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Judicial Dialogue, Judicial Competition and Global Environmental Law

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I. Introduction[1]

According to Article 19(1) of the Treaty on European Union (TEU), Member States are responsible for providing remedies sufficient to ensure effective legal protection in the fields covered by Union law. Environmental law (Article 4(2)(e) of the Treaty on the Functioning of the EU (TFEU) in combination with Articles 191-193 TFEU) is such a field.[2] It should be noted that in the EU *substantive* environmental rules (emission standards, quality standards, products standards, etc.) have been harmonised to a significant extent. This substantive law, generally contained in Union directives, is transposed into national legislation and applied and enforced by national authorities.

However, with respect to issues concerning access to justice in environmental matters things are different. The EU Member States are in principle competent to determine (and responsible for determining) the applicable procedures and the way they are organised.

In other words, the way in which a provision of Union environmental law can be invoked in the national legal system and the form in which this occurs depends largely on national law. According to the established case law of the European Court of Justice, it is, in the absence of Union law, for the national legal order of each Member State to designate the competent courts and to lay down the procedural rules for proceedings designed to ensure the protection of the rights which individuals acquire through the direct effect of Union law.[3] In other words, Union law does not in principle concern itself with the manner in which it is applied within the national legal orders. This is known in European law as the principle of procedural autonomy. As an expression of the subsidiarity principle, procedural autonomy implies a degree of variation in the manner in which substantive Union law is

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[1] This chapter builds on some of my previous publications, e.g., 'Who is the referee? Access to Justice in a Globalised Legal Order. A Case Analysis of ECJ Judgment C-240/09 Lesoochranárske zoskupenie of 8 March 2011'. In: *REALaw* 2011/1, p. 85-97.

[2] The competences of the EU in the area of environmental protection must be regarded, also in the words of the Article 4(2) TFEU, as a 'shared competence'. A shared competence implies that both the Union and Member States may legislate and adopt legally binding acts in that area. However, the Member States shall exercise their competence only to the extent that the Union has not already exercised, or has decided to cease exercising, its competence. Cf. in general J.H. Jans and H.H.B. Vedder, *European Environmental Law*, 4th edition, Europa Law Publishing 2012.

[3] Case 45/76 *Comet* [1976] ECR 2043; Case 33/76 *Rewe* [1976] ECR 1989 and Case 265/78 *Ferwerda* [1980] ECR 617. Cf. on this so-called *Rewe/Comet* case law: Jans et al., *Europeanisation of Public Law*. Europa Law Publishing 2007, Chapter 2.

applied throughout the Member States.

And indeed, it has emerged from research[4] that national procedural environmental law varies from one European country to the next. There are, for example, differences in time limits for appeal,[5] standing requirements in particular for NGOs, access to legal aid, intensity of judicial review,[6] court and other legal costs,[7] differences in the length of judicial proceedings, etc. As a result, comparable proceedings may produce very different outcomes.

Although there is no *general* competence of the Union legislature to harmonise legal proceedings in the Member States it does act, bit by bit, when the Union legislature considers that these differences have become too great in a certain area and it may decide to take legislative action and harmonise national legislation in that area. In such cases, it is not only the substantive law that is harmonised but also the manner in which Member States must apply it. With respect to access to justice in environmental matters, the main legal instrument is the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the so called Aarhus Convention). The Aarhus Convention is a, in EU-speak, a 'mixed agreement', one to which both the EU and its Member States are parties.[8] For the time being, it suffices to say that access to justice in environmental matters is influenced by three sets of rules: international environmental law (the Aarhus Convention), EU environmental law (the Directives and the Regulation implementing the Aarhus Convention in the EU) and national environmental law (national rules on access to court).

The first case law shows the interplay of these rules on access to court. However, before we are to consider some of these cases, we have to present the rules of the Aarhus Convention and its EU implementing measures in a little more detail.

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[4] See, for example, N. de Sadeleer, G. Roller & M. Dross (eds.), *Access to Justice in Environmental Matters and the Role of NGOs; Empirical Findings and Legal Appraisal.* Europa Law Publishing 2005.

[5] Cf. English Court of Appeal 12 April 2000 *Regina v North West Leicestershire Country Council, East Midlands International Airport Ltd.,* ex parte *Moses* [2000] Env. L.R. 443. Reasonable time limits have been upheld as being compatible with the requirements of Union law; Case C-188/95 *Fantask* [1997] ECR I-6783.

[6] Cf. with respect to the Aarhus Directive 2003/35 requiring courts to examine the substantive legality of a decision Case C-427/07 *Commission v Ireland* [2009] ECR I-6277, paras. 87-89.

[7] Cf. also Case C-427/07 *Commission v Ireland* [2009] ECR I-6277, paras. 92-93.

[8] Decision 2005/370/EC, OJ 2005 L 124/1.

II. The Aarhus Convention and the EU

Under Article 216(2) TFEU, agreements concluded by the EU are binding on the institutions of the Union and on its Member States. Provisions of EU law must as far as possible be interpreted in a manner that is consistent with international agreements concluded by the Union.[9] At the same time, national courts are required to interpret national procedural rules as far as possible in the light of the international commitments of the European Union.[10] Where the subject matter of an agreement concerns partly the competence of the Union and partly that of the Member States, it is essential to ensure close cooperation between the Member States and the Union, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into.[11] In addition, Member States must refrain from measures – unilateral or otherwise – which could jeopardise the attainment of the Union's objectives.

As is clear from Article 4 TFEU, environmental policy is a 'shared' competence. Neither the Union nor its Member States have exclusive competence in this area. This is also reflected in Article 191(4) TFEU, in the field of external relations. Multilateral environmental conventions and the Aarhus Convention are not different in this respect, and will, as a rule, fall partly under the competence of the Union and partly under the competence of the Member States.

In this paper we will concentrate our analysis on Articles 9(2), 9(3) and 9(4) of the Aarhus Convention. Article 9(2) of the Aarhus Convention requires access to justice for a group of decisions specifically listed in the Convention and reads:

> Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
>
> (a) *Having a sufficient interest*
>
> or, alternatively,
>
> (b) *Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure*

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[9] Cf. Case C-284/95 *Safety Hi-Tech* [1998] ECR I-4301, para. 22, and as regards the Aarhus Convention in particular, Case C-240/09 *Lesoochranárske zoskupenie*, judgment of 8 March 2011, especially paras. 50-51.

[10] Cf. Case C-53/96 *Hermès International* [1998] ECR I-3603, para. 28.

[11] See, for example, in the field of environmental law Case C-246/07 *Commission v Sweden* [2010] ECR I-3317.

before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission […].

Article 9(3) provides a basic obligation to provide access to justice for all other decisions relating to the environment:

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

Article 9(4) of the Aarhus Convention provides essentially that environmental review procedures shall be '[…] fair, equitable, timely and not prohibitively expensive'. The provision is applicable both to Article 9(2) and 9(3) procedures. To meet the obligations under the Aarhus Convention, the EU took the following measures:

- Regulation 1367/2006 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;[12] In view of the fact that the EU institutions do not take decisions falling under Article 9(2) of the Aarhus Convention, the Regulation, by creating an internal review procedure for certain NGOs, deals with Article 9(3) of the Convention in particular.
- Directive 2003/35 providing for public participation with respect to the drawing up of certain plans and programmes relating to the environment.[13] The preamble to that directive shows that it is exclusively intended to implement Article 9 paragraphs 2 and 4 of the Aarhus Convention. The directive more or less copied and pasted Articles 9(2) and (4) of the Convention and provides a legal framework for access to justice in the Member States as far as it concerns decision-making on EIAs and with respect to major industrial installations. A proposal from the Commission to implement the access to justice provisions of Article 9(3) Aarhus Convention via a directive is, politically speaking, 'dead'.[14] In other words, the European legislature has still not taken any measures to implement Art. 9(3) Aarhus Convention with respect to environmental decisions by the Member States.

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[12] OJ 2006 L 264/13.

[13] OJ 2003 L 156/17.

[14] COM/2003/0624 final.

We have already mentioned that the Aarhus Convention is a so-called 'mixed agreement'. It is clear from the case law of the CJEU that when a convention falls partly within the competence of the Member States and partly within that of the Union, it can only be implemented by means of a 'close association between the institutions of the Community and the Member States both in the process of negotiation and conclusion and in the fulfilment of the obligations entered into.'[15] The conclusion of mixed agreements requires that certain matters must be regulated with regards to the relationship between the Union and its Member States on the one hand, and the other parties to the convention on the other. A problem with mixed environmental agreements concerns the extent to which the Union and its Member States are bound by them vis-à-vis the other contracting parties. After all, mixed agreements are concluded, because neither the Union nor the Member States has exclusive competence. To what extent does this internal division of powers affect the legal position of the other parties? Is the Union only bound as far as third countries are concerned in respect of those provisions that fall within its competence? To overcome these problems, most multilateral treaties on the environment contain specific provisions on the matter. With respect to the Aarhus Convention, the EU declared:

> '[…] that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations.'[16]

This declaration of competence also raises the question of the CJEU's authority to interpret provisions of mixed agreements, in this case the provisions of the Aarhus Convention. The general rule on this has been laid down by the ECJ in *Merck Genéricos*.[17] In essence, the Court held in that judgment that the jurisdiction to ascribe

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[15] Opinion 2/91 [1993] ECR I-1061 *(ILO-convention no. 170*). Cf. also the 'principle of sincere cooperation' mentioned in Article 4(3) TEU.

[16] See Decision 2005/370/EC, Council Decision 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. OJ 2005 L 124/1 and OJ 2006 L 164/17.

[17] Case C-431/05 *Merck Genéricos Produtos Farmacêuticos* [2007] ECR I-7001.

direct effect to a provision of a mixed agreement depends on whether that provision is found in a sphere in which the EU had legislated. If so, EU law would apply; if not, the legal order of a Member State was neither required nor forbidden to accord to individuals the right to rely directly on the rule in question.

III. Introducing the 'Players'

We have already mentioned in the introduction that, within the European Union, access to justice in environmental matters is influenced by three sets of rules: international environmental law (the Aarhus Convention), EU environmental law (the Directives and the Regulation implementing the Aarhus Convention in the EU) and national environmental law (national rules on access to court). Let us introduce the main 'players' with respect to the interpretation of the access to justice provisions of the Aarhus Convention. They are:

- the Aarhus Compliance Committee and parties to the Aarhus Convention joined in the Meeting of the Parties (MoP);
- national courts of the contracting parties;
- the Court of Justice of the European Union;
- the European Court on Human Rights.

III.1. Aarhus Compliance Committee cum annexis

An important role to ensure compliance with the provisions of the Aarhus Convention is played by the so-called Aarhus Compliance Committee (ACC). The origins of the ACC can be found in Article 15 of the Aarhus Convention that provides:

The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.

In its decision I/7 MoP the Meeting of the Parties decided that 'communications may be brought before the Committee by one or more members of the public concerning that Party's compliance with the Convention.' The ACC consists of eight independent experts who have recognised competence in the field and who serve in their personal capacity. Remarkably, the ACC accepts not only the submissions of Parties to the Convention and referrals from the Secretariat about non-compliance

with the Convention but also communications from the public. The ACC is not to be regarded as court or tribunal providing individual remedies to individuals. Its main focus is to strengthen compliance by making recommendations to the Meeting of the Parties. According to the Committee's first Chairman, Prof. Veit Koester: 'If and when the Committee does reach some conclusions, these will be referred to the Meeting of the Parties, which will be the final arbiter as to whether or not there is a case of non-compliance.' From the perspective of the Aarhus Convention and its objectives this statement makes perfect sense.

III.2. The Court of Justice of the European Union and the European Court on Human Rights

However, let us take a different perspective, that of the European Court of Justice. The Aarhus Convention is a 'mixed treaty' and, as a matter of EU law, binding on the EU and its Member States. In the terminology of the CJEU: the Aarhus Convention is 'an integral part of the legal order of the European Union' (*Slovak Bears* case). Furthermore, although in particular Directive 2003/35 more or less copied the provisions of the Aarhus Convention, from a formal point of view the access to justice provisions of Directive 2003/35 are to be considered 'EU law'. Besides, it is quite clear that, once again from the perspective of EU law, the European Court of Justice is the final arbiter on the interpretation of EU law. Matters are, however, more complicated. The access to justice provisions of Directive 2003/35 cannot be looked at and analysed in isolation. They are embedded in a more overarching general doctrine: the right to an effective remedy and to a fair trial as enshrined in Article 47 of the Charter on Fundamental Rights of the EU. And that provision finds it origins in just another part of 'European law' that is Articles 6 and 13 of the European Convention on Human Rights of which the European Court on Human Rights is the final arbiter. That treaty is, however, clearly linked to the EU Treaties. According to Article 6(3) TEU: 'Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.'[18]

[18] See also Article 6(2) EU: 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.'

III.3. National (Constitutional) Courts

But let us not forget the important role of the national courts. The Aarhus Convention requires the parties to submit national compliance reports. The reports show that many countries changed their legislation to comply with the Aarhus Convention. The Constitutions in several countries declare that international treaties and conventions can have direct effect (self-executing effect) in national the legal system and/or take precedence over national law.

Articles 93 and 94 of the Dutch *Grondwet* (Constitution) provide for the application of international law in the Netherlands. They state:

> *'Article 93: Provisions of treaties and of decisions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published.'*
>
> *'Article 94: Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of decisions by international institutions.'*

In other countries such precedency and/or primacy rules are non-existent. Furthermore, national constitutional law, written and unwritten, in several countries provides that national law must be interpreted in such a manner as to comply with international law.

For example, it is a principle of Dutch constitutional law that domestic Dutch law should be interpreted in the light of the public international law obligations of the Dutch state, and in the UK the House of Lords held in the *Pinochet* case that the State Immunity Act 1978 had to be interpreted in a manner which accords with public international law.[19]

Having introduced the most important players, my interim conclusion is as follows. The Meeting of the Parties, with assistance of the Aarhus Compliance Committee, is the final arbiter regarding compliance with the Aarhus Convention. The European Court of Justice is the final arbiter regarding the interpretation of EU law. The European Court on Human Rights (ECtHR) is the final arbiter on compliance with the European Convention on Human Rights (ECHR). And, finally, national (constitutional) courts are the final arbiters on matters of national (constitutional) law.

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[19] UK House of Lords 24 March 1999 *Regina v Bartle and the Commissioner of Police for the Metropolis and others,* ex parte *Pinochet* [1999] UKHL 147, [2000] 1 AC 147.

Let us now have look at some cases and how this multi-layered system truly functions.

IV. The Question of 'Who Decides Who Has Access to Justice' in Environmental Matters is a Difficult One

The following two cases – one from the European Court of Justice and one from the Dutch Council of State – illustrate the problems regarding the demarcation of the various jurisdictions.

IV.1 The *Slovak Bears* case

First, let us present the *Slovak Bears* case from the European Court of Justice.[20] The facts are as follows. A Slovak NGO (Lesoochranárske zoskupenie VLK (LZV) in English: the WOLF Forest Protection Movement[21] requested that the Slovak ministry for the environment inform it of any administrative decision-making procedures which might potentially affect the protection of nature and the environment or which concerned the granting of derogations to the protection of certain species or areas. At the beginning of 2008, LZV was informed of a number of pending administrative proceedings brought by, i.a., various hunting associations. On the 21st of April 2008, the Ministry took a decision granting a hunting association's application for permission to derogate from the protective conditions accorded to brown bears. In the course of that procedure, it notified the Ministry that it wished to participate, seeking recognition of its status as a 'party' to the administrative proceedings under the provisions of Article 14 of the Slovakian Administrative Procedure Code. In particular, LZV asserted that the proceedings in question directly affected its rights and legally protected interests arising from the Aarhus Convention. It also considered the convention to have direct effect. The ministry, however, argued that LZV did not have the status of 'party' but of 'participant' or 'interested party'. Prior to the 30th of November 2007, Slovakian law (the second sentence of Article 83, paragraph 3, of Law No. 543/2002) gave NGOs the status of 'parties to the proceedings' to associations whose objective was the protection of the environment.

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[20] Case C-240/09 *Lesoochranárske zoskupenie*, judgment of 8 March 2011.

[21] See their bilingual website at http://www.wolf.sk/en/en-home.

These associations had the opportunity to contest any decisions taken before the Slovak courts. However, that law was amended with effect from the 1st of December 2007. The effect of that amendment is that environmental associations are now classed as 'interested parties' rather than as 'parties to the proceedings'. In practice, the change of status precludes those associations from directly initiating proceedings themselves to review the legality of decisions. Instead, they must request a public attorney to act on their behalf.

In its decision of 26th of June 2008, the ministry confirmed that LZV did not have the status of a 'party' to the proceedings. LZV could not, therefore, appeal against the decision of the 21st of April 2008. Moreover, the ministry considered the Aarhus Convention an international treaty, which needed to be implemented in national law before it could take effect. The court held that Article 9(2) and (3) of the Aarhus Convention does not contain any unequivocally drafted fundamental rights or freedoms which would be directly applicable to public authorities. LZV lodged an action against the contested decision at the Bratislava Regional Court. That court dismissed LZV's application. LZV appealed to the Slovak Supreme Court, which stayed the proceedings before it and referred preliminary questions on the interpretation of the Aarhus Convention to the Court of Justice. In particular, it wanted to know whether Art. 9(3) of the Aarhus Convention is directly effective within the meaning of settled case law of the CJEU.

In short, the question is whether the CJEU itself or the competent court of a Member State is best-placed to determine whether Article 9(3) of the Aarhus Convention has direct effect or not? The general rule on this has been laid down by the Court in *Merck Genéricos*.[22] In essence, the Court held in that judgment that the jurisdiction to ascribe direct effect to a provision of a mixed agreement depends on whether that provision is found in a sphere in which the EU had legislated. If so, EU law would apply; if not, the legal order of a Member State was neither required nor forbidden to accord to individuals the right to rely directly on the rule in question. In view of the fact that the European legislature has not taken any measures to implement Art. 9 paragraph 3 of the Aarhus Convention (see also the declaration of competence *supra*) with respect to environmental decisions by the Member States, one would have expected – as was also suggested by the advocate-general Sharpston in this case – the CJEU would give room to the Slovak courts to decide the matter. However, in a remarkable judgment the Court assumed jurisdiction to de-

[22] Case C-431/05 *Merck Genéricos Produtos Farmacêuticos* [2007] ECR I-7001.

cide the matter at hand and that 'the Court has jurisdiction to interpret the provisions of Article 9(3) of the Aarhus Convention and, in particular, to give a ruling on whether or not they have direct effect'. Basically it argued that because the substance of the dispute (hunting bears) was governed by EU law (e.g. the Habitats Directive), it was also competent to rule on the direct effect of the Aarhus Convention. For almost every environmental dispute one must come to the conclusion that 'it relates to a field covered in large measure' by an EU directive (there are more than 200 in all areas of environmental protection). This inevitably means that Article 9(3) of the Aarhus Convention would almost always fall within the scope of EU law and, subsequently, within the jurisdiction of the CJEU.

IV.2 The Case of Law of the Dutch Council of State

The second case deals with the possible effects of Article 9(2) and (4) of the Aarhus Convention in the national legal order.[23] As mentioned *supra,* these provisions of the Aarhus Convention have been implemented by the EU legislator by means of Directive 2003/35. The context of this judgment was as follows. On 31 March 2010, legislation – the Crisis and Recovery Act (*Crisis- en herstelwet*, Chw) – entered into force in the Netherlands, which, amongst other things, shortens the procedures required before construction projects can commence. It covers, for example, the construction of roads and business parks as well as houses and wind farms. Various provisions of this legislation concern Dutch administrative procedural law.[24] Section 1.4 of the Act, for example, provides that – contrary to the first paragraph of section 8:1 of the General Administrative Law Act (*Algemene wet bestuursrecht*, Awb) – a legal entity established pursuant to public law and not being part of the central government, or an administrative body not being part of the central government, may not appeal against a decision, if that decision is not addressed to that legal entity or to an organ of the legal entity, or to that administrative body or the legal entity of which that administrative body is part. What is more, section 1.6, paragraph 2, and section 1.6a of the Crisis and Recovery Act make it impossible to lodge a *pro forma* appeal: an appeal will be declared inadmissible, if it does not state the grounds on which it is based. Interested parties have argued in a number of procedures before the Council of State that these provisions are contrary to Article 9(2) and (4), as well as others, of the Aarhus Convention. In the judgments in question,

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[23] Council of State 29 July 2011, LJN: BR4025. See also Council of State 17 November 2010, LJN: BO4217 and 19 January 2011, LJN: BP1342.

[24] It is, incidentally, intended to incorporate a number of provisions of the Crisis and Recovery Act in the General Administrative Law Act so that they become generally applicable. See the legislative proposal *Wetsvoorstel aanpassing bestuursprocesrecht*, Kamerstukken 2009/10, 32450, nr. 1-4.

the Council of State observed:

Both the Netherlands and the European Union are parties to the Aarhus Convention. From the judgment of the Court of Justice of the European Community of 11 September 2007 in Case C-431/05 *Merck Genéricos* […], it follows that in a case like that direct reliance on a rule from the Convention in proceedings before a national court *is not permitted*, if that rule concerns a sphere in which the European Union has laid down rules.

Under Directive 2003/35/EEC, by way of implementation of the obligations arising under, i.a., Article 9(2) of the Aarhus Convention, Directive 85/337/EEC […] was amended by the insertion of Article 10a. Given that the European Union has laid down rules in this sphere, it is not possible in these proceedings to rely directly on Article 9(2), but it must be assessed whether national law is in conformity with the law laid down by the European Union in this respect.[25]

In other words, according to the Council of State, a claimant cannot rely directly on a provision of a mixed agreement before the national courts, if the rule laid down by the convention concerns a sphere in which the Community lawmaker has already laid down rules. The Council of State bases this position on the judgment in *Merck Genéricos*. It is my opinion that this cannot be implied from that or any other judgment of the European Court of Justice.[26] On the contrary, Member States have an independent duty in law to ensure they do not act in contravention of international obligations entered into by the Union. When faced with the question whether a number of provisions of Dutch administrative procedural law conflict with Article 9(2) and (4) of the Aarhus Convention, amongst others, the Council of State should not have hidden behind Directive 2003/35. After all, under Article 216(2) TFEU, agreements concluded by the EU are binding on the institutions of the Union *and* on its Member States; this means that Member States have a responsibility of their own to ensure they do not act in contravention of international obligations entered into by the Union.[27] By merely examining whether national law was consistent with

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[25] Italics added by the author.

[26] A more extensive analysis is due to be published in a *Liber Amicorum* under the title 'Direct reliance on the Aarhus Convention before Dutch administrative courts'.

[27] The parallel can be drawn with the *Costanzo* doctrine, in the way local and regional authorities cannot hide behind conflicting national legislation to implement Union measures. See for a detailed consideration M.J.M. Verhoeven, *The Costanzo Obligation. The obligation of national administrative authorities in case of incompatibility between national law and European Law*, Intersentia 2011.

Directive 2003/35, the Council of State was basically sidelining the Aarhus Convention and rendering it ineffective. In addition, if the Council of State had any doubts concerning the direct effect or otherwise of Article 9(2) of the Convention, or the consequences entailed by the requirement to interpret in a manner which is consistent with the Convention, it should, as the highest national court in this area, have referred the matter to the Court of Justice for a preliminary ruling in accordance with Article 267 TFEU.

V. Limiting Access to Justice for NGOs

The Aarhus Convention recognises the important role NGOs can play in environmental protection.[28] In the words of advocate-general Sharpston:[29]

> 'The provisions on access to justice in environmental matters here at issue start from the premiss that the natural environment belongs to us all. Preventing environmental damage is society's responsibility, not just the responsibility of individuals or isolated interests. Viewed in that light, the provisions of the Aarhus Convention [...] give legal form to the logic of collective action. The individual is protected by acting in a group and the group is collectively strengthened by its individual members. Both the individual and the general interest are thus better protected; and the benefits for all concerned outweigh the disadvantages.'
>
> [...] I take the view that the Aarhus Convention and [...] Directive 2003/35, have deliberately chosen to reinforce the role of non-governmental organisations promoting environmental protection. They have done so in the belief that such organisations' involvement in both the administrative and the judicial stages not only strengthens the decisions taken by the authorities but also makes procedures designed to prevent environmental damage work better.'

The fact that the Aarhus Convention and the EU provisions implementing the Convention aim to enable *broad* access to justice is not seriously contested in either the case law or the literature.[30] Furthermore, the Aarhus Compliance Committee emphasises that a broad interpretation of the Convention should be the rule, not the exception. However, this does not mean that the Aarhus Convention safeguards access for *any individual* regarding *any act of a public authority*. Limitations are certainly possible with regard to the persons and bodies who seek access to justice.

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[28] See in particular Article 2(5) and Article 9(2) of the Convention.

[29] Cf. her opinion in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening* [2009] ECR I-9967.

[30] See for instance C. Schall, 'Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?', *Journal of Environmental Law* 2008, 417-453.

This follows, amongst others, from the words of Article 9(3) of the Aarhus Convention, in so far as it expressly refers to the national law of contracting States: 'where *they* meet the criteria, if any, laid down in its national[31] law' (emphasis added).[32]

It is remarkable that the barriers to access contained in the Aarhus Regulation ('individual scope', 'external effect' and 'legally binding') particularly concern the *type* of act against which proceedings can be brought. It follows from the use of the word 'they', that the sentence in Article 9(3) of the Aarhus Convention as mentioned above, cannot concern limitations with regard to the *type* of act.

In this respect, it is important to acknowledge that the Aarhus Convention does not introduce an *actio popularis* (access to justice for all) for environmental matters. Although the Aarhus Convention decided to strengthen the role of non-governmental organisations promoting environmental protection, access to justice in environmental matters can be made subject to certain conditions and limitations. The following sub-paragraphs deal with various cases where certain conditions and limitations were put to the test.

V.1 The *Djurgården* case[33]

This case concerned a reference for a preliminary ruling to the CJEU from the Swedish *Högsta domstolen*, which wanted to know whether the directive permitted national legislation that allowed access to a court of law or other independent and impartial body only to non-governmental environmental organisations with at least 2,000 members. At the same time, the question arose whether access to the court could be limited on the ground that the persons concerned had already had the opportunity to express their views during the public participation phase of the decision-making procedure. As regards the latter question the Court of Justice observed:

> 'It is also apparent therefrom [Article 10a of Directive 85/337, as amended by Directive

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[31] Of course, 'national' must in the context of legal protection against European institutions be read as 'EU'.

[32] The freedom granted to national legislatures to establish certain requirements for access to justice, is subject to limits, as follows from the judgment of the Court of Justice in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening* [2009] ECR I-9967. The primary objective of the Convention (and the EU implementing measures) to establish a broad access to justice must be guaranteed.

[33] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening* [2009] ECR I-9967.

2003/35] that any non-governmental organisations which promote environmental protection and meet the conditions which may be required by national law satisfy the criteria, with respect to the public concerned who may bring an appeal, laid down in Article 1(2) of Directive 85/337 read in conjunction with Article 10a.'

'[...] participation in an environmental decision-making procedure under the conditions laid down in Articles 2(2) and 6(4) of Directive 85/337 is separate and has a different purpose from a legal review, since the latter may, where appropriate, be directed at a decision adopted at the end of that procedure. Therefore, participation in the decision-making procedure has no effect on the conditions for access to the review procedure.'[34]

This judgment does not only have serious consequences for Swedish procedural environmental law but for the law of other Member States as well. Dutch law, for instance, contains a provision to the effect that a party may not rely on a breach of a legal rule before a court of law, unless this was first raised during the preceding public participation procedure (section 6:13 Dutch General Administrative Law Act). And German administrative procedural law (what is known as *materielle Präklusion*) is comparable to Dutch law in this respect.[35]

In fact, the situation in both Dutch and German law is the reverse of the situation in the Swedish case. As a result of the emphasis on the independent role and function of judicial protection and its separation from the public participation procedure, also in terms of purpose, the question arises to what extent section 6:13 of the Dutch General Administrative Law Act is consistent with the Aarhus Directive. The Court of Justice decision would seem to imply that as far as access to justice is concerned it is irrelevant whether or not an organisation has taken part in the decision-making procedure.

As regards the '2,000-member limit' the Court of Justice ruled that this was also unacceptable. The Court stressed that while it was true that the words 'meet the conditions which may be required by national law' leave it to national legislatures to determine under what conditions environmental organisations may have access to justice, the national rules must both 'ensure 'wide access to justice' and 'render

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[34] See also para. 48 of the judgment, from which it is clear that access to review procedures may not be limited on the ground that the persons concerned have already been able to express their views in the participatory phase of the decision-making procedure.

[35] Cf. M. Niedzwicki, *Präklusionsvorschriften des öffentlichen Rechts im Spannungsfeld zwischen Verfahrensbeschleunigung, Einzelfallgerechtigkeit und Rechtsstaatlichkeit* (Berlin 2007).

effective' the provisions of the EIA Directive on judicial remedies. The Court concluded:

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

It is within the Member State's margin of discretion to require that the environmental organisation has as its object the protection of nature and the environment and:

> '[I]t is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. However, the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its scope.'

Thus, judgment was passed on the '2,000-member criterion':

> 'The Swedish Government, which acknowledges that at present only two associations have at least 2000 members and thereby satisfy the condition laid down in Paragraph 13 of Chapter 16 of the Environment Act, has in fact submitted that local associations could contact one of those two associations and ask them to bring an appeal. However, that possibility in itself is not capable of satisfying the requirements of Directive 85/337 as, first, the associations entitled to bring an appeal might not have the same interest in projects of limited size and, second, they would be likely to receive numerous requests of that kind which would have to be dealt with selectively on the basis of criteria which would not be subject to review. Finally, such a system would give rise, by its very nature, to a filtering of appeals directly contrary to the spirit of the Directive which, as stated in paragraph 33 of this judgment, is intended to implement the Aarhus Convention.'

This part of the judgment might have effects for the law of many other Member States as well. In this respect too there are parallels with Dutch administrative procedural law. Though Dutch law does not have a 2,000-member rule, there are other impediments to environmental organisations desiring to bring a matter before the courts. Recent case law of the Dutch Council of State has made it clear that 'litigation-only' NGOs do not have standing.[36] Whether or not this case law is consistent with the Aarhus Directive is not completely clear.

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[36] Cf. H.D. Tolsma, K.J. de De Graaf, and J.H. Jans, 'The Rise and Fall of Access to Justice in the Netherlands', (2009) *Journal of Environmental Law*, Vol. 21, Issue 2, p. 309-321.

V.2 The *Trianel* case[37]

In *Trianel*, a German administrative court referred, once again to the European Court of Justice, the question of whether environmental organisations should be allowed to argue infringement of rules of law that are intended to protect the legal interests of individuals. According to the German *Umweltrechtsbehelfsgesetz* (Environmental Appeals Act), environmental organisations have standing only in judicial review, under the condition that the decision challenged is in violation of legal rules that '*Rechte Einzelner begründen*' (establish individual rights). The Court of Justice found this incompatible with Directive 2003/35, implementing Article 9(2) of the Aarhus Convention. This Directive precludes legislation which does not permit non-governmental organisations to have standing before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' on the infringement of a rule flowing from the environmental law of the European Union and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals. A non-governmental organisation has the right to have standing before the courts on the infringement of the rules of national law flowing from the Habitats Directive even where, on the ground that the rules relied on protect only the interests of the general public and not the interests of individuals whereas national procedural law does not permit this.

V.3 The *Slovak Bears* case[38]

We have already presented this case *supra* in paragraph IV.1 of this paper. However, this judgment is not only relevant for the question of who is the final arbiter on the interpretation of the Aarhus Convention but in another aspect as well. Once the European Court of Justice had assumed jurisdiction to decide whether or not Article 9(3) Aarhus Convention has direct effect or not in the EU legal order, it decided to deny any direct effect, as a matter of EU law. However, it continued by stating 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 [is] be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law'. Consequently, 'it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.'

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[37] Case C-115/09 *Trianel Kohlekraftwerk Lünen*, judgment of 12 May 2011.

[38] Case C-240/09 *Lesoochranárske zoskupenie VLK*, judgment of 8 March 2011.

Although, according to the CJEU, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights that individuals derive from EU law, their discretion seems to be restricted by the Aarhus Convention. In other words, as a matter *of European Union* law there is an obligation on the Member States to interpret their *national* access to justice laws in the light of Article 9(3) of the *Aarhus Convention*. Although Article 9(3) of the Aarhus Convention is too insufficiently clear and precise an obligation to have direct effect, it is precise and clear enough to require the Slovak to court to interpret its national laws so as to enable an environmental protection organisation, such as the LZV, to challenge the Slovak ministry's decisions. If this analysis is correct, this can only mean that through the use of consistent interpretation Article 9(3) of the Aarhus Convention is applicable across the full breadth of European environmental law.[39]

V.4 The *Stichting Natuur en Milieu and Pesticide Action Network Europe* case[40]

A recent judgment given by the EU's General Court (previously known as the Court of First Instance) shows the connection between EU law and the Aarhus Convention in yet another way. To fully understand the importance of the judgment, we need to give some background information on the problematic position of third parties, particularly 'general interest organisations', seeking judicial protection against measures taken by the EU institutions.

Put briefly, the problem is the following. For an action brought by a third party seeking the annulment of an act of a European institution to be admissible, the act must be of 'direct and individual concern' to the applicant. Particularly the requirement that the act be of 'individual concern' proves in practice to be a hurdle that is virtually insurmountable. According to settled case law, persons are only considered to be individually concerned 'if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and, by virtue of those factors, distinguishes them individually just as in the case of the person addressed'. In the literature this is referred to as the *Plaumann* test.[41]

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[39] Cf. also J. Ebbeson, 'Access to Justice at the National Level. Impact of the Aarhus Convention and European Union Law', in: M. Pallemaerts (ed.), *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law*, Europa Law Publishing 2011.

[40] Case T-338/08, judgment of 14 June 2012. Appeal pending, Case 404/12 and Case 405/12.

[41] Case 25/62 *Plaumann v Commission* [1963] ECR 95. Cf. on this case law extensively Hans Roland

To illustrate how this test works we may refer to yet another judgment of the General Court.[42] In 2009, the European Union issued a regulation prohibiting the placing on the market of seal products in the European Union,[43] except those resulting from hunts traditionally conducted by Inuit and other indigenous communities and contributing to their subsistence. The hunt, including the hunting of seals, is an integral part of the culture and identity of the members of the Inuit society and as such is recognised by the UN Declaration on the Rights of Indigenous Peoples.[44] The case concerned an application for annulment of the Regulation, brought by a number of Inuit seal hunters living in Canada and organisations representing their interests, among others.

The central element in the Regulation is that only seal products resulting from hunts traditionally conducted by Inuit and other indigenous communities and contributing to their subsistence may be placed on the market (Art. 3 of the Regulation). Without blinking an eyelid, the General Court applied the settled case law regarding 'individual concern' from the *Plaumann* test, with the inevitable result that the action was declared inadmissible.

The Aarhus Compliance Committee has already expressed its concerns about this line of case law.[45] The ACC held that the case law of the CJEU regarding the standing requirements 'is too strict to meet the criteria of the Convention'. Additionally, it stated that 'the Committee is also convinced that if the examined jurisprudence of the EU Courts on access to justice were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with Article 9, paragraph 3, of the Convention.' However, the European Court of Justice was never impressed by those, also within the Court-system, who were critical of their case law. Their main argument to uphold their case law was that the 'judicial system of the European Union is a complete system of legal reme-

Schwensfeier, *Individuals' Access to Justice Under Community Law* (diss. Groningen University 2009).

[42] Case T-18/10 *Inuit Tapiriit Kanatami and Others v EP and Council*, Order of 6 September 2011. Cf. on this case J.H. Jans, 'On Inuit and judicial protection in a shared legal order', *EEELR* 2012/4, p. 188-191.

[43] Regulation 1007/2009 on trade in seal products, OJ EU 2009 L 286/36.

[44] Cf. Art. 20(1) Declaration: 'Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

[45] Findings and Recommendations of the Compliance Committee with regard to Communication Accc/C/2008/32 (Part I), 14 April 2011.

dies and procedures designed to ensure review of the legality of acts of the institutions.'[46] And that 'where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty [now Article 263, fourth paragraph TFEU], directly challenge Community measures of general application, they are able, depending on the case, either indirectly by pleading the invalidity of such acts before the Community Courts under Article 184 of the Treaty [now Article 277 TFEU] or to do so directly before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid […] to make a reference to the Court of Justice for a preliminary ruling on validity.'

This 'communicating vessels' doctrine (or 'national-by-pass' argument) is not undisputed. A basic problem is of course that the ability to challenge measures of the EU institutions is being made dependent on the availability of remedies at the national level. Recently, a new 'attack' on this case law has been launched from outside the EU by the Aarhus Compliance Committee. On the 1st of December 2008 the non-governmental organisation ClientEarth submitted a communication to the Committee alleging a failure by the European Union to comply with its obligations under Article 3, paragraph 1, and Article 9, paragraphs 2, 3, 4 and 5, of the Convention. Most interesting are the ACC's observations on the possibility of judicial review before the EU Courts through national courts of the Member States:

> 'While the system of judicial review in the national courts of the EU Member States and the request for preliminary ruling is a significant element for ensuring consistent application and proper implementation of EU law in the Member States, 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. Nor does the system of preliminary review amount to appellate system with regard to decisions, acts and omissions by the EU institutions and bodies. Thus, with respect to decisions, acts and omissions of EU institutions and bodies, the system of preliminary ruling does neither in itself meet the requirements of access to justice in Article 9 of the Convention nor compensate for the strict jurisprudence of the EU Courts'.

Remarkable is that in another recent judgment of the General Court it seems to have sided with the ACC and took position contrary to its 'boss' the European Court of Justice.[47] In that case two Dutch NGOs challenged a Commission decision granting the Netherlands a temporary exemption from the obligations on ambient air quality. As the judgment of the General Court is now under appeal, we have to wait

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[46] See, i.a., Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para. 40.

[47] Case T-396/09 *Vereniging Milieudefensie, established in Amsterdam & Stichting Stop Luchtverontreiniging Utrecht*, Judgment of 14 June 2012.

and see whether the European Court of Justice is as impressed as the General Court by the opinion expressed by the ACC.

The EU *legislature* was apparently also not convinced that the existing European law *acquis* was in accordance with the Aarhus Convention, and in 2006 adopted Regulation 1367/2006. According to Article 1 of this Regulation, its objective is '*to contribute to the implementation of the obligations arising under the* [...] *Aarhus Convention*'.[48] In paragraph 2 of this paper we already mentioned that this Regulation focuses on compliance with Article 9(3) Aarhus Convention in particular. This provision requires 'access to administrative *or* judicial procedures'. In other words, and unlike Article 9(2) Aarhus Convention, Article 9(3) does not require access to 'a court of law and/or another independent and impartial body': access to an 'administrative procedure' suffices.

With regards to access to justice, Article 10(1) of Regulation 1367/2006 grants environmental organisations which meet certain requirements the right to make a request for internal review of an administrative act under environmental law.[49]
The Regulation met criticism in the academic legal literature.[50] It was claimed that it hardly brought any improvements to the legal protection of environmental organisations. In particular, it was claimed that the scope of the Regulation was too restrictive. The scope is seriously limited by the fact that the procedure for internal review is only applicable to so-called '*administrative acts*', a concept defined in the Regulation as 'any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects'. Thus, in order to have access to this procedure for internal review, measures involved must be:

- of individual scope;
- legally binding and

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[48] See also recital 4 of the preamble: 'Provision *should* be made to apply the requirements of the Convention to Community institutions and bodies.' Italics added.

[49] According to Article 11, it must concern environmental organisations which are non-profit-making and have existed for more than 2 years and have the primary stated objective of promoting environmental protection in the context of environmental law. Also, the subject matter in respect of which the request for internal review is made must be covered by its objective and activities.

[50] See A.M. Keessen, *European Administrative Decisions; How the EU Regulates Products on the Internal Market*, European Administrative Law Series (2), Europa Law Publishing 2009, at pp. 151-153, and J.H. Jans, 'Did Baron von Munchausen ever visit Århus? 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: *Reflections on 30 Years of EU Environmental Law; A High Level of Protection*?, Prof. Richard Macrory (ed.). Europa Law Publishing 2006, pp. 475-490.

- have external effects.

These are cumulative criteria, which means that each and every one of these conditions must be met for the measures to be amenable to internal review. In a previous study we analysed the way this Regulation is being applied by the EU institutions.[51] This study showed that this internal review procedure does not function adequately at all. It can be concluded from the small number of requests that have been lodged since the entry into force of the Regulation that the procedure is not very popular. It appears that in the few cases in which a request for internal review has been lodged, this, leaving aside one single case, did not lead to a substantive assessment of the request. The vast majority of the requests were declared inadmissible. The Regulation's requirement that the request must concern a decision of 'individual scope', or a legal measure with external effect, were in particular grounds for inadmissibility. In that study we argued that the conditions for admissibility of the Regulation and the (broad) application thereof by the EU institutions cannot be based on the Aarhus Convention itself. Therefore, we pleaded that the conditions for admissibility should be interpreted and applied in conformity with the Aarhus Convention. In the *Stichting Natuur en Milieu and Pesticide Action Network Europe* case the General Court, more or less, sided with us. The General Court, while acknowledging the ECJ's judgment in the *Slovak Bears* case stating that Article 9(3) Aarhus Convention is not directly effective was willing to determine the validity of Regulation 1367/2006 in light of the Aarhus Convention, Article 9(3) in particular.

Although no basis can be found in Article 9(3) of the Aarhus Convention to limit access to justice to *individual* measures, it does appear from Article 2(2) of the Convention that it is not applicable to a public authority acting in a 'legislative capacity'. The explanation for this 'exception' can be found in the Aarhus Convention Implementation Guide which states: 'This is due to the fundamentally different character of decision making […] in a legislative capacity, where elected representatives are more directly accountable to the public through the election process […]'.[52]

The next question is whether every European general measure (which is excluded from the internal review procedure of the Regulation) can be considered as 'legislation' in the true meaning of the word. It is true that all legislation in itself has a general character,

[51] J.H. Jans and 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'. *Review of European and Administrative Law*, Vol. 3, No. 2, pp. 53-65, 2010.

[52] Available at <http://www.unece.org/env/pp/acig.pdf>. This document does not, however, have any special legal status.

yet is it also true that all general measures can be considered as 'legislative acts'? The use of the notion of 'individual scope' in the Regulation could lead to the situation that too many measures are excluded from the internal review procedure.[53] And indeed, the General Court concluded:

> 'Lastly, so far as the wording of the other provisions of the Aarhus Convention is concerned, it should be noted that, under Article 2(2) of that convention, the concept of 'public authority' does not cover 'bodies or institutions acting in a judicial or legislative capacity'. Accordingly, the possibility that measures adopted by an institution or body of the European Union acting in a judicial or legislative capacity may be covered by the term 'acts', as used in Article 9(3) of the Aarhus Convention, can be ruled out. That does not mean, however, that the term 'acts' as used in Article 9(3) of the Aarhus Convention can be limited to measures of individual scope. There is no correlation between measures of general application and measures taken by a public authority acting in a judicial or legislative capacity. Measures of general application are not necessarily measures taken by a public authority acting in a judicial or legislative capacity.
>
> It follows that Article 9(3) of the Aarhus Convention cannot be construed as referring only to measures of individual scope.
>
> [...]

It follows from the above that Article 9(3) of the Aarhus Convention cannot be construed as referring exclusively to measures of individual scope. Consequently, in so far as Article 10(1) of Regulation No 1367/2006 limits the concept of 'acts', as used in Article 9(3) of the Aarhus Convention, to 'administrative act[s]' defined in Article 2(1)(g) of Regulation No 1367/2006 as 'measure[s] of individual scope', it is not compatible with Article 9(3) of the Aarhus Convention.'

VI. Final conclusions

This contribution dealt with some, at first glance, rather simple questions:

- Who decides who has access to justice as guaranteed by the Aarhus Convention?
- Who is the final arbiter on questions regarding the interpretation of the Aarhus Convention?
- Who decides whether or not there is compliance with the Aarhus Convention, in particular with respect to the conditions restricting NGO's access to justice?

This article shows that these questions are not as simple as they seem, or at least

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[53] See also P. Wennerås, *The Enforcement of EC Environmental Law*, OUP 2007, at p. 234.

that there are no simple answers to those questions.

Lawyers have a tendency to look at law as a system of vertical hierarchy. And to look at international law, European law and national law as separate spheres. As a result of that, the mutual relationship and influence of international environmental law and national environmental law has been studied, from both a top-down and as well as a bottom-up perspective: the orthodox analysis of the consequences of international environmental law for national law and policy has been combined with an analysis starting from national law, looking into the influences national law exerts upon international law. It is, however, submitted that this 'traditional' look does not bring us any further and is not very helpful to understand how the law on access to justice in environmental matters truly functions.

This is related to the fact that access to justice in environmental matters is 'Aarhus'-, EU-, ECHR- and national law at the same time. National and international legal systems become 'connected' on the basis of a set of common values and standards.

This paper shows legal systems on access to justice in environmental matters in a more horizontal way: not one of vertical hierarchy but of overlapping circles of shared competences.

This paper also shows that there is another dimension emerging in the relationship between international and national law. This dimension reflects a more 'horizontal' approach in the sense that the main focus is the relationship between national and international actors who exchange information, decisions, rulings, opinions and ideas about how international environmental law rules, institutions, principles and concepts should or could be fleshed out and further developed. The forum changes: national law become connected via EU and the Aarhus Convention.

In a globalised legal order there is not one master! It is about jurisdictional pluralism, communication, dialogue, strength of arguments, competition and acceptance, based on a set of common values and common standards as enshrined by the Aarhus Convention.

The European Court of Justice's judgment in the *Slovak Bears* case is exceptional and illustrative in this respect: as a matter of European Union law, there is an obligation on the Member States to interpret their national access to justice laws in the light of Article 9(3) of the Aarhus Convention.