subjected to an adverse cost order. The Committee held that under such circumstances the operator had contributed to the costs incurred by the claimants because it had failed to propose an expert.

With regard to the subjective analysis element, the CJEU firstly held that the particular interests of the claimant must be taken into account in the assessment of whether a cost order should be granted. In other words, it was not necessary to show that the costs were also objectively unreasonable or that the claim was brought in the public interest.⁴⁵³ With regard to the assessment itself, the Court held that it was necessary to ascertain whether the cost of proceedings exceeded the financial resources of the person concerned and that, therefore, this assessment “*cannot be based exclusively on the estimated financial resources of an ‘average’ claimant, since such information may have little connection with*

445 ACCC/C/2014/111 (Belgium), ECE/MP.PP/C.1/2017/20 para. 75 and ACCC/C/2008/33 (UK), para. 134.

446 C-530/11 *Commission v UK*, para. 45.

447 ACCC/C/2011/57 (Denmark), ECE/MP.PP/C.1/2012/7, para. 48.

448 *Ibid.*, para. 52.

449 C-260/11 *Edwards*, para. 40.

450 C-530/11, *Commission v UK*, para. 57.

451 ACCC/C/2011/57 (Denmark), para. 47.

452 ACCC/C/2008/23 (United Kingdom), para. 52.

453 C-530/11 *Commission v UK*, para. 57.

the situation of the person concerned.⁴⁵⁴ It further held that national courts may take into account:

*“the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the law and the applicable procedure and the potentially frivolous nature of the claim at its various stages [...] but also, where appropriate, costs already incurred at earlier levels in the same dispute.”*⁴⁵⁵

The Court also emphasized that the fact that an applicant has not been deterred from initiating proceedings is *“insufficient to establish that the proceedings are not prohibitively expensive for him.”*⁴⁵⁶

The Court also clarified that cost protection must apply throughout the proceedings, including appeal and second appeal.⁴⁵⁷ In the context of EIA proceedings, it also made clear that the prohibitive costs concern all costs arising from participation in the judicial proceedings.⁴⁵⁸

2.3.3. Resulting limits on court discretion

The Aarhus Committee has held that it is possible to give discretion to the national courts to adjust the costs, as long as sufficient mechanisms are in place to ensure that they are not prohibitively expensive and that the public interest of challenges and fairness for the applicant are taken into account.⁴⁵⁹ According to the Committee, this is not the case in a system in which there is *“no clear legally binding direction from the legislature or judiciary to ensure that costs are not prohibitively expensive”*.⁴⁶⁰

In its findings on communication ACCC/C/2014/111 (Belgium), the Aarhus Committee contrasted the situation that had prevailed in the UK with the Belgian system which also allowed for court discretion in cost awards, albeit within clear statutory limits. Specifically, the national system in this case provided for a flat-rate contribution to be paid by the unsuccessful claimant (at the time of the dispute 1,320 €, for cases not quantifiable in monetary terms) which the national judge could however adjust within a minimum and maximum range (at the time of the dispute between 82.50 € and 11,000 €). In adjusting the costs within this range, the judge could take into account

454 C-260/11 *Edwards*, para. 41 and C-530/11 *Commission v UK*, para. 48.

455 C-530/11 *Commission v UK* citing to C-260/11 *Edwards*, para. 42.

456 C-260/11 *Edwards*, para. 49 and C-530/11 *Commission v UK*.

457 C-260/11 *Edwards*, para. 44.

458 C-427/07, *Commission v Ireland*, para. 92.

459 ACCC/C/2008/33 (UK), para. 135.

460 Ibid. The Aarhus Committee has considered the United Kingdom's cost system in detail, in its report to the sixth session of the Meeting of the Parties. In its report, the Committee inter alia considered the applicability of cost protection to all claims covered by Article 9 AC, the levels of the cost caps applied, costs for procedures with multiple claimants, cost protection on appeal, requiring claimant's to provide a financial schedule of resources, cost protection of all stages of procedures, cross-undertakings for damages and cost protection for interveners and funders of litigation in the different systems applicable in England/Wales, Scotland and Northern Ireland. See Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention, ECE/MP.PP/2017/46, available at: <https://www.unece.org/fileadmin/DAM/env/pp/mop6/English/ECE_MP.PP_2017_46_E.pdf>.

*“the unsuccessful party's financial capacity as a factor in reducing the amount of the allowance, and also other relevant aspects of the case, namely the complexity of the case, the allowances awarded on a contractual basis to the successful party and ‘the manifestly unreasonable nature of the situation’.”*⁴⁶¹ The Committee found that, even though the flat-rate contribution would be prohibitively expensive for some applicants, given the discretion for the judge to vary this amount, the legal framework in itself did not contravene Article 9(4) of the Convention.⁴⁶²

The Court of Justice adopted a similar approach in its judgments in *Commission v UK*. The Court first stated that *“the discretion available to the court when applying the national costs regime in a specific case cannot in itself be considered incompatible with the requirement that proceedings not be prohibitively expensive.”*⁴⁶³ However, it then found that the UK rules on the matter were not sufficiently clear and precise. Specifically, the Court held that it was not tenable that a national judge needed to *“analyse and assess the effect – which is moreover subject to debate – of various decisions of the national courts”* in order to determine the level of a cost order in a specific case. The Court found that in order for specific rights that individuals derive from EU law to be effective, Member States needed instead to adopt *“unequivocal rules”* regulating the procedure on cost protection.⁴⁶⁴

2.3.4. Applicability throughout the proceedings

In *North East Pylon*, the Court of Justice considered the requirement in Article 11(4) of the EIA Directive that costs should not be prohibitively expensive. The Court first clarified that cost protection must apply to all the costs borne by the party concerned and therefore it also applied to proceedings seeking leave to bring a challenge, if national procedural law requires such a procedure.⁴⁶⁵ Based on previous case law, the same would apply to appeal proceedings.

The Court then considered whether Article 11(4) EIA Directive, which implements Article 9(2) AC in conjunction with Article 9(4) AC, applied to the challenge as a whole, or only to those arguments that relate to the public participation provisions of that Directive. The Court opted for the latter.⁴⁶⁶ On the other hand, the costs relating to other arguments in the dispute (those relating to other provisions of EU or national law) are covered by Articles 9(3) in conjunction with 9(4) of the Aarhus Convention.⁴⁶⁷

This distinction between costs incurred in relation to arguments covered by Article 9(2) AC on the

461 ACCC/C/2014/111 (Belgium), para. 67.

462 Ibid, paras 69-71.

463 C-530/11, *Commission v UK*, para. 54.

464 Ibid, para. 56. See similarly, C-427/07 *Commission v Ireland*, paras 92-94.

465 C-470/16 *North East Pylon*, para. 34. See also C-530/11 *Commission v UK*, para. 44.

466 C-470/16 *North East Pylon*, para. 36.

467 Ibid, para. 58.

one hand and Article 9(3) AC on the other may appear academic, since both are essentially covered by Article 9(4) AC. However, the Court's distinction between claims is nonetheless at odds with the requirements of Article 9 AC.

First, as discussed at length in chapter 2, Article 9(2) AC requires courts to review the "procedural and substantive" legality of the acts or omissions being challenged. It is not limited to either the public participation requirements contained in Article 6 AC, nor to contraventions of environmental law (as opposed to Article 9(3) AC). National courts should therefore be required, on the basis of Article 9(2) AC, to apply cost protection to any claim as to the substantive and

procedural legality of the act or omission in question.⁴⁶⁸

Second, as the CJEU recognised itself, "*cost protection must apply to all costs borne by the party concerned.*"⁴⁶⁹ This requirement does not allow for a differentiation of the costs incurred by the party concerned in procedures falling under Article 9(1), (2) or (3) AC. The assessment of whether the costs are prohibitively expensive should be considered independently of the headings under which the claims in the procedure fell. It will therefore fall to national judges to interpret the two categories of claims, i.e. aspects related to public participation on the one hand and compliance with national or EU law related to the environment on the other, sufficiently widely to encompass the costs incurred by the claimant as a whole.

468 This is based on the fact that the EU Member States are also separately Parties to the Aarhus Convention.

469 C-470/16 *North East Pylon*, para. 30 and C-260/11 *Edwards*, para. 28.

3. Dissemination of information and appropriate assistance mechanisms

3.1. Assistance mechanisms

In accordance with Article 9(5) AC, Parties "*shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.*" As explained in the Implementation Guide, the requirement to provide assistance mechanisms is not limited to financial barriers but also concerns any other limitations to obtain effective access to justice.⁴⁷⁰ However, this article has been applied most frequently in the context of financial barriers.

In this regard, the Aarhus Committee has said that the reference to "shall" clarifies that this is an enforceable obligation that can be the subject of a finding of non-compliance with the Convention, at least in conjunction with Article 9(4) AC. Accordingly, the Committee held that by establishing a system of legal aid that was only accessible to well-funded NGOs, the "*Party concerned did not take into consideration the establishment of appropriate assistance mechanisms*" and therefore failed to comply with Article 9(5) AC and the requirement in Article 9(4) AC to provide fair and equitable remedies.⁴⁷¹ Moreover, the requirement for appropriate assistance mechanisms can feature in the consideration of applicable costs in a given system (see discussion above), i.e. it is one possibility to ensure that access to courts is not prohibitively expensive.⁴⁷²

470 Implementation Guide, pp. 205-207.

471 ACCC/C/2009/36 (Spain), para. 66.

472 In the follow-up on compliance by the United Kingdom, the Committee considers the establishment of assistance mechanisms as part of the overall cost assessment. See Report to the sixth session of the Meeting of the Parties, ECE/MP.PP/2017/46, paras 57 and 74.

As stated in the Commission Notice, Article 47(3) CFR requires that "*legal aid shall be made available to those who lack sufficient resources insofar that it is necessary to ensure effective access to justice*", thus arguably going beyond the requirement to "consider" under Article 9(5) AC. As stated in the Notice, examples for possible assistance mechanisms include "*pre-litigation advice, legal assistance and representation in court, and exemption from - or assistance with - the cost of proceedings.*"⁴⁷³

Article 47(3) CFR was interpreted in detail in *DEB*, a case concerning an application for legal aid by a company with no employees or creditors. In its considerations, the Court of Justice relied heavily on the case law of the European Court of Human Rights under the corresponding Article 6(1) ECHR.⁴⁷⁴ The Court held:

"59 [...] the principle of effective judicial protection, as enshrined in Article 47 of the Charter, must be interpreted as meaning that it is not impossible for legal persons to rely on that principle and that aid granted pursuant to that principle may cover, inter alia, dispensation from advance payment of the costs of proceedings and/or the assistance of a lawyer.

60 In that connection, it is for the national court to ascertain whether the conditions for granting legal aid constitute a limitation on the right of access to the courts which undermines the very core of that right; whether they pursue a legitimate aim; and whether there is a reasonable relationship of proportionality between the means employed and the legitimate aim which it is sought to achieve.

473 Commission Notice, para. 195.

474 C-279/09 *DEB*, ECLI:EU:C:2010:811, paras 45-52.

61 *In making that assessment, the national court must take into consideration the subject-matter of the litigation; whether the applicant has a reasonable prospect of success; the importance of what is at stake for the applicant in the proceedings; the complexity of the applicable law and procedure; and the applicant's capacity to represent himself effectively. In order to assess the proportionality, the national court may also take account of the amount of the costs of the proceedings in respect of which advance payment must be made and whether or not those costs might represent an insurmountable obstacle to access to the courts.*

62 *With regard more specifically to legal persons, the national court may take account of their situation. The court may therefore take into consideration, inter alia, the form of the legal person in question and whether it is profit-making or non-profit-making; the financial capacity of the partners or shareholders; and the ability of those partners or shareholders to obtain the sums necessary to institute legal proceedings.*⁴⁷⁵

The case is noteworthy firstly because it explicitly links the provision of legal aid to the principle of effective judicial protection and thereby to the requirement that effective legal remedies be available. Therefore, the absence of legal aid can constitute an infringement because it effectively prevents access to legal remedies, comparable to restrictions on standing or prohibitively expensive costs, as discussed above. Secondly, *DEB* is noteworthy for its explicit acknowledgement that Article 6(1) of the ECHR is the corresponding provision to Article 47 CFR and that the case law of the ECtHR on legal aid must therefore be used to interpret Article 47 CFR.⁴⁷⁶

475 Ibid, paras 59-62.

476 Ibid, paras 35-37.

3.2. Dissemination of information

Finally, Article 9(5) AC requires that information is disseminated on access to administrative and judicial review procedures. While the Aarhus Committee has not dealt with this obligation as of yet, the Court of Justice addressed this requirement in Case C-427/07 *Commission v Ireland*, which is also cited as an example of good practice in the Aarhus Convention Implementation Guide.⁴⁷⁷ In this case, the Court held that what is now Article 11(5) of the EIA Directive stipulates “an obligation to obtain a precise result”, specifically to ensure, “in a sufficiently clear and precise manner, that the public concerned is in a position to be aware of its rights on access to justice in environmental matters.”⁴⁷⁸ As also discussed in the Commission Notice, a number of requirements follow from this judgment, including that web-based information may be insufficient, that information should be complete, accurate and up-to-date as well as clear and understandable for a non-lawyer.⁴⁷⁹

The Court's decision in *Commission v Ireland* is particularly noteworthy because the Court held that the requirement to provide practical information under the EIA Directive was an expression of the underlying principles of the Directive to “promote access to justice in environmental matters, along the lines of the Aarhus Convention.”⁴⁸⁰ This statement reflects the fact that the provision of information is not only applicable under the EIA Directive but can also be an element to inform the interpretation of the other EU access to justice rights discussed in this guide.

477 Implementation Guide, p. 205.

478 C-427/07 *Commission v Ireland*, paras 97-98.

479 Commission Notice, paras 204-208.

480 C-427/07 *Commission v Ireland*, para. 96.

Chapter 5

Access to Justice concerning decisions of EU institutions



CJEU	ACCC findings	Legal provisions
<p>Joined Cases C-401/12 P to C-403/12 P, <i>Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht</i> and Joined Cases C-404/12 P and C-405/12 P, <i>Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe</i>: Compliance of the Aarhus Regulation with the Aarhus Convention;</p> <p>Cases T-33/16, <i>TestBioTech v Commission</i>: Definition of "environmental law";</p> <p>T-12/17, <i>Mellifera eV, Vereinigung für wesensgemäße Bienenhaltung v European Commission</i> and T-529/09, <i>Acts of individual scope</i>;</p> <p>T-177/13, <i>TestBioTech and Others v Commission</i>: Consequences of internal review;</p> <p>C-583/11P, <i>Inuit Tapiriit Kanatami v Parliament and Council</i> and T-262/10, <i>Microban International and Microban (Europe) v Commission</i>: Definition of "regulatory act", "implementing measures" and "direct concern";</p> <p>C-274/12, <i>Telefonica SA v Commission</i> and C-456/13P <i>T&L Sugars Ltd, Sidul Acucares, Unipessoal Lda v Commission</i>: further on "implementing measures";</p> <p>C-25/62, <i>Plaumann v Commission</i>: Definition of "individual concern";</p> <p>T-219/95 R, <i>Marie-Thérèse Danielsson and Others v Commission</i>, C-50/00, <i>Unión de Pequeños Agricultores v Council</i>;</p> <p>T-177/01, <i>Jégo-Quéré v Commission</i> ; C-321/95 P, <i>Greenpeace and Others v Commission</i> and T-236/04, <i>EEB and Stichting Natuur en Milieu v Commission</i> : Application of "individual concern" to NGOs;</p> <p>T-600/15, <i>PAN Europe and Others v Commission</i>: Application of "direct concern" to NGOs;</p> <p>C-416/17, <i>European Commission v French Republic</i>: Obligation to refer under Article 267 TFEU.</p>	<p>ACCC/C/2008/32, Parts I and II (European Union): Non-compliance of the EU with the Aarhus Convention;</p> <p>ACCC/C/2005/11 (Belgium): Applicability of the Convention to the judiciary.</p>	<p>Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L264/13;</p> <p>Council Decision (EU) 2018/881 of 18 June 2018 requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006, OJ L155/6.</p>

Since the creation of the European Community, access to EU courts for members of the public to challenge decisions of the EU institutions has been all but barred.

The very limited exceptions to this are EU decisions that refuse access to documents and decisions that refuse applications for internal review, discussed in section 1.1.4

below. Indeed, access remains very limited despite the adoption of the Aarhus Regulation to implement the provisions of the Aarhus Convention to EU institutions.⁴⁸¹ In 2017, the Aarhus Committee found both the jurisprudence of the EU courts and the Aarhus Regulation in breach of Article 9(3) and (4) of the Convention for not allowing members of the public to have access to the EU courts.⁴⁸² Since then some initial steps have been taken by the European Commission and the Council to address the situation. However, it remains to be seen whether they will adopt the necessary measures to bring about compliance with the Convention and whether the jurisprudence of the EU courts will take the required direction.

The Aarhus Regulation and the Treaty on the Functioning of the EU

Under EU law, there are two means of challenging EU institutions' decisions in environmental matters:

- Internal review by the institution that took the decision under Article 10 of the Aarhus Regulation followed by an action before the EU courts in accordance with Article 12 of the Regulation; and
- Direct action before the EU courts under Article 263(4) TFEU.

Under Article 10 of the Aarhus Regulation, environmental organisations can request an EU institution that has adopted *"an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act"* to carry out an internal review of their act or omission.

Such a request must be made in writing and within a time limit not exceeding 6 weeks after the administrative

⁴⁸¹ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L264/13.

⁴⁸² ACCC/C/2008/32 (European Union), (Part II), ECE/MP.PP/C.1/2017/7.

act was adopted, notified or published, whichever is the latest, or, in the case of an alleged omission, 6 weeks after the date when the administrative act was required. The request shall state the grounds for review.

The EU institution must consider the request unless it is clearly unsubstantiated. The institution must state its reasons in a written reply as soon as possible, but no later than 12 weeks.

Where the institution is unable to reply in time, it must inform the NGO making the request of the reasons why it is unable to meet the deadline. This notification must be sent as soon as possible and in any event within 12 weeks of receipt of the request and must give a date by which the institution intends to reply.

In any event, the institution must act within 18 weeks from receipt of the request.

If the institution considers the request inadmissible or refuses to review the decision, Article 12 of the Regulation provides that the refusal may be challenged by bringing *"proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty"*. This procedure is further analysed in section 1.1.4. below

Aside from the procedure provided by the Aarhus Regulation, Article 263(4) TFEU provides the conditions under which an action for annulment can be brought by natural and legal persons against either:

- An act addressed to the applicant
- An act which is of direct and individual concern to the applicant
- A regulatory act which is of direct concern to the applicant and does not entail implementing measures.

Article 265 TFEU allows the CJEU to review a failure to act on the part of the EU institutions. The same conditions of access as those foreseen by Article 263(4) apply.

1. What measures can be challenged?

1.1. Internal Review under the Aarhus Regulation

The Regulation allows NGOs to challenge administrative acts and omissions. The term *"administrative act"* is defined by Article 2(1)(g) of the Aarhus Regulation as *"any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects"*. An administrative omission is defined as *"any failure of a Community institution or body to adopt an administrative act as defined in (g)."* This is therefore far narrower than what is provided for by Article 9(3) of the Aarhus Convention.

1.1.1. Acts of individual scope

The term *"individual scope"* is not defined by the regulation. It is interpreted in a very restrictive way. Many of the Commission decisions challenged under the internal review request procedure have been Commission implementing regulations. These acts are adopted to implement, supplement and amend directives and regulations. They can, for example, approve a substance or a product. Most of these requests are considered inadmissible by the Commission on the grounds that the provisions of these implementing regulations are applicable to all operators manufacturing or placing on the market the concerned products, as well as the operators using or selling them. For example, the Commission considers that the regulations approving

substances contained in plant protection products apply to all operators manufacturing or placing on the market products containing the approved substances.⁴⁸³ The approval of the substance is valid for any operator intending to apply for authorisation for the placing on the market of plant protection products containing the active substance. Therefore, the Commission considers that these regulations must be regarded as an act of general application addressed to all operators and cannot be considered an administrative act within the meaning of Article 2(1)(g) of the Aarhus Regulation. The same reasoning applies to the authorisation to place on the market biocidal products.

It follows that even decisions applying to one substance are not considered as being of individual scope.

However, decisions granting one company the authorisation to use a substance is considered as being of individual scope.⁴⁸⁴

The decision of the Commission to recognise an entity as a monitoring organisation, pursuant to Regulation 995/2010, which lays down the obligations of operators who place timber and timber products on the market, is also considered to be an administrative act⁴⁸⁵.

Moreover, it seems that only EU acts addressed specifically to companies can qualify as administrative acts. Decisions addressed to Member States have not been considered as such. The Commission argues that acts addressed to Member States do not relate to “objectively determined situations” and entail legal effects for individual beneficiaries. In one of its replies the Commission stated that: “A decision addressed to a specific Member State may, however, be of general scope by reason of the fact that it is designed to approve a scheme which applies to one or several categories of persons defined in a general and abstract manner.”⁴⁸⁶

As a result, decisions that have a crucial impact on the environment and human health, such as the ones at stake in cases *Vereniging Milieudefensie*⁴⁸⁷ (setting maximum limits for pesticides residues) and *Stichting Natuur*⁴⁸⁸ (exempting a State from complying with its obligations under a directive) and that allegedly are in breach of EU law are not challengeable.

(Lack of) Position of the Court of Justice

In *Stichting Natuur*,⁴⁸⁹ the Court of Justice refused to review the legality of Article 10 and Article 2(1)(g) of the Aarhus Regulation with regards to Article 9(3) AC. In this case, the Commission had adopted a decision authorising a postponement of the deadline by which the Netherlands would have to reach some of the air quality objectives of Directive 2008/50. Two NGOs requested an internal review of this decision, which the Commission rejected on the grounds that its decision was not a measure of individual scope and that it could not therefore be considered an “administrative act” within the meaning of Article 2(1)(g) of the Aarhus Regulation. In *Vereniging Milieudefensie*,⁴⁹⁰ the NGO applicants challenged the Commission’s decision to reject their request for internal review of Regulation 149/2008 setting maximum (pesticides) residue levels for certain products. The Commission rejected this request for the same reason. The applicants alleged that Article 10(1) of the Aarhus Regulation was incompatible with Article 9(3) AC. They argued that Article 10(1), in conjunction with Article 2(1)(g) of the Regulation restricts the categories of acts that can be challenged within the internal review procedure to administrative acts of individual scope, whereas Article 9(3) of the Convention provides that members of the public can challenge “acts and omissions” by private persons and public authorities.

The NGOs appealed the Commission’s refusal to review the decision in question to the General Court in accordance with Article 12 of the Aarhus Regulation.⁴⁹¹ The General Court agreed with the Commission that, under Article 10(1) and Article 2(1)(g) of the Aarhus Regulation, the request for internal review was inadmissible.⁴⁹² However, it also held that Article 10(1) was incompatible with Article 9(3) of the Aarhus Convention, highlighting that, whereas Article 9(3) of the Convention gives Parties a margin of discretion as to the criteria for standing and the nature of the procedure, it afforded no such discretion as to the definition of the acts which could be challenged.⁴⁹³ The General Court recalled that, according to settled case-law, the Aarhus Convention prevailed over acts of secondary EU legislation but it also noted that the courts of the EU may examine the validity of a provision of a regulation in the light of an international treaty only where the nature and broad logic of the treaty do not prevent this and where the provisions of the treaty are unconditional and sufficiently precise.⁴⁹⁴

483 T-12/17 - *Mellifera v Commission*, ECLI:EU:T:2018:616.

484 For example, the requests addressed to the Commission to review its decisions granting authorisations for some uses of substances under the REACH Regulation were deemed admissible. See reply from the Commission to ClientEarth request, 2 May 2017, C(2017)2914. <<http://ec.europa.eu/environment/aarhus/requests.htm>>

485 See reply of the Commission of 12 October 2015 to the request for internal review from Greenpeace, Ref Ares (2015)4274787.

486 Reply to the internal review request that led to the joined Cases C-401/12 P to C-403/12 P, *Council and others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, ECLI:EU:C:2015:4.

487 C-401/12 P to C-403/12 P, *Council and others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*

488 C-404/12 P and C-405/12 P, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, ECLI:EU:C:2015:5.

489 Joined Cases C-401/12 to C-403/12, *Council and others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*.

490 Joined Cases C-404/12 P and C-405/12 P, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*.

491 T-338/08 *Stichting Natuur en Milieu and Pesticide Action Network Europe v European Commission*, ECLI:EU:T:2012:300.

492 *Ibid.*, para. 48.

493 *Ibid.*, para. 77.

494 *Ibid.*, paras 51-53.

However, referring to the *Fediol* and *Nakajima* cases, the General Court held that where an EU regulation implements international law to impose obligations on EU institutions, the courts must be able to review the legality of that regulation in the light of the relevant international agreement. This is the case even where the rules of that agreement are not capable of conferring on the individual concerned the right to invoke it before the courts.⁴⁹⁵

The General Court concluded that the Aarhus Regulation had been adopted to meet the EU's obligations under Article 9(3) of the Aarhus Convention, as was clear from both Article 1(1) of the Regulation and recital 18 of its preamble.⁴⁹⁶ It followed that Article 10(1) of the Regulation, in so far as it provides for an internal review procedure only in respect of acts defined as "measures of individual scope", is incompatible with Article 9(3) of the Aarhus Convention. It consequently annulled the Commission's decisions.⁴⁹⁷

This ruling was welcome, as a means of incentivising the European Commission to bring the Regulation into compliance with the Aarhus Convention, by broadening categories of decisions breaching environmental law, which could be challenged and brought under the scrutiny of the courts.

However, the Commission, the Council and the Parliament appealed the ruling. The three institutions unanimously claimed that the General Court erred in holding that Article 9(3) of the Aarhus Convention may be relied on in order to assess the compliance of Article 10(1) of the Regulation with that provision.

The judgment of the General Court was overturned by the Court of Justice.⁴⁹⁸ It held that Article 9(3) of the Aarhus Convention did not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals. Only members of the public who "*meet the criteria, if any, laid down in ... national law*" are entitled to exercise the rights provided for in Article 9(3), this required the adoption of a subsequent measure and was not, therefore, unconditional and sufficiently precise.⁴⁹⁹

The Court rejected the application of the *Fediol* and the *Nakajima* cases on which the General Court had relied, holding that "*those two exceptions were justified solely by the particularities of the agreements [WTO and GATT] that led to their application*"⁵⁰⁰. The rest of the reasoning of the Court is unclear and rather questionable. To justify its refusal to examine the compatibility of the Aarhus Regulation with Article 9(3) of the Convention, the Court

argued that Article 10(1) of the Regulation neither made direct reference to specific provisions of the Aarhus Convention nor conferred rights on individuals to rely on Article 9(3).⁵⁰¹ In addition, it surprisingly held that Article 10(1) did not implement specific obligations stemming from Article 9(3) of the Aarhus Convention since the parties to the Convention had a broad margin of discretion when defining the rules for the implementation of "*the administrative or judicial procedures*" provided.⁵⁰²

Finally, the Court ruled that by adopting the Aarhus Regulation it does not follow that the EU intended to implement obligations that derive from Article 9(3) of the Aarhus Convention "*with respect to national administrative or judicial procedures, which as EU law now stands, fall primarily within the scope of member State law*" and referred to the *Slovak Bears* case.⁵⁰³

The Court concluded that Article 9(3) AC could not be relied on in order to assess the legality of Article 10(1) of the Aarhus Regulation.⁵⁰⁴ Consequently, the question of whether limiting administrative and judicial challenges to acts of individual scope is compatible with Article 9(3) AC remains unanswered by the Court. In neither case has the Court decided that the European Commission's decisions are legally correct. The Court has not ruled either that the Aarhus Regulation is legally sound nor that the Aarhus Convention is correctly implemented into European law.

This ruling raises questions about the way the EU applies the international conventions it ratifies. Refusing to review the legality of EU secondary legislation in the light of provisions of the Aarhus Convention seems to be at odds with Article 216(2) TFEU, which provides that international conventions ratified by the EU are binding upon the EU institutions (including on the courts) and with settled case-law, which states that these conventions prevail over EU secondary law.

Findings of the ACCC

The ACCC addressed the judgment of the Court in Part II of its findings on communication ACCC/C/2008/32 (European Union), stating that it agreed with the General Court's analysis that "*there is no reason to construe the concept of acts in article 9, paragraph 3, of the Convention as covering only acts of individual scope*" and that "*there is no correlation between measures of general application and measures taken by a public authority acting in a judicial or legislative capacity*". This refers to the fact that acts adopted by institutions acting in their legislative capacity are excluded from the scope of the Convention in accordance with Article 2 AC (see chapter 1, section 2.5). It concluded that Article 10, paragraph 1, of the Aarhus regulation "*fails to correctly implement*

495 Ibid, paras 54-57.

496 Ibid, para. 58.

497 Ibid, paras 83-84.

498 Joined Cases C-404/12 P and C-405/12 P *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*.

499 Joined Cases C-404/12 P and C-405/12 P *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, para. 47.

500 Ibid, para. 49.

501 Ibid, para. 50.

502 Ibid, para. 51.

503 Ibid, para. 52.

504 Ibid, para. 53.

article 9, paragraph 3, of the Convention insofar as the former covers only acts of individual scope.⁵⁰⁵

The Committee further reasserted that, “it is also important to note that while article 9, paragraph 3, allows Parties a degree of discretion to provide criteria that must be met by members of the public before they have access to justice, it does not allow Parties any discretion as to the acts or omissions that may be excluded from implementing laws”.⁵⁰⁶ The Committee noted that the Court neither agreed nor disagreed with the General Court’s reasoning. It stressed its surprise at the reasoning of the Court regarding its conclusion that it could not be considered that the EU had intended to implement the obligations which derived from article 9(3) AC by adopting the Aarhus Regulation. It concluded that the Court left itself unable to mitigate the flaws correctly identified by the General Court, and that Article 10(1) of the Aarhus Regulation therefore still failed to adequately implement Article 9(3) of the Convention.

The consideration of the ACCC’s findings by the General Court?

Since the adoption of the findings of the Aarhus Committee, an NGO submitted a request for internal review of the Commission’s regulation prolonging the approval of glyphosate.⁵⁰⁷ The Commission rejected the request on the ground that the contested decision was not of “individual scope” for the purpose of Article 10(1) and 2(1)(g) of the Aarhus Regulation. The NGO challenged the reply of the Commission before the General Court. Their arguments were twofold. First, the Commission’s decision was in breach of the Aarhus Regulation for not considering the decision as being of individual scope. Second, it was also in breach of the Convention, as Article 9(3) does not specify that only acts of individual scope can be challenged. The General Court reasserted the case-law of the CJEU (*Vereniging Milieudéfensie and Stichting Natuur*) according to which article 9(3) was not directly applicable “in the legal order of the Union” and could not therefore be relied on to assess the legality of the Union’s acts.⁵⁰⁸ It also reasserted that the Parties to the Convention benefit from a wide margin of discretion regarding the modalities of implementation of the administrative and judicial procedures referred to in Article 9(3) of the Convention.

The new element brought by this ruling is that the applicant relied on the recommendations of the Aarhus Committee on communication ACCC/C/2008/32 concerning the EU.⁵⁰⁹ The General Court, however, refused to take the recommendations into account,

stating that it is “a simple draft”,⁵¹⁰ which was adopted only after the contested decision. The Court therefore considered that it was not necessary to respond to the question raised by the Commission whether the recommendations of the Committee should be adopted by the Meeting of the Parties (of the Convention) or whether this is not necessary for them to become final and binding.⁵¹¹ A positive reading of this part of the ruling would be that, had the findings been adopted before the contested decision, the Court may have considered them.

The Court also rejected the possibility of interpreting Article 10(1) and 2(1)(g) of the Aarhus Regulation in a way that would conform with Article 9(3) of the Convention since, according to the Aarhus Regulation, only acts of individual scope can be the subject of an internal review request. The Court therefore considered it impossible to interpret it as including acts of a general scope. The Court concluded that this interpretation would be “*contra legem*”. This understanding of the conform interpretation principle seems to contradict its very purpose, which is to ensure that EU law applies in conformity with international law and, if this is not possible, to set the EU law provision aside. This is what the CJEU requires with regard to provisions of national law that contravene EU law.⁵¹² Once again, Article 9(3) AC, a provision of a legally binding international convention, remains a dead letter in the Union legal order.

1.1.2. Acts adopted under environmental law

The acts amenable to review must be adopted under “environmental law”. Article 2(1)(f) of the Aarhus Regulation defines “environmental law” as “Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems”.

This definition makes it clear that the legal basis of the contested measure is irrelevant and cannot constitute a criteria to exclude measures from the internal review procedure.

However, the term “which contributes to the pursuit of the objectives of Community policy on the environment”, has led to some confusion and has been interpreted in an overly restrictive manner by certain EU institutions. In case T-33/16, the General Court established that an authorisation of GMOs constitutes an act adopted under environmental law within the meaning of Article 2(1)(f) of the Aarhus Regulation. It found that the EU legislature,

505 ACCC/C/2008/32 (European Union) (Part II), para. 51.

506 Ibid, para. 52.

507 T-12/17, *Mellifera Ev, Vereinigung für wesensgemäße Bienenhaltung v Commission*, ECLI:EU:T:2018:616.

508 Translation of the author, para. 85.

509 ACCC/C/2008/32 (European Union) (Part II), paras.84 and following.

510 In French: “un simple projet”, translated by the author, para. 86.

511 T-12/17, *Mellifera v Commission*, para. 86.

512 See for example Case C-664/15, *Protect*.

in referring to the objectives listed in Article 191(1) TFEU, intended to give to the concept of “environmental law” a broad meaning not limited to matters relating to the protection of the natural environment in “the strict sense”. Further, the fact that Article 192(2) TFEU according to which environmental law, “in so far as it is the subject of Title XX of the TFEU” may also include provisions and measures of a fiscal nature or that affect town planning, quantitative management of water resources and land use and measures affecting Member State’s choice between different energy resources and the general structure of its energy supply. The Court noted that a restrictive definition of environmental law would exclude these areas from its scope. Finally, the exceptions provided for by the Aarhus Regulation with regard to acts adopted in the fields of competition law, infringement proceedings, Ombudsman proceedings and anti-fraud proceedings indicated that the concept of environmental law must be interpreted “very broadly”.⁵¹³

The Court affirmed in an unequivocal way that an authorisation decision to place a GMO on the market is an act that falls within the scope of the area of environmental protection. It relied on the fact that the protection of health of individuals is one of the objectives of EU policy in the area of the environment and that the objectives of Regulation 1829/2003 on genetically modified food and feed is to regulate human interventions that affect the environment by reason of the presence of GMOs liable to have effects on human and animal health.

Interestingly, the General Court specified that the state of the environment within the meaning of the Aarhus Regulation is not confined to the state of the natural environment within the EU. Therefore, the fact that the food and feed have undergone biological or technical processing in their country of origin outside the EU is of no relevance.

The rejection by the General Court of the distinction between environmental concerns and public health is very welcome. Both are so intrinsically linked that addressing them separately would not ensure the protection of either of them. It is regrettable that, in addition to relying on the “individual scope” criterion to reject requests for internal review, the meaning of “environmental law” is also used to restrict the categories of acts that can be contested, particularly when both criteria have been found to be in violation of Article 9(3) AC by the ACCC.

The ACCC found that Article 9(3) AC is broader than the definition of the Aarhus Regulation. It requires State parties to “provide a right of challenge where an act or omission – any act or omission whatsoever by a Community institution or body, including any act implementing any policy or any act under any

law – contravenes law relating to the environment.”⁵¹⁴ The ACCC further stated that “it is clear that, under the Convention, an act may “contravene” laws relating to the environment without being “adopted” under environmental law within the meaning” of article 10(1) of the regulation.⁵¹⁵ The Committee concluded that it is not consistent with article 9(3) of the convention to exclude from the scope of article 10(1) any act or omission made under EU legislation that does not “contribute to the pursuit of the objectives of Community policy on the environment as set out in the Treaty”⁵¹⁶.

1.1.3. Acts having legally binding and external effects

Only acts having “legally binding and external effects” can be challenged under the Aarhus Regulation.

The ACCC stated that, “it is not convinced that generally excluding all acts that do not have legally binding and external effects is compatible with article 9, paragraph 3, of the Convention. It appears that some acts by the Party concerned [the EU] that do not have legally binding and external effect including some or all acts of those referred to by the communicant, might be covered by article 9, paragraph 3.”⁵¹⁷

The acts referred to by the Committee include: decisions approving Operational Programme Transport for certain Member States;⁵¹⁸ a Commission proposal to implement a directive and the omission to adopt such a proposal;⁵¹⁹ guidelines on state aid for environmental protection and energy;⁵²⁰ and the EC’s statement concerning the implementation of a provision of the EU ETS Directive specifying the way Member States may use revenues generated from auctioning of allowances to support the construction of certain plants.⁵²¹ All these are examples of decisions that were the subject of internal review requests that have been rejected by the European Commission as inadmissible because they were considered as not having external or binding effect.

514 ACCC/C/2008/32 (EU) (Part II), para. 98.

515 Ibid, para. 100.

516 Ibid, para. 100.

517 Ibid, para. 103.

518 Commission’s reply of 06/08/2008 on request made by Ekologicky Pravní Service. The Commission argues that these decisions are addressed to Member States and that it is their responsibility and competence to implement them. However, the fact that some discretion is left to the Member States is not that convincing to demonstrate that the decision lacks external effects. Moreover, these programmes set out a development strategy with a coherent set of priorities and that these decisions enable the Commission to make commitments on the Community’s budget to complement national actions, integrating into them the priorities of the Community.

519 Commission’s reply of 7/04/2014 to Greenpeace, Transport & Environment, Friends of the Earth Europe. The NGO was challenging the omission to submit the proposal for the implementation measures of a provision of the Fuel Quality Directive, in particular the fuel baseline standard and greenhouse gas emissions calculation methodologies. The adoption of a Commission proposal to implement a directive clearly has external effects in that it starts the procedure to adopt an implementing or delegated act, and can trigger the European Parliament and Council to act in the relevant case, either using their veto or supporting the proposal. It will also trigger interventions from the industrial sectors concerned.

520 Commission’s reply of 13/10/2014 to Friends of the Earth England, Wales and Northern Ireland

521 Commission’s reply of 27/4/2009 to ClientEarth internal review request.

513 Case T-33/16, *TestBioTech v Commission*, ECLI:EU:T:2018:135, para.46.

1.1.4. Challenging the reply to the internal review request versus the initial act

According to Article 12 of the Aarhus Regulation, if the NGO that made the internal review request is unsatisfied with the reply from the institution, it may institute proceedings before the CJEU “in accordance with the relevant provisions of the Treaty”.

There are two implications regarding the right to institute proceedings before the Court under Article 12 of the Aarhus Regulation. First, the right to challenge a decision to reject a request for internal review (the reply) necessarily encompasses the right to contest its legality on the basis that it upholds an unlawful decision (the initial decision). That is a substantive challenge going beyond the control of procedural irregularities. Second, a decision of the Court to annul the reply of the EU institution, on grounds that it upholds an unlawful decision, necessarily entails that the underlying decision should itself be annulled. However, the interpretation of the General Court is not clear on these points and is evolving at the time this guide is being written. A number of pending cases should clarify the situation in 2019.

In the *TestBio Tech* case, the General Court explained that it is implicit in the provisions of the Aarhus Regulation that an EU institution, after conducting an internal review of an environmental act, has the power:

*“either [to] reject the request for internal review as unfounded by reasoned decision or on the ground that the internal review did not lead to a different result than the one obtained by the authorisation decision or, as legally permitted, take any other measure it deems appropriate to amend the authorisation decision, including amendment, suspension or repeal of an authorisation.”*⁵²²

In circumstances where the EU institution has, following a request for review, decided to amend the authorisation decision, it is open to the NGO making the request to scrutinise the amended decision and, if it considers that grounds for concern remain, make a fresh request for review.⁵²³

However, where the EU institution has rejected the request for internal review as unfounded and, essentially, endorsed the underlying decision, “the non-governmental organisation to which that [rejection] decision is addressed may bring an action for annulment against that decision, as provided for in the first situation covered by the fourth paragraph of Article 263 TFEU.”⁵²⁴

The grounds upon which a decision rejecting review of an authorisation may be challenged have been clearly set out by the Court as follows:

*“the party requesting the review may institute proceedings against the decision rejecting the request for internal review as unfounded before the EU Courts, and may allege lack of powers, infringement of essential procedural requirements, infringement of the Treaties or of any legal rule relating to their application, or misuse of powers.”*⁵²⁵

Therefore, procedural errors of the EU institution in dealing with a request for internal review provides grounds for challenge before the Court, as do substantive breaches of EU law. In the author’s view, this means that a challenge under Article 12 of the Aarhus Regulation may refer to the unlawfulness of the initial decision.

In the *TestBioTech* case referred to above, it is our understanding that the Court explicitly rejected the contention that an NGO could never refer to the unlawfulness of the initial decision when the organisation had raised those grounds of unlawfulness in its request for internal review.⁵²⁶ On the contrary, the Court affirmed that an organisation is entitled to argue that the reply of the institution, by failing to take the correct view on the unlawfulness of the initial decision, has unlawfully ratified that decision.⁵²⁷ An organisation therefore “may ... ask the Court to declare that [a reply] is unlawful, even if it is based on the authorisation decision being unlawful or unfounded.”⁵²⁸

If the Court were to annul a reply for manifest error on the grounds that it effectively endorsed the unlawful initial decision, the logical remedy is to annul the initial decision as well. Otherwise, the absurd situation could arise in which the reply is annulled but the initial decision remains in force, despite its manifest error having been confirmed by the Court.

Such a situation would frustrate the recognised objective of the Aarhus Convention, since it would provide NGOs with an incomplete right of access to justice and would render the process by which NGOs may seek annulment of no practical effect in certain cases. Despite the provisions of the Aarhus Regulation, which seek to expand access to justice for NGOs, NGOs would in fact be left in the position of being unable to make any reference to the lawfulness of decision-making of EU institutions before EU Courts.

Further, such a situation would create legal uncertainty as to how the EU institution should implement the ruling of the Court. The legality of the initial decision would be uncertain since, by annulling the reply, the Court would necessarily have accepted the NGO’s arguments as to the manifest errors vitiating not only the reply, but the initial decision also. It is expected that in this situation, the duty to take the necessary steps

522 T-177/13, *TestBioTech eV and Others v European Commission*, ECLI:EU:T:2016:736, para. 52.

523 Ibid, para. 54.

524 Ibid, para. 53.

525 Ibid, para. 56.

526 Ibid, para. 57.

527 Ibid, para. 57 and 59.

528 Ibid, para. 56.

to comply with the judgment enshrined in Article 266 TFEU, would oblige the institution in question to revoke the underlying decision. However, an issue arises when the ruling of the Court only addresses errors of law made by the institution in the reply that can be addressed without reassessing the initial decision.

The ACCC has urged the EU Courts to take the approach outlined above, stating that “it is possible for the European Courts to interpret Article 12 [of the Aarhus Regulation] in a way that would allow them both to consider failure to comply with Article 10(2) and (3) as well as the substance of an act falling within Article 10(1). If the European Courts fail to interpret Article 12 in that way, that Article will not be in compliance with the [Aarhus] Convention.”⁵²⁹ Accordingly, the findings of the ACCC state that “to the extent that the Party concerned [the EU] is going to rely on the jurisprudence of the ECJ to ensure that the obligations arising under article 9, paragraphs 3 and 4 of the Convention are implemented, the Committee recommends to the EU that the ECJ:

- assesses the legality of the EU’s implementing measures in the light of those obligations and acts accordingly; and
- interprets EU law in a way which, to the fullest extent possible, is consistent with the objectives laid down in article 9, paragraphs 3 and 4.”

The *TestBiotech* ruling is currently under appeal to the Court of Justice and will hopefully clarify the scope of the proceedings before the Court under Article 12 of the Aarhus Regulation, in taking into account the findings of the ACCC.

1.2. Direct actions under the Treaty on the Functioning of the EU

Another means of challenging the acts of EU institutions is that foreseen by Article 263(4) TFEU, which provides the conditions under which an action for annulment can be brought before the EU courts by natural and legal persons. Article 263(4) has three limbs, which correspond to three categories of acts that can be challenged:

- An act addressed to the applicant;
- An act which is of direct and individual concern to the applicant;
- A regulatory act which is of direct concern to the applicant and does not entail implementing measures.

The first category refers to measures that are addressed to the natural or legal person concerned, such as decisions under Article 101 TFEU on competition rules applying to undertakings, or decisions by EU institutions that respond to requests for access to information and documents.

The second category, essentially includes all acts of EU institutions having legal effects and which are not

covered by the first or third categories. Importantly, these include EU legislative acts. The concept of acts of “individual and direct concern” is explained in more detail in section 2 on standing below. The third category of acts challengeable under Article 263(4) TFEU, i.e. regulatory acts that do not require implementing measures, enjoy less stringent standing criteria, as described below. It was introduced by the Lisbon Treaty to address the situation where the lack of national implementing measures led natural and legal persons to breach EU law in order to bring a case at national level. A contested act must fulfil two cumulative criteria to fall within this category. If it fails to do so, it falls to be considered under the second limb of Article 263(4), i.e. acts which are of individual and direct concern. The criteria are:

A regulatory act ...

The term “regulatory act” was defined in *Inuit Tapiriit Kanatami*⁵³⁰ as “acts of general application other than legislative acts”.

The Court held that an act of general application means: “an act which applies to objectively determined situations and ... produces legal effects with respect to categories of persons envisaged in general and in the abstract”.⁵³¹

According to the Court, the concept of non-legislative acts excludes those adopted under the ordinary and special legislative procedures, under Article 294 and 289(2) TFEU respectively. Non-legislative acts include decisions adopted under Article 290 TFEU (delegated acts) and Article 291(2) TFEU (implementing acts) as well as other acts of general application adopted by the Commission, ECHA, EFTA and other agencies and bodies.

... Which “does not entail implementing measures”

This criterion has been interpreted very restrictively by the CJEU. The question is assessed by reference to the position of the person bringing the case.⁵³² The case-law of the CJEU is however not entirely consistent. The CJEU has held in *T&L Sugars* that if the EU decision only produces legal effects vis-à-vis the applicant through a Member State implementing measure (even if the Member State has no discretion in how to implement it), the condition is not met.⁵³³ On the other hand, the General Court decided differently in *Microban* in stating that despite the existence of implementing measures the contested act was nevertheless a regulatory act. The

530 C-583/11P, *Inuit Tapiriit Kanatami v Parliament and Council*, ECLI:EU:C:2013:625, para. 60

531 T-262/10, *Microban International Ltd v Commission*, ECLI:EU:T:2011:263, para. 23.

532 C-274/12 *Telefonica SA v Commission*, ECLI:EU:C:2013:852, para. 30.

533 See two examples of cases: Cases C-456/13P, *T&L Sugars Ltd, Sidul Acucareos, Unipessoal Lda v Commission* and T-262/10 *Microban*. In *T&L Sugars*, a Commission Regulation set the criteria for the issuing of certificates regarding sugar production. The Member State had no discretion over the implementation of the criteria. Nevertheless, the issuing of the certificate was held to constitute implementing measures because the Commission regulation produced legal effects vis-à-vis the applicants only through the Member State certificate. By contrast, despite the existence of implementing measures in the *Microban* case, the general Court found it was still a regulatory act because the implementing measures were unnecessary and purely ancillary to the Commission regulation.

529 ACCC/C/2008/32 (European Union) (Part II), para. 119.

lack of clarification on this point leads to legal uncertainty as to what type of act can be qualified as such.

The CJEU's restrictive interpretation of these criteria means that the amendment of Article 263(4) TFEU has no impact for NGOs having standing. As noted by the

ACCC in its findings on communication ACCC/C/2008/32 (European Union), this definition is narrower than the range of acts amenable to review under Article 9(3) AC, and is therefore not compliant with this provision.⁵³⁴

⁵³⁴ Findings and recommendations of the Compliance Committee ACCC/C/2008/32 (EU) (Part II), para. 71.

2. What are the conditions of standing?

2.1. Under the Aarhus Regulation

Under Article 10 of the Aarhus Regulation, NGOs meeting the requirements in Article 11 of that regulation can request an internal review of an administrative act adopted under environmental law or an omission.

An NGO can make a request if:

- (a) *It is an independent non-profit-making legal person in accordance with a Member State's national law or practice;*
- (b) *It has the primary stated objective of promoting environmental protection in the context of environmental law;*
- (c) *It has existed for more than two years and is actively pursuing the objective referred to under (b);*
- (d) *The subject matter in respect of which the request for internal review is made is covered by its objective and activities.*

As explained in the section above, if the NGO is not satisfied with the reply of the EU institutions, it may institute proceedings before the CJEU.

In its findings against the EU, the ACCC found that Article 9(3) AC requires "members of the public" that meet the criteria, if any, laid down in the law, to be given access to administrative or judicial procedures. It noted that "the term 'members of the public' in the Convention includes, but is not limited to, NGOs". It concluded that "by barring all members of the public except NGOs meeting the criteria of its article 11, the Aarhus Regulation fails to correctly implement article 9, paragraph 3."⁵³⁵ That should certainly be a point to address in the study that is being carried out for the Commission to explore ways to bring the EU in compliance with the findings (see section "What next?" below).

2.2. Under the TFEU

The other avenue to challenge acts adopted by the EU institutions is through Article 263(4) TFEU, which is open to "any natural or legal person". As noted in section 1.2 above, Article 263(4) TFEU has three limbs and different standing criteria apply to each one.

The first limb concerns decisions addressed to the applicant, in which case no further standing conditions apply. That is the case, for example, when an EU institution refuses a request for access to documents.

The second limb applies to all acts that are not covered by the first and third limbs. The applicable standing criteria require applicants to be individually and directly concerned by the contested act. The third limb, which concerns challenges to regulatory acts that do not require implementing measures, requires that applicants be directly concerned only.

The conditions to be met for "direct concern" are quite strict, and even more so for "individual concern", making access to the EU courts impossible in practice for individuals and NGOs.

2.2.1. The individual concern criterion

The test for "individual concern" was defined in the *Plaumann* case as requiring that the applicant show she/he is affected "by reason of **certain attributes which are peculiar to them** or by reason of circumstances in which they are **differentiated from all other persons** and by virtue of these factors distinguishes them individually just as in the case of the person addressed". Even though this interpretation was given in relation to Article 230(4) TEC - Article 263(4) TFEU's pre-Lisbon predecessor - since 1962 the Court has resisted pressure, from among others, Advocate General Jacobs⁵³⁶ and the General Court⁵³⁷, to change its position. This means that, under the current state of the Court's case law, this requirement is impossible for individuals and NGOs to meet in environmental matters because measures affecting the environment will, by definition, not solely concern the applicant. This has effectively exempted the decisions of EU institutions from public judicial scrutiny. This jurisprudence has the somewhat illogical outcome that the more people affected by a measure the less likely it is that they will have standing to challenge it. All cases brought by NGOs and individuals in environmental matters have been rejected as inadmissible.⁵³⁸

⁵³⁶ Opinion of Advocate General Jacobs delivered on 21 March 2002 in case C-50/00, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:197.

⁵³⁷ T-177/01, *Jégo-Quéré v Commission*, ECLI:EU:T:2002:112.

⁵³⁸ Cases T-585/93, *Stichting Greenpeace Council and Others v Commission*, ECLI:EU:T:1995:147; C-321/95 P, *Stichting Greenpeace Council and Others v the Commission*, ECLI:EU:C:1998:153; T-219/95 R, *Marie-Thérèse Danielsson and Others v Commission*, ECLI:EU:T:1995:219; T-236/04, *EEB and Stichting Natuur en Milieu v Commission*, ECLI:EU:T:2005:426.

⁵³⁵ *Ibid*, para. 93.

This has to be contrasted with the position for industry when it comes to showing direct and individual concern. The Court has shown in several cases that it interprets the criterion of “*individual concern*” differently depending on whether the interests at stake are of an economic or public (environmental) nature. Indeed, it has a much more flexible interpretation of the standing rules when the applicant is a business interest group than when it is a public interest group, notably an environmental NGO. This is so when economic benefits and the use of a trademark are in question but also because of the procedural guarantees provided in commercial matters.⁵³⁹

This is also true for the direct concern criteria. The EU courts have in several cases recognised that companies had their legal or even their factual situation affected by decisions of EU institutions which made them directly concerned by the contested decisions.⁵⁴⁰ The EU courts have therefore established a double standard giving broader rights to the industry to defend their economic and financial interests leaving the protection of the environment and public health unrepresented before the CJEU.⁵⁴¹

In its findings on the first part of communication ACCC/C/2008/32 adopted in 2011, the ACCC condemned the strict approach taken by the CJEU on the standing requirements under Article 263(4) TFEU. It found that the *Plaumann* doctrine, by requiring the applicant to demonstrate that their legal situation is affected because of a factual situation that differentiates him or her from all other persons, made it impossible for members of the public to ever challenge acts relating to health or the environment. Therefore, it considered that the Court of Justice’s case-law on “*individual concern*”, by failing to take into account the entry into force of the Convention in its interpretation of Article 263(4) TFEU, did not correctly implement the requirements of Article 9(3).⁵⁴²

2.2.2. The direct concern criterion

The criterion of direct concern is applicable to both regulatory acts and other acts adopted by EU institutions. The interpretation of “*direct concern*” for the purposes of Article 263(4) TFEU was clarified by the Court in the *Microban*⁵⁴³ case, which provides a twofold test. To be of direct concern to the applicant, the contested act must:

- Affect the legal situation of the applicants, and

- Leave no discretion to its addressees as to its implementation, “*such implementation being purely automatic and resulting from the application of Community rules without the application of other intermediary rules*”.

The requirement that the measure must affect the legal situation of the applicant will usually make it impossible for environmental NGOs to obtain standing under Article 263(4) TFEU, as they act in order to defend the public interest in the environment, rather than their subjective rights.

For example, in the *PAN*⁵⁴⁴ case, three NGOs were denied standing by the General Court for lack of direct concern. The case concerned the approval by the Commission of the sulfoxaflo, an active substance for plant protection products, which the applicant NGOs sought to challenge because of its harmful effect on bees. The applicants argued that they were directly concerned by the approval because it represented a threat to beekeepers’ producing activities and would therefore affect their right to property and to conduct a business as well as their campaign activities. The General Court rejected this argument, finding the potential effect on the applicants’ economic activity was factual in nature, and did not impact their legal situation.

The General Court relied on *Stichting Natuur* to state that “*individuals cannot rely directly on Article 9(3) of the Aarhus Convention before the*” CJEU.⁵⁴⁵ Therefore, Article 9(3) cannot be relied on to assess the compatibility of the Aarhus Regulation with the Convention nor to interpret Article 263(4) TFEU in light of the Convention.

The General Court also held that it is settled case law that Article 47 CFR laying down the right to an effective remedy, is not intended to change the system of judicial review laid down by the Treaties and particularly the rules relating to the admissibility of direct actions brought before the CJEU.⁵⁴⁶ It conceded that the conditions of admissibility in Article 263(4) TFEU must be interpreted in the light of the fundamental right to effective judicial protection, but that such an interpretation cannot have the effect of setting aside those conditions, which are expressly laid down in that Treaty.⁵⁴⁷

Therefore, applicants cannot rely on Article 37 (on environmental protection) and 47 CFR to challenge the interpretation of Article 263(4) TFEU.

The ACCC also found that the CJEU’s interpretation of the “*direct concern*” criterion would make it impossible for organisations acting solely for the purpose of

539 Order of the President of the Court of First Instance T-96/92, CCE Grandes Sources, ECLI:EU:T:1995:77; T-12/93, *Comité Central d’Entreprise de la Société Anonyme Vittel and Others v Commission*, ECLI:EU:T:1995:78, para. 47; and joined cases T-528/93, T-542/93, T-543/93 and T-546/93, *Metropole Télévision v Commission*, ECLI:EU:T:1996:99.

540 See for example, Case T-114/02 *Babyliss SA v Commission*, ECLI:EU:T:2003:100.

541 Ludwig Krämer, “Access to Environmental justice: The double standard of the ECJ”, *Journal of European Environmental and Planning Law*, Volume 14, Issue 2, p. 159-185, 2017.

542 ACCC/C/2008/32 (EU) (Part I), ECE/MP.PP/C.1/2011/4/Add.1, paras 86-87.

543 T-262/10, *Microban International and Microban (Europe) v Commission*, para. 27.

544 T-600/15, *PAN Europe, Bee Life and Unapii v Commission*, ECLI:EU:T:2016:601.

545 *Ibid*, para. 59.

546 *Ibid*, para. 49.

547 *Ibid*, para. 50.

protecting the environment to obtain standing under the third limb of Article 263(4) TFEU, as such organisations would not be able to show an effect on their legal situation. Moreover, the Committee considered that the requirement that the challenged measure “leave no discretion to its addressees, who are entrusted with

the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules” was incompatible with Article 9(3) of the Convention, as it introduced additional requirements as to the kind of acts which are amenable to challenge under that provision.

3. Recommendations of the ACCC

The Committee adopted the following recommendations in relation to access to the EU courts:

- (a) All the relevant EU institutions within their competences take the steps necessary to provide the public concerned with access to justice in environmental matters in accordance with article 9, paragraph 3 and 4, of the Convention.
- (b) If and to the extent that the EU intends to rely on the Aarhus Regulation or other EU legislation to implement article 9(3) and (4) of the Convention:
 - (i) The Aarhus Regulation be amended, or any new EU legislation be drafted, so that it is clear to the CJEU that that legislation is intended to implement article 9(3) of the Convention
 - (ii) New or amended legislation implementing the Aarhus Convention use wording that
- (c) clearly and fully transposes the relevant part of the Convention; in particular it is important to correct failures in implementation caused by the use of words or terms that do not fully correspond to the terms of the Convention.
- (c) If and to the extent that the EU is going to rely on the jurisprudence of the CJEU to ensure that the obligations arising under article 9(3) and (4) of the Convention are implemented, the CJEU:
 - (i) Assess the legality of the EU’s implementing measures in the light of those obligations and act accordingly;
 - (ii) Interpret EU law in a way which, to the fullest extent possible, is consistent with the objectives of article 9(3) and (4) of the Convention.
 - (iii) Referral for preliminary rulings through Article 267 TFEU.

4. Referral for preliminary rulings under Article 267 TFEU

Article 267 TFEU provides a means by which legal and moral persons can obtain from the CJEU a preliminary ruling on the validity and interpretation of EU acts and of the Treaties by requesting that national courts refer a question to the CJEU. By this provision, national courts must only refer the question if they consider that it is necessary to enable them to give judgment. However, when the question is raised in a case pending before a national court of last instance, that court is under an obligation to bring the matter before the CJEU.⁵⁴⁸ National courts are only exempted from making such a reference if the answer to the question is “so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved” (*acte clair*)⁵⁴⁹ or “where previous decisions of the court have already dealt with the point of law in question” (*acte éclairé*).⁵⁵⁰ Questions on the validity of EU law must also be referred by lower national courts because national

courts are not competent to rule on the validity of EU law.

Most of the rulings of the CJEU interpreting access to justice rights originate in a reference for a preliminary ruling from a national court. Such recourse to the CJEU constitutes a means of ensuring a harmonised implementation of EU legislation. It therefore follows that it should be part of the strategic approach of NGOs and other stakeholders of civil society seeking to use this mechanism to ensure access to justice is provided in compliance with the Aarhus Convention and the relevant EU directives.

The EU courts have repeatedly asserted that the Treaty provides for a complete system of judicial remedies because members of the public have the right to dispute the legality of measures of Member States based on an EU act before national courts and national courts can request a preliminary ruling from the ECJ.⁵⁵¹

However, The ACCC found that:

“While the system of judicial review in the national courts of the EU member States, including the possibility to request a preliminary ruling, is a significant element for ensuring consistent application and proper implementation of EU law in its member States, it cannot be a basis for generally denying members of the

⁵⁴⁸ An illustration of this possibility in environmental matters is provided by *Standley* (Case C-293/97, *Standley*, ECLI:EU:C:1999:215, paras 51 and 52), where the Court *inter alia* reviewed the validity of the Nitrates Directive 91/676/EEC in light of the polluter pays principle in Article 191 TFEU. Another example can be found in *Safety Hi Tech*, where it reviewed the validity of the Ozone Regulation 3093/94 [now 2037/2000] against the objective of a high level of environmental protection in Article 191 TFEU (Case C-284/95, paras 33 to 61). Article 267 TFEU was also used to obtain the review of an implementing act in the form of a Commission directive adopted under the Packaging Waste Directive 94/62/EC in *Eco-Emballages SA* (Joined cases C-313/15 and C-530/15).

⁵⁴⁹ C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, ECLI:EU:C:1982:335, para. 16.

⁵⁵⁰ *Ibid*, para. 14.

⁵⁵¹ C-321/95P, *Stichting Greenpeace Council and Others v the Commission*.

public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies; nor does the system of preliminary review amount to an appellate system with regard to decisions, acts and omissions by the EU institutions and bodies. Thus, with respect to decisions, acts and omissions of EU institutions and bodies, the system of preliminary ruling neither in itself meets the requirements of access to justice in article 9 of the Convention, nor compensates for the strict jurisprudence of the EU Courts⁵⁵².

The ACCC also more pragmatically pointed out that “such a procedure requires that the NGO is granted standing in the EU member State concerned. It also requires that the national court decides to bring the case to the ECJ under the conditions set out in the TEC article 234 [now article 267]”. The lack of an EU directive implementing the access to justice provisions of the Aarhus Convention leads to serious discrepancies among national jurisdictions, with certain of them denying legal standing to NGOs and therefore barring them from relying on the preliminary ruling procedure. There are also last resort jurisdictions which, despite the fact that they have the obligation to

refer a question to the CJEU when the interpretation of an EU act is not clear (*acte clair*), simply refuse to do so. The ruling of the CJEU in case C-416/17 *Commission v France*, condemning France for not referring a question illustrates the difficulty NGOs can face in convincing national courts to defer to the CJEU⁵⁵³. In that case, the Commission argued before the Court that, as a national court of last instance, the Conseil d’Etat had breached the third paragraph of Article 267 TFEU in failing to make a preliminary ruling to the CJEU on the interpretation of EU law. Because there was an element of doubt regarding the Conseil d’Etat’s interpretation of EU law, it was in breach of Article 267 TFEU for failing to make a preliminary reference on the matter.

Given the persistent reluctance of numerous national jurisdictions to refer questions to the CJEU even where there is a doubt as to how an EU act should be interpreted, a more systematic monitoring from the European Commission on the use of this practice and infringement proceedings would be welcome.

552 ACCC/C/2008/32 (EU) (Part I), para. 90.

553 C-416/17, *European Commission v French Republic*, ECLI:EU:C:2018:811.

5. What next?

Since the adoption of the findings of the ACCC, the Meeting of the Parties (MoP) to the Aarhus Convention took place in September 2017. According to the procedure foreseen in Decision I/7,⁵⁵⁴ the practice is that the ACCC’s findings are endorsed by the MoP. Until the last MoP all the findings of the ACCC had been endorsed without any opposition from State Parties. However, in this case the European Commission proposed to reject the findings of non-compliance.⁵⁵⁵ No other party had ever made such a proposal. The Council, which adopts the EU position in view of the MoP, rejected the Commission’s proposal. Instead, it opted for a compromise that accepted the draft MoP decision of the Bureau of the Convention⁵⁵⁶ subject to several amendments. The main amendment was to “take note of” the findings,⁵⁵⁷ the implication being that *endorsing* the findings would make them legally binding while *taking note* of them will not.⁵⁵⁸ The EU also proposed to delete references to the CJEU jurisprudence being too strict and therefore not in compliance with the Convention. The reason relied upon was that given “*the separation of powers in the Union, the Council of the EU*

cannot give instructions or make recommendations to the [CJEU] concerning its judicial activities. Therefore the recommendations ... related to the Court of Justice and its jurisprudence cannot be accepted.”⁵⁵⁹ This seems to be at odds with the legally binding force recognised by Article 216 TFEU of international conventions ratified by the EU for all EU institutions including the CJEU. Endorsing the findings would not have amounted to the Council giving instructions to the Court because there is no ambiguity as to the fact that it would be the ACCC adopting the findings of non-compliance, not the Council. The Council would only be endorsing them formally on behalf of the EU as a whole. Moreover, the endorsement of the findings does not lead to the adoption of recommendations or instructions to the Court. It is for each EU institutions to take the necessary steps to bring about compliance with the Convention.

The interpretation adopted by the Council implies that the courts of State parties to the convention are not subject to the provisions of the AC and to the scrutiny of the ACCC, an argument that had already previously been explicitly rejected by the Aarhus Committee.⁵⁶⁰ In the same findings, the ACCC considered the jurisprudence of national courts and recommended that it should take a new direction, in this case referring to

554 Report of the first meeting of the parties, Decision I/7 review of compliance, ECE/MP.PP/2/Add.8, 2 April 2004.

555 European Commission Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention regarding compliance case ACCC/C/2008/32, 29.6.2017, COM(2017) 366 final.

556 Draft Decision VI/8f on compliance by the European Union.

557 Excerpt from the report of the sixth session of the Meeting of the Parties (ECE/MP.PP/2017/2).

558 Elena Fasoli, Alistair Mc Glone, “The non-compliance Mechanism under the Aarhus Convention as ‘soft’ enforcement of international environmental law: Not so soft after all!”, *Neth Int Law Review* (2018) 65:27-53.

559 Draft Council Decision on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention as regards compliance case ACCC/C/2008/32 (EU), Brussels 13 July 2017, 1150/17.

560 ACCC/C/2005/11 (Belgium), paras 41-43.

the jurisprudence of the Belgian Conseil d'Etat.⁵⁶¹ These findings have been endorsed by the MoP including by the EU. The Belgian constitutional system may be somewhat bewildering to some of us but the principle of the separation of powers does also apply in that country.

The EU's position stirred strong opposition from other State Parties, the NGOs and members of the ACCC.⁵⁶² The EU was criticised by NGOs, certain non-EU States Parties to the Convention because it runs contrary to the EU's leadership on democratic accountability, respect for the rule of law and environmental protection. Some concerns were also raised as it also set an unfavourable precedent for other Parties to the Convention not to endorse future findings of the ACCC, and therefore undermine the role and purpose of the ACCC.

The representative of Norway expressed her concern regarding the proposal by the EU. She stated that *"by proposing those amendments the EU seemed to be seeking for itself a kind of special status as a Party to the Aarhus Convention with regard to the extent of its obligations and the need to implement measures necessary to comply with them"*.⁵⁶³ As mentioned in the report of the MoP: *"Several Parties expressed their great concern and reluctance to deviate, as an exceptional measure for that particular case only, from the long-standing and consistent practice of adopting decisions at each ordinary session of the Meeting of the Parties endorsing all of the findings issued by the Compliance Committee during the intersessional period regarding non-compliance by individual Parties."*⁵⁶⁴

This discussion led to the postponement of the adoption of a decision on the case until the next MoP in 2021. The EU recalled in an official statement its willingness *"to continue exploring ways and means to comply with the convention in a way that was compatible with the fundamental principles of the European Union legal order and with its system of judicial review."*⁵⁶⁵

Following that unprecedentedly heated MoP, certain Member States felt the need to make amends and for the first time in environmental matters resorted to Article 241 TFEU.⁵⁶⁶ In doing so, the Council requested the Commission to submit, by 30 September 2019, a study on the Union's options for addressing the findings of the Committee *"to explore ways and means to comply with the Aarhus Convention in a way that is compatible with the fundamental principles of the Union*

legal order and with its system of judicial review".⁵⁶⁷ It specified that *"the study shall cover the legal, financial and human resources implications of different options, including amending Regulation (EC) No 1367/2006."*⁵⁶⁸

The decision also states that by 30 September 2020, *"if appropriate in view of the outcomes of the study"* the Commission shall submit *"a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006, or otherwise ... inform the Council on other measures required as a follow-up to the study"*.⁵⁶⁹

Five Member States, France, Italy, Spain, Luxembourg supported by Latvia, have adopted an official statement to regret the *"lack of ambition of the decision"*.⁵⁷⁰ According to them *"the revision of the Aarhus Regulation no longer appears clearly as the objective of the decision but as one possible option among others"* and the deadline set for the Commission to submit its revision proposal (September 2020) is too remote given that the next Meeting of the Parties will take place in 2021.

The first proposal of the Council decision was more ambitious, clearly requesting the Commission to submit a legislative proposal amending the Aarhus Regulation in order to bring it into full compliance with Articles 9(3) and (4) of the Aarhus Convention. After prolonged discussion, the Presidency decided to table another version, which indeed does not guarantee that compliance will be brought about, at least not before the next MoP.

The Council Decision refers to the two resolutions adopted by the European Parliament in November 2017. The first on an Action Plan for nature, people and the economy.⁵⁷¹ The second, on the EU Environmental Implementation Review (EIR).⁵⁷² Both call, among other things, on the Commission to submit a new legislative proposal reviewing the Aarhus Regulation, in order to take account of the Committee recommendation.

The way to revise the Aarhus Regulation is not suggested by the Council decision. However, it gives a basis to it in stating that, *"It appears possible to amend Regulation (EC) No 1367/2006 in such a way that the Union's system of judicial review would not be altered,*

⁵⁶¹ Ibid, para. 48.

⁵⁶² See Excerpt from the report of the sixth session of the Meeting of the Parties (ECE/MP.PP/2017/2).

⁵⁶³ Ibid, para. 57.

⁵⁶⁴ Ibid, para. 62.

⁵⁶⁵ Ibid, para. 62.

⁵⁶⁶ Article 241 TFEU provides that *"The Council, acting by a simple majority, may request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals. If the Commission does not submit a proposal, it shall inform the Council of the reasons"*.

⁵⁶⁷ Council Decision (EU) 2018/881 of 18 June 2018 requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006, OJ L155/6, Article 1(1).

⁵⁶⁸ Ibid, Article 1(2).

⁵⁶⁹ Ibid, Article 2(1).

⁵⁷⁰ 9649/18 ADD 1, Note Point « I/A », Joint statement by the French, Luxembourg, Italian and Spanish delegations supported by the Latvian delegation, 4 June 2018.

⁵⁷¹ European Parliament resolution of 15 November 2017 on an Action Plan for nature, people and the economy (2017/2819(RSP)), available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0441+0+DOC+XML+V0//EN&language=EN>>

⁵⁷² European Parliament resolution of 16 November 2017 on the EU Environmental Implementation Review (EIR) (2017/2705(RSP)), available at: <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0450+0+DOC+XML+V0//EN&language=EN>>

in particular by widening the category of Union acts in respect of which internal review could be requested."

In parallel, the European Commission launched a public consultation on the way to bring the EU into compliance with the access to justice provisions of the Aarhus Convention.

The European Commission decided to carry out an inception impact assessment⁵⁷³ to fulfil the commitment

it made at the MoP "to explore ways and means to comply with the Aarhus Convention". A consultation is organised to gather the public's views on the matter in early 2019.

However, carrying out a study falls short of what is needed to bring about compliance with the Convention. The decision of the ACCC is very clear: the Aarhus Regulation which implements the provisions of the Convention at EU institutional level is not in line with the Convention and must therefore be amended.

573 <https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2432060_en>

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Acknowledgments

Authors

Anaïs Berthier, Senior Lawyer,
Environmental Democracy
project lead, ClientEarth

<aberthier@clientearth.org>

Anne Friel, Lawyer, Environmental
Democracy, ClientEarth

<afriel@clientearth.org>

Sebastian Bechtel, Lawyer, Environmental
Democracy, ClientEarth

<sbechtel@clientearth.org>

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Brussels
60 Rue du Trône (3rd floor)
Box 11
1050 – Ixelles
Brussels
t +32 (0)2 808 34 65
info@clientearth.org

London
Fieldworks
274 Richmond Road
Martello St Entrance
London
E8 3QW
t +44 (0)20 7749 5970
info@clientearth.org

www.clientearth.org