Beiträge zum Europa- und Völkerrecht

Katja Rath

# Quo Vadis CJEU – Unsettling jurisdiction on public access to environmental information

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# Quo Vadis CJEU – Unsettling jurisdiction on public access to environmental information

by

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## A. Introduction

The European Union is a contracting party to numerous bilateral and multilateral international treaties. The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention[1]) is one of them. The EU is therefore an actor in the international community, which not only shapes the international system, but also has impacts the internal legal order of the Union. When the EU ratified the Aarhus Convention in 2005 a commitment to guarantee broad access to justice in environmental matters both at the national and the EU level was made. One of the aims of the EU as stated in Art. 3(5) of the 2007 Treaty on European Union (TEU), is to contribute 'to the strict observance and the development of international law'. While there is no doubt that the EU is bound as a signing party to the Aarhus Convention, the commitment to international law by the CJEU differs tremendously. Especially the tendency of the Court in recent years to give environmental associations more rights to obtain information and appeal in court has recently suffered a setback if EU institutions were involved. This paper debates whether EU secondary legislation, like the Aarhus Regulation and decisions by EU institutions, may be reviewed against the criteria of the provisions of an international treaty like Aarhus. The European General Court (EGC) endorsed this and overturned decisions of the European Commission, which were found to be incompatible with the Aarhus Convention. In contrast, the CJEU decided in several cases in 2015 that environmental NGOs have no right to access information from EU authorities when withholding requested information is acceptable by provisions of the EU Aarhus Regulation, or when the challenged act of the EU institution is not an 'administrative act' as defined by the Aarhus Regulation. It is remarkable that in comparable cases where NGOs requested information from Member State authorities or sought access to court, the CJEU was quick to rule that this behaviour is not compatible with provisions of the Aarhus Convention. It appears as if the Court wishes to avoid challenges to decisions of EU institutions, which would be in blatant conflict with international law, namely the Arhus Convention, as well as the public demand for a more transparent and accountable European Union. The commitment to international law by the European Union cannot be taken for granted, and accordingly, this paper will investigate the reasons the CJEU has given for its behaviour.

The selected case law will thus mainly focus on the question of whether European secondary law, like Regulations and Directives transforming the Aarhus Convention, must be measured against the Aarhus Convention, specifically Art. 9(3) thereof. To get to the bottom of this contentious jurisdiction, it is crucial to understand the general relationship between international law and EU secondary law (B). In a second step, the relevant case law on the matter of the Aarhus Convention will be explored (C) and finally possible reasons for the different outcomes will be discussed (D).

[1] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), signed on 25 June 1998, entered into force on 30 October 2001, available on the internet: <http://live.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf> (last access 30 November 2017).

## B. Relation between international law and EU secondary law

### I. The adoption of Aarhus within the multi-level-governance system

The Aarhus Convention has currently 47 parties, 46 of them states and the European Union (EU).[2] It is a multilateral environmental agreement, which strengthens three pillars: access to information, public participation in decision-making and access to justice in environmental matters.[3] One of the cornerstones of the Aarhus Convention is Art. 9(3) which reads that '[…] each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment'.

With the European Community's Decision on the conclusion of the Aarhus Convention, the EU acceded to the Convention in 2005.[4] As with most multilateral environmental agreements (MEA), the EU and the member states signed the Aarhus Convention as a mixed agreement. Nevertheless, unlike other MEA, the Aarhus Convention commits the EU to guarantee compliance not only within its Member States, but also within its own institutions, as they are by definition public authorities in the sense of the Convention, Art. 2(2) (d).[5] Upon signature of the Aarhus Convention, the EU made a statement underlining its commitment, declaring that '[its] institutions will apply the Convention…in the field covered by the Convention'.[6] In the post-Aarhus era, environmental NGOs gained better standing requirements for direct actions in environmental cases, at least when the EU court had to decide on the standing of national courts of the Member States (see section C.I.).

Already in 2003, two Directives concerning the first and second pillar of the Aarhus Convention were adopted to establish the legal framework for the transformation of the three pillars into European legislation: The Directive 2003/4/EC on public access to environmental information[7] and Directive 2003/35/EC on public participation[8]. The third pillar, though—access to justice—was not so easy to incorporate into the EU acquis. For years, environmental NGOs struggled to obtain direct access to EU courts in environmental matters.[9] The European Courts refused to reconsider its well-established Plaumann approach,[10]

2 When using the term EU, the former EC is meant if the reference relates to the European Community before the Treaty of Lisbon 2009.

3 *Wates*, JEEPL, 2 (2005), 2 (2).

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

5 *Rodenhoff*, RECIEL 11 (2002), 343 (343 f.); *Kravchenko*, CJIELP 18 (2007), 1 (4 ff.)

6 For the full text of the declaration see: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en> (last access 26 October 2017).

7 Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC [2003], of 28 January 2003, OJ L41/26.

8 Directive 2003/35/EC 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 [2003], of 25 June 2003 OJ L156/17; for a critical view on this Directive see *Mason*, GEP 10 (2010), 10 (22).

9 EGC, Case T-585/93 *Stichting Greenpeace Council/Commission* [1995] ECR II-2205; Case T-219/95 *R Marie-Thérèse Danielsson, Pierre Largenteau and Edwin Haoa/Commission of the European Communities* [1995] ECR II-3051; ECJ Case C-321/95 *P StichtingGreenpeace Council and Others/Commission* [1998] ECR I-1651; Case C-294/83 *Parti écologiste 'Les Verts'/European Parliament* [1986] ECR 1339.

10 ECJ, Case 25/62 *Plaumann & Co/Commission* [1963] ECR 95.

but stated that the Plaumann-test remained good law regardless of 'the nature, economic or otherwise, of those of the applicants' interests which are affected'.[11] After a long legislative quarrel about another Directive on access to justice,[12] the Regulation 1367/2006 (Aarhus Regulation[13]) finally adopted provisions of the Aarhus Convention related not only to European institutions, but also bodies, offices or agencies established by or based on the TEU.

These EU institutions need to adapt their internal procedures and practices to the provisions of the new Regulation. Article 1(1) Aarhus Regulation states that the 'objective of this Regulation is to contribute to the implementation of the obligations arising […] by laying down rules to apply the provisions of the Convention to Community institutions and bodies [...]'. Article 2(1) Aarhus Regulation defines an 'administrative act' as 'any measure of individual scope under environmental law'. As a central issue, Art. 10(1) Aarhus Regulation provides that NGOs that fulfil certain criteria are permitted to request an internal review to the EU institution or body that has adopted an administrative act under environmental law. Article 10(1) can be understood as implementing the obligations resulting from Art. 9(3) of the Aarhus Convention, which should have made obsolete the Plaumann formula for NGOs in environmental cases. Many welcomed the Aarhus Regulation as a substantial milestone in the pursuit of better access to justice at the EU level.[14] But as the case law in section C II will show, the internal review procedure of the Aarhus Regulation cannot be seen as a great triumph in changing the difficulty of environmental NGOs in obtaining better access to justice. In many instances, the controversial acts by EU institutions do not—at least as far as the CJEU is concerned—constitute measures for which internal review is foreseen.[15] It is thus not surprising to see that the Aarhus Compliance Committee concluded that, if the rigid jurisprudence of the EU courts continues, the EU will fail to comply with Art. 9(3) of the Aarhus Convention.[16]

## II. The influence of international law on the EU acquis

For a better comprehension of the upcoming case law and the dispute over the possible effects of the Aarhus Convention on the EU legal order, some context on the influence of international law is necessary.[17] Traditionally, international law does not regulate the question of the legal status of an international agreement within the internal legal order of a contracting party. This principle also applies to the EU and it is thus up to EU law to define how an international agreement gains legal relevance in EU law.

The general framework concerning the relationship between international treaties to which the EU is a contracting party and European law is governed by the TEU[18] and the

11 See on the topic also *Schoukens*, Utrecht Journal of International and European Law 31 (2015), 46 (48); *Gérard*, JEL 10 (1998), 331 (337 ff.); *Torrens*, RECIEL 8 (1999), 336 (339); *Poncelet*, JEL 24 (2012), 287 (296 ff.).

12 See details on the legislative procedure: Procedure 2003/0246/COD.

13 Regulation (EC) 1367/2006 of 25 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006]OJ L264/13.

14 *Crossen/Niessen*, RECIEL 16 (2007), 332 (339 f.)

15 *Jans/Harryvan*, Rev Eur & Ad L 3 (2010), 53 (64 f.)

16 Communication ACCC/C/2008/32 [Part I] (European Union), para 93.

17 For a more detailed account on the matter see: *Tietje*, in: Wouters/Nollkaemper/de Wet (eds), The Europeanisation of International Law – The Status of International Law in the EU and its Member States, 55-69.

18 Treaty on European Union [2012] OJ C326.

Treaty on the Functioning of the European Union (TFEU).[19] Article 47 TEU provides the EU with international legal personality, and thus the ability to become a party to an international agreement governed by international law as defined in the Vienna Convention on the Law of Treaties[20] and the Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations.[21] Article 216(2) TFEU states that 'agreements concluded by the Union are binding upon the institutions of the Union and on its Member States'. However, the status of an international treaty as an integral part of Community law does not say anything about its hierarchical status within the EU acquis. International treaties to which the EU has acceded must comply with the constitutional framework of the EU, Art. 218(11) TFEU. Accordingly, if the EU acceded to an international agreement, the provisions of that specific international contract generally prevail over acts laid down by institutions of the EU. In simplified terms, international law is higher-ranking than EU secondary law and EU primary law is superior to international law.[22] This means that the CJEU, at least from an international law perspective, does not have the power to void a treaty that is in conflict with EU law.[23] At the same time the CJEU may very well declare the act of an EU institution invalid.

In its past jurisdiction, the ECJ has established a wide-ranging jurisprudence on what effect is to be given to provisions of international agreements on EU law. Individuals may directly rely on provisions of an international agreement to which the EU is a contracting party, if the conditions for 'direct effect' or 'direct applicability' are fulfilled.[24] In this context, the ECJ usually applies a two-tier assessment. It first asks whether the respective international treaty is of such a nature that it might create directly effective rights and obligations for individuals. If this can be answered positively, the ECJ goes on to determine whether the specific provision is sufficiently 'legally perfect' to accord individual rights. A provision, with regard to the wording, purpose and nature of the agreement, is directly applicable if that provision 'contains a clear, precise and unconditional obligation, which is not subject, in its implementation or effects, to the adoption of any subsequent measure'.[25] It should be noted, though, that the ECJ established this type of assessment by referring to preliminary rulings (Art. 267 TFEU). Hence, the ECJ only dealt with the possibility of invoking provisions of an international treaty before the judge of a Member State.

Furthermore, the ECJ clarified that because international treaty law is an integral part of European law, there is an obligation for national courts 'when called upon to apply national rules' related to a respective international agreement 'to do so, as far as possible, in the light of the wording and purpose' of the applicable provisions of an agreement.[26] If the ECJ ap-

19 Treaty on the Functioning of the European Union [2012] OJ C326.

20 1155 UNTS 331, No. 18232.

21 Not yet in force. Text is available on the internet: <http://legal.un.org/ilc/texts/instruments/english/conventions/9_1_1961.pdf> (last access 26 October 2017).

22 *Peters*, GYIL 40 (1997), 9 (35 f.)

23 *Tietje*, in: Wouters/Nollkaemper/de Wet (eds), The Europeanisation of International Law – The Status of International Law in the EU and its Member States, 55 (57).

24 On the problems of confusing terminology in this regard see *Peters*, GYIL 40 (1997), 9 (42 ff.); for the link between environment and human rights see *Morgera*, RECIEL 14 (2005), 138 (139).

25 See ECJ, Case 12/86 *Meryem Demirel/Stadt Schwäbisch Gmünd* [1987] ECR 3719, para 14; Case C-162/96 *A. Racke GmbH & Co./Hauptzollamt Mainz* [1998] ECR I-3655, para 31; Case C-300/98 *Parfums Christian Dior SA/TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk/Wilhelm Layher GmbH & Co. KG and Layher BV* [2000] ECR I-11307, para 42.

26 ECJ, Case C-53/96 *Hermès International/FHT Marketing Choice BV* [1998] ECR I-3603, para 28 and *Tietje*, in: Wouters/Nollkaemper/de Wet (eds), The Europeanisation of International Law – The Status of International Law in the EU and its Member States, 55 (59).

plies this principle of interpretation in conformity with international law to the Member States, then it must also apply it to secondary EU law relating to an international treaty. The ECJ stated explicitly that 'the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements'.[27] In order to answer the question of whether provisions from the Aarhus Convention have a direct effect or need to be at least interpreted in the light of the international agreement, it would be beneficiary to look at some case law of the ECJ on other international agreements and their effect on European and national law.

## III. Previous jurisdiction of the ECJ on international treaties

First, it is important to clarify that the ECJ in its permanent jurisprudence denies direct effect of WTO law before national courts or the courts of the Community.[28] It ruled that individuals could only appeal provisions that conferred rights before courts if the international treaty at issue can be seen as 'capable of having direct effect and if the provision at issue was sufficiently precise and unconditional'.[29] The main reason for this argumentation and the refusal of direct effect was of course to maintain political flexibility. Nonetheless, the Court also established two exemptions where individuals could actually rely on provisions of WTO law to question provisions of EU secondary law. First, where the EU act at issue referred explicitly to specific provisions of WTO law (the *Fediol* exception[30]) and second where the EU anticipated the implementation of a specific requirement assumed under WTO law (the *Nakajima* exception[31]).

In its *Biotechnology* judgement,[32] the ECJ started to further differentiate between situations where an international treaty created directly effective individual rights and where it could be used more broadly by courts to assess the EU's compliance. An example for the first interpretation is the application of provisions of the Rio Convention on Biological Diversity.[33] Unlike typical WTO law, it is not based on 'reciprocal and mutually advantageous arrangements'.[34] Rather, it works more like a human rights treaty, since it primarily establishes obligations of one treaty party towards its citizens.[35] It therefore does not preclude review by the courts of compliance with the obligations incumbent on the Community as a party to that agreement.[36] An example for the latter reading is the case *Intertanko*,[37] which

27 ECJ, Case C-61/94 *Commission of the EC/Federal Republic of Germany* [1996] ECR I-3989, para 52.

28 See only ECJ, Case C-53/96, Case C-76/00 *Petrotub SA and Republica SA/Council of the European Union* [2003] ECR I-79; Case C-93/02 *Biret International SA/Council of the European Union* [2003] ECR I-10497; Case C-377/02 *Léon Van Parys NV/Belgisch Interventie- en Restitutiebureau (BIRB)* [2005] ECR I-1465.

29 ECJ, Case C-149/96 *Portuguese Republic/Council of the European Union* [1999] ECR I-8425.

30 ECJ, Case C-70/87 *Fédération de l'industrie de l'huilerie de la CEE (Fediol)/Commission of the European Communities* [1989] ECR 1781.

31 ECJ, Case C-69/89 *Nakajima All Precision Co. Ltd/Council of the European Communities* [1991] ECR I – 2072.

32 ECJ, Case C-69/89 *Kingdom of the Netherlands/European Parliament and Council of the European Union* [2001] ECR I-7149.

33 The Rio de Janeiro Convention on Biological Diversity; Council Decision 93/626/EEC of 25 October 1993 concerning the conclusion of the Convention on Biological Diversity [1993] OJ L309/1.

34 ECJ, Case C-149/96 *Portugal/Council* [1999] ECR I-8395, para 42-46.

35 *Ankersmit/Pirker*, Review of EU legislation under EU international agreements revisited: Aarhus receives another blow, 17 November 2015.

36 ECJ, Case C-377/98, *Netherlands/Parliament and Council*, [2001] ECR I-7149, para 54.

dealt with the International Association of Independent Tanker Owners. In that case, the ECJ again applied the firm reasoning of WTO case law to an international agreement—namely, the United Nations Convention on the Law of the Sea. The Court specified that the Convention does not 'in principle' grant independent rights to individuals and ruled that the 'nature and broad logic' of the Convention prohibited the Court from assessing the legality of EU acts in the sense of its provisions.[38]

A further fine-tuning for the Courts 'direct effect' application was reached in the judgement on *Air Transport Association of America*.[39] In that case, the Court allowed review of EU legislation in light of an international agreement, since the treaty did not specifically preclude this and because the agreement created directly and immediately applicable rules, which conferred rights and freedoms to individuals. So the ECJ examines whether an agreement does not as a whole preclude any effect as a benchmark for review in the EU legal order and whether the provision to be applied regulates individuals in a sufficiently direct way.

Following this development, it seems only logical that the ECJ would most likely give direct effect or at least interpret national and European legislation and acts in the light of the following Aarhus provisions. While Art. 4(1) Aarhus Convention states that 'public authorities in response to a request for environmental information, make such information available to the public', Art. 9(3) Aarhus Convention specifies that 'members of the public have access to administrative or judicial procedures to challenge acts and omissions'.

## C. Selected case law on the effect of the Aarhus Convention on Member States

### I. ECJ Judgements concerning NGO's request for access to court in Member States

#### *1. Case C-240/09 'Slovak Brown Bear'*

This case concerned the request of a Slovak NGO called Lesoochranárske zoskupenie VLK ('LZ') to participate as a party to a number of administrative proceedings concerning the protection of nature and the environment. At the beginning of 2008, LZ was informed of a number of pending administrative proceedings brought by various hunting associations regarding the grant of derogations to the system of protection for species such as the brown bear.[40] LZs attempts of becoming a party to the administrative proceedings, for that purpose relying directly on the Aarhus Convention, were rejected by the national Ministry.[41] Furthermore, the Ministry stated that the Aarhus Convention was an international treaty which needed to be implemented in national law before it could take effect.[42] LZ then brought an appeal against the decisions of the Ministry, arguing that the provisions in Art. 9(3) of the Aarhus Convention had direct effect ('self-executing-effect'). The Slovak Supreme Court asked the ECJ for a preliminary ruling.

[37] ECJ Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others/Secretary of State for Transport* [2008] ECR I-4057.

[38] *Ibid.*, paras 64-65.

[39] ECJ, Case C-366/10 *Air Transport Association of America and Others/Secretary of State for Energy and Climate Change* [2011] ECR I-13755.

[40] ECJ, Case C-240/09 *Lesoochranárske zoskupenie VLK/Ministerstvo zivotného prostredia Slovenskej republiky* [2011] ECR I-1285, para 20.

[41] *Ibid.*, para 21.

[42] *Ibid.*, Opinion of AG [Sharpston], para 23.

First, the Court considered if it had the jurisdiction to interpret the provisions of Art. 9(3) Aarhus Convention. It stated that the Aarhus Convention was signed by the EU and the Member States based on joint competence. It follows that it is within the Courts competence to define the obligations of the Member States concerning the interpretation of the Aarhus Convention on the one hand and the obligations which the Community has assumed on the other hand.[43] 'Where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law, [it is important], in order to forestall future differences of interpretation, that the provision should be interpreted uniformly [...]'.[44] In the next step, the CJEU determined whether, in the field covered by Art. 9(3) of the Aarhus Convention, the EU has exercised its powers and adopted provisions to implement the obligations, which derive from it. If not, Art. 9(3) of the Aarhus Convention would be assigned to the jurisdiction of the national legislators of the Member States.[45] The Court argued that in the field of environmental protection, the EU has explicit competences (now Art. 191 TFEU).[46] The Court concluded that the dispute falls within the scope of EU law.[47] In this case, the affected species of the granted derogations, the brown bear, is mentioned in Annex IV(a) to Directive 92/43/EEC (Habitats Directive).[48] Under Art. 12 thereof, it is subject to a system of strict protection from which derogations may be granted only under the conditions laid down in Art. 16 of the Habitats Directive. After the ECJ affirmed both, the interpretation sovereignty of the Aarhus Convention as mixed international agreement and its jurisdiction to interpret Art. 9(3) Aarhus Convention, despite the lack of a Community act, he devoted himself to the actual question if Art. 9(3) Aarhus Convention has a direct effect. The Court denied the direct applicability of Art. 9(3) of the Aarhus Convention because 'it does not contain any clear and precise obligation capable of directly regulating the legal position of individuals'.[49] Rather, it requires an adoption of a subsequent measure of some kind. The ECJ then gave the national court orders on the interpretation of its national procedural law to comply with the Aarhus Convention. Accordingly, 'it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Art. 9(3) of the Aarhus Convention'.[50]

The essential statement of the *Slovak Brown Bear* decision was not the finding that Art. 9(3) Aarhus Convention does not have direct effect. Rather, the remarks concerning how national law should be interpreted in the light of Art. 9(3) Aarhus Convention form the very core of the *Slovak Brown Bear* decision, which is apparent in the fact that they find themselves in the operative part of the decision. Additionally, the statement that the purpose of the generally formulated Art. 9(3) Aarhus Convention lies in ensuring effective environmental protection was decisive and formative. From this basic assumption, as well as the combination of Art. 9(3) Aarhus Convention and the principles of effectiveness and equiva-

43 *Ibid.*, para 31.
44 *Ibid.*, para 42.
45 *Ibid.*, paras 32-34.
46 *Ibid.*, para 35.
47 *Ibid.*, paras 37-38.
48 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L206/7.
49 ECJ, Case C-240/09, *Lesoochranárske zoskupenie VLK/Ministerstvo zivotného prostredia Slovenskej republiky* [2011] ECR I-1285, paras 44-45.
50 *Ibid.*, para 51.

lence, the ECJ gives extensive legal specifications to the Member States on how to embellish the structure of national law concerning the environmental protection. The Court clarified that it did not tolerate restrictions of the 'wide access to justice' as well as actions restricting the possibility to challenge legal errors.

### *2. Case-115/09 'Trianel'*

Trianel, the intervener, intended to build a coal-fired power station in Lünen, Germany.[51] Within eight kilometres of the project site, there are designated areas per definition of the Habitats Directive, which were also officially declared conservation zones under national German law. After the environmental impact assessment, the German authority issued a preliminary decision, stating that there were no legal concerns in relation to the project site, and a partial permit for the project was issued. The environmental NGO BUND,[52] recognised under Paragraph 3 of the German Environmental Appeals Act, initiated proceedings against the German authorities. The proceedings aimed both at the withdrawal of the preliminary decision and at the permit. *Trianel* claims that these decisions contain formal and substantive defects (project infringes, violation of the protective and precautionary principles as well as violations of the German nature protection laws, which implement the Habitats Directive, especially Art. 6 thereof). The local Administrative Court referred the case to the ECJ and asked for a preliminary ruling on the interpretation of Art. 10a of the Public Participation Directive 85/337/EEC,[53] i.e. the EIA-Directive 2003/35/EC.[54] To obtain *locus standi* in German administrative law, the impairment of a substantive individual right is essential, following the German Environmental Appeals Act as well as the more general German Code of Administrative Court Procedure.

First, the Court underlines that the first paragraph of Art. 10a of Directive 85/337 provides that the decisions, acts or omissions referred to in that article must be actionable before a court of law through a review procedure 'to challenge [their] substantive or procedural legality'[55]. The Court further notes that it does not matter if the admissibility of an action may be conditional on a 'sufficient interest in bringing the action'[56] or on the applicant alleging 'the impairment of a right'.[57] This implementation as well as the definition of a sufficient interest and impairment of a right is left to the national legislation. With the objective of giving the public 'wide access to justice'[58] in applying the Aarhus Convention to environmental NGOs, the ECJ established that national statutes, by setting up additional prerequisites, obstruct access to justice as guaranteed by EU law and the Aarhus Convention.[59] The concept that a case can only be brought to court if individual rights explicitly granted

[51] ECJ, Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfahlen eV/Bezirksregierung Arnsberg* [2011] ECR 3715 f.; Case C-115/09, Opinion of Adv. Gen. Sharpston, p. 3683 f.

[52] The Nordrhein-Westfalen branch of Friends of the Earth Germany.

[53] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L175/40.

[54] Council Directive 2003/35/EC of 26 May 2003.

[55] ECJ Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfahlen eV/Bezirksregierung Arnsberg* [2011] ECR 3715 f., para 37.

[56] *Ibid.*, para 38.

[57] *Ibid.*, para 38.

[58] *Ibid.*, para 39.

[59] *Ibid.*, paras 41, 42.

by legislation are at stake is a major principle of German procedural law. However, in the field of environmental conservation, legislation often does not confer rights to individuals but provides for nature protection as such or for the public interest.[60] The Court then states that 'although it is the right of the Member State (…) what rights can give rise when infringed, but they cannot deprive environmental protection organisations which fulfil the conditions laid down in Directive 85/337 of the opportunity of playing the role granted to them both by Directive 85/337 and by the Aarhus Convention.'[61]

The key question was whether the German obligation of an impairment of individual rights valid in the environmental context is compatible with international and EU law, in particular with Art. 9(3) Aarhus Convention and Art. 10a of Directive 85/337. The Court emphasises the importance of the Aarhus convention. The special role, accorded to environmental NGOs under the Convention and the Directives strengthens the quality and the legitimacy of decisions taken by the authorities and stimulates the machinery for preventing environmental damage. As a consequence of the judgment, Germany had to change its Environmental Appeals Act accordingly. Until this was done, the ECJ declared the Directive on Public Participation directly applicable. After two leading cases of the Court (*Slovac Brown Bear* and *Trianel*) confirmed the importance of the accessibility of courts in the environmental law, especially for environmental protection organisations, the German legislators modified both paragraphs so that they are now in conformity with the *Aarhus*.

## II. CJEU Judgements concerning NGO´s requests towards EU institutions

### *1. 'Joined Cases' C-401/12 P to C-403/12 P and C-404/12 P to C-405/12 P*

In the joined cases C-401/12 P to C-403/12 P,[62] the NGO applicants Vereniging Milieudefensie and Pesticide Action Network Europe submitted a request to the Commission for internal review under Art. 10 of Aarhus Regulation. The NGOs specifically demanded an internal review of the decision of the Commission to grant the Netherlands an exemption under Directive 2008/50 on ambient air quality. The Commission rejected the NGO's request as inadmissible on the ground that its decision was not a measure of individual scope and that it could therefore not be considered an 'administrative act' within the meaning of Art. 2(1) (g) of the Aarhus Regulation. Only an administrative act could be the subject of an internal review procedure provided under Art. 10(1) Aarhus Regulation.

In joined cases C-404/12 P to C-405/12 P,[63] the Commission previously accepted that the Netherlands postponed the deadline for attaining annual limit values for nitrogen dioxide in certain zones as laid down in Regulation 149/2008.[64] In 2008, the NGO Stichting Natuur en Milieu requested an internal review of the Regulation 149/2008 itself. The Eu-

60 ERA 'Module 3: Environmental Impact Assessment (EIA) Directive – EIA procedure, Public Participation' <http://ec.europa.eu/environment/legal/law/2/module_3_11.htm> (last access 26 October 2017).

61 Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfahlen eV/Bezirksregierung Arnsberg* [2011] ECR 3715 f., para 44.

62 ECJ, Joined Cases C-401/12 P to C-403/12 P *Council of the European Union and Others/Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* ECLI:EU:C:2015:4.

63 ECJ, oined Cases C-404/12 P to C-405/12 P *Council of the European Union and European Commission/Stichting Natuur en Milieu and Pesticide Action Network Europe* [2011] ECR I-13755.

64 Commission Regulation (EC) 149/2008 of 29 January 2008 amending Regulation (EC) No 396/2005 of the European Parliament and of the Council by establishing Annexes II, III and IV setting maximum residue levels for products covered by Annex I thereto [2008] OJ L58/1.

ropean Commission rejected the requests for an internal review with the same reasoning as in C-401/12 P to C-403/12 P.

In all cases, the General Court annulled the Commission's decision and determined at the beginning that 'pursuant to Art. 300(7) EC,[65] international agreements concluded by the European Union bind its institutions and consequently prevail over the acts laid down by those institutions.'[66] The General Court ruled that an internal review in both cases was possible, following the so called *Nakajima* exception.[67] It determined that 'an internal review procedure which covered only measures of individual scope would be very limited (which) is not justified'.[68] Article 10(1) of the Aarhus Regulation has to be applied in the light of Art. 9(3) of the Aarhus Convention. This finding was based on the fact that Art. 10(1) of the Regulation was an implementation of Art. 9(3) of the Convention and expressly referred to the latter.[69] 'In consequence, in so far as Art. 10(1) (...) limits the concept of 'acts' in Art. 9(3) of the Aarhus Convention to 'administrative act[s]" defined (...) as "measure[s] of individual scope", it is not compatible with Art. 9(3) of the Aarhus Convention'.[70] For the second case, it stated that the adoption of Regulation 149/2008 fell within the scope of the Commission's regulatory activities and could not be considered 'legislative' activity, which would be excluded from Art. 9(3) of the Aarhus Convention.[71]

All things considered, the reasoning of the General Court follows WTO case law (Cases C-70/87 and C-69/89). The General Court declares the partial incompatibility of the Regulation, which opens the way for a review of legality. For the very first time, EU judges were willing to assess the legality of EU rules on access to justice at the European level in the light of the third pillar of the Aarhus Convention. By considering the impact of Art. 9(3) of the Aarhus Convention on EU rules, it seemed as if the General Court began to move toward more accountability in environmental matters.[72] Nevertheless, the Commission, the Council and the Parliament appealed the ruling, claiming that the General Court erred in holding that Art. 9(3) of the Aarhus Convention might be relied on in order to assess the compliance of Art. 10(1) of Aarhus Convention with that provision.

The CJEU annulled the judgments of the General Court in its decisions for both of the *Joined Cases*. According to its own judicature, the CJEU stressed that provisions of an international agreement to which the EU is a party need 'to be unconditional and sufficiently precise' to be relied upon in support of an action for annulment of an act of secondary EU law.[73] It held that Art. 9(3) of the Aarhus Convention does 'not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals'.[74] 'Since only members of the public who "meet the criteria, if any, laid down in (...)

65 Now art 216(2) TFEU.

66 ECJ, Case T-338/08 *Stichting Natuur en Milieu and Pesticide Action Network Europe/European Commission* [2012] ECR II-0000, para 51.

67 *Ibid.* and ECJ Case T-396/09 *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht/European Commission* [2012] ECR II-0000, paras 54-57.

68 ECJ, Case T-338/08, *Stichting Natuur en Milieu and Pesticide Action Network Europe/European Commission* [2012] ECR II-0000, para 76.

69 Case T-396/09, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht/European Commission* [2012] ECR II-0000, paras 54, 58.

70 *Ibid.*, para 69.

71 Case T-338/08, *Stichting Natuur en Milieu and Pesticide Action Network Europe/European Commission* [2012] ECR II-0000, paras 68-70.

72 *Schoukens*, Utrecht Journal of International and European Law 31 (2015), 46 (54).

73 ECJ, Cases C-401/12 P to C-403/12 P, C*ouncil of the European Union and Others/Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* ECLI:EU:C:2015:4, para 54.

74 *Ibid.*, para 55.

national law" are entitled to exercise the rights provided for in Art. 9(3)'.[75] This required the adoption of a subsequent measure and was not, therefore, unconditional and sufficiently precise.[76] The CJEU rejected the application of the *Fediol* and the *Nakajima* cases, holding that 'those two exceptions were justified solely by the particularities of the agreements [WTO and GATT] that led to their application.'[77] Article 10(1) of Aarhus Regulation 'neither made direct reference to specific provisions of the Aarhus Convention nor (conferred rights on individuals to rely on Art. 9(3)).'[78] In addition, Art. 10(1) did not implement specific obligations stemming from Art. 9(3) of the 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".'[79] Finally, the Court ruled that by adopting the Aarhus Regulation, the EU did not intend to implement obligations that derive from Art. 9(3) of the Aarhus Convention.[80] It further stated that 'with respect to national administrative or judicial procedures, which as EU law now stands, fall primarily within the scope of member State law',[81] and refers to the *Slovak Brown Bear* case.[82]

### *2. Case C-612/13 P 'ClientEarth'*

Case C-612/13 P dealt with the request by the NGO ClientEarth to receive access to studies relating to the conformity of national legislation with the EU environmental acquis in several Member States. The Commission had only granted partial access to the documents and stated that it needed to withhold information as its release would weaken its ability to monitor and enforce EU environmental law through infringement proceedings (Art. 258 TFEU). The Commission claimed that this information fell within the exception of Art. 4(2) third indent of Regulation 1049/2001 (Public Access to Documents).[83] That provision allows the Commission to refuse access to a document 'where disclosure would undermine the protection of the purpose of inspections, investigations, and audits, unless there is an overriding public interest in disclosure.' ClientEarth argued that the Commission could not rely on that exception because it was incompatible with Art. 4(4) (c) Aarhus Convention: 'a request for environmental information may be refused if the disclosure would adversely affect the course of justice (…) or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature'.

After mentioning the case law on the requirements for challenging the validity of EU acts under EU international agreements mainly the *Joined Cases* from January 2015,[84] the CJEU applied the requirements to the case, and in particular Art. 4(4) (c) of the Aarhus Convention. The Court found Art. 4(4) (c) not sufficiently precise and unconditional. It

[75] *Ibid.*, para 55.
[76] *Ibid.*, paras 54-55.
[77] *Ibid.*, para 57.
[78] *Ibid.*, para 58.
[79] *Ibid.*, para 59.
[80] *Ibid.*, paras 60-61.
[81] *Ibid.*, para 60.
[82] ECJ, Case C-240/09, *Lesoochranárske zoskupenie VLK/Ministerstvo zivotného prostredia Slovenskej republiky* [2011] ECR I-1285, paras 41,47.
[83] Regulation 1049/2001/EC of 30 May 2001 regarding public access to European Parliament, Council and Commission documents [2001] OJ L145/43.
[84] ECJ, Cases C-401/12 P to C-403/12 P and C-404/12 P to C-405/12 P, C*ouncil of the European Union and Others/Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* ECLI:EU:C:2015:4.

then reasoned that *Aarhus* could not be relied upon, firstly, because 'the reference, in Art. 4(1) of the Aarhus Convention, to national legislation indicates that that convention was obviously designed with the national legal orders in mind, and not the specific legal features of institutions of regional economic integration, such as the European Union. This is even true where those institutions can sign and accede to the Aarhus Convention, under Art. 17 and 19 thereof.'[85] Secondly, it pointed out the context in which *Aarhus* was concluded by the EU. It referred to the EU's statement which stated that 'the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention'[86]. Thirdly, and more specifically to the text of Art. 4(4) (c) of the Aarhus Convention, it stated that 'neither the reference, in Art. 4(4) (c), to enquiries 'of a criminal or disciplinary nature', nor the obligation laid down in the second paragraph of Art. 4(4) to interpret in a restrictive way required release of the documents. 'A fortiori, a prohibition on giving to the concept of "enquiry" a meaning which takes account of the specific features of the Union, and in particular the task incumbent on the Commission to investigate any failures of Member States to fulfil their obligations which might adversely affect the correct application of the Treaties and the EU rules adopted pursuant to the Treaties, cannot be inferred from those provisions.'[87]

The first controversial point was reading the reference to national legislation in Art. 4(1) of the Aarhus Convention as indicating that the Convention's terms should not apply to EU legislation.[88] But apart from this very formal argument, the crucial point was whether the Aarhus Regulation was in compliance with the Aarhus Convention since infringement proceedings are not mentioned within the exception of Art. 4(4) (c) of the Aarhus Convention. It almost seems as if the CJEU is only incidentally protecting Regulation 1049/2001 from review under the Aarhus Convention's Art. 4(4) (c)[89]. Infringement proceedings are aimed at simultaneously policing compliance with EU law by Member States and more generally as an instrument for securing performance of EU policies. But aside from this, the rejection of direct effect of Art. 4(4) Aarhus Convention follows in the footsteps of the *Joined Cases* establishing case law which is not *Aarhus* friendly.

## D. Conclusion

The initial question—whether EU secondary legislation like the Aarhus Regulation and decisions by EU institutionsmay be reviewed against the criteria set down in Art. 9(3) and Art. 4(1) Aarhus Convention—must be answered in the affirmative, despite the recent rulings by the CJEU.

First and foremost, the hierarchical level of international law favors this view. The Aarhus Convention concluded by the EU is binding upon the institutions of the Union and on its Member States, Art. 216(2) TFEU. Within the multi-level-governance system, international law, namely international agreements to which the EU is a contracting party, have far-reaching effects on European law. Pursuant to the established case law of the ECJ and

[85] ECJ, Case C-612/13 P *ClientEarth/European Commission* ECLI:EU:C:2015:486, para 40.
[86] *Ibid.*, para 41.
[87] *Ibid.*, para 42.
[88] *Mason*, GEP 10 (2010), 10 (21 ff.)
[89] *Ankersmit/Pirker*, Review of EU legislation under EU international agreements revisited: Aarhus receives another blow, 17 November 2015.

the CJEU, the EU courts may only review the legality of a regulation in the light of an international agreement when the nature and the broad logic of the agreement does not preclude such an assessment and where, in addition, the provisions of the treaty appear, as regards their consent, to be unconditional and sufficiently precise (direct effect). At first it seemed to be only consequent to deny direct effect to Art. 9(3) of the Aarhus Convention like in *Slovak Brown Bear* decision. Still, the decision from the Grand Chamber of the CJEU stated that, although drafted in broad terms, the provision aimed to ensure effective environmental protection at the national level. This begs the question of why a similar rationale has not prevailed in a case concerning internal review at the EU level. There is no visible reason why the CJEU is progressive at the national level and conservative at the EU level except to guard the decisions of EU institutions. This shows that the Court apparently believes that international environmental law is still, at least in part, Soft Law, and not of a comprehensive constitutional nature in the interest of the international community. For international environmental treaties like the Aarhus Convention or the Biodiversity Convention which are not based on mutually advantageous arrangements like WTO, this selective view of the Court can make or, in the recent case law, break the effectiveness of international environmental law.

The concept of direct effect could be a strong instrument that the CJEU can use to overcome the line of the European legal order and enhance the rights of individuals or NGOs when European secondary law falls short. Even though the provisions Art. 4(1) and Art. 9(3) of the Aarhus Convention do not contain clear and precise obligations capable of directly regulating the legal position of individuals but rather require an adoption of a subsequent measure. The denial of direct effect of these provisions is questionable. At the least, the CJEU´s rejection of the *Fediol* and the *Nakajima* exceptions to the criteria of direct effect do not seem reasonable. The CJEU ruled that those two exceptions were justified solely by the particularities of the agreements (WTO and GATT) that led to their application. At first glance, the CJEU makes a reasonable choice in opting for a restrictive application of the *Fediol* and *Nakajima* exceptions. On the other hand, when an EU act like the Aarhus Regulation, in its Recital 18, refers directly to Art. 9(3) of the Aarhus Convention stating that 'provisions on access to justice should be consistent with the Treaty', then the application of the *Nakajima* exception does not seem too far-fetched. However, it remains unclear whether the Court's take remains convincing when considering the CJEU's strict reading of the exceptions is not compensated by a more lenient approach towards direct effect as a precondition for international law. Then major differences in the level of judicial protection exist for individuals in cases which relate to the EU's international obligations.

Even if the provisions in question cannot be qualified for direct effect, this does not release the CJEU from interpreting European secondary law in the light of the Aarhus Convention. This is especially true if the implementing legislation narrows access to courts and access to information by putting up stricter criteria than *Aarhus*, as done in Art. 10(1) Aarhus Regulation and in the exception for access to documents in Art. 4(2) of Public Access to Documents Regulation. Although in the cases *Slovac Brown Bear* and *Trianel* the Court argued that, by setting up additional national requirements to obtain standing for a NGO in court, suitable access to justice as assured by EU law and the Aarhus Convention is violated, it nevertheless seemed oblivious as to whether European secondary law adds additional requirements.

The CJEU´s weak grounds in the *Joined Cases* decisions for the strict requirement of an 'administrative act' in Art. 10(1) Aarhus Regulation were as follows: by adopting the Aarhus Regulation, the EU did not intended to implement obligations that derive from Art. 9(3) of the Aarhus Convention. The main question is, if the Aarhus Regulation does not imple-

ment the Aarhus Convention, what then does it do?[90] The Court started its line of argumentation by explaining that the Aarhus Convention is designed for member states of the Aarhus Convention and not for the EU. It refers to the *Slovak Brown Bear* case, completely ignoring Art. 216(2) TFEU and Art. 1(1) Aarhus Regulation. Clearly, the EU intended (at least in 2006) to implement Art. 9(3) Aarhus Convention when drafting the incompatible Art. 10(1) Aarhus Regulation. Consequently, it is for the CJEU to review the legality of the measure in question in the light of the obligations laid down in the Aarhus Convention. Currently, the Aarhus Regulation offers only a restricted scope, namely by limiting the access to an internal review procedure only where the EU acts being challenged are 'measures of individual scope'. As a result of these discretions accorded to the EU institutions, the Aarhus Regulation is currently only applicable to very few decisions adopted in environmental matters. The CJEU missed a unique opportunity to fill the gaps in the EU system of judicial protection in environmental cases. It is very likely that the weaknesses of the current EU implementing rules as to access to justice in environmental matters will persevere in the next years.

Apparently, the CJEU plans to defer the possibility of challenging decisions of the European institutions back to the Member States and what legal protection can be afforded by national courts. This conclusion considers the context of the latest study on the implementation of Art. 9(3) and (4) of the Aarhus Convention—a daring venture, as the study describes national implementation as 'diverging, random and inconsistent'.[91] During national proceedings, the CJEU might be involved. But preliminary proceedings often last several years during which, in order to safeguard the effectiveness of the legality review before the CJEU, the national proceedings are suspended. [92] It remains highly uncertain whether national proceedings can, in cases where national implementing measures are present, serve as a useful and practical backup option for the CJEU.[93] The strategy of the CJEU might just be that the delays and financial burden involved with proceedings that start at the national courts make them disadvantageous and therefore seldom.

When interpreting 4(2) of the third indent of Regulation 1049/2001 in light of Art. 4(4)(c) Aarhus Convention in the *ClientEarth* judgement, the CJEU ignored the general rule that exceptions to a rule (here the right to access public documents) are to be interpreted in a restrictive manner. The second paragraph of Art. 4(4) of the Aarhus Conventions specifically states this narrow rule of interpretation as well as Art. 6(1) of the EU Aarhus Regulation, which refers to the provision that was in question (Art. 4 of Regulation 1049/2001). They all claim that 'the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.' The CJEU then again used the formality that Art. 4(1) of the Aarhus Convention refers specifically to the framework of national legislation and not to the specific legal features of the EU. However, due to the historic development of international treaties and the special nature of the EU, international

[90] To the point: *Pirker*, Cases C-401 to 403/12 and C-404 to 405/12: No review of legality in light of the Aarhus Convention, European Law Blog, 29 January 2015.

[91] *Darpö*, Effective Justice? Synthesis Report of the Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union, 2013, available on the internet: <http://ec.europa.eu/environment/aarhus/access_studies.htm> (last access 26 October 2017).

[92] *Wennerås*, The Enforcement of EC Environmental Law, 213.

[93] *Schoukens*, Access to Justice in Environmental Matters on the EU Level After the Judgements of the General Court of 14 June 2012: Between Hope and Denial, Nordic Envtl LJ 2014, 7, available on the internet: <http://nordiskmiljoratt.se/haften/NMT%252c%2022%20aug%20(2).pdf> (last access 26 October 2017).

agreements will often speak of their member 'states' and then of 'national' legislation and not include an extra sentence so the EU is reminded of their obligation.

## E. Outlook

The non-application of direct effect and the denial of the *Fediol* and *Nakajima* exceptions shield the European legal order from international environmental law. The practice of when direct effect of international law is applied by the CJEU exposes how the Court plays a critical political function at the intersection of legal orders. Accordingly, the CJEU might indeed be criticised for not taking into account the official aims of the EU to contribute to the strict observance and development of international law (Art. 3(5) TEU). Altogether, the reasons why decisions by EU institutions and secondary EU legislation are not measured against the benchmark of the Aarhus Convention are protective, obvious and frankly a confession that the CJEU favours the EU over the Member States. While the Court is not hesitant to enforce strict requirements on the Member States whenever asked to interpret the Aarhus Convention, EU institutions are let off easy with dubious reasons. The unjustified lenience towards EU institutions might easily lead to less engagement of the EU legal order with international law and therefore a weakened influence of international environmental law. Despite this negative outlook, the recent CJEU decisions together with a future non-compliance finding by the Aarhus Compliance Committee might serve as a wakeup call for the EU legislator.

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