
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?

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*Progress is impossible without change, and those who
cannot change their minds cannot change anything
(George Bernard Shaw)*

Abstract

It is a well-known fact of life that public interest litigation before the EU courts is rendered virtually impossible due to the strict application of the *Plaumann*-doctrine. However, in the wake of the ratification of the Aarhus Convention by the EU in 2005, it was hoped that the implementation of Article 9(3) of the Aarhus Convention would usher in an era of wider access to justice in environmental matters. This expectation has been belied. It soon emerged that, even with the adoption of Regulation No. 1367/2006, which specifically aimed to implement Article 9(3) of the Aarhus Convention for EU institutions by enabling environmental NGOs to file a request for internal review of EU decisions in relation to the environment, nothing has changed on the ground. In fact, it turned out the internal review procedure was applied so restrictively that almost none of the requests that were filed by the environmental NGOs during the past years were treated on their merits. Recently, the rigid application of the admissibility requirements laid down by Regulation No. 1367/2006 was debunked by the General Court in its recent rulings of 14 June 2012. Whilst ostensibly progressive, it will be argued in this paper that, even if the rulings of the General

Court of 14 June 2012 are upheld by the CJEU on appeal, they will only bring limited changes in the non-compliance by the EU as to its obligations under the third pillar of the Aarhus Convention. It will be maintained that, in the end, the reconsideration of the *Plaumann*-doctrine, alongside a thorough revision of Regulation No. 1367/2006, is the only sensible solution for this perennial flaw in the EU legal system.

I. Introduction

In spite of the recent growth of environmental protection statutory provisions, the environmental degradation continues. By collecting and disseminating information to the wider public about the state of the environment, environmental NGOs (ENGOS) are playing a seminal part in the raising of the environmental awareness in society¹. In the past decades, ENGOS have succeeded in fostering the political debate about important issues, such as acid rain, climate change and deforestation. Concepts such as sustainable development, natural resource conservation and the restoration of ecosystems have been put on the agenda of policy makers, largely thanks to

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¹ See, amongst others: A Agarwal, 'Role of NGOs in the Protection of Environment' (2008) *Journal of Environmental Research and Development*, pp. 933–938.

the relentless efforts of ENGOs. In a world characterized by the retreat of the state from a number of public functions and regulatory activities, the watchdog activities of ENGOs in safeguarding the public interest become all the more important for ensuring an adequate environmental performance, not only by national authorities but also multinational companies.

Notwithstanding the obvious benefits that accompany the rise of ENGOs in society, they still face important barriers when bringing environmental claims before courts. The political interests that are tied to the decision making process urge authorities to impair the possibilities for access to justice in environmental cases. Often the actions of ENGOs are being viewed as important impediments for further economic development. The enhanced eagerness of many ENGOs to go to court in order to enforce their viewpoints is increasingly being tagged a serious impediment for the business and economic progress. From the courts' side, it is moreover feared that lenient standing rules for ENGOs will lead to an exponential growth of litigation. And thus ENGOs are often confronted with rigid standing requirements whenever go to court with environmental claims. In a certain way, these strict admissibility requirements can be seen the procedural compound of the leading discourse amongst many business people, who become increasingly fearful of the impact of ENGOs on their profits.

Since 1998, the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention)² has played an increasingly important role in the strive for a better

access to justice for ENGOs. As is widely known, the Aarhus Convention aims to enhance public participation in environmental governance and lift the existing barriers for ENGOs and citizens to effectively challenge decisions that possibly contravene environmental law. It is grounded on the assumption that a wider involvement of individuals and ENGOs in environmental matters, if supplemented by effective access to justice, can lead to significant improvements in environmental protection. Accordingly, the Aarhus Convention, which was adopted under the auspices of the United Nations Economic Commissions for Europe (UNECE), calls for the recognition of a number of procedural rights for individuals and ENGOs with regard to the environment. To that end, the quintessential third pillar of the Aarhus Convention, laid down by Article 9, aims at empowering ENGOs and citizens to assist in the enforcement of environmental law. Especially Article 9(3) of the Aarhus Convention, that provides for a general right to challenge acts and omissions by private parties and public persons allegedly infringing national environmental law, has recently come to the forefront as a seminal provision in the strive for a wider access to justice in environmental cases for ENGOs.

By ratifying the Aarhus Convention in 2005³, along with its Member States, the EU committed itself to guaranteeing sufficient access to justice in environmental matters, both within the EU Member States and on the EU level. However, it is a well-known fact of life that public interest litigation is seriously compromised by the strict standing requirements maintained in the settled case-law of the EU Courts. Until today, no single ENGO has ever succeeded in gaining

² Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, 25 July 1998 ('the Aarhus Convention'). The Aarhus Convention entered into force on 1 October 2001.

³ 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.

access to the Court of Justice of the European Union (CJEU) or the former Court of First Instance (CFI) – which has been renamed General Court since the entry into force of the Lisbon Treaty – in order to obtain judicial review of a contested measure adopted by a European institution. Traditionally, such actions are hindered by the prevailing CJEU interpretation of what is of “*individual concern*”, one of the two conditions that need to be fulfilled pursuant to Art. 263 (4) of the TFEU for private entities in order to be able to challenge in an admissible manner an act originating from an EU institution⁴. The strict stance of the EU Courts has turned the implementation of the third pillar of the Aarhus Convention in a very troublesome endeavour.

In order to ensure compliance with the EU’s obligations under the Aarhus Convention, the European Parliament and Council enacted Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies, which aims to implement the third pillar of the Aarhus Convention for EU institutions⁵. The Aarhus Regulation sought to transpose the obligations enshrined in Art. 9 (3) of the Aarhus Convention into Union law by enabling ENGOs meeting certain criteria to request an internal review under environmental law of acts adopted, or omissions, by EU institutions and bodies. Subsequently, ENGOs can institute proceedings before the CJEU. By some authors, the Aarhus Regulation was welcomed

as a significant step forwards in the pursuit of a better access to justice in environmental matters on the EU level⁶. Over time, it was hoped that the Aarhus Regulation might open new doors for ENGOs on the EU level and hence allow them to weigh more on the outcome of the decision making process in environmental matters. However, most legal scholars believed that, taking into account the limited material scope of the Aarhus Regulation, the latter would make little difference in enhancing access to justice in environmental matters on the EU level⁷. The latter were proven right by the reluctant application of the internal review procedures by the EU institutions and bodies in the recent years. Yet in two eagerly awaited judgments the General Court – more in particular in *Stichting Natuur en Milieu* (case T-396/09)⁸ and *Vereniging Milieudefensie* (case T-338/08)⁹ – the General Court somewhat surprisingly rejected the strict application of the Aarhus Regulation by the European Commission so far, invalidating two Commission decisions in this regard.

At first sight, these two rulings appear to be ground-breaking for the strive for a more wide access to justice in environmental cases on the EU level. Both decisions seemingly depict an

⁴ Case 25/62, Plaumann [1963] ECR 95 at 107.

⁵ Regulation (EC) No 1367/2006 of the European Parliament and the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, [2006] OJ L 264/13 (‘Aarhus Regulation’). See extensively on the Aarhus Regulation: K Lenaerts, J A Gutiérrez-Fons, ‘The General System of EU Environmental Law Enforcement’ (2011) *Yearbook of European Law* 30 (1), pp. 21–24.

⁶ See, amongst others: T Crossen, V Niessen, ‘NGO standing in the European court of justice – does the Aarhus Regulation open the door?’ (2007) *RECIEL* 16 (3), pp. 332–340.

⁷ P Wennerås, *The Enforcement of EC Environmental Law* (Oxford Studies in European Law: 2007), at p. 234; J Jans, ‘Did Baron von Munchausen ever Visit Aarhus. Some Critical Remarks on the Proposal for a Regulation on the Application of the Provisions of the Aarhus Convention to EC Institutions and Bodies’ in R Macrory (ed.), *Reflections on 30 Years on EU Environmental Law: A High Level of Protection* (Europa Law Publishing: 2005), at p. 480 and 484.

⁸ Case T-396/09, *Stichting Natuur en Milieu* [2012] ECR I-0000 (Appeal Cases before the Court of Justice C-404/12 P, C-405/12 P).

⁹ Case T-338/08, *Vereniging Milieudefensie* [2012] ECR I-0000 (Appeal Cases before the Court of Justice C-401/12 P, C-402/12 P and C-403/12).

increased openness towards the wide access to justice in environmental matters which is put forward by the Aarhus Convention. However, in this paper it will be substantiated that, even if the judgments of the General Court are upheld by the CJEU on appeal, they will only bring limited changes in the non-compliance by the EU as to its obligations under the third pillar of the Aarhus Convention. At the same time, it will be established that, taking into consideration the partial findings and recommendations issued by the Aarhus Compliance Committee (ACCC) in 2011 on access to justice before the EU Courts, a more fundamental shift in jurisprudence is needed in order to bring about a genuine improvement as regards legal standing in environmental cases.

Apart from the introduction, this paper is comprised of five parts. In the second section a brief account will be given of the redress possibilities in Union law before the entry into force of the Aarhus Regulation. After having explored the content of the Aarhus Regulation in the third section, as far as the implementation of the third pillar of the Aarhus Convention is concerned, the paper will zoom in on the two rulings of the General Court of 14 June 2012. In the fifth section of this paper it will be submitted why the rulings of the General Court, even if reasserted on appeal, do not significantly improve the standing criteria for ENGOs before the EU Courts. In fact, it will be asserted that the rulings are, in the end, providing a fig leaf for maintaining limited access to justice for ENGOs before the EU Courts. In the final section it will be established that also the modifications on standing requirements before the EU Courts, as introduced by the Lisbon Treaty, fall short of bringing about the much desired sea change in access to justice for ENGOs.

II. Access to Justice *before* the Aarhus Regulation: The Road to Nowhere?

II.1. Art. 9(3) of the Aarhus Convention

Before delving into the recent case-law developments of the EU Courts as to legal standing in environmental cases, we need to briefly recall the main requirements set about by the so-called “third pillar” of the Aarhus Convention. This succinct analysis will serve as main touchstone in our subsequent analysis of the recent jurisprudence of the EU Courts.

a. the basics

The Aarhus Convention is widely hailed as one of the most innovative environmental treaties of the past decades, and rightly so. Whereas most environmental agreements include material obligations that Parties have to each other, the Aarhus Convention also imposes obligations on Parties and public authorities towards the public as far as access to information, public participation and access to justice are concerned. This is grounded on the assumption that sustainable development can only be achieved through the involvement of all stakeholders. It is therefore often being referred to as a “*proceduralisation of the environmental regulation*”, as it focuses more on setting and listing procedures than establishing standards and specific outcomes¹⁰.

As is widely known, the Aarhus convention more specifically encompasses three pillars: access to information, public participation and access to justice¹¹. Arguably, the final and most

¹⁰ G Aarti, ‘Transparency under scrutiny: Information disclosure in Global Environmental Governance’ (2008) *Global Environmental Politics* 8 (2), p. 2.

¹¹ See more extensively: United Nations Economic Commission for Europe, *The Aarhus Convention: An Implementation Guide* (2nd Edition, New York and Geneva: 2014), (‘Aarhus Implementation guide’), available at: <http://www.unece.org/environmental-policy/treaties/public-participation/publications/public-participation/2013/aarhus-convention-implementation-guide->

contentious right is the right of access to justice, as enshrined in Art. 9 of the Aarhus Convention. The latter article, which includes the provisions on access to justice, adopts a threefold approach. It aims to provide access in three distinct contexts: review procedures with respect to information requirements (first pillar)¹²; review procedures with respect to specific (project-type) decisions which are subject to public participation requirements (second pillar)¹³, and challenges to breaches of environmental law in general¹⁴. Interestingly, Art. 9 (3) of the Aarhus Convention is not merely aiming at enforcing the environmental rights that have been accorded to the public by virtue of the first two pillars of the Aarhus Convention. It creates a further class of cases where citizens can appeal to administrative or judicial bodies. By some, Art. 9(3) is referred to as a separate right to file a public interest law suit¹⁵. Art. 9(4) prescribes the minimum qualitative standards that must be met in all such procedures, as well as the type of remedies that must be provided. Under Art. 9(5) Parties are obliged to ensure that information is provided to the public on access to administrative and judicial procedures and appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

b. the specific requirements of Art. 9 (3)

Pursuant to Art. 9 (3) of the Aarhus Convention, in situations where Art. 9 (1) and Art. 9 (2) do not apply, Parties to the Convention have to ensure

[second-edition-text-only-version.html](#) (accessed 15 May 2014).

¹² Art. 9 (1) Aarhus Convention.

¹³ Art. 9 (2) Aarhus Convention.

¹⁴ Art. 9 (3) Aarhus Convention.

¹⁵ See in a similar vein: T P Vidovic, 'Access to Justice (steps to Procedural Harmonization on grounds of the Aarhus Convention)' in V Sancin and M K Dine (eds.), *International Environmental Law: Contemporary Concerns and Challenges in 2014* (GV Založba: 2014), p. 190, fn 8.

that "members of the public have access to administrative or judicial procedures to challenge acts and omissions by private parties and public authorities which contravene provisions of its national law relating to the environment". Admittedly, in comparison with Art. 9 (1) and Art. 9 (2) of the Aarhus Convention, the wording of Art. 9 (3) remains rather vague. It also seems to allow greater flexibility than Art. 9 (2) of the Aarhus Convention. This should not come as a surprise, not only taking into account the above-mentioned drafting process, but also given the wide array of acts and omissions to which Art. 9 (3) of the Aarhus Convention applies¹⁶.

The latter was strikingly illustrated by the Aarhus Compliance Committee's (ACCC) findings on communication ACCC/C/2005 (Belgium)¹⁷ and communication ACCC/C/2011/58 (Bulgaria)¹⁸. This being the case, many countries still expected the actual added value of Art. 9 (3) of the Aarhus Convention to be very limited¹⁹.

Regarding the object of the possible administrative or judicial review, Art. 9 (3) of the Aarhus Convention does not, at first glance, give many clues either. Hence, the scope of Art. 9 (3) of the Aarhus Convention is very broad, entailing that any act or omission by private parties and/or public authorities that contravenes environmental law must be challengeable. Either way, read in conjunction with Art. 2 (2) d of the Aarhus

¹⁶ J Ebbesson, 'Impact of the Aarhus Convention and European Union Law' in M Pallemarts (ed.), *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law*, (Europa Law Publishing: 2011), p. 269.

¹⁷ Communication ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2 (28 July).

¹⁸ Communication ACCC/C/2011/58 (Bulgaria), ECE/MP.PP/C.1/2012/14, par. 83.

¹⁹ See more extensively: A Wetzel, 'The Influence of International Institutions on Access to Justice in Environmental Matters in the EU and its Member States' in O Costa, K E Jørgensen (eds.) *The Influence of International Institutions on the EU: When Multilateralism Hits Brussels* (Palgrave Macmillan: 2012), p. 85.

Convention, a first clear delimitation becomes apparent. Pursuant to Art. 2 (2) d of the Aarhus Convention bodies or institutions acting in their legislative or judicial capacity or not included in the definition of public authorities. This exemption will also prove relevant in EU-context, as will be portrayed later on in this paper.

As regards the nature of the review procedures that need to be provided by the Parties to the Aarhus Convention, Art. 9 (3) of the Aarhus Convention, once more, remains open to question. It merely sets out that the public should have access to administrative *or* judicial proceedings. Nonetheless, in comparison with Art. 9 (2) of the Aarhus Convention, the wording of Art. 9 (3) remains rather ambiguous. Whereas Art. 9 (2) of the Aarhus Convention obliges Convention parties to ensure access to a review procedure before a court of law or some other form of independent and impartial body, Art. 9 (3) of the Aarhus Convention does not contain any specific requirements in this respect.

Still, taking into account the additional qualitative standards of Art. 9 (4) of the Aarhus Convention, it surely can be contended that also the procedures provided by Convention parties in the context of Art. 9 (3) of the Aarhus Convention, whether administrative or judicial, must be “adequate and effective”²⁰. Again, this feature will turn out crucial for the further assessment of the recent EU efforts in this regard.

Art. 9 (3) of the Aarhus Convention obliges Convention parties to provide for access to the aforementioned review procedures for “members of the public” where they meet the criteria, if any, laid down in national law. The wording of Art. 9 (3) of the Aarhus Convention appears to be quite broad in comparison to Art. 9 (2) of the Aarhus Convention. Art. 9 (3) does not refer to “members of the public concerned” but to “members of the pub-

lic”. Given the broad definition of “the public”²¹, it can be upheld that it effectively covers any natural or legal persons, including, amongst others, environmental organisations. On the other hand, the referral to “the criteria, if any, laid down in national law” seems to allow a great deal of flexibility to the Convention parties in delimiting the scope of the review procedures. Indeed, already from the outset it was clear that the Convention parties are not obliged to establish a system of popular action (*actio popularis*) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. Nonetheless, in its earlier findings the ACCC underscored that Convention parties cannot use the clause “where they meet the criteria, if any, laid down in national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organisations from challenging acts or omissions that contravene national law relating to the environment²².

II.2. Three different ways to say “no”

Already before the entry into force of the Aarhus Convention the EU Courts had been confronted with pleas for a more lenient application of the admissibility requirements in environmental cases. The below section will briefly tackle the most seminal rulings of the EU Courts in this regard. It will be revealed that many of the arguments that were invoked in these proceedings still pop up in the ongoing debate and thus remain relevant for the assessment of the current day situation as regards access to justice in environmental cases.

²¹ See Art. 2 (4) of the Aarhus Convention: “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups”.

²² ACCC Belgium (see above n 17), par. 35. See more recently: Communication ACCC/C/2006/18 (Denmark), ECE/MP.PP/2008/5/Add.4, paras. 31, 35 and 41; ACCC Bulgaria (see above n 18), par. 65.

²⁰ Aarhus Implementation Guide (see above n 11), p. 200.

a. Greenpeace: no different treatment for environmental cases!

Prior to 1 December 2009, *ex Art.* 230 (4) of the TEC (now Art. 263(4) of the TFEU) provided that “(a)ny natural or legal person may (...) institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former”. As is widely known, the strict interpretation by the EU Courts of the criterion of “individual concern”, is representing an effective restriction on public interest litigation, especially so in environmental cases where diffuse interest are at stake.

The obvious starting point for any analysis of the treatment of legal actions instigated by ENGOs before the EU Courts are the rulings in *Greenpeace*, which date 1995²³ and 1998²⁴ respectively. In the latter case, *Greenpeace International*, some local ENGOs and residents of Gran Canaria more specifically sought the annulment of a decision adopted by the European Commission to provide financial assistance from the European Regional Development Fund (ERDF) for the construction of two power stations on the Canary Islands, without requiring an environmental impact assessment as was provided by EU environmental law²⁵. In order to substantiate the admissibility of their lawsuit, the plaintiffs invited the CFI to adopt a more liberal approach, recognising that their *locus standi* depended not only on a purely economic interest but on their

interest in the protection of the environment²⁶. However, most importantly, the CFI refused to reconsider its well-established *Plaumann*-approach, which puts forward that in order to initiate an admissible action against a measure of general application, the individual plaintiff must be singled out by it from the public at large in environmental cases. More in particular, it held that the *Plaumann* case-law remains good law regardless “the nature, economic or otherwise, of those of the applicants’ interests which are affected”²⁷. The CFI concluded unambiguously that “the applicants thus cannot be affected by the contested decision other than in the same manner as any other local resident, fisherman, farmer or tourist who is, or might be in the future, in the same situation”²⁸. The action of the ENGOs suffered a similar fate.

The same line of reasoning was upheld by the ECJ on appeal. No additional lip service was paid to the seminal role of ENGOs in the strive for more environmental protection and sustainable development in modern day society. The ENGOs were left as a “prophet in the wilderness” and were send home by the EU Courts. When faced with the supplementary argument of the appellants that rejecting the actions would create a legal vacuum, which might not be filled by the possibility of bringing procedures before the national courts, as it was not possible to challenge the decision of the European Commission before the national courts, the ECJ maintained that the necessary remedies were still available in the national courts, based on *ex Art.* 234 of the TEC concerning preliminary rulings²⁹. The same reasoning was later on also applied by the CFI in *Danielson*³⁰.

²³ Case T-585/93, Stichting Greenpeace Council [1995] ECR II-2205

²⁴ Case C-321/95P, Stichting Greenpeace Council [1998] ECR I-1651.

²⁵ Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operation of the European Investment Bank and the other existing financial instruments, [1998] OJ L 185/9.

²⁶ Greenpeace (see above n 23), par. 32.

²⁷ *Ibid*, par. 38

²⁸ *Ibid*, par. 55.

²⁹ *Ibid*, par. 32.

³⁰ Case T-21/95 R, Marie-Thérèse Danielsson [1995], ECR II-3051, par. 77.

Not surprisingly, the outcome in *Greenpeace* was met with some fierce criticism in the legal literature as it exposed the blatant lack of sufficient access to justice on the EU level³¹. The strict rationale applied by the EU Courts rendered it virtually impossible for individuals and ENGOs to successfully challenge the legality of EU decisions. The latter will not be able fulfil the strictly applied *Plaumann*-test in environmental cases, as, most of the time, environmental harm cannot be singled out to the extent that it is exclusively related to only one person.

At the time, Jans submitted that the ECJ seemed to assume that the decision of the European Commission is merely a kind of “*preparatory decision*”, to which no specific legal effects were attached³². Other authors argued that the opposite is true, as, what was at issue in the Spanish case, was the lawfulness of the Commission decision and not, as the CJEU seemed to suggest, the decision of the Spanish authority granting the authorisation³³. Likewise, the literature questioned whether the so-called standard of a “*complete*” system of judicial remedies, as was highlighted by the ECJ in *Les Verts*³⁴, is lived up to in this case.

Taking the long way round via the national courts might again confront the applicant with different rules of standing which might, in turn, bar cases from getting through to the ECJ. This being the case, the ruling in *Greenpeace* clearly indicated that, in the ECJ’s view, the denial of standing for ENGOs under the annulment procedure does not result into a lack of effective judicial remedy.

b. a failed revolt: it’s up to the national courts and the Member States!

As such, the deplorable situation for ENGOs and individual applicants before the EU Courts remained unchanged since *Greenpeace*. It is tempting to say that the rulings in *Greenpeace* mark both the starting point and the end point of the quest for environmental justice before the EU Courts so far. Since then, the EU Courts consistently dismissed pleas for a more progressive reading of the admissibility requirements enshrined in the treaties. The underlying reason therefore was the fear for a massive influx of direct actions by ENGOs, taking into account the high number of legal persons that have as their object the protection and conservation of the environment. And thus, the quasi-constitutional of the jurisprudential definition of “*individual concern*” prevailed over the pledges for a more open approach for ENGOs and concerned individuals.

Admittedly, in *Jégo-Quéré*, the CFI famously reversed the so-called *Plaumann*-test when interpreting Art. 230 (4) to that extent that “*there (was) no compelling reason to read into the notion of individual concern a requirement that an individual applicant seeking to challenge a general measure (had to be) differentiated from all others affected by it in the same way as an addressee*”³⁵. From environmental point of view, it remains somehow ironic to note

³¹ See amongst others: N Gérard, ‘Access to the European Court of Justice: A Lost Opportunity’ (1998) *Journal of Environmental Law* 10 (2), pp. 331–346; A Albers-Llorens, ‘Locus Standi of Private Parties in Environmental Cases’ (1999) *Cambridge Law Journal* 58(1), pp. 1–48; D L Torrens, ‘Locus Standi of Environmental Associations under EC Law – Greenpeace – A Missed Opportunity for the CJEU’ (1999) *RECIEL* 8(3), 336–346; J Jans, *European Environmental Law* (2nd edn, Europa Law Publishing: 2000), p. 217. See for a more recent critical assessment: C Poncet, ‘Access to Justice in Environmental Matters – Does the European Union Comply with its Obligations?’ (2012) *Journal of Environmental Law* 24(2), pp. 287–309.

³² J Jans (see above n 31), p. 219.

³³ A Ward, *Judicial Review and the Rights of Private Parties in EC Law*, (Oxford University Press: 2000), pp. 154–156.

³⁴ Case 294/83, Parti écologiste ‘Les Verts’ [1986] ECR 1339, par. 23.

³⁵ Case T-177/01 *Jégo Quéré* [2002] ECR I-5137, par. 49

that the CFI seized this particular case, in which the legality of an EC measure aimed at the recovery of the stock of hake in the waters of the south of Ireland was contested, as testing case.

That said, the CFI held that one could not expect from *Jégo-Quéré* to initiate a national procedure and contesting the validity of the Regulation by violating its rules and then questioning their illegality in subsequent judicial proceedings brought against him³⁶. It reasoned that such a premise would violate the effective judicial protection, enshrined in Art. 47 of the Charter of Fundamental Rights of the European Union³⁷.

The revolt of the CFI was only short lived. As is widely known, the ECJ effectively struck down the uprising by the CFI and Advocate-General Jacobs with its decision in *Unión de Pequeños Agricultores (UPA)* in 2002³⁸. Subsequently, it also overturned the CFI on appeal in the *Jégo-Quéré*-case³⁹, thereby firmly closing the sudden window of opportunity. The ECJ effectively shifted the responsibility to the Member States and the national courts. In the end, it was up to the Member States to grant individuals effective judicial protection. Next to interpreting national procedural rules in a way that enables individuals and NGOs to challenge the legality of national implementing measures, there was only one option left to overcome the ECJ's strict admissibility-test and that would be by amending the Treaties on this point.

Although the strict view of the ECJ has been met with mixed feelings by many commenta-

tors⁴⁰, the CFI quickly fell into old habits, once again reasserting its strict view on the admissibility of direct actions by private individuals. The so-called *European Environmental Bureau (EEB)* cases exemplified that access in environmental matters was still as remote in 2005 as it was in the nineties⁴¹. In these cases the CFI also refuted an alternative line of argumentation, based on the procedural rights granted to NGOs throughout the decision-making process, which was believed to ease up the standing requirements to some extent⁴². Ultimately the CFI took all hope away by noting that, at the time being, the Community legislation did not bestow procedural rights on the NGOs which could alter their *locus standi*⁴³.

c. post Aarhus: more of the same!

Bearing in the mind the entry into force of the Aarhus Convention for the EU in May 2005, it was hoped that the ECJ (later on, the CJEU) and the CFI (later on, the General Court) would be prompted to alter their strict view on access to justice in environmental matters.

But again, all too overly optimistic views were quickly denounced by the outcome of the *WWF-UK*-case. Here, the annulment was sought of Council Regulation of 21 December 2006 fixing for 2007 quotas and total allowable catches for cod (TACs) applicable in community waters⁴⁴

³⁶ *Jégo Quéré* (see above n 35), par. 45. See more extensively: K Lenaerts and T Corhaut, 'Judicial Review as a Paper to the Development of European Constitutionalism' (2003) *Yearbook of European Law* 22 (1), pp. 1–43.

³⁷ *Ibid*, par. 41 and 42.

³⁸ Case C-50/00 P *Unión de Pequeños Agricultores* [2002] ECR I-6677.

³⁹ Case C-263/02 P *Commission v Jégo Quéré* [2004] ECR I-3425.

⁴⁰ See amongst others: B Vesterdorf, 'The Community Court System Ten Years from Now And Beyond: Challenges And Possibilities' (2003) 28 *E.L. Rev.* 28(3), pp. 303–323.

⁴¹ Cases T-94/04 *EEB* [2005] ECR II-4419; Joined Cases T-236 and T-241 *EEB* [2005] ECR II-4945.

⁴² See amongst others Joined Cases T-38/99 to T-50/99 *Sociedade Agrícola dos Arinhos* [2001] ECR II-585, par. 48; Case T-47/00 *Rica Foods* [2002] ECR II-113, par. 55; Case T-13/99 *Pfizer Animal Health* [2002] ECR II-3305, par. 81–106.

⁴³ *EEB* (see above n 41), par. 62.

⁴⁴ Council Regulation No 41/2006 of 21 December 2006 fixing for 2007 fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community

before the CFI. The CFI held that *WWF UK*, being merely a member of the North Sea RAC, could not, by relying on its procedural guarantees, claim that it was distinguished individually in this respect⁴⁵. Also a final plea based on the irreparable environmental damage caused by the disputed TACs and to right to effective judicial remedies, was rejected⁴⁶. In essence, these views were also upheld by the ECJ on appeal⁴⁷.

This case-law is to be read in conjunction with the decision of the CFI in *Região autónoma dos Açores* where the CFI, admittedly, in an *obiter dictum*, pointed out that, in any event, Art. 9 (3) of the Aarhus Convention referred to the criteria laid down in the national law, and in EU law such criteria were set by *ex Art. 230, (4)* of the TEC and the related jurisprudence⁴⁸. Equally, the CFI, in line with the earlier case-law which was outlined above, set aside the argument that no effective legal remedy would be available if the action were to be declared inadmissible⁴⁹.

II.3. A first warning issued by the ACCC

a. partial findings ...

Needless to say, it was to be expected that sooner or later an environmental NGO would submit this troublesome situation to the ACCC⁵⁰. This eventually happened on 1 December 2008, when *ClientEarth*, supported by a number of entities

vessels, in waters where catch limitations are required, [2007] OJ L 15/1.

⁴⁵ Case T-91/07, *WWF-UK Ltd* [2008], ECR II-00081, par. 81–82.

⁴⁶ *Ibid*, par. 86–88.

⁴⁷ Case C-355/08, *WWF-UK Ltd* [2009] ECR I-00073.

⁴⁸ Case T-37/04, *Região autónoma dos Açores*, [2008] ECR II-00103, par. 93. The view of the CFI was also upheld by the ECJ in appeal: Case C-444/08 P, *Região autónoma dos Açores* [2009] ECR I-00200.

⁴⁹ *Ibid*, par. 92.

⁵⁰ Pursuant to Art. 15 of the Aarhus Convention, the parties to the Aarhus Convention have established the ACCC in October 2012 to review compliance by the parties with their obligations under the Convention. See more extensively: J Ebbesson (see above n 16), 250–251.

and a private individual, submitted a communication to the Committee alleging a failure by the European Union to comply with its obligations under Art. 9 of the Aarhus Convention. The ACCC decided to defer further consideration of the communication until the CJEU had decided in *Stichting Milieu en Natuur*, one of the two cases that finally gave rise to the judgments of the General Court of 14 June 2012. Accordingly, at its 32nd meeting, 11–14 April 2011, the ACCC adopted only partial findings in this case, delaying certain issues awaiting the future decisions of the EU Courts in cases where application had been made of the Aarhus Regulation⁵¹.

b...which nevertheless severely criticises the strict standing requirements on the EU level

In its partial findings and recommendations of April 2011 the ACCC openly refrained from assessing in detail each and every possible form of challengeable decision-making by EU-institutions or each decision rendered by an EU Court⁵². Still, the ACCC easily concluded that a consistent application of the *Plaumann*-test would result in no member of the public ever being able to challenge a decision or a regulation in environmental cases before the CJEU. Such an outcome could hardly be deemed reconcilable with Art. 9 (3) of the Aarhus Convention⁵³. No big surprises here.

However, whilst the ACCC held that the general traits of the case-law of the EU Courts clearly run counter to the requirements of Art. 9 (3) and (4) of the Aarhus Convention, it apparently did not want to issue an outright, unconditional non-compliance statement⁵⁴. Ultimately, the ACCC held that “*if the jurisprudence of the EU*

⁵¹ Communication ACCC/C/2008/32 (Part I) (European Union), par. 10.

⁵² *Ibid*, par. 63.

⁵³ *Ibid*, par. 87.

⁵⁴ *Ibid*, par. 93.

Courts, as evidenced by the cases examined, were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraphs 3 and 4, of the Convention”.

Notwithstanding its strict wording on the existing case-law of the EU Courts in respect of access to justice in environmental matters, the ACCC therefore did not issue clear-cut recommendations towards the EU. In the end, it was held “that a new direction of the jurisprudence of the EU Courts should be established in order to ensure compliance with the Convention”⁵⁵. To that end, all relevant EU institutions are recommended to “take the steps to overcome the shortcomings reflected in the jurisprudence of the EU Courts in providing the public concerned with access to justice in environmental matters”⁵⁶.

III. Access to Justice after the Aarhus Regulation: The Road to Nowhere (Bis)?

By all means, it had become clear that the EU, in order to in order to fulfil its obligations under the third pillar of the Aarhus Convention, had to establish new rules in respect of the EU institutions. The aforementioned case-law on *locus standi* in environmental cases had painfully illustrated the need for supplementary legal tools in this respect. Those new rules were laid down by the Aarhus Regulation, that grants public rights and imposes obligations on Community institutions and bodies regarding access to environmental information (title I), public participation concerning plan and programmes relating to the environment (title II) and access to review procedures (title III).

The Aarhus Regulation itself is implemented by means of two Commission Decisions 2008/50/

EC⁵⁷ and 2008/40/EC, Euratom⁵⁸. Interestingly enough, the Aarhus Regulation, apart from expanding the scope of Regulation No 1049/2001⁵⁹ in order to implement the provisions enshrined in Art. 9 (1) of the Aarhus Convention⁶⁰, only focuses on the implementation of the requirements on access to justice included in Art. 9 (3) of the Aarhus Convention.

Although the solution provided for by the Aarhus Regulation to the application of the strict *Plaumann* case-law is, at first sight, fairly straightforward, it was the result of a long and hard decision-making process, including reconciliation⁶¹. By granting ENGOs the right to seek for an internal review of EU administrative acts, the issue of standing could be solved without having to revise the strict *Plaumann*-doctrine. It was presumed that the ENGOs could easily challenge the reply given by the EU institution to which a request has been made, as it would be only addressed to the applicant. Or, to put in

⁵⁷ Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and the Council on the Aarhus Convention as regards requests for the internal review of administrative acts [2008] OJ L 13/24.

⁵⁸ Commission Decision 2008/401/EC, Euratom of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No 1367 of the European Parliament and the Council on the application 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 [2008] OJ L 140/22.

⁵⁹ Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] OJ L145/43.

⁶⁰ See more in detail: K Lenaerts and J A Gutiérrez-Fons (see above n 5), p. 22; T Crossen, V Niessen (see above n 6), p. 332.

⁶¹ See more extensively: M Pallemmaerts, *Compliance by the European Community with its obligation on access to justice as a party to the Aarhus Convention*, (Institute for European Environmental Policy: 2009), available at http://www.ieePeu/assets/422/aarhus_report.pdf (accessed 15 May 2014), p. 26.

⁵⁵ Ibid, par. 97.

⁵⁶ Ibid, par. 98.

the words of the European Commission's Proposal⁶², "*this preliminary procedure was introduced in order not to interfere with the right to access to justice under Article 230 EC Treaty, under which a person may institute proceedings with the Court of Justice against decisions of which it is individually and directly concerned*"⁶³. As a reform of the TEC in order to allow for a more generous *locus standi* for ENGOs was to be ruled out from the very beginning, the only option left was the creation of a preliminary administrative review procedure which would then, indirectly, but sufficient to grant the ENGOs in question access to justice (Art. 12 of the Aarhus Regulation).

III.1. New admissibility hurdles

In order to get access to the internal review procedure under the Aarhus Regulation some substantive and, to a lesser extent, procedural, hurdles need to be taken. First and foremost, the administrative review procedure is only accessible for ENGOs which meet certain requirements, laid down in Article 11 of the Aarhus Regulation. Natural persons have been left out of the personal scope of the international review procedure, which seems at odds with Art. 9(3) of the Aarhus Convention.

Yet a more fundamental constraint is created by Art. 10(1) of the Aarhus Regulation, which stipulates that "*Any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for an internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged omission, should have adopted such*

an act". Accordingly, the substantive scope of the internal review procedure is limited to "*an administrative act adopted under environmental law, or an alleged administrative omission [to adopt such an act]*". However, the term "*administrative act*" was, as such, nowhere to be mentioned in the TFEU, nor in the former TEC. By referral to Art. 2(1) *litra g* of the Aarhus Regulation it is further defined as "*any measure of individual scope under environmental law, taken by a Community institution or body, and having a legally binding and external effect*", restricting the scope of the internal review procedures in a significant manner.

Most worrisome was the limitation of administrative acts to acts of *individual scope*⁶⁴. By inserting the word "*individual*", many environmental measures, which are deemed to be of a general nature, such as implementing measures adopted by the European Commission, seemed to fall outside the scope of the internal review procedure. Many commentators, such as Jans and Wennerås, feared that a strict interpretation of this notion, might effectively undo the internal review procedure of much of its added value as to access to justice in environmental matters⁶⁵.

III.2. The return of *Plaumann* via the back door?

And this is exactly what happened. In the few cases in which, up until today, a request for internal review of an environmental measure of an EU institution has been submitted, the relevant EU institution chose to reject it being admissible⁶⁶.

⁶² Proposal for a Regulation of the European Parliament and of the Council of 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 EC Institutions and Bodies, COM (2003) 622 final ('Commission Proposal').

⁶³ *Ibid*, 13.

⁶⁴ Common Position (EC) No 31/2005 adopted by the Council on 18 July 2005, [2005] OJ C 264E/18

⁶⁵ P Wennerås (see above n 7), p. 234; J Jans (see above n 7), p. 480.

⁶⁶ Reply of the Commission services to Justice & Environment of 26 May 2008, published on the Commission's website at: http://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20J_E.pdf (accessed 15 May 2014) and Reply of the Commission services to Justice & Environment of 6 July 2010, published on the Commission's

Some requests were declared inadmissible for straightforward reasons, such as the lack of “legally binding and external effects”⁶⁷. Yet more significant was the fact that many of the requests that were received by the European Commission were rejected since they did not amount to a “measure of individual scope” as laid down by the Aarhus Regulation.

Accordingly, a request by PAN and Greenpeace internal review of Commission Implementing Regulation (EU) No 1143/2011 approving the substance *prochloraz*, in accordance with Regulation (EC) No 1107/2009, was declared inadmissible as the concerned provision are “applicable to all operators manufacturing or placing on the market plant protection products containing *prochloraz*”. In that regard, the Commission held that the contested decision had to be regarded as an act of general application addressed to all operators⁶⁸. Earlier on, the European Commission had reached a similar outcome when addressing several requests for internal review of a decision amending Directive 91/414/EEC to include several hazardous substances⁶⁹. Also outside of the scope of the EU rules on the listing of hazardous substances, the European institutions, adopted a

website at http://ec.europa.eu/environment/aarhus/pdf/requests/9_reply%20.pdf (accessed 15 May 2014). For a more thorough overview, see: J Jans, G Harryvan, ‘Internal Review of EU Environmental Measures. It’s True: Baron Van Munchausen Doesn’t Exist! Some Remarks on the Application of the So-Called Aarhus Regulation’ (2011) *Review of European and Administrative Law Review* 3 (2), pp. 53–65

⁶⁷ See for instance: Reply of the Commission services to EPS of 6 August 2008 published on the Commission’s website at: http://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20EPS.pdf (accessed 15 May 2014).

⁶⁸ Reply of the Commission services to Pan Europe and Greenpeace of 9 March 2012, published on the Commission’s website at: http://ec.europa.eu/environment/aarhus/pdf/requests/11_reply.pdf (accessed 15 May 2014).

⁶⁹ E.g. Reply of the Commission services to Stichting Natuur en Milieu of 21 April 2009, published on the Commission’s website: http://ec.europa.eu/environment/aarhus/pdf/snm_reply.pdf (accessed 15 May 2014).

narrowly interpretation of the notion of “measure of individual scope”. The rejection of the European Council of a request filed by WWF-UK seeking to review a CFP regulation establishing TACs for certain fish stocks is perhaps the most notable example thereof. Hence, the internal review procedure, at least when applied very rigidly, does not seem to be able to fill the gap that was left by the above-mentioned strict jurisprudence of the EU Courts.

IV. The First Test-Cases: Is the Aarhus Convention Here to Stay?

Let us now turn to the first acid test for the strict interpretation adopted by the European Commission in its above-studied administrative practice in relation to the notion of “measure of individual scope”. Recently, two ENGOs challenged the strict interpretation of the notion of “measure of individual scope”, as enshrined in Art. 10 (1) of the Aarhus Regulation, before the General Court. By doing so, the ENGOs effectively put the strict interpretation of the notion “administrative act” under judicial review⁷⁰. It was the first time the EU Courts were offered the opportunity to assess the legal soundness of the new instruments enacted in order to implement the third pillar of the Aarhus Convention on the EU level. And, rather surprisingly given the earlier case-law on access to justice in environmental cases, the ENGOs seem to have driven their point home.

IV.1. Factual background

The importance of having put in place a complete and effective system of judicial protection, also in the specific context of EU environmental law, becomes all the more apparent when we take a look at the factual background of both

⁷⁰ Currently, there are also two similar proceedings pending before the General Court (cases T-232/11 and T-192/11).

cases. They exemplify the need for additional legal review procedures which are available both to the ENGOs and the public concerned in the context of decisions enacted by EU institutions.

The first case revolved around health safety issues. In the *Stichting Milieu en Natuur* case, two Dutch ENGOs requested an internal review of Regulation No 149/2008⁷¹ amending Regulation (EC) No 396/2005 of the European Parliament and the Council by setting maximum residue levels for listed products. The ENGOs were of the opinion that the European Commission, when adopting these maximum residue levels for pesticides, did not duly take into consideration the “*high level of consumer protection*” enshrined in Regulation No 396/2005⁷², which formed the legal basis of the adoption of the contested regulation. The European Commission declined from reviewing the contested decision on the merits, as it held that the contested regulation did not amount to an administrative act meeting the criteria of Art. 2 (1) (g) of the Aarhus Regulation⁷³.

The second case related to air quality issues in the Netherlands. Two Dutch ENGOs had launched a request for internal review against a Commission Decision⁷⁴, made on the basis of a derogation clause enshrined in the Air Quality

Framework Directive⁷⁵, by which the Netherlands were allowed to postpone compliance with air quality limit values for nitrogen oxides and altogether exempted from compliance with limit values for particulate matters in certain zones in the Netherlands. The ENGOs, however, maintained, that the conditions to apply the derogatory clause in this particular case were not fulfilled. Yet again the European Commission upheld that the decision at issue could not be qualified as a “*measure of individual scope*” within the meaning of the Aarhus Regulation⁷⁶.

IV.2. The outcome

The two cases before the General Court revolved around two specific lines of argumentation put forward by the ENGOs against the decisions of the European Commission declaring their requests for internal review inadmissible. In their first plea, the ENGOs claimed that the European Commission, in finding that the challenged acts could not be considered an act of individual scope, wrongly held that their requests for internal review of these acts were inadmissible. By their second plea the ENGOs contended that, if indeed it would turn out that the strict interpretation upheld by the European Commission is in line with the provisions of the Aarhus Regulation, Art. 10 (1) would contravene Art. 9 (3) of the Aarhus Convention.

By considering these arguments the General Court would finally have the opportunity to shed view on the two conflicting interpretations that, in the absence of any case-law of the

⁷¹ Commission Regulation (EC) No 149/2008 of 29 January 2008 amending Regulation (EC) No 396/2005 of the European Parliament and the Council by establishing Annexes II, III and IV setting maximum residues levels for products covered by Annex I thereto, [2008] OJ L 58/1.

⁷² Regulation (EC) No 396/2005 of the European Parliament and the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC, [2005] OJ L 70/1.

⁷³ Reply of the Commission services of 1 July 2008 to *Stichting Natuur en Milieu en Pesticide Action Network*, available on the Commission’s website at: http://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20SNMpdf and http://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20PAN.pdf (accessed 15 May 2014).

⁷⁴ Decision C(2009) 2560 final (not published in the OJ).

⁷⁵ 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, [2008] OJ L 152/1.

⁷⁶ Reply of the Commission services of 28 July 2009 to *Vereniging Milieudefensie en Stichting Stop Luchtverontreiniging Utrecht*, available on the Commission’s website at: http://ec.europa.eu/environment/aarhus/pdf/requests/8_reply.pdf (accessed 15 May 2014).

EU Courts in this respect, had been upheld in the legal literature.

On the one hand, there were commentators, such as Jans, who were quite sceptical about the added value of the Aarhus Regulation and maintained that Art. 2 (1) of the Aarhus Regulation excludes administrative “*measures of general application*”⁷⁷. On the other hand, authors like Wennerås advocated a more liberal reading of the aforementioned provisions⁷⁸.

From the very beginning it was clear that the first claim of the ENGOs had little chance of success, bearing in mind the specific wordings of the Aarhus regulation. It was therefore not at all surprising that the General Court finally held that the European Commission, by rejecting both requests for internal review as inadmissible, had, as such, not acted in violation of Art. 10 (1) of the Aarhus Regulation. In that respect, the General Court affirmed that the European Commission, when assessing whether the contested measures constituted a measure of individual scope for the purposes of Art. 2 (1) (g) of the Aarhus Regulation, could effectively rely on the established case-law under *ex 230* (4) of the TEC in relation to action for annulment⁷⁹. Accordingly, in order to determine the scope of a measure, the EU Institutions should not look merely at the official name of the measure but should first take account of its purpose and its content⁸⁰. In the same vein, the General Court ruled that for a measure to be regarded as being of general application it needs to apply to objectively determined situation and to entail legal effects for categories of persons envis-

aged generally and in the abstract⁸¹. Accepting the Commission’s argument, the General Court held in both cases that the contested measures, of which the internal review had been sought, did indeed qualify as a measure of general nature. Likewise, it was found that the requests as such did not meet the requirements laid down by the Aarhus Regulation⁸².

In both cases, the ENGOs alternatively submitted that, in case the General Court would indeed hold that the requests did not meet the strict criteria enshrined in the Aarhus Regulation, it nevertheless should find that, by limiting the concept of “*acts*” in Art. 9 (3) of the Aarhus Convention to “*administrative acts*”, which, in their turn should be defined as “*measures of individual scope*”, Art. 10 (1) of the Aarhus Regulation would violate the Aarhus Convention. Hence, the ENGOs more in particular raised a plea of illegality against the mentioned provisions of the Aarhus Regulation⁸³. Generally, EU Courts agree to review the legality of measures of secondary legislation in light of provisions of international agreements, even in the absence of direct effect, when the latter aim to implement a particular obligation under an international agreement or, alternatively, where the measure makes an explicit *renvoi* to particular provisions of that agreement⁸⁴. In the present case, the General Court quickly came to the conclusion that the conditions to apply this reasoning were fulfilled as it could not be doubted that that regulation indeed intended to implement the EU’s obligations under the Aarhus Convention⁸⁵.

⁷⁷ J Jans (see above n 7), p. 480; T Crossen and V Niessen (see above n 6), p. 336.

⁷⁸ P Wennerås (see above n 7), p. 235.

⁷⁹ Stichting Natuur en Milieu (see above n 8), par. 29; Vereniging Milieudefensie (see above n 9), par. 26.

⁸⁰ See e.g. Case C-307/81 *Alusuisse* [1982] ECR 3463, par. 8.

⁸¹ Stichting Natuur en Milieu (see above n 8), par. 30; Vereniging Milieudefensie (see above n 9), par. 27.

⁸² Stichting Natuur en Milieu (see above n 8), par. 42.

⁸³ Stichting Natuur en Milieu (see above n 8), par. 52; Vereniging Milieudefensie (see above n 9), par. 52.

⁸⁴ Case C-69/89, *Nakajima* [1991] ECR I-2069, par. 31.

⁸⁵ Stichting Natuur en Milieu (see above n 8), par. 57–58.

As to the limitation of the concept of “acts” to “administrative acts” in the sense of Art. 2 (1) (g) of the Aarhus Regulation, the General Court found this to be incompatible with Art. 9 (3) of the Aarhus Convention.

Although the term “acts” in itself is not defined by the Aarhus Convention, the General Court considered the limited scope of the internal review procedure to be in contradiction with the objectives thereof. Whilst recognising that under Art. 9 (3) of the Aarhus Convention, the Parties to that Convention retain a certain measure of discretion with regard to the definition of the persons who have a right of recourse to administrative or judicial procedure and as to the nature of the procedure (whether administrative or judicial), the General Court rightly notes that the Aarhus Convention does not offer the same discretion as regards the definition of “acts” which are open to challenge⁸⁶.

IV.3. The aftermath

In the above-mentioned decisions, the General Court availed itself of the opportunity to point out the flaws and deficiencies of the Aarhus Regulation as regards access to justice. And thus, at first glance, both judgments must be considered an important step forwards in the pursuit of a better implementation of the obligations concerning access to justice enshrined in the Aarhus Convention on the EU level⁸⁷. Likewise, the rulings stand out as the first ever decisions where a referral to the Aarhus Convention was accepted as a means to enhance access to justice in environmental matters on the EU level. However, the

⁸⁶ Stichting Natuur en Milieu (see above n 8), par. 77; Vereniging Milieudefensie (see above n 9), par. 66.

⁸⁷ See also in this regard: C Sisler, E de Götzen, ‘Access to Justice in Environmental Matters: What is New on the Implementation of the Aarhus Convention in the European Union’ in V Sancin and M K Dine (eds.), *International Environmental Law: Contemporary Concerns and Challenges in 2014* (GV Založba: 2014), pp. 207–208.

EU institutions were clearly not convinced by the General Court’s more progressive approach towards the Aarhus Convention in the EU-context. The European Commission, closely followed by the Council and the European Parliament, launched an appeal against the two judgments of the General Court. Accordingly, it will be the CJEU which will have a final say on the matter⁸⁸. Below, it will be examined to what extent the objections of the European Commission, the Council and the European Parliament, could possibly lead to a reversal of the judgments by the CJEU on appeal and, subsequently, what would be the implications thereof for access to justice in environmental cases.

a. on the lack of direct effect of Art. 9(3) of the Aarhus Convention (and how to circumvent it)

One of the fiercest critiques issued by the European Commission, the Council and the European Parliament against the judgments of the General Court is related to the fact that the latter

⁸⁸ See: Appeal brought on 24 August 2012 by the European Parliament against the judgment of the General Court (Seventh Chamber) delivered on 14 June 2012 in Case T-396/09 *Vereniging Milieudefensie, Stichting Stop Luchtverontreiniging v Commission*, [2013] OJ C 9/26; Appeal brought on 27 August 2012 by the European Commission against the judgment of the General Court (Seventh Chamber) delivered on 14 June 2012 in Case T-396/09 *Vereniging Milieudefensie, Stichting Stop Luchtverontreiniging v Commission*, [2013] OJ 9/26; Appeal brought on 27 August 2012 by the Council of the European Union against the judgment of the General Court (Seventh Chamber) delivered on 14 June 2012 in Case T-396/09 *Vereniging Milieudefensie, Stichting Stop Luchtverontreiniging v Commission*, [2013] OJ 9/25; Appeal brought on 27 August 2012 by the European Commission against the judgment of the General Court (Seventh Chamber) delivered on 14 June 2012 in Case T-338/08 *Stichting Natuur en Milieu, Pesticide Action Network Europe v Commission*, [2013] OJ C 9/28; Appeal brought on 3 September 2012 by the Council of Europe against the judgment of the General Court (Seventh Chamber) delivered on 14 June 2012 in Case T-338/08 *Stichting Natuur en Milieu, Pesticide Action Network Europe v Commission*, [2013] OJ C 9/27.

did consider Art. 9 (3) of the Aarhus Convention to be appropriate to serve as ground for review of Art. 10 of the Aarhus Regulation. It is upheld that the finding of the General Court is based on a fundamentally erroneous interpretation of the settled case-law on the possibility for individuals to rely on the provisions of an international agreement with the aim of challenging the validity of a Union act. Both institutions insist that no legal review of the Aarhus Regulation could have been carried out in the first place. In order to fully grasp the ins and outs of the objections of the European Commission, the Council and the European Parliament in this respect, the basic principles governing the effects of international conventions and agreements within Union law need to be reiterated first.

Art. 216 (2) of the TFEU, which stipulates that agreements concluded by the EU are binding on the institutions of the Union and its Member States. Yet the binding effect as, formulated in the latter provision, is not sufficient to ensure review of the legality or validity of EU acts. Pursuant to the established case-law of the CJEU, a provision of an international agreement needs to have “*direct effect*”, in order to serve as a touchstone for the legality of secondary EU legislation⁸⁹. Admittedly, the EU Courts had showed some modest openness towards acknowledging the direct effect of not only bilateral agreements with non-member countries aimed at developing a particular kind of general relationship with such countries⁹⁰, but also of environmental multilateral agreements⁹¹. However, in its notable case-law on GATT or WTO law the ECJ/CJEU

and, later also the CFI, consistently refused to review the legality of Community measures in light of GATT or WTO provisions as the structure and the nature of these agreements as a whole, excluded that they would be relied upon before EU (or national) Courts in order to review the legality of EU acts⁹².

Given the above-mentioned case-law, the crucial question was first whether Art. 9 (3) of the Aarhus Convention could be relied upon by the ENGOs in order to set aside Art. 10(1) of the Aarhus Regulation. As such, the General Court did not have to carry out this analysis itself as the CJEU had already dealt with that particular issue in *Lesoochranské zoskupenie VLK*, which is better known as the *Slovak Brown Bear-case*⁹³. In that landmark ruling on access to justice in environmental matters at the national level, the CJEU had to assess whether ENGOs could rely on Art. 9 (3) of the Aarhus Convention in order to set aside stricter national rules on access to justice in environmental matters, and this in the context of legal proceedings where substantial rules of EU environmental law were at stake.

This proved to be a rather troublesome issue. Whilst the CJEU could not neglect that the EU legislature had failed to adopt a directive implementing Art. 9(3) of the Aarhus Convention, it did conclude that it had the necessary jurisdiction to interpret Art. 9 (3) of the Aarhus Convention⁹⁴. Still, the Grand Chamber denied direct effect to Art. 9(3) of the Aarhus Conven-

⁸⁹ Case C-308/06, *Intertanko* [2008] ECR I-04057, par. 45.

⁹⁰ See amongst others: Case C-17/81 *Pabst & Richarz* [1982] ECR 1331, par. 25–27 (on the (former) Association agreement with Greece). For an exhaustive overview, see: P Eeckhout, *EU External Relations Law* (Oxford EU Law Library: 2011), pp. 333–343.

⁹¹ Case C-213/03 *Syndicat professionnel coordination des pêcheurs de l'étang de Berre* [2004] ECR I-7357.

⁹² Joined cases C-21 to 24/72 *International Fruit Company* [1972] ECR 1219.

⁹³ Case C-240/09 *Lesoochranské zoskupenie VLK* [2011] ECR I-01255. See more on this: M Eliantonio, ‘Case note on case C-240/09 *Lesoochranské zoskupenie* and case C-115/09 *Trianel Kohlekraftwerk*’ (2012) *CML Rev.* 49, pp. 767–791; J. Jans, ‘Who is the Referee? Access to Justice in a Globalised Legal Order: A Case Analysis of CJEU Judgment C-240/09 *Lesoochranské Zoskupenie* of 8 March 2011’ (2011) *Review of European Administrative Law* 4 (1), pp. 85–97.

⁹⁴ *Ibid*, par. 32–36.

tion since, in its view, it did contain any clear and precise obligation capable of directly regulating the legal position of individuals⁹⁵. However, the CJEU went on and noted that Art. 9 (3) of the Aarhus Convention, although drafted in broad terms, still aimed to ensure effective environmental protection⁹⁶. The Court concluded that: “if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law”⁹⁷, thereby implicitly reaffirming the duty of consistent interpretation that rests upon the national courts in this respect⁹⁸. Although some authors questioned the judgement, out of fear that the CJEU might have “stepped into the legislature’s shoes”⁹⁹, others have endorsed the judgment as a bold step towards more effective judicial protection in environmental matters within the ambit of EU environmental law¹⁰⁰.

And thus it remains ironic to note that *Lesoochranárske zoskupenie VLK*, which is widely hailed as a breakthrough in terms of implementing Art. 9(3) of the Aarhus Convention (at least at Member States’ level), was heavily relied upon by, amongst others, the European Commission in its decisions to launch an appeal against the judgments of the General Court of 14 June 2012.

⁹⁵ Ibid, par. 45.

⁹⁶ Ibid, par. 46.

⁹⁷ Ibid, par. 49

⁹⁸ The CJEU has equally confirmed the application of the principle of consistent interpretation in the context of international agreements. See Case C-61/94 Commission v Germany [1996] ECR I-3989, par. 10.

⁹⁹ J. Jans (see above n 93).

¹⁰⁰ See most recently: J-F Brakeland, ‘Access to justice in environmental matters – developments at EU level’ (published in the *Gyoseiho-kenkyu*, 2014, No 5), available at <http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2014/05/arten-brakelandup.pdf> (accessed 15 May 2014).

From the foregoing analysis it can be inferred that the selective reading by the European Commission and others of the decision of the CJEU in *Lesoochranárske zoskupenie VLK*, simply confining it to an expression of the lack of direct effect of Art. 9 (3) of the Aarhus Convention, lacks persuasiveness. This in itself already hints that the General Court’s approach, which downplayed the lack of direct effect of Art. 9 (3) of the Aarhus Convention and eventually went on to examine the legality of Art. 10 in light thereof, does appear to be the right one.

Yet, in order to do so, the General Court had to apply the afore-mentioned *Nakajima*-exception, which allows the Court to still review the validity of the Regulation in light of a provision of an international agreement, despite of its apparent lack of direct effect. In its decisions to appeal the judgments of the General Court, the European Commission, however, fiercely advocated against the use of the *Nakajima*-exception in the case at hand. It submitted that the use thereof, outside the context of the WTO/GATT context, should remain exceptional. Additionally, it was held that, in any event, the *Nakajima*-exception cannot be applied in this case as the content of Art. 9 (3) of the Aarhus Convention remains extremely vague¹⁰¹.

Pursuant to the *Nakajima* case-law, the EU Courts are able to review the legality of a regulation, where it is intended to implement an obligation on the EU institution under the an international treaty, under the terms of that treaty, even when the latter does not fulfil the aforementioned criteria¹⁰². Commentators like Eeckhout rightly point out that this case-law may well reflect some type of compromise reached within the court, striking a balance between a lack of di-

¹⁰¹ Appeal decisions (see above n 88).

¹⁰² *Nakajima* (see above n 84).

rect effect and respect for the EU's international commitments¹⁰³.

In its judgments of 14 June 2012, the General Court quickly came to the conclusion that the conditions to apply the aforementioned exception are fulfilled. Indeed, here, as was the case in *Nakajima*, the applicants were questioning indirectly, in accordance with Art. 277 of the TFEU, the validity of a provision of a regulation in light of an international convention. More in particular, applicants put forward the illegality of a provision of the Aarhus Regulation in light of the Aarhus Convention in order to obtain an annulment of two decisions of the European Commission which are based on the mentioned regulation¹⁰⁴. Evidently, it could not be doubted that that Aarhus Regulation indeed intended to implement the EU's obligations under the Aarhus Convention¹⁰⁵. Additionally, demanding the provision to be precise in the sense of the case-law on direct effect, as the Commission contended in its submissions on appeal, would effectively run counter to the very essence of the case-law on the principle of implementation, *i.e.* providing an exception for the General Court to review a Union act in light of international rules, despite the lack of direct effect thereof. Indeed, the mere fact that a provision is devoid of having a direct effect, does not imply its non-existence¹⁰⁶. Moreover, as mentioned above, the CJEU in *Lesoochránárske zoskupenie VLK* eventually denoted that Art. 9 (3) of the Aarhus Convention, at least, deemed to be sufficiently precise in order to serve as an inter-

pretation guideline for the national courts in order to ensure the effective protection of the rights conferred by EU environmental law (the so-called "indirect effect"). In addition, the CJEU showed less reluctance to allow ENGOs to rely upon the last two sentences of paragraph 3 of Art. 10(a) of Directive 85/337/EEC in order to set aside the German "*Schutznorm-theory*", under which complainants have only standing to invoke legal provisions that are designed to protect their specific interests¹⁰⁷. Would it, in light of the above, not be illogical to use Art. 9 (3) of the Aarhus Convention as a means to force the national courts to rethink their traditional approach towards legal standing in environmental cases whilst considering it irrelevant for access to justice on the EU level?

Somehow, the General Court was probably aware of the possible criticism that might arise from its application of the *Nakajima* case-law outside the framework of the WTO/GATT context. In order to proactively refute remarks arguing for a limited application of the *Nakajima*-exception only to the context of GATT/WTO law, it referred to the notable *Racke* case¹⁰⁸. In *Racke* the ECJ examined the validity of a regulation in light of customary international law¹⁰⁹. Although the specific articulation between *Racke* and *Nakajima* remains contested in legal literature¹¹⁰, there appears to be no good reason why the principle of implementation should remain confined to secondary EU legislation implementing WTO agreements and legislation implementing environmental agreements equally devoid of having direct effect¹¹¹.

¹⁰³ P Eeckhout (see above n 90), p. 361.

¹⁰⁴ Stichting Natuur en Milieu (see above n 8), par. 57; Vereniging Milieudefensie (see above n 9), par. 57.

¹⁰⁵ Stichting Natuur en Milieu (see above n 8), par. 58; Vereniging Milieudefensie (see above n 9), par. 58.

¹⁰⁶ A Berthier, 'A first success in the long run for better access to justice in the EU: The scope of the administrative review procedure provided under Regulation 1367/2006 invalidated by the General Court' (2012) *ELNI Review* (2), p. 96.

¹⁰⁷ Case C-115/09, Case Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV [2011] ECR I-03673, par. 57 and 58.

¹⁰⁸ Case C-162/96 *Racke* [1998] ECR I-3665.

¹⁰⁹ *Ibid.*, par. 47.

¹¹⁰ P Eeckhoutt (see above n 90), p. 394.

¹¹¹ A Berthier (see above n 106), p. 96.

b. On the substance: the broad interpretation of Art. 9(3) of the Aarhus Convention and its wider implications

In the above part it has been portended that the General Court had good reasons to use Art. 9(3) of the Aarhus Convention as touchstone for Art. 10 of the Aarhus Regulation. Concerning the substance, the General Court was confronted with questions relating to the specific limitations of the scope of application of Art. 9 (3) of the Aarhus Convention. Ultimately, the General Court found that Art. 9 (3) of the Aarhus Convention, read in conjunction with the objectives and purpose of it, would be violated if an internal review were to be limited to measures of individual scope¹¹². Accordingly, the General Court seemed to share the criticism of most commentators pointing at the poor implementation of Art. 9 (3) of the Aarhus Convention by the internal review procedure, which is included in the Aarhus Regulation¹¹³.

However, in its submissions on appeal, the European Commission is maintaining that the General Court erred in finding that the Parties to the Aarhus Convention enjoy limited discretion in identifying the acts which are to be subject to an administrative review pursuant to Art. 9 (3) of the Aarhus Convention¹¹⁴. As noted above, Art. 9 (3) of the Aarhus Convention in itself does not contain a clear delimitation of its scope.

Nevertheless, as established in section 2 of this paper, the provision potentially covers a wide range of administrative and judicial proceedings. In the meantime, the ACCC has presented us with some more guidance in this regard. For instance, in its findings and recommendations on the limited access to the Belgian Council of State by environmental organisations

in Belgium, the ACCC denoted that Art. 9 (3) of the Aarhus Convention also covers “*executive acts of a general nature*” under regional spatial planning law¹¹⁵.

Evidently, the ACCC was also required to consider the same issue in its partial findings and recommendations on the access to justice in environmental matters in the EU, issued in April 2011. Although, as already highlighted above, the ACCC refrained from conducting a specific examination of the decisions by the EU institutions in the relevant Court decisions which were presented to it, it still did not rule out that some of these acts are covered by Art. 9 (3) of the Aarhus Convention. According to the ACCC “*this is the case if an act or omission by an EU institution or body can be (i) attributed to it in its capacity as a public authority, and (ii) linked to provisions of EU law relating to the environment*”¹¹⁶. The ACCC denoted that, for instance, the decision which was at stake in *Greenpeace* before the CFI and, subsequently the ECJ, *i.e.* to provide financial assistance from the European Regional Development Fund for the construction of two power stations, might serve as a good example of an act that would fall under Art. 9 (3) of the Aarhus Convention¹¹⁷. Hence, the ACCC was able to conclude that at least some acts and omissions by EU institutions are covered by Art. 9 (3) of the Aarhus Convention¹¹⁸.

By and large, it can be concluded that the approach chosen by the General Court seems to be in line with the point of view of the ACCC on this matter. Yet the court did not go that far to explicitly refer to the findings and recommendations of the ACCC as to the interpretation of the Aarhus Convention itself. Nevertheless, in its judgment in *Stichting Natuur en Milieu*, the General Court

¹¹² Stichting Natuur en Milieu (see above n 8), par. 76; Vereniging Milieudefensie (see above n 9), par. 65.

¹¹³ See amongst others P Wennerås (see above n 7), pp. 235–236.

¹¹⁴ Appeal Decisions (see above n 88), par. 6–8.

¹¹⁵ ACCC Belgium (see above n 17), par. 31.

¹¹⁶ ACCC European Union (see above n 51), par. 72.

¹¹⁷ Ibid, par. 73.

¹¹⁸ Ibid, par. 74.

did explicitly refer to the Aarhus Implementation Guide when it had to contemplate the question whether or not the European Commission in that specific case had acted in its legislative capacity. In that respect, the General Court noted that, although that Guide has no legal force, there is no reason why it should not use it as basis for interpreting the Aarhus Convention¹¹⁹.

Possibly, the CJEU, in its decisions on appeal, could seize the opportunity to explicitly refer to the earlier findings and recommendations of the ACCC in respect of the scope of Art. 9 (3) of the Aarhus Convention. However, if it chose to do so, the CJEU would evidently have to take into account the aforementioned critical appraisal by the same ACCC, issued in 2011, of its own strict case-law on the admissibility criteria for ENGOs and individuals in environmental cases. It remains doubtful whether the CJEU would be prepared to take such a bold step. In its recent Opinion in *Edwards*, Advocate General Kokott, made an explicit reference to the assessment performed by the ACCC on the issue of prohibitive costs for legal proceedings in the UK¹²⁰. Although the CJEU has not made an explicit link so far, some commentators note that the findings of the ACCC will serve as part of the context in which the CJEU assesses possible breaches by Member States of their obligations under the Aarhus Convention and EU environmental law¹²¹. Be that as it may, a referral to the findings and recommendations of the ACCC would force the CJEU to clarify its view on the legal effect of decisions issued by tribunals established by international agreements. Up until now, this question has been mainly treated by the EU Courts in the context of the EU's WTO membership. In that respect, the EU Courts have generally rejected the self-stand-

ing effect of decisions of the WTO dispute settlement body, stressing the never-ending scope for negotiations in the WTO¹²².

At the same time, it is noteworthy that the General Court explicitly referred to the interpretation rules which are enshrined in Art. 31 of the Vienna Convention of 23 May 1969 on the Law on Treaties and Art. 31 of the Vienna Convention of 21 March 1986 on the Law of Treaties between States and International Organisations in this respect¹²³. In light of the objectives and purpose of the Aarhus Convention an internal review procedure which covers only measures of individual scope would be very limited considering that acts adopted in the field of the environment are indeed mostly of a general nature¹²⁴. This reasoning makes perfect sense, especially in light of the afore-mentioned administrative practice of the internal review procedure by the EU institutions so far.

Generally speaking, the General Court explicitly asserts the view that all acts which can be qualified as general acts must fall under the scope of review procedures pursuant to Art. 9 (3) of the Aarhus Convention. However, there is one notable exception. Pursuant to the Aarhus Convention, public institutions acting in a legislative capacity are exempted. Thus legislative acts should, as such, not be challengeable in accordance with the provisions enshrined in Art. 9 (3) of the Aarhus Convention¹²⁵.

¹²² See for instance: Case C-377/02 *Van Parys* [2005] ECR I-1465, par. 52–61. For a further analysis of this case-law, see: P Eeckhout (see above n 90), pp. 365–374.

¹²³ *Stichting Natuur en Milieu* (see above n 8) par. 72; *Vereniging Milieudefensie* (see above n 9), par. 61.

¹²⁴ *Stichting Natuur en Milieu* (see above n 8) par. 76; *Vereniging Milieudefensie* (see above n 9), par. 65.

¹²⁵ This topic also popped up, albeit in a slightly different context, in the recent case-law of the CJEU, where the Court needed to clarify to what extent Member States can circumvent the Aarhus requirements by adopting legislative acts that “ratify” a pre-existing administrative decisions. See: Joined cases C-128/09 to C-131/09, C-134/09

¹¹⁹ *Stichting Natuur en Milieu* (see above n 9), par. 68.

¹²⁰ Opinion A-G Kokott in Case C-260/11 *Edwards* [2013] ECR I-0000.

¹²¹ J-F Brakeland (see above n 100), p. 14.

As rightly pointed out by the General Court, the fact that acts adopted by institutions or bodies acting in their legislative or judicial capacity, does not necessarily imply that the term “acts” as used in Art. 9 (3) of the Aarhus Convention can be limited to acts of an individual scope as measures of general application are not necessarily measures taken by a public authority acting in a judicial or legislative capacity¹²⁶. As already hinted by commentators like Wennerås¹²⁷ and Pallemmaerts¹²⁸, the interpretation of this exemption was expected to give rise to some thorny interpretation issues, even more so on the EU level than on the national level. This was especially so since the TEC did not make a clear distinction between legislation and other forms of action, which on the national level can be qualified as being of an executive or regulatory nature¹²⁹.

The entry into force of I-33 and I-34 of the draft Treaty Establishing a Constitution for Europe would have provided a formal distinction between legislative and non-legislative acts¹³⁰. However, this formal distinction was not, as such, withheld in the Lisbon Treaty. Still, the TFEU is offering some more clues as to the distinction between both categories of measures. Art. 289 (3) of the TFEU now stipulates that legal acts adopted by legislative procedure shall constitute legisla-

tive acts, thereby codifying the earlier case-law of the ECJ in this respect¹³¹. On the other hand, the Lisbon Treaty introduces a new category of non-legislative acts of a general nature, the “delegated acts”. Pursuant to Art. 290 of the TFEU the legislator delegates the power to adopt acts amending non-essential elements of a legislative act to the Commission. As for the exemption for legislative acts more specifically, reference must be made to *Stichting Milieu*, where the General Court was confronted with this very issue as the European Commission maintained that the contested Regulation had been adopted in its legislative capacity. According to the European Commission, the obligations under Art. 9 (3) of the Aarhus Convention are not to be taken into account as it only covers acts of public authorities when they are not acting in their legislative capacity.

The General Court, however, quickly dismissed the argument of the European Commission as it was apparent from the provisions on the basis of which said Regulation 149/2008 was adopted that the European Commission acted in the exercise of its implementing powers¹³².

Another, more fundamental objection which is raised against the judgments of 14 June 2012 relates to the fact that, in its view, the limited scope of the review procedure could be justified if one were to take into account other remedies available before national courts. As can be inferred from the case-law which has been succinctly treated above, such is a classic counter-argument in order to maintain the Court’s stare decisis as regards legal standing. Notwithstanding the growing criticism, the ECJ (and later on, the CJEU) had always maintained that the ECT had established a complete system of remedies to ensure the review of the legality of the Commu-

and C-135/09, *Boxus* [2011] ECR I-09711; Case C-182/10, *Solvay* [2012] ECR I-0000.

¹²⁶ *Stichting Natuur en Milieu* (see above n 8), par. 78; *Vereniging Milieudefensie* (see above n 9), par. 67.

¹²⁷ P Wennerås (see above n 7), p. 235.

¹²⁸ M Pallemmaerts, ‘Access to Environmental Justice on the EU level. Has the ‘Aarhus Regulation’ Improved the Situation’ in M Pallemmaerts (ed.), *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing: 2011), p. 281.

¹²⁹ *Ibid.*

¹³⁰ According to Art. I-34 of the draft Treaty Establishing a Constitution for Europe non-legislative measures are essentially delegated regulations (Art. I-35) and implementing acts (Art. I-36), adopted by the Council of Ministers or the Commission.

¹³¹ See, amongst others: Case C-25/70, *Köster* [1970] ECR 1170.

¹³² *Stichting Natuur en Milieu* (see above n 8), par. 62–69

nity acts¹³³. In the view of the European Commission, the administrative review procedure did not need to cover all categories of acts, as meant by Art. 9 (3) of the Aarhus Convention¹³⁴. And thus the European Commission seemed to have found the Achilles' heel of the General Court's reasoning.

However, the criticism of the European Commission in this respect has, to a large extent, been explicitly considered by the General Court in its judgment in *Vereniging Milieudefensie*, where a similar argument was raised by the Council of the European Union. Here, the Court explicitly underlined that not all measures of general application adopted by the European institutions in the field of the environment have been transposed into national law by means of a measure which may be challenged before a national court¹³⁵.

Furthermore, as regards the measure at stake, the General Court held that the Council failed to show how the applicants could bring an action before a national court challenging the measure of general application in respect of which they asked the European Commission to conduct an internal review¹³⁶. For the time being, the reasoning of the General Court seems sound since, in any event, the contested act in *Vereniging Milieudefensie* did not seem to require implementing measures which could be challenged before national courts. Interestingly, the reasoning of the General Court also bears a strong resemblance to the partial findings of the ACCC. Whereas the ACCC recognised the system of judicial review in the national courts of the EU Member States and the request for a preliminary ruling as a significant element for ensuring consistent and proper implementation of

EU law in the Member States, it stressed that “*it cannot be a basis for generally denying members of the public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies*”¹³⁷.

V. Maintaining the Status Quo?

Having explored the exact content of the judgments of the General Court of 14 June 2012, it appears that the General Court has finally come to grips with the requirements for access to justice in environmental matters, set out by Art. 9 (3) of the Aarhus Convention. That said, it remains uncertain whether the Court's viewpoints will ensure *full* compliance with Art. 9 (3) and 9 (4) of the Aarhus Convention. Indeed, the General Court has only annulled the Commission's decisions about the inadmissibility of the requests made under the Aarhus Regulation. And thus no substantial review has yet taken place of the decisions of which the internal review had been sought. Equally so, the judgments as such do not bring about any changes in the case-law of the EU court or any clarifications on the ENGOS' right of standing to challenge EU institutions' decisions. In the below section it will be submitted that many additional critiques are prone to blur the seemingly progressive stance of the General Court in its ruling of 14 June 2012.

V.1. *Plaumann* (again and again...)

The primary aim of the Aarhus Regulation was to cure the blockage to public interest litigation before the EU Courts that was essentially caused by the application of the strict *Plaumann* case-law by the EU Courts, even so in environmental cases, as exemplified by the analysis above. Art. 12 of the Regulation rather vaguely stipulates that “*the non-governmental organisation which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in ac-*

¹³³ UPA (see above n 38), par. 40.

¹³⁴ Appeal Decisions (see above n 88).

¹³⁵ *Vereniging Milieudefensie* (see above n 9), par. 75.

¹³⁶ *Vereniging Milieudefensie* (see above n 9), par. 76.

¹³⁷ ACCC European Union (see above n 51), par. 90.

cordance with the relevant provisions of the Treaty". Currently, most pressing concern relates to the implications of the internal review procedure on the standing of ENGOs before the EU Courts. The drafting history of the Aarhus Regulation indicated that, despite the clear ambitions included in the Commission's proposal (offering access to the EU Courts via an administrative detour), it was far from certain whether this would, in practice, be the outcome of the Aarhus Regulation¹³⁸. Basically, the supporters of the more progressive approach contended that the inclusion of Art. 12 would be pointless, unless the words "*in accordance with relevant provisions of the Treaty*" would give more rights than the Treaty itself to date. According to this interpretation, these words shall therefore be interpreted in such a way that all other issues – with the exception of standing – which would be based on the Aarhus Regulation itself – are regulated by the ECT/TFEU¹³⁹.

On the surface, this optimism seems to be warranted given the first appraisal of the Aarhus Regulation in *Região autónoma dos Açores*. In that case, which has already briefly been touched upon above, the applicant explicitly relied on the Aarhus Convention and the Aarhus Regulation, in order to further substantiate the admissibility of his claim. Interestingly, the CFI, after having recalled the flexibility that Article 9(3) of the Aarhus Convention allows for, nevertheless seemed to concede that the admissibility criteria laid down in *ex Art.* 230 (4) of the TEC are very strict. As a sort of justification for its strict approach towards *locus standi*, the CFI indicated that the Community legislature had adopted, in order to

facilitate access to the Community judicature in environmental matters, the Aarhus Regulation. More in particular, the CFI indicated that Title IV of that regulation "*lays down a procedure on completion of certain non-governmental organisations may bring an action for annulment before the Community judicature under Article 230 EC*"¹⁴⁰.

Seemingly, the CFI held that the Aarhus Regulation might ease up the access to justice for ENGOs. However, at the end of the day, the internal review procedure could not be applied in the latter case, amongst others because the Aarhus Regulation was not in force at the relevant time. It therefore remained tricky to deduce general conclusions as to the access to the EU Courts for ENGOs upon completion of the internal review procedure from this "*obiter dictum*".

Some commentators were of the opinion that the outcome of the proceedings in *Vereinigende Milieudefensie en Stichting Natuur en Milieu* would not provide for more clues on the claimants' standing to bring an action for annulment against the underlying decision, of which the internal review had been sought¹⁴¹. Yet, although the proceedings in both cases were directly aimed at seeking the annulment of the "*written reply*" declaring their request for internal review inadmissible, and, hence, not on Art. 12 of the Aarhus Regulation, the General Court nevertheless had to pronounce itself on the consequences of a possible subsequent judicial review. In a last attempt to counter the progressive interpretation given to Art. 9 (3) of the Aarhus Convention, the Council had maintained at the hearing that limiting "*administrative acts*" to measures of individual scope would still be justified in light of the conditions laid down in *ex Art.* 230 (4) of the TEC.

¹³⁸ J Jans (see above n 7), p. 483.

¹³⁹ See for instance: Justice and Environment, 'The Aarhus Regulation and the future of standing of NGOs/public concerned before ECJ in environmental cases', available at: http://www.justiceandenvironment.org/_files/file/aarhus-access-to-justice-study-2008.pdf (accessed 15 May 2014).

¹⁴⁰ *Região autónoma dos Açores* (see above n 48), par. 93.

¹⁴¹ See for instance M Pallemmaerts (see above n 128), p. 308.

In refuting this argument, the General Court denoted that “whatever the scope of the measure covered by an initial review as provided for in Article 10 of Regulation No 1367/2006, the conditions for admissibility laid down in Article 230 EC must always be satisfied if an action is brought before the Courts of the European Union”¹⁴². The General Court went on stating that “the conditions laid down in Article 230 EC – and, in particular, the condition that the contested act must be of direct and individual concern to the applicant – apply also to measure of individual scope which are not addressed to the applicant. A measure of individual scope will not necessarily be of direct and individual concern to a non-governmental organisation which meets the conditions laid down in Article 11 of Regulation 1367/2006”¹⁴³. Hence, paradoxically, by rejecting the argumentation raised by the Council in order to avoid an all-too-wide interpretation of the notion “administrative act”, the General Court effectively struck down the hope that was sparked by the earlier decision of the CFI in *Região autónoma dos Açores*. In other words, by stressing that the strict admissibility requirements included in Art. 263 (4) of the TFEU still have to be complied with, the judgments of 14 June 2012 again exemplify the reluctance of the EU Courts to grant a wider access to justice in environmental cases. Although the strict view seems to be, at first sight, at odds with the earlier judgment of the CFI in *Região autónoma dos Açores*, it is as such in line with the other prominent case-law on this topic, which already has been treated earlier on.

Indeed, the CFI already held in the *EEB* cases that “the principles governing the hierarchy of norms (...) preclude secondary legislation from conferring standing on individuals who do not meet the requirements of the fourth paragraph of Article 230

EC. A fortiori the same holds true for the statement of reasons of a proposal for secondary legislation”¹⁴⁴. The CFI even added to this that, “even if the applicants were acknowledged as qualified entities for the purposes of the Aarhus Regulation Proposal, it is clear that they have not put forwards any reason why that status would lead to the conclusion that they are individually concerned by the contested act”¹⁴⁵. Later on, in *WWF-UK*, the CFI again reiterated that whatever entitlement ENGOs might derive from the Aarhus Regulation, it is granted in its capacity as a member of the public, implying that this cannot differentiate an ENGO from any other persons of the public, within the meaning of Art. 263 (4) of the TFEU¹⁴⁶.

Accordingly, the General Court merely reasserted its earlier view on the matter and, at the same time, pinpointed that, in any event, the optimistic views which sparked in the wake of its contradictory but benevolent statement in *Região autónoma dos Açores* were premature and misplaced. As a consequence, the “progressive picture” that was painted above needs to be adjusted. The judgments of the General Court of 14 June 2012 most probably demonstrate that in future environmental cases, where substantial arguments are raised in legal proceedings directed against the underlying decision, the EU Courts might simply reassert the strict interpretation of individual concern, as applied in *Plaumann* and the above-mentioned case-law¹⁴⁷.

V.2. Justice delayed is justice denied?

Besides the limited standing requirements, which must be respected in subsequent legal proceedings, it remains unsettled whether an action for annulment brought against a reply rejecting an ENGO’s request for internal review could pos-

¹⁴² Stichting Natuur en Milieu (see above n 8) par. 80; Vereniging Milieudefensie (see above n 9) par. 72.

¹⁴³ Stichting Natuur en Milieu (see above n 8) par. 81; Vereniging Milieudefensie (see above n 9) par. 73.

¹⁴⁴ *EEB* (above n 41), par. 67.

¹⁴⁵ *Ibid.*, par. 69.

¹⁴⁶ *WWF-UK* (see above n 48), par. 82.

¹⁴⁷ *A Berthier* (above n 106), p. 93.

sibly lead to a full review of the substantive and procedural legality of the underlying measures. The judgments of 14 June 2012 do not offer us clear guidance since only the written reply was targeted there. However, a closer look at the exact wording which was used in the judgments of 14 June 2012, indicates that the General Court merely wanted to point out that, irrespective of the limitations placed on the notion of “*administrative acts*” within the context of the Aarhus Regulation, a subsequent or even simultaneous action brought before the EU Courts must always respect the strict admissibility requirements. Evidently, future case-law might provide us with more clues in this respect.

At the same time, even subsequent judicial proceedings in the context of which only the written replies as such are challenged might give rise to certain additional complications in relation to the underlying act. As noted by Wennerås, a possible finding by an EU court that a written reply is vitiated by an error of law, inevitably reflects back on the legality of the original decision¹⁴⁸. As a result, it is not excluded that, in light of the operative part of the judgment, taken together with the specific grounds which led to it, the EU institution might have to reconsider its original decision and, if appropriate, amend or withdraw it altogether¹⁴⁹.

In order to illustrate this, the decision of which the internal review had been sought in *Vereniging Milieudefensie* can be used as a brief case study. The underlying act in that case was, as stated above, an exemption granted to the Netherlands from complying with the air quality standards for particulate matter under Directive 2008/50/EC. Let us now assume, for the sake of the argument, that the ENGO in question had

effectively been given a written reply by the European Commission on the merits, reasserting that, as stated in the original exemption decision, the conditions for granting such an exemption were fulfilled. In the context of Directive 2008/50/EC this entails, amongst others, that the air quality plan, presented by the Netherlands, has to effectively ensure that conformity with the limit values will be reached before the new deadline. If then, later on, this written reply were to be quashed by the General Court because it is of the opinion that the statement of reasons is vitiated by an error of law, this would undoubtedly also have an impact on the original act.

Imagine, for instance, a judgment whereby the General Court would have denoted that the air quality plan presented insufficient guaranties to ensure that the limit values will be attained in due time. In that scenario, the European Commission would, at least in practice, be forced to reconsider its original decision as it was based on the same ground that was declared to be vitiated by an error of law by the General Court in its decision on the written reply.

Some commentators suggested the ENGOs to, additionally, try seeking the suspension of the original act pursuant to *ex Art. 242* of the TEC (now Art. 278 of the TFEU). While it was agreed that the original decision *prima facie* fell outside the scope of that provision, it was also contended that earlier case-law already exemplified that EU Courts allowed for interim suspension of an act which was not the subject matter of review, but the consequence of the act challenged. Alternatively, plaintiffs could seek an interim injunction against the EU institution, since the wording thereof is not limited to the suspension of the contested act, but would also allow for any necessary interim measures pursuant to *ex Art. 243* of the TEC (now Art. 279 of the TFEU)¹⁵⁰.

¹⁴⁸ P Wennerås (see above n 7), p. 243. See, in a similar vein: C Sisler, E de Götzen, (see above n 87), p. 208.

¹⁴⁹ P Wennerås (see above n 7), p. 243.

¹⁵⁰ *Ibid*, p. 245.

Two Dutch ENGOs effectively took on the challenge in *Vereniging Milieudefensie* and lodged an application for interim relief, requesting in essence that the President of the General Court suspend operation of the contested review decision pending a decision in the main proceedings or pending adoption by the Commission of a new decision regarding the request for internal review. This request was, not unexpectedly, rejected by the President as it is established case-law that an application for suspension of operation cannot, in principle, be envisaged against a negative administrative decision, since the grant of suspension could not have the effect of changing the applicant's position¹⁵¹.

At the same time, the Dutch ENGOs also requested the President to impose interim measures in order to ensure that the Netherlands would comply with the limit values enshrined in Directive 2008/50/EC, entailing that no infrastructure projects could be carried out in the meantime which could not have been granted a permission without reference to the contested exemption. In the same order of 17 December 2009, the President of the General Court dismissed this action for interim relief as inadmissible, because the requested interim measures clearly go further than the object of the main action, which was only confined to the question of the validity of the written reply. More in particular, the President went on noting that it would go beyond the scope of his jurisdiction to impose such interim measures, as it would amount to an injunction to draw precise inferences from the annulment decision, and such an order would exceed the Court's powers in the main action¹⁵². Hence, imposing interim measures would effectively lead to prejudging of the consequences of the chal-

lenged decision on the merits¹⁵³. Equally so, in the judgment of 14 June 2012 the General Court rejected the applicant's claim to order the Commission to examine the merits of the request for internal review within a fixed period to be determined by the Court itself¹⁵⁴.

Be that as it may, in the former decision the President did not necessarily exclude that the withdrawal or suspension of the underlying act (the exemption) could be part of the consequences attached to a possible annulment of the internal review decision on the merits. However, the point remained moot as the action itself was essentially aimed at the annulment of the written reply on procedural grounds¹⁵⁵. This, in itself, represents a blatant illustration of the absence of adequate and effective administrative or judicial review procedures on the EU level. At the end of the day, it is striking to note that after more than five years of judicial proceedings, still no final ruling on the legality issues in regard to the derogation at stake has been achieved.

Accordingly, the proceedings in *Vereniging Milieudefensie* exemplify the important time delays linked with the application of the internal review procedure. This would run counter to the requirement enshrined in Art. 9 (4) of the Aarhus Convention, according to which it must be ensured that the available procedures are, in any event, fair, equitable, *timely* and not prohibitively expensive. Indeed, some of the delays which had been granted to the Netherlands in order to comply with the air quality standards, included in Directive 2008/50/EC, have already expired in the meantime¹⁵⁶, entailing that at least a substan-

¹⁵¹ Case T-396/09 R *Vereniging Milieudefensie* [2009] ECR II-246, par. 40.

¹⁵² *Ibid.*, par. 41.

¹⁵³ See also Case T-396/03 R *Arizona Chemical* [2004] ECR II-205, par. 67.

¹⁵⁴ *Vereniging Milieudefensie* (see above n 9), par. 18.

¹⁵⁵ See also on this topic: C *Sisler, E de Götzen*, (see above n 87), p. 208.

¹⁵⁶ This is, amongst others, the case for the postponement of the deadline attaining the annual limit value for nitrogen dioxide in zone 9 in the Netherlands, which will

tial part of the action of the two Dutch ENGOs, initiated in 2009, has lost its purpose. Arguably such outcome runs counter to the Aarhus Convention since it illustrates the lack of an effective and adequate judicial review in environmental cases on the EU level.

Henceforth, there seems to be no access to injunctive relief before the EU Courts in order to prevent or remedy possible injuries attached to allegedly unlawful EU decisions.

Such outcome is all the more striking since the CJEU itself recently underlined the importance of the right for the public concerned to ask the national court or competent independent and impartial body to order interim measures, pending a definitive decision on the lawfulness of a permit in light of EU environmental law, in order to guarantee the effectiveness of the judicial review¹⁵⁷. Also in the Aarhus Implementation Guide referral is being made to several findings of the ACCC in which the importance of preliminary injunctive relief has been reasserted¹⁵⁸. Additionally, in communication ACCC/C/2008/24 (Spain) the ACCC held that courts have to ensure that citizens can obtain injunctive relief at an early stage of the judicial proceedings¹⁵⁹.

V.3. The absence of an impartial and independent administrative review option

Apart from the standing issues and the lack of timely review, it has become apparent that it is still not settled to what extent proceedings seeking only the annulment of written replies on the merits might effectively force the EU institutions to reconsider the original act of which the inter-

expire by 31 December 2012. The exemptions from the obligations to apply limit values for particulate matter have already expired by 10 June 2011.

¹⁵⁷ Križan and others [2013] ECR I-0000, par. 109.

¹⁵⁸ Aarhus Implementation Guide (see above n 11), p. 200–201.

¹⁵⁹ Communication ACCC/C/2008/24 (Spain), ECE/MP.PP/C.1/2009/8/Add.1, paras. 104–105.

nal review has been sought. Likewise, another more fundamental issue pops up which, until recently, has not been frequently touched upon in the available legal literature on this topic. Admittedly, in its findings and recommendations of April 2011, the ACCC indicated that adequate administrative review procedures on the EU level might, to a certain extent, be able to compensate for the strict case-law of the EU Courts on the standing requirements for ENGOs and individuals in environmental cases¹⁶⁰. Hence, the ACCC seems to accept that the internal review procedure, included in the Aarhus Regulation, might be capable of meeting the standards of Art. 9 (3) and (4) of the Aarhus Convention.

To a certain extent this opinion, at least implicitly, seems to have underpinned the reasoning of the General Court in its judgments of 14 June 2012, as it clearly urges for a wider scope of the internal review procedure.

Generally speaking, such a view seems to be in line with the wording of Art. 9 (3) of the Aarhus Convention. Whereas Art. 9 (2) of the Aarhus Convention obliges Convention parties to ensure access to a review procedure before a court of law or some other form of independent and impartial body, Art. 9 (3) of the Aarhus Convention indeed does not contain any specific requirements in this respect. It merely stipulates that members of the public must have access to administrative *or* judicial procedures to challenge acts and omissions by private persons and public authorities contravening environmental law provisions. Accordingly, it could be put forward that, whenever the scope of the internal review procedure is widened, allowing also acts of a general nature to be encompassed, compliance with Art. 9 (3) of the Aarhus Convention will be achieved. However, such a line of reasoning is not faultless. Taking into account the additional

¹⁶⁰ ACCC European Union (see above n 51), par. 94.

qualitative standards of Art. 9 (4) of the Aarhus Convention also the procedures provided by Convention parties in the context of Art. 9 (3) of the Aarhus Convention, whether administrative or judicial, must be “adequate and effective”. This, amongst others, entails that the final ruling of the decision-making body must be impartial and free from prejudice, favouritism or self-interest¹⁶¹. As Ebbesson rightly pointed out, the requirements of fair and equitable procedures will be key considerations when administrative procedures are to be examined in light of the Aarhus Convention standards¹⁶².

Henceforth the internal review mechanism, even if it would encompass also acts of a general nature, can hardly be qualified as “adequate and effective”. It merely allows ENGOs to request the EU bodies and institutions which have adopted the contested acts to reconsider them. As such, the internal review procedure in itself does not seem to be able to ensure compliance with the requirements included in Art. 9 (3) and (4) of the Aarhus Convention. In contrast to other administrative review procedures, such as the review by the *European Ombudsman*¹⁶³, an internal review does not seem to offer a review which is impartial, adequate and fair. Obviously, EU institutions and bodies will not be eager to frequently review their own acts. To a certain extent, this is also illustrated by the above-mentioned administrative practice of the internal review to date.

Client Earth, in its earlier submissions on the draft findings of the ACCC, also pointed out that, according to the European Commission’s rules of procedure, it is “the member of the Commission responsible for the application of the provisions on the basis of which the administrative act concerned was adopted” that decides whether or not the act

of which a review is sought is in breach of environmental law¹⁶⁴. In addition, it maintained that the internal review procedure as such does not provide any injunctive relief either, as exemplified by the analysis presented above. Moreover, a reference to the possibility of lodging complaints against “maladministrations” of institutions with the European Ombudsman, seems incapable of offering the necessary relief, in light of Art. 9 (4) of the Aarhus Convention, as its decisions are even not binding on EU institutions¹⁶⁵.

As a consequence, it is clear that broadening the scope of the internal review procedure will not suffice to achieve the commitments of the EU under the Aarhus Convention. As there is, until now, a clear lack of adequate administrative remedies on the EU level available to the members of the public, it becomes all the more important to broaden the access to the EU Courts. Since Art. 9 (3) of the Aarhus Convention does not, as such, require the existence of a judicial review procedure, the establishment of an administrative review body in itself might also already be sufficient to ensure compliance. In that regard, it might be desirable to also take into consideration the option of establishing an effective, full-fledged administrative review procedure, which safeguards the necessary impartiality and independence requirements in this regards.

VI. The Treaty of Lisbon: Any Additional Help for ENGOs?

In order to complete the assessment of the added value of the Aarhus Regulation, one also needs to take into consideration the latest modifications introduced by the Lisbon Treaty as regards

¹⁶¹ Implementation Guide (see above n 11), pp. 201–202.

¹⁶² J Ebbesson (see above n 16), p. 264.

¹⁶³ See extensively M Pallemarts (see above n 61), pp. 16–20.

¹⁶⁴ Client Earth, ‘Comments on the Draft Findings’, 11 April 2011, par. 4 and 5, available at: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/DRF/frClientEarth_comments_draft_findings032011.pdf (accessed 15 May 2014).

¹⁶⁵ Ibid, par. 8.

judicial protection. In this respect, not only the amendments made to the provisions in the Treaty as to direct actions for annulment are to be considered, but also the strengthening of the individual legal protection in the fields covered by Union law before national courts. It must be checked whether both modifications might not be helpful in mitigating or overcoming the above-mentioned shortcomings.

VI.1. The added judicial protection in relation to “regulatory acts”

As widely known, the TFEU did not limit itself to merely copying the framework of remedies set out by the TEC, but also revised the *locus standi* requirements for private applicants in the context of annulment procedures.

Hence, as of 2009, the provision on direct actions for annulment by natural or legal persons, which is now present in Art. 263 (4) of the TFEU, now allows: “Any natural or legal person (...) (to) institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures”. By excluding the *Plaumann*-test in the hypothesis of a regulatory act not entailing implementing measures, the Lisbon Treaty clearly sought to remedy the lack of judicial review in situations such as those outlined in *Jégo-Quéré*. Due to the lack of a clear definition of the notion of “regulatory act” in the Lisbon Treaty, the exact meaning remained until recently the subject of a lively debate amongst scholars, ever since it was included in the draft Treaty Establishing a Constitution for Europe¹⁶⁶.

Regrettably, also the new version of Art. 263 (4) of the TFEU does not lay down any explicit provisions which would guarantee access to ju-

dicial review in environmental matters in accordance with Art. 9 (3) of the Aarhus Convention. Moreover, most commentators, such as Jans, contended that, regardless of the correct interpretation of the term “regulatory act”, it would not add much to the field of environmental law, since the overwhelming majority of EU acts require implementing measures¹⁶⁷. Jans even explicitly referred to the decision of the European Commission which was at stake in *Greenpeace*, stating that, in any event, this decision could not be qualified as a “regulatory act”¹⁶⁸. Other commentators assumed that the widening up of the admissibility conditions by the Lisbon Treaty could have a positive impact on the access to the EU Courts by the public in the environmental sector¹⁶⁹.

In the meantime, both the General Court and the CJEU clarified the matter. In *Inuit Tapiriit Kanatami* the General Court, after having carried out a literal, historical and teleological interpretation of the latter provision¹⁷⁰, held that “regulatory acts” must be understood as covering all acts of general application apart from legislative acts¹⁷¹. In October 2013 this view was confirmed by the CJEU¹⁷².

In *Microban*, however, the General Court accepted that a decision which was adopted by the Commission in the exercise of its implementing powers, could be qualified as a “regulatory act”¹⁷³. Notwithstanding the low expectations of some commentators, the recent case-law on Art. 263 (4) of the TFEU seems capable of lessening the

¹⁶⁶ See: for instance: R Barents, ‘The Court of Justice after the Treaty of Lisbon’ (2010) *CMLRev* 47 (3), pp. 709–729.

¹⁶⁷ J Jans (see above n 7), p. 485.

¹⁶⁸ *Ibid.*

¹⁶⁹ See amongst others: J-F Brakeland (see above n 100), p. 3.

¹⁷⁰ Case T-18/10, *Inuit Tapiriit Kanatami* [2011] ECR II-75.

¹⁷¹ *Ibid.*, par. 56.

¹⁷² Case C 583/11 P *Inuit Tapiriit Kanatami* [2013] ECR I-0000, par. 60.

¹⁷³ Case T-262/10, *Microban International Ltd* [2011] ECR II-07697, par. 22.

burden of admissibility for annulment actions, to a certain extent.

Because the notion of “*regulatory act*” also clearly included delegated and implementing acts, pursuant to Art. 290 and Art. 291 of the TFEU, as long as they are acts of a general application, it is not inconceivable to hold that also decisions pertaining to the listing of substances, as were at stake in *EEB*, could also benefit from the relaxed standards included in Art. 263 (4) of the TFEU. However, on the other hand, it remains uncontested that regulations adopted by the Parliament and the Council acting together through legislative procedures, still fall outside of the scope of the more lenient standards on access to justice. Yet, as already mentioned above, such findings do not stand at odds with the Aarhus Convention since the latter exempts legislative acts from the requirements on administrative and judicial review, as included in its Art. 9 (3).

On the downside, it must be noted that, in the aforementioned ruling, the Court adopted, on both occasions, a very strict interpretation of the notion of “*direct concern*”¹⁷⁴. As also concluded by Advocate-General Kokott in her opinion on appeal in *Inuit Tapiriit Kanatami*¹⁷⁵, the requirement of direct concern is not fulfilled in cases where there is only a factual effect, whereas, in previous case-law, actions for annulment had been admitted where the effects of those acts on the respective applicant are not legal, but merely factual, for example because they are directly affected in their capacity as market participants in competition with other market participants. Accordingly, there appears to be a clear tendency in the General Court’s recent case-law to hold that having its economic situation affected by a decision is not enough to be directly concerned by a

regulatory act and to have legal standing before the EU Courts¹⁷⁶.

As a result, it still remains to be seen to what extent the environmental impact of, for instance, the use of products containing hazardous substances, could be qualified as having “*direct concern*” for private individuals or ENGOs. While the new wording of Art. 263 (4) of the TFEU might have given rise to a wider access to the EU Courts in some environmental cases by excluding the requirements to be individually concerned by a regulatory act, the requirement of being “*directly concerned*”, especially in the field of environmental policy decisions, is to be interpreted so strictly that access to the EU Courts for ENGOs and individuals would still be illusory. It is thus not unthinkable that, in environmental cases, the battle for a wider access to the EU Courts in the coming years will, to a certain extent, have to refocus on the exact interpretation that needs to be given to the requirement of “*direct concern*”.

VI.2. Enhanced legal protection before national courts as panacea for all ills?

It must be borne in mind that the authors of the Lisbon Treaty achieved the aim of strengthening individual legal protection not only by extending the direct legal remedies available to natural and legal persons under the third variant of the fourth paragraph of Article 263 TFEU, but also, with the second subparagraph of Article 19 (1) of the TEU, intended to strengthen individual legal protection in the fields covered by Union law before national courts. Pursuant to the latter provision “*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*”¹⁷⁷.

¹⁷⁴ See also: A Berthier (above n 106), p. 94.

¹⁷⁵ Opinion A-G Kokott in *Inuit Tapiriit Kanatami* (see above n 170), par. 71.

¹⁷⁶ *Inuit Tapiriit Kanatami* (see above n 170), par.75.

¹⁷⁷ See also in this regard: Case C-432/05 *Unibet* [2007] ECR I-2271, par. 65.

Interestingly, also in the field of environmental EU law, a tendency to broaden the access to justice before national courts can be detected in the recent case-law. The last years, the CJEU has revealed itself as a big proponent of wide access to justice for ENGOs in environmental cases at national level, thereby significantly curtailing the procedural autonomy of the Member States. As a matter of fact, the CJEU does not seem to shy away from urging national courts to reconsider their traditional approach towards standing for ENGOs in environmental cases, as, amongst others, portrayed by the ruling in the above portrayed *Slovak Brown Bear*-case. All in all, the CJEU seems to adopt a rather generous attitude towards standing for ENGOs and individuals in environmental cases before national courts.

Also the Court's ruling in *Janecek* could be tagged as an early example of the increased willingness of the ECJ to broaden access to national courts of the public in environmental cases¹⁷⁸. The more recent decision in *Bund für Umwelt und Naturschutz Deutschland* serves as another striking example thereof. Here, the CJEU strictly scrutinized national procedural rules in light of the requirements enshrined in Art. 9 of the Aarhus Convention, as implemented in Union law. The CJEU had to assess to what extent the so-called "*Schutznormtheorie*", under which individuals and ENGOs have only standing to invoked legal proceedings that are designed to protect their specific interest is reconcilable with the EU provisions on access to justice. Under such an approach, public interest litigation is being made virtually impossible since lawsuits initiated by ENGOs and aimed at the protection of the general interest of the environment fall outside of the scope of a "*schutznorm*". Finally, the CJEU held that both EU environmental law and the Aarhus Convention preclude the use of a "*schutznorm*"

which does not permit ENGOs to rely before the courts, in an action contesting a decision authorising projects which fall within the scope of Union law, on the infringement of a rule flowing from EU environment law and intended to protect the environment¹⁷⁹.

Possibly even more compelling in this respect are the decisions of the CJEU in *Boxus*¹⁸⁰ and *Solvay*¹⁸¹, in which it was underlined that the Aarhus Convention, read in conjunction with EU environmental law, requires that any national court, if no other legal actions are available under the applicable national procedural law, should be enabled to review whether a legislative act, exempting a project from a prior environmental impact assessment, has complied with the applicable conditions laid down by EU environmental directives¹⁸². In more recent case-law, the CJEU also underlined the need of protection of the previously formed legal status of complex multistage processes¹⁸³ and adherence to decisions of the higher court¹⁸⁴. Likewise, the Court also clarified the term of "not prohibitively expensive costs" in two recent cases, which deal with the costs of access to justice which have traditionally been very high in the United Kingdom's various jurisdictions¹⁸⁵.

Surely, the above-mentioned rulings must be welcomed as a good example of how the CJEU took into consideration Art. 9 (3) of the Aarhus Convention when interpreting national procedural rules, thereby ensuring effective judicial protecting at national level, even in the (blatant) absence of a general EU Directive on this mat-

¹⁷⁸ Case C-237/07, Dieter Janecek [2008] ECR I-06221.

¹⁷⁹ Trianel (see above n 107), par. 46.

¹⁸⁰ Boxus (see above n 125).

¹⁸¹ Solvay (see above n 125).

¹⁸² Boxus (see above n 125), par. 54; Solvay (see above n 125), par. 50.

¹⁸³ Case C-72/12, Altrip [2013] ECR I-0000.

¹⁸⁴ Križan (see above n 157).

¹⁸⁵ Case C-530/11, Commission v UK [2014] ECR I-0000; Case C-260/11, Edwards [2013] ECR I-0000.

ter¹⁸⁶. However, whilst the drafted proposal for an EU Directive was set aside in 2003, the proactive jurisprudence of the CJEU and different study findings¹⁸⁷ urged the Commission to restart the process towards a legally binding instrument in order to implement Art. 9(3) of the Aarhus Convention¹⁸⁸. The 2013 study carried out by Darpö concluded that there clearly exists a clear need for a new directive, in order to harmonize the national efforts in implementing Art. 9(3) and (4) of the Aarhus Convention. The latter study concluded that the status of implementation of the latter provisions in the Member States can be tagged as “diverging, random and inconsistent”, underpinning the need for a harmonizing directive¹⁸⁹.

Taking stock of recent case-law developments, the CJEU can certainly not be accused of unwillingness to take into account Article 9 of the Aarhus Convention in respect of the review of well-established rules of national procedural law, such as the German “*schutznorm*”. In fact, the CJEU clearly did not shy away from calling into question a core principal of a national legal system in light of the third pillar of the Aarhus Convention. As a result, it is now uncontested that Art. 9 of the Aarhus Convention may trump national procedural rules.

Moreover, in general, it is true that the coherence of the judicial system of the European Union does not rest solely on the EU Courts, but rather on the interlocking system of jurisdiction

of the EU Courts and the national courts, exemplifying the principle of upholding the “*rule of law*” in the Union legal order. Yet, while the national courts might indeed, in line with the rulings of the ECJ in *Les Verts*, play a crucial role in filling gaps in the system of judicial protection, they will probably not be able to provide a sustainable solution to fill the judicial protection gaps on the EU level, where still a lot of barriers remain which prevent ENGOs and individuals from having access to justice in conformity with the requirements set out in Art. 9 (3) of the Aarhus Convention. In that respect, referral can be made to the issues that had been already spotted by Advocate-General Jacobs in his Opinion in *Unión de Pequeños Agricultores*¹⁹⁰. There it was noted that the preliminary ruling is not available as a matter of right (since it is up to the national courts to refer a question to the CJEU). On top of that, it remains useful to recall that, in *Vereniging Milieudefensie*, the General Court already rejected a recourse to national proceedings as justification for the limited scope of the internal review procedure, as no national measure appeared to be available to question before the national courts. A similar conclusion could also be reached in the context of, for instance, fisheries measures adopted within the framework of fisheries conservation policy, which still largely remains an exclusive competence of the EU. In such instances, that are simply no national measures which could be contested before national courts.

The ACCC reached a similar conclusion in its findings and recommendations of April 2011, whereby it pointed, amongst others, to the fact that it is, in any event, up to the national court to bring such cases to the CJEU¹⁹¹. Hence, there remains a great deal of uncertainty whether the

¹⁸⁶ Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM[2003] 624 final, 24 October 2003.

¹⁸⁷ See most interestingly Jan 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 at http://ec.europa.eu/environment/aarhus/access_studies.htm.

¹⁸⁸ See more on this topic: T P Vidovic (see above n 15); p. 199; J-F Brakeland (see above n 100), pp. 17–23.

¹⁸⁹ J Darpö (see above n 187), p. 25.

¹⁹⁰ A-G Jacobs Opinion in UPA (see above n 38), paras. 42–44.

¹⁹¹ ACCC European Union (see above n 51), par. 89.

case at hand will finally end up before the EU Courts. In other words, enhanced legal protection before national courts, whilst as such desirable, cannot serve as a panacea for all ills in this context.

At the end of the day, the possibility of challenging decisions of the European decisions would depend entirely on the legal protection afforded by the national courts. Moreover, another compelling reason why national courts might refrain from referring questions to the CJEU in environmental cases is the significant time during (mostly several years) which the national proceedings would have to be suspended, coupled with very strict conditions for interim relief, at least as far as legal challenges to EU acts¹⁹². The large amounts of delays and costs that are involved in such proceedings make them disadvantageous in many instances¹⁹³. In sum, whilst the continuous development of the case-law widening the access to justice in environmental cases before national courts must certainly be hailed as a positive evolution, it may not be used as scapegoat for denying modifications to the existing case-law on access to EU courts for ENGOs and the wider public, especially so in environmental cases. Given the recent findings in the aforementioned studies, where it was concluded that access to justice in environmental matters still leaves a lot to be desired at the national level, merely relying on the national courts may not be sufficient in light of the Aarhus Convention¹⁹⁴. In the absence of a new directive on access to justice in environmental matters before national courts, it can be assumed that in many instances, even whenever national implementing measures are available, national litigation will not serve as a useful and realistic fall-back option.

¹⁹² P Wennerås (see above n 7), p. 213.

¹⁹³ See also: M Eliantonio (see above n 93), p. 789.

¹⁹⁴ J Darpö (see above n 187), p. 9.

In light of the foregoing decisions of the General Court and the ACCC, it will be very interesting to see how the CJEU will tackle this issue. If it were to follow the view of the General Court in *Vereniging Milieudefensie*, this could possibly serve as a catalyst for a future reverse of established case-law on standing requirements in environmental cases, as, in that hypothesis, it would lose its one of its settled lines of argumentation to ground the limited access on the EU level for ENGOs.

In fact, it might be hoped that the CJEU, not only in the cases on appeal, but also in other, future proceedings, might seize the opportunity to display the same openness towards the Aarhus Convention as regards access to justice on the EU level as it did in recent years in respect of national admissibility requirements for ENGOs. The recent Aarhus-friendly case-law in the context of national procedural rules might in fact serve as an additional incentive to do away with the traditional *Plaumann*-doctrine instead of justification for the persisting rigid attitude on standing criteria on the EU level. For, to a certain extent, it would be highly inconsistent for the EU Courts to require the national courts to interpret well-vested national procedural rules in light of the Aarhus Convention, whilst giving a deaf ear to the latter convention in the context of direct actions against EU measures. Whilst enhanced protection before national courts is certainly capable of filling in some gaps, it will certainly not be able to guarantee in itself a full-fledged and effective system of judicial protection in the context of EU decisions.

VII. Conclusion and Outlook

Wrapping up, it can be seen from the above conducted analysis that the pursuit of a better access to justice in environmental cases on the EU level is far from over. On the surface, the recent judgments handed down by the General

Court in June 2012 should indeed be welcomed as a first, important step in the struggle for an enhanced level of legal protection in environmental cases. The General Court undoubtedly showed a greater openness towards the requirements enshrined in Art. 9 (3) of the Aarhus Convention, even confronted with the lack of a direct effect thereof. By ruling out the rigid application of the Aarhus Regulation with referral to Article 9 (3) of the Aarhus Convention, the General Court apparently moved away from its traditional strict approach towards public interest litigation.

And to a certain extent, it is tempting to conclude that the General Court has moved away from its earlier “conservative” approach towards access to justice in environmental cases on the EU level. Taken together with the recent case-law developments as regards access to justice on the national level, the EU Courts seem ready to revisit their *stare decisis* as to judicial review in environmental matters. In that light, one could portend that the EU Courts finally took stock of the growing international awareness concerning government accountability, transparency and responsiveness, which are all, in a certain way, closely related to a better access to justice in environmental matters. ENGOs possess a level of technical expertise and thus play a vital role in the much needed struggle for more environmental protection in modern day society. Since on the EU level major decisions as to the environment and public health are being taken, a satisfactory degree of judicial review must be provided here too. This appears to be a matter of simple common sense. Also EU decisions in the field of the Common Fisheries Policy to administrative decisions on the authorisation of chemicals, pesticides, biocides and GMOs must be subject to judicial review, just as is the case at national level.

And thus, there remains ample reason to urge for a more wider access to justice in env-

ronmental cases on the EU level. Whilst the EU likes to portray itself as a progressive player in the field of environmental protection and sustainable development, the lack of effective judicial protection in environmental matters severely puts into question the latter image.

Admittedly, the rulings of the General Court of June 2012 might include the gems of hope that many ENGOs are eagerly awaiting for a long time. Yet, at the same time, the rulings also contain some disturbing warnings for future public interest litigation. In fact, their legacy might be less favourable for ENGOs in the long run. Accordingly, the recent decisions seem to highlight that the critiques on the adequacy of the Aarhus Regulation were well-deserved. If the CJEU were to confirm this view on appeal then a mere stalemate would be reached as regards judicial protection in environmental cases on the EU level. Moreover, given the fact that, as outlined above, the internal review procedure in itself does not seem to fulfil the basic requirements of Art. 9 (3) and (4) of the Aarhus Convention on several accounts, the ACCC might be, in its final findings, less reluctant to issue some more outright findings and recommendations as regards the (obvious) non-compliance by the EU with its obligations under the Aarhus Convention.

It is a misconception to believe that the battle for a better access to the EU Courts will have ended with the lawsuits that have been dealt with in this paper. Quite the contrary is true. Taking into account the appeals by the European Commission, the Council and the European Parliament, it is abundantly clear that even the limited progress that has been reached in the judgments of 14 June 2012 is not even certain to last.

At the end of the day, it is rather ironic to note that, whilst the CJEU is recently spawning “*progressive*” case-law, which urges national courts to re-think their traditional rigid approach towards public interest litigation in the context of

EU environmental law, it refuses to do the same as regards direct actions against EU measures. Instead of shifting responsibility to the Member States, which can take the (rather unlikely) initiative to initiate an intergovernmental conference to consider an amendment to Art. 263 of the TFEU or the national courts, the EU Courts themselves should reconsider their well-vested approach towards the notion of “*direct and individual concern*”. As was pointed out by the ACCC, the relevant provisions of the TFEU are drafted in such a way that they can be interpreted by the EU Courts in line with the standards enshrined in the Aarhus Convention. While, for the time be-

ing, this might seem uncharted territory for the EU Courts, given the quasi-constitutional status of the *Plaumann*-doctrine, it appears to be the only sensible solution for this perennial inconsistency in the long run. The EU Courts have run out of excuses not to transcend their traditional approach to legal standing in environmental cases. Alternatively, the EU risks of becoming the laughing stock of international environmental policy. For, how serious can one take the environmental commitments of the EU, if it appears to be unable to provide an adequate level of effective judicial protection in environmental matters before its own courts?