

RESEARCH ARTICLE

# Access to Justice in Environmental Cases after the Rulings of the Court of Justice of 13 January 2015: *Kafka* Revisited?

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By ratifying the Aarhus Convention in 2005 the EU committed itself to guaranteeing broad access to justice in environmental matters both at the national and the EU level. Yet, in spite of the clear-cut obligations incumbent upon the EU, EU courts have consistently rebuked pleas for a softening of the standing requirements in the context of direct actions against EU acts that might have an impact on the environment and/or public health. In addition, the internal review procedure set out by the 2006 Aarhus Regulation has been interpreted so restrictively by the EU institutions that that its added value in the stride toward better access to courts in environmental matters remains ephemeral at best.

This led the General Court to finding that the Aarhus Regulation, by excluding general EU acts from the scope of internal review, was in breach of Article 9(3) of the Aarhus Convention. In its recent rulings of 13 January 2015, however, the Court of Justice of the EU (CJEU) overruled the General Court by holding that the Aarhus Regulation could not be reviewed in light of the Aarhus Convention. With its refusal to use Article 9(3) of the Aarhus Convention as a reference criterion for the purpose of reviewing the EU's compliance with the Aarhus Convention's obligations, the CJEU avoided tackling the unsatisfactory level of judicial protection in environmental cases at the EU level.

This paper argues that the rulings of the CJEU are to be qualified as a significant step backwards for judicial protection in environmental matters at the EU level. It is established that, instead of addressing the current failings of the EU with respect to access to justice in environmental cases, the CJEU's hands-off approach paves the way for yet another decade of non-compliance by the EU in the realm of access to justice in environmental cases.

**Keywords:** Access to justice; Judicial review; EU environmental law

## I. Introduction

Franz Kafka is renowned for depicting his characters trapped in a system of rules and laws that they know very little about. The ambiguous relationship between man and 'The Law' is probably best reflected in the parable *Before the Law*, which is often viewed as the centrepiece of Kafka's most famous novel *The Trial*.<sup>1</sup> In this story, Joseph K., Kafka's recurrent protagonist, tries to gain admission to the mysterious and elusive Court. One day, K. has to show an important client from Italy around a cathedral. There the priest reveals himself as a court employee, and he tells K. a story about a 'man from the country' who comes to a great door seeking the Law. Before it stands a doorkeeper who is barring the entrance. He tells the man that he cannot go through at the present time. At the end of the conversation, as the 'man from the country' is dying, he wonders why, even though everyone seeks the Law, no one else has come in all these years: 'Everyone strives to reach the Law so how does it happen that for all these years no one but myself ever begged for admittance?'. The doorkeeper replies that since the man is dying, he is going to close the door.

It is only a small step from K.'s frustration about not getting access to the Law to the futile attempts of environmental NGOs and other individuals to gain direct access to the EU courts in environmental matters.

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<sup>1</sup> Franz Kafka, *The Trial* (first published 1925, Penguin Modern Classics 2009).

Traditionally, such actions are hindered by the prevailing interpretation of the requirement for individual concern, one of the two conditions that need to be fulfilled pursuant to Article 263(4) of the Treaty on the Functioning of the European Union (TFEU) for private entities in order to be able to challenge a legislative or administrative EU act.

Yet the analogy goes further. When questioned by ‘the man from the country’ about the reasons underpinning the limited access to the Law, Kafka’s doorkeeper famously replied that, ‘No one else could even be admitted here, since this gate was only made for you. I am now going to shut it’. In a similar manner, the admissibility threshold put forward by the Court of Justice of the European Union (CJEU) in its renowned 1963 *Plaumann*-ruling requires a private party to prove that he or she is in a unique position in relation to the contested administrative or legislative EU act.<sup>2</sup> Not surprisingly, this rigid interpretation, which has been consolidated by the EU courts ever since, bars public interest organisations, such as environmental NGOs, from directly challenging EU acts before the EU courts.<sup>3</sup> In itself, this would matter little if the possibility to indirectly challenge EU acts through national proceedings – which are subsequently brought before CJEU via the preliminary ruling procedure – would effectively counterbalance this lack of direct access to EU courts in environmental cases. However, even if the EU acts are implemented through national rules, national environmental proceedings often face important obstacles too, such as limited standing at national level and reluctance by the national courts to refer the matter to Luxemburg, turning this detour in an ineffective alternative to direct access to EU courts.

The dire position of environmental NGOs before the EU courts stands in marked contrast with recent international developments in the field of environmental justice. By ratifying the 1998 Aarhus Convention<sup>4</sup> in 2005,<sup>5</sup> the EU committed itself to guaranteeing sufficient access to justice in environmental matters. As is widely known, the Aarhus Convention calls for the recognition of a number of procedural rights for individuals and NGOs with regard to the environment.<sup>6</sup> In order to ensure compliance with the EU’s obligations under the Aarhus Convention, the European Parliament and Council passed Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies (‘Aarhus Regulation’).<sup>7</sup>

Some welcomed the Aarhus Regulation as a significant step forward in the pursuit of better access to justice at the EU level.<sup>8</sup> However, until today, the internal review procedure has not been particularly successful in altering the predicament of environmental NGOs to the better. Indeed, a quick glance at the recent administrative application of the internal review procedure reveals that most requests for internal review filed by environmental NGOs were rejected by the EU institutions. In most instances, it is upheld that the contested acts do not constitute measures for which internal review is foreseen.<sup>9</sup>

When confronted with the first legal challenges targeting the limited scope of the internal review mechanism in *Stichting Natuur en Milieu*<sup>10</sup> and *Vereniging Milieudefensie*,<sup>11</sup> the General Court invalidated two decisions of the European Commission in which a restrictive approach to the Aarhus Regulation had been applied. It did so by referring to the EU’s obligations under Article 9(3) of the Aarhus Convention. On appeal, however, the CJEU rejected the Aarhus-based discourse in its decisions of 13 January 2015 and avoided a

<sup>2</sup> Case 25/62 *Plaumann & Co. v Commission of the European Economic Community* [1963] ECR 95.

<sup>3</sup> Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) v Commission* [1995] ECR II-2205; Case C-321/95 P *Stichting Greenpeace Council and Others v Commission* [1998] ECR I-1651. See more extensively Nicole Gérard, ‘Access to the European Court of Justice: A Lost Opportunity’ (1998) 10(2) JEL 331; Diana L Torrens, ‘Locus Standi of Environmental Associations under EC Law – Greenpeace – A Missed Opportunity for the CJEU’ (1999) 8(3) RECIEL 336. For a more recent critical assessment of this case law, see Charles Poncelet, ‘Access to Justice in Environmental Matters – Does the European Union Comply with its Obligations?’ (2012) 24(2) JEL 287.

<sup>4</sup> Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, 25 July 1998 (Aarhus Convention) [1999] 2161 UNTS 447; 38 ILM 517.

<sup>5</sup> 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.

<sup>6</sup> See Jeremy Wates, ‘The Aarhus Convention: a Driving Force for Environmental Democracy’ (2005) 2(1) JEEPL 3, 4.

<sup>7</sup> Council Regulation (EC) No 1367/2006 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).

<sup>8</sup> Teall Crossen and Veronique Niessen, ‘NGO Standing in the European Court of Justice - Does the Aarhus Regulation Open the Door?’ (2008) 16(3) RECIEL 332, 333.

<sup>9</sup> Jan H Jans and Gertjan 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’ (2010) 3(2) Rev Eur & Ad L 53.

<sup>10</sup> Case T-396/09 *Stichting Natuur en Milieu and Pesticide Action Network Europe v Commission* (CFI, 14 June 2012).

<sup>11</sup> Case T-338/08 *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v Commission* (CFI, 14 June 2012).

legality review of the Aarhus Regulation in the light of the international obligations that are incumbent on the EU.<sup>12</sup>

The rulings of the Grand Chamber of 13 January 2015 settle a long-running dispute between environmental NGOs and the European Commission about the effectiveness of the Aarhus Regulation in improving access to justice in environmental matters at the EU level.

For the purpose of this article, the landmark judgments of the CJEU are assessed in the light of the recent international trend towards more environmental democracy and justice. More in particular, this article seeks to elucidate the lack of coherence between the conservative approach used by the CJEU in relation to direct access to justice in environmental cases at the EU level and the more ambitious premises and objectives upon which the Aarhus Convention is grounded. Additional focus is placed on two alternative approaches which, at least according to some observers, might have allowed the CJEU to better align its case law with the shift towards environmental democracy. In the last section, this article reflects on the more fundamental question pertaining to the compatibility of the internal review procedure with the requirements of the Aarhus Convention and, subsequently, examines whether the reluctant stance of the CJEU merits reconsideration in the light of the recent international developments.

## II. The Bumpy Road to Environmental Justice at the EU Level: The General Court Succumbs to Aarhus in 2012

### A. Troubles Ahead

#### 1. Different Ways to Say 'No'

In order to fully grasp the arguments that are raised in the recent Aarhus-proceedings before the CJEU, it is necessary to take a step back and briefly examine the relevant case law developments of the past two decades. As such, the stark rise in Aarhus-related legal challenges before EU courts did not occur in a vacuum. It is the direct result of a decade-long but commonly overlooked struggle by environmental NGOs to get direct access to EU courts in environmental matters.

Rather ironically, the notable decisions of the Court of First Instance (CFI) and ECJ in *Greenpeace*, dating from the mid-1990s, still remain the most seminal judgments on direct access to EU courts in environmental matters. As is widely known, the CFI in *Greenpeace* refused to reconsider its well-established *Plaumann*-approach. In refuting the arguments raised by the applicants, the CFI ultimately held that the *Plaumann*-test remained good law regardless of 'the nature, economic or otherwise, of those of the applicants' interests which are affected'.<sup>13</sup> Accordingly, the CFI found 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'.<sup>14</sup> The actions of the involved environmental NGOs suffered a similar fate. On appeal, a similar reasoning was upheld.<sup>15</sup> When being confronted with the supplementary argument that rejecting the direct actions created a legal vacuum, the ECJ maintained that the necessary remedies were still available at the level of the national courts.<sup>16</sup> In other cases, such as *Danielsson*, the CFI used an almost identical rationale.<sup>17</sup>

Needless to say, the rigidity of the EU courts in assessing direct challenges of EU acts in environmental matters was met with fierce criticism in the legal literature.<sup>18</sup> Many commentators questioned whether the so-called standard of a 'complete' system of judicial remedies in the EU/EC legal order, which had been put forward by the ECJ itself in its landmark ruling in *Les Verts*,<sup>19</sup> was lived up to. It was submitted that, in the event the EU acts are implemented in national or regional rules, taking the long way around via the national courts would again confront the environmental NGOs with different and often severely restrictive rules on standing which might hinder cases from getting through to the ECJ.<sup>20</sup>

<sup>12</sup> Joined cases C-404/12 P and C-405/12 P *Council and Others v Stichting Natuur en Milieu and Milieu and Pesticide Action Network Europe* (CJEU, 13 January 2015); Joined cases C-401/12 P and C-403/12 P *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht* (CJEU, 13 January 2015).

<sup>13</sup> *Stichting Greenpeace Council (Greenpeace International)* (n 3) para. 38.

<sup>14</sup> *ibid* para 55.

<sup>15</sup> *Stichting Greenpeace Council and Others* (n 3).

<sup>16</sup> *ibid* para 32.

<sup>17</sup> Case T-219/95 R *Marie-Thérèse Danielsson, Pierre Largenteau and Edwin Haa v Commission of the European Communities* [1995] ECR II-3051, para 77.

<sup>18</sup> *Stichting Greenpeace Council and Others* (n 3).

<sup>19</sup> Case C-294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339, para 23.

<sup>20</sup> Angela Ward, *Judicial Review and the Rights of Private Parties in EC Law* (Oxford University Press 2008) 154.

Nevertheless, the EU courts have consistently dismissed pleas for a more progressive reading of the admissibility requirements in the context of environmental litigation ever since. In particular, the EU courts were fearful of a massive influx of direct actions by environmental NGOs, taking into account the relatively high number of legal persons in the EU that have as their object the protection and conservation of the environment. Ultimately the quasi-constitutional status of the jurisprudential definition of ‘individual concern’ prevailed over the pledges for a more open approach for environmental NGOs and concerned individuals.

That said, it is noteworthy to briefly recall the 2002 revolt of the CFI in its *Jégo-Quééré*-decision, in which a more reasonable interpretation of the requirement of ‘individual concern’ was put forward.<sup>21</sup> As is widely known, this jurisprudential revolution was only short-lived and thus did not help the environmental NGOs in their strive for better access to the EU courts. Indeed, in the same year the ECJ overruled the more generous interpretation of the standing requirements by the CFI in its landmark decision in *Unión de Pequeños Agricultores (UPA)*.<sup>22</sup> Subsequently, the ECJ also overturned the CFI on appeal in *Jégo-Quééré*,<sup>23</sup> thereby re-closing the sudden window of opportunity for a broader direct access to EU courts in cases where no implementing measures could be challenged before a national court. Also in its subsequent rulings in environmentally related cases, the EU courts quickly fell into old habits and refrained from reconsidering the classical stance on standing for private individuals. The 2005 decisions of the CFI in *European Environmental Bureau* starkly exemplified that access in environmental matters was still as remote in 2005 as it was in the mid-1990s.<sup>24</sup>

Remarkably, the entry into force of the Aarhus Convention in 2005 did not succeed in prompting the EU courts to adopt a more favourable attitude towards the standing requirements for environmental actions. In the post-Aarhus era, environmental NGOs and the EU courts continued to differ over the interpretation of the standing requirements for direct actions in environmental cases. Among others, the rulings of the EU courts in *World Wildlife Fund UK*, in which the annulment was sought of a CFP-regulation laying down quotas and total allowable catches for cod, aptly illustrate the limited impact the Aarhus Convention has had on the *locus standi* of environmental NGOs.<sup>25</sup> This case 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 Article 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 Article 230(4)* of the TEC and the related jurisprudence.<sup>26</sup> Equally so, the CFI set aside the argument that no effective legal remedy would be available if the action were to be declared inadmissible in the latter case.<sup>27</sup>

## 2. A Subtle Hint by the Aarhus Compliance Committee

In light of the above it is thus safe to hold that the *Plaumann*-test had become the proverbial *bête noir* of the environmental NGOs in the context of direct actions against EU acts. Alarmed by the reluctance on the part of the EU courts to accommodate direct actions initiated by environmental NGOs, Client Earth decided to refer the matter to the Aarhus Compliance Committee, which was established in 2002 to review compliance by the Contracting Parties to the Aarhus Convention.

Whereas the Aarhus Compliance Committee decided to defer further consideration of the communication, delaying certain issues awaiting subsequent decisions of the EU courts in the cases where application had been made of the Aarhus Regulation, it did not refrain from criticising the reluctant stance of the EU courts on standing in environmental cases in its 2011 partial findings.<sup>28</sup>

In its partial findings and recommendation, the Aarhus Compliance Committee did not assess in detail each and every possible form of challengeable decision-making by EU institutions or each decision rendered by an EU court. However, on a more general note, the Aarhus Compliance Committee held that the consistent application of the *Plaumann*-test had resulted in no member of the public ever being able to directly challenge a decision or a regulation in environmental cases before the EU courts. The Committee highlighted

<sup>21</sup> Case T-177/01 *Jégo Quééré v Commission* [2002] ECR I-5137, para 49.

<sup>22</sup> Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-6677.

<sup>23</sup> Case C-263/02 P *Commission v Jégo Quééré* [2004] ECR I-3425.

<sup>24</sup> Case T-94/04 *European Environmental Bureau (EEB) and Others v Commission of the European Communities* [2005] ECR II-4419; Joined Cases T-236/04 and T-241/04 *European Environmental Bureau (EEB) and Stichting Natuur en Milieu v Commission of the European Communities* [2005] ECR II-4945.

<sup>25</sup> Case T-91/07 *WWF-UK Ltd v Council of the European Union* [2008] ECR II-00081, paras 81–82; Case C-355/08 P *WWF-UK Ltd v Council of the European Union* [2009] ECR I-00073.

<sup>26</sup> Case T-37/04 *Região autónoma dos Açores v Council of the European Union* [2008] ECR II-00103, para 93. The view of the CFI was also upheld by the ECJ in appeal: Case C-444/08 P *Região autónoma dos Açores v Council of the European Union* [2009] ECR I-00200.

<sup>27</sup> *ibid* para 92.

<sup>28</sup> Communication ACCC/C/2008/32 [Part I] [European Union].

that, pursuant to Article 9(3) of the Aarhus Convention, Contracting Parties have to ensure 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'.

While the Committee explicitly acknowledges that the Contracting Parties are not obliged to establish a system of popular action (*actio popularis*) in their national procedural laws with the effect that anyone can challenge any decision, act or omission relating to the environment, they are required to implement generous standing requirements for environmental cases. In line with its earlier case law, the Aarhus Compliance Committee pointed out that the clause 'where they meet the criteria, if any, laid down in national law' cannot serve 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 environment.<sup>29</sup> As illustrated by the analysis above, the latter is exactly what had happened in the EU. It is thus not surprising to see the Aarhus Compliance Committee conclude that if the rigid jurisprudence of the EU courts were to continue, unless fully compensated for by adequate administrative review procedures, the EU would fail to comply with Article 9(3) and (4) of the Aarhus Convention.<sup>30</sup>

## **B. A Small Spark of Hope for Environmental Justice?**

### **1. Everything Remains Exactly the Same**

Despite its strict wording, the Aarhus Compliance Committee was hesitant to issue a clear-cut condemnation of the EU system of legal remedies in environmental cases.<sup>31</sup> Apparently, it assumed that the 2006 Aarhus Regulation, if interpreted in an Aarhus-friendly way, would offer ample review options for environmental NGOs. This immediately touches upon one of the major points of contention in the legal proceedings leading up to the rulings of the Grand Chamber of the CJEU of 13 January 2015. For, as alluded above, these lawsuits in essence revolved around the viability of the internal review mechanism that had been set up by the Aarhus Regulation in order to live up to the EU's commitments under the Aarhus Convention. The exact material scope of this internal review procedure lies at the heart of the debate on access to justice in environmental cases at the EU level.

For the purpose of this analysis, a major focus is to be placed on Article 10(1) of the Aarhus Regulation. It is indeed this provision that delineates the material scope of the internal review procedure. In particular, Article 10(1) stipulates that environmental NGOs meeting certain criteria are entitled to request an internal review to the EU institution or body that has adopted a certain administrative act under environmental law or, in case of an alleged administrative omission, that should have adopted such an action.<sup>32</sup> At the time, it was believed that by granting environmental NGOs the right to seek an internal review of EU administrative acts, the issue of standing could be solved without having to revise the strict *Plaumann*-doctrine. Or, to put in the words of the European Commission's Proposal,<sup>33</sup> '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'.<sup>34</sup> As a reform of the TEC in order to allow for a more generous *locus standi* for environmental NGOs had to be ruled out from the beginning, the only feasible option left was the creation of a preliminary administrative review procedure which would then, indirectly, grant the environmental NGOs in question access to justice in order to challenge the legality of the written reply issued by the EU institutions.<sup>35</sup> However, in order to get access to the internal review procedure, new admissibility hurdles have to be taken. A major constraint is created by the requirement that limits the substantive scope of the internal review procedure to 'an administrative act adopted under environmental law, or an alleged administrative omission (to adopt such an act)'. By referral to Article 2(1) litra g of the Aarhus Regulation administrative acts are further defined as 'any measure of individual scope under environmental law, taken by a Community

<sup>29</sup> Communication ACCC/C/2006/18 [Denmark], ECE/MP.PP/2008/5/Add.4, paras. 31, 35 and 41.

<sup>30</sup> ACCC European Union (n 28) para 93.

<sup>31</sup> *ibid* para 97.

<sup>32</sup> See more extensively Marc Pallemarts, 'Compliance by the European Community with its Obligations on Access to Justice as a Party to the Aarhus Convention' (2009) IEEP Report, 26–27 <[http://www.ieePeu/assets/422/aarhus\\_report.pdf](http://www.ieePeu/assets/422/aarhus_report.pdf)> accessed 15 March 2015.

<sup>33</sup> Proposal for a Regulation of the European Parliament and of the Council of the application of the provisions of the Århus 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.

<sup>34</sup> *ibid* 13.

<sup>35</sup> Aarhus Regulation (n 7), art. 12.

institution or body, and having a legally binding and external effect', restricting the material scope of the internal review procedures in a significant manner.<sup>36</sup> Yet, by inserting the word 'individual', the majority of environmental decisions, such as implementing measures adopted by the European Commission in the field of the Common Fisheries Policy (CFP), seem to fall outside the scope of the internal review procedure. Unsurprisingly, many commentators, such as Jans and Wennerås, feared that, given its limited material scope, the Aarhus Regulation had blindsided the proponents of environmental democracy by its alleged progressive ambitions.<sup>37</sup>

These suspicions were proven right by the subsequent administrative practice. In the few cases in which a request for internal review of an environmental measure of an EU institution had been submitted, the relevant EU institution rejected it as inadmissible.<sup>38</sup> To compound matters even further, the bulk of the requests were dismissed because of the strict interpretation of the notion 'measure of individual scope' as laid down by the Aarhus Regulation.<sup>39</sup> This raised the question whether the internal review procedure was capable of fully compensating for the detected deficiencies in the system of legal remedies at the EU level in environmental cases.

## 2. The Aarhus Convention Saved the Day in 2012

In the previous years, several environmental NGOs sued the EU institutions over their restrictive stance on the internal review procedure. Accordingly, the EU courts were asked to shed light on the exact material scope of the internal review procedure and, most importantly, its compatibility with Article 9(3) of the Aarhus Convention.

As background for the subsequent analysis and in order to illustrate the cases in which access to justice in environmental matters at the EU level is being sought, this section succinctly examines the facts of the two cases that ultimately led to the 2015 rulings of the CJEU. In the first case, *Stichting Milieu en Natuur*, two Dutch environmental NGOs requested an internal review of Regulation 149/2008<sup>40</sup> amending Regulation (EC) 396/2005 of the European Parliament and the Council by setting maximum residue levels for listed products.<sup>41</sup> The second lawsuit, *Vereniging Milieudefensie*, related to the persistently unsatisfactory air quality in the Netherlands. In particular, two Dutch environmental NGOs had launched a request for internal review against Commission Decision 2560,<sup>42</sup> made on the basis of a derogation clause enshrined in the Air Quality Framework Directive.<sup>43</sup> In both cases the European Commission declined to review the contested decisions on the merits by holding that the latter did not amount to administrative acts meeting the criteria of Article 2(1) (g) of the Aarhus Regulation.<sup>44</sup>

Centrally, the environmental NGOs contended that, if it would turn out that the strict interpretation of the internal review procedure upheld by the European Commission was indeed compatible with the wording of the Aarhus Regulation, Article 10(1) of the Aarhus Regulation would contravene Article 9(3) of the Aarhus Convention.

<sup>36</sup> Common Position (EC) No 31/2005 adopted by the Council on 18 July 2005 [2005] OJ C 264E/18.

<sup>37</sup> Pål Wennerås, *The Enforcement of EC Environmental Law* (Oxford Studies in European Law 2007) 234; Jan H 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 Richard Macrory (ed), *Reflections on 30 Years of EU Environmental Law: A High Level of Protection?* (Europa Law Publishing 2005) 484.

<sup>38</sup> Reply of the Commission services to Justice & Environment of 26 May 2008 <[http://ec.europa.eu/environment/aarhus/pdf/title\\_iv/Reply%20to%20J\\_E.pdf](http://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20J_E.pdf)> accessed 15 March 2015; Reply of the Commission services to Justice & Environment of 6 July 2010 <[http://ec.europa.eu/environment/aarhus/pdf/requests/9\\_reply%20.pdf](http://ec.europa.eu/environment/aarhus/pdf/requests/9_reply%20.pdf)> accessed 15 March 2015. For a more thorough overview, see: Jans and Harryvan (n 9).

<sup>39</sup> See Hendrik Schoukens, 'Access to Justice in Environmental Matters on the EU Level After the Judgements of the General Court of 14 June 2012: Between Hope and Denial' (2014) *Nordic Evtl LJ*, 18 <[http://nordiskmiljoratt.se/haften/NMT%252c%2022%20aug%20\(2\).pdf](http://nordiskmiljoratt.se/haften/NMT%252c%2022%20aug%20(2).pdf)> accessed 15 March 2015.

<sup>40</sup> 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.

<sup>41</sup> Council Regulation (EC) No 396/2005 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.

<sup>42</sup> Decision C(2009) 2560 final.

<sup>43</sup> 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.

<sup>44</sup> Reply of the Commission services of 1 July 2008 to *Stichting Natuur en Milieu* and *Pesticide Action Network* <[http://ec.europa.eu/environment/aarhus/pdf/title\\_iv/Reply%20to%20SNM.pdf](http://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20SNM.pdf)> and <[http://ec.europa.eu/environment/aarhus/pdf/title\\_iv/Reply%20to%20PAN.pdf](http://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20PAN.pdf)> accessed 15 March 2015; Reply of the Commission services of 28 July 2009 to *Vereniging Milieudefensie en Stichting Stop Luchtverontreiniging Utrecht* <[http://ec.europa.eu/environment/aarhus/pdf/requests/8\\_reply.pdf](http://ec.europa.eu/environment/aarhus/pdf/requests/8_reply.pdf)> accessed 15 March 2015.

In 2012, the General Court presented its views on the Aarhus-related claims. In essence, the Court was asked to choose between the two conflicting interpretations of the Aarhus Regulation that had emerged in the legal literature so far. On the one hand, there were commentators, such as Jans, who maintained that Article 2(1) of the Aarhus Regulation excludes administrative ‘measures of general application’.<sup>45</sup> On the other hand, authors like Wennerås advocated for a more liberal reading of the afore-mentioned provisions and thus did not see any need to invoke the Aarhus Convention as an additional means of interpretation.<sup>46</sup>

The argumentation raised by the environmental NGOs fell apart in two subclaims. However, from the outset it was evident that the first subclaim, which basically hinged upon the afore-mentioned progressive reading of the Aarhus Regulation upheld by some commentators, had little chance of success.<sup>47</sup> Accepting the Commission’s argument, the General Court quickly concluded that the contested measures, of which the internal review had been sought, qualified as a measure of general nature.<sup>48</sup> Thus, applying the strict wording of the Aarhus Regulation, no internal review was available for environmental NGOs in the context of such administrative acts.

However, in both cases the environmental NGOs additionally contested the legality of the Aarhus Regulation in the light of Article 9(3) of the Aarhus Convention. In order to adjudicate this ‘plea of illegality’, the General Court first had to be ready to accept the Aarhus Convention as a ‘benchmark’ for reviewing the legality of Article 10(1) of the Aarhus Regulation.<sup>49</sup> It ultimately decided to carry out the requested legality review by holding that Article 10(1) explicitly aimed to implement a particular obligation under an international agreement.<sup>50</sup> Instead of pointing to the lack of direct effect attached to Article 9(3) of the Aarhus Convention, which would have been in line with the earlier ruling of the Grand Chamber of the CJEU in *Lesoochránárske zoskupenie*,<sup>51</sup> the General Court chose to apply the so-called ‘implementation-exception’ as an alternative approach vis-à-vis the legality review sought for by the environmental NGOs. In its rulings of 14 June 2012, the General Court quickly reached the conclusion that the conditions to apply the latter exception had been complied with since the Aarhus Regulation explicitly referred to the Aarhus Convention.<sup>52</sup>

As to the substance, the General Court first had to pronounce itself on the specific nature of the contested decision in *Stichting Natuur en Milieu*. Given the fact that the Aarhus Convention exempted the public institutions acting in a legislative capacity, legislative acts are not challengeable under Article 9(3) of the Aarhus Convention. Not unsurprisingly, the Commission maintained that it had adopted the contested regulation in *Stichting Natuur en Milieu* in its legislative capacity. The General Court, however, dismissed the latter argument, as, in its view, the contested decision did not qualify as a legislative act. In particular, it was apparent from the provision on the basis of which said Regulation 149/2008 was adopted that the European Commission had acted in the exercise of its regulatory powers.<sup>53</sup>

On a more general note, the General Court concluded that the limitation of the concept of ‘acts’ to ‘administrative acts’ in the sense of Article 2(1)(g) of the Aarhus Regulation was incompatible with Article 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 blatant contradiction with the objectives thereof. While recognising that under Article 9(3) of the Aarhus Convention, the Contracting Parties retained 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 ultimately held that the Aarhus Convention does not offer the same discretion as regards the definition of ‘acts’ which are open to challenge.<sup>54</sup> Consequently, the General Court annulled both decisions of the European Commission.

<sup>45</sup> Jans (n 37) 480.

<sup>46</sup> Wennerås (n 37) 235.

<sup>47</sup> *Stichting Natuur en Milieu* (n 10) para 29; *Vereniging Milieudefensie* (n 11) para 26.

<sup>48</sup> *Stichting Natuur en Milieu* (n 10) para 42.

<sup>49</sup> *Stichting Natuur en Milieu* (n 10) para 52; *Vereniging Milieudefensie* (n 11) para 52.

<sup>50</sup> Case C-69/89 *Nakajima All Precision Co. Ltd v Council of the European Communities* [1991] ECR I-2069, para 31.

<sup>51</sup> Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-01255. See Mariolina Eliantonio, ‘Case C-240/09, *Lesoochránárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011’ (2012) 49(2) CML Rev 767; Jan H Jans, ‘Who is the Referee? Access to Justice in a Globalised Legal Order: A Case Analysis of CJEU Judgment C-240/09 *Lesoochránárske Zoskupenie* of 8 March 2011’ (2011) 4(1) Rev Eur Ad L 85.

<sup>52</sup> *Stichting Natuur en Milieu* (n 10) paras 57–58; *Vereniging Milieudefensie* (n 11) paras 57–58.

<sup>53</sup> *Stichting Natuur en Milieu* (n 10) paras 62–69.

<sup>54</sup> *Stichting Natuur en Milieu* (n 10) para 77; *Vereniging Milieudefensie* (n 11) para 66.

### 3. A Bold Step Forward or Maintaining the Status Quo?

On the surface, the rulings of the General Court appear groundbreaking. And to a large extent they are. For the first time ever, EU judges were willing to assess the viability of EU rules on access to justice at the EU level in the light of the third pillar of the Aarhus Convention. However, even though the progressive rationale underpinning these rulings is remarkable in its own right, some additional caution is warranted.

The following three points are in order to contextualise the decisions of 14 June 2012 and, in addition, to further understand the final outcome of the case before the Grand Chamber of the CJEU.

*First* – focusing on the compatibility of the rulings of the General Court with the well-established case law of the EU courts governing standing requirements for direct actions – it is to be noted that the General Court was not swayed by the supplementary lines of argumentation that had been put forward by the European Parliament and the Council. Recalling the ECJ's earlier reliance on the available review options at national level, the latter institutions had submitted that the environmental NGOs had sufficient review options to their disposal before the national courts. This would in turn justify the restrictive interpretation of the material scope of the Aarhus Regulation. Rather surprisingly, especially in the light of the afore-mentioned rigid jurisprudence of the EU courts on the admissibility conditions for direct actions in the previous decades, the General Court refuted this argument in its ruling in *Vereniging Milieudefensie*. It did so by holding that the Council had failed to show how the applicants could bring an action before a national court challenging the contested act at issue.<sup>55</sup> Accordingly, the General Court seemed to have modestly stepped away from its rather theoretical approach to the dual-track nature of the EU system of judicial protection, which was displayed by the ECJ in its much-criticised<sup>56</sup> ruling in *UPA*.<sup>57</sup>

While *Vereniging Milieudefensie* did not concern a direct action against a substantive EU act – and it thus remains hard to draw general lessons from it in that regard – it nevertheless marked a significant shift from the earlier approach adopted by the EU courts vis-à-vis the availability of effective national remedies when interpreting the legal standing requirements before their own jurisdictions.<sup>58</sup> In its rulings of 14 June 2012, the General Court decided to effectively scrutinise the review options available before the national courts. Therefore the rulings of the General Court are to be tagged as an important step forwards for access to justice in environmental matters at the EU level. They showcased that the General Court would no longer be willing to reject a plea for wider access to justice before EU courts whenever no effective judicial remedies are available at national level.

*Second* – as to the wider implications of the General Court's allegedly progressive stance on judicial protection in environmental cases – it needs to be emphasized that the rationale used by the General Court, even if upheld by the CJEU, would not have fundamentally cured all the shortcomings of the EU in the realm of access to justice in environmental cases. At first sight, the latter assumption seems to stand at odds with the progressive discourse that was used by the General Court. As such, the rulings of 14 June 2012 display a remarkable openness on the part of the General Court towards the Aarhus Convention and thus are to be assessed as a providential sign for environmental democracy. For one, it might be maintained that the General Court had finally come to terms with the requirements for access to justice in environmental matters.<sup>59</sup> At the same time, some observers, including myself, remained sceptical about the practical added value of the rulings of 14 June 2012 in the strive for more access to courts in environmental cases.<sup>60</sup> Admittedly, when measured against the conservative approach towards the Aarhus Convention at the EU level that had prevailed so far, the rulings are to be hailed as a welcome step forwards towards a more encompassing scheme of internal review in environmental matters. Even more so, taking into consideration the landmark decision of the CJEU in *Lesoochranárske zoskupenie*, in which the CJEU refused to grant direct effect to Article 9(3) of the Aarhus Convention, the General Court could have easily rejected the plea for using the Aarhus Convention as a 'benchmark' or 'reference criterion' for the purpose of a legality review of an EU act. By toning down the importance of direct effect as a prerequisite for a legality review of EU implementing measures, the General Court pointed the way to a more viable approach towards environmental

<sup>55</sup> *Vereniging Milieudefensie* (n 11) para 76.

<sup>56</sup> See Tim Corthaut and Frédéric Vanneste, 'Waves between Strasbourg and Luxembourg: The Right of Access to a Court to Contest the Validity of Legislative or Administrative Measures' (2006) 25(1) YB Eur L 475.

<sup>57</sup> *Unión de Pequeños Agricultores* (n 22).

<sup>58</sup> See eg *Região autónoma dos Açores* (n 26).

<sup>59</sup> See eg Communication ACCC/C/2005/11 [Belgium], ECE/MPPP/C.1/2006/4/Add.2 (28 July), para 31.

<sup>60</sup> Schoukens (n 39) 29; see in similar vein Anaïs 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 1167/2006 Invalidated by the General Court' (2012) ELNI Review 92, 96.

justice at the EU level. It is thus clear that the General Court cannot be accused of having a bias against Aarhus. Having said this, it still remains uncertain whether the viewpoints adopted by the General Court would have ensured full compliance with Article 9(3) and (4) of the Aarhus Convention. To some extent, the rulings of the General Court also inadvertently exposed many shortcomings in the EU system of judicial review for environmental matters. In that regard, it is seminal to bear in mind that the General Court only annulled the Commission's decisions about the inadmissibility of the requests for internal review made under the Aarhus Regulation. In other words, in spite of the yearlong proceedings, no substantial review of the challenged decisions had taken place by June 2012.

Arguably, such findings are hard to reconcile with the requirements for effective and timely judicial protection in environmental cases laid down by Article 9(4) of the Aarhus Convention. In essence, however, these findings point to the inherent vices linked to the overarching characteristics of the internal review mechanism and thus are not to be blamed to the General Court as such.

*Third* – widening the view even further – the General Court did make it clear that, at any rate, the *Plaumann*-test would remain good law in case of direct challenge to EU acts before the EU courts. In this respect, the General Court noted that 'whatever the scope of the measure covered by an initial review as provided for in Article 10 of Regulation 1167/2006, 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'.<sup>61</sup>

Henceforth, the General Court struck down the modest hopes that had been sparked by the earlier decision of the CFI in *Região autónoma dos Açores*.<sup>62</sup> It is true that, at least in the latter case, the CFI cautiously indicated that the Aarhus Regulation might help in creating a wider access to EU courts in environmental cases. The judgments of 14 June 2012, however, exemplify the persisting reluctance of the EU courts to grant a wider access to justice in environmental cases as far as direct annulment actions are concerned. Added to that, the President of the General Court also dismissed the action for interim relief in *Vereniging Milieudefensie*, in which the environmental NGOs had requested the President to impose interim measures ensuring that the Netherlands would comply with the applicable air quality standards enshrined pending the legal proceedings.<sup>63</sup> Equally so, the General Court rejected the applicant's request to order the Commission to examine the merits of the request for internal review within a fixed period to be determined by the Court itself.<sup>64</sup>

These observations are not without relevance. Taken together with recurring time delays linked to legal proceedings before EU courts and the other inherent shortcomings of the internal review procedure (see *infra*), it is thus safe to conclude that the rulings of 14 June 2012 still left a lot of defects of the current EU review scheme unaddressed.

### III. The *Solomon* Judgments of the CJEU of 13 January 2015: Missed Opportunities for Environmental Democracy at the EU level?

#### A. *Back to Square One*

While the practical effect of the rulings of the General Court of 14 June 2012 on environmental litigation remained questionable at best, the generous stance towards the Aarhus Convention flared up hopes of a shift towards more environmental democracy at the EU level. By considering the impact of Article 9(3) of the Aarhus Convention on EU rules, the General Court was believed to have set in motion a process towards more accountability in environmental matters. Still, the modest progress offered by the latter rulings of the General Court was not certain to last. The European Commission, closely followed by the Council and the European Parliament, decided to lodge an appeal against the decisions. Thus the Grand Chamber of the CJEU would have the final say on the compatibility of the Aarhus Regulation with the EU's international commitments. In this section, the long-awaited rulings in both cases on the 13<sup>th</sup> of January 2015 are examined more into detail.

The submissions of the EU institutions, which were displeased by the General Court's more progressive approach towards the Aarhus Convention in the European context, focused on two central issues. First and foremost, the EU institutions portended that the General Court's rulings were based on an erroneous interpretation of the settled case law of the CJEU on the possibility for individuals to rely on the provision of international agreements with the aim of challenging the validity of a EU act of secondary legislation. As to

<sup>61</sup> *Stichting Natuur en Milieu* (n 10) para 80; *Vereniging Milieudefensie* (n 11) para 72.

<sup>62</sup> *Região autónoma dos Açores* (n 27).

<sup>63</sup> See also Case T-396/03 R *Arizona Chemical BV and Others v Commission of the European Communities* [2004] ECR II-205, para 67.

<sup>64</sup> *Vereniging Milieudefensie* (n 11) para 18.

the merits of the case, it was maintained that the General Court had erred in law by finding that the Parties to the Aarhus Convention enjoy limited discretion in identifying the acts that are subject to an administrative or judicial review pursuant to Article 9(3) of the Aarhus Convention.

In its rulings of 13 January 2015, the Grand Chamber of the CJEU decided to follow the submissions of the appellants pertaining to the legality review of the Aarhus Regulation in the light of Article 9(3) of the Aarhus Convention. Returning to the basic legal principles underlying the invocability of provisions of an international agreement, the CJEU set out that provisions of an international agreement can only be relied upon to review an act of EU secondary legislation where the nature and broad logic of that agreement did not preclude it and, additionally, the provisions at issue were, as regards their content, unconditional and sufficiently precise. With reference to its previous ruling in *Lesoochranárske zoskupenie*, the CJEU held that Article 9(3) of the Aarhus Convention does not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals. By explicitly referring to members of the public who 'meet the criteria, if any, laid down in (...) national law', the latter provision is subject, in its implementation or effect, to the adoption of a subsequent measure.<sup>65</sup> Consequently, the provision could not be relied upon to review the validity of the Aarhus Regulation.

Against the backdrop of the latter premises, the Grand Chamber ultimately decided to overrule the General Court's reasoning. More specifically, it rejected the use of the so-called *Fediol*- and *Nakajima*-exceptions as a means to bypass the lack of direct effect of Article 9(3) of the Aarhus Convention. In its ruling in *Fediol*, the ECJ held that it would conduct a legality review of an EU act in the light of WTO-law where the EU act at issue referred explicitly to specific provisions of WTO-law, whereas the *Nakajima*-exception referred to a case of legality review where the EU intended to implement a particular obligation assumed under WTO law. Although the lawsuits filed by the environmental NGOs had no linkages with WTO-law, these 'exceptions' been brought up by the General Court in its 2012 rulings in order for it to proceed with the legality review of the Aarhus Regulation in the light of the requirements set out by Article 9(3) of the Aarhus Convention. However, the CJEU ultimately held that 'those two exceptions were justified solely by the particularities of the agreements that led to their application'. In addition, in the CJEU's view, the vague and ambiguous wording of Article 9(3) of the Aarhus Convention rendered it unsuitable as a reference criterion for the purpose of legality review of EU secondary legislation.

It is interesting to take a closer look at the reasoning laid down by the CJEU. As to the *Fediol*-exception,<sup>66</sup> the Grand Chamber held that it did not apply to the cases at issue since Article 10(1) of the Aarhus Regulation did not directly refer to any specific provisions of the Aarhus Convention, nor did it explicitly confer a right to individuals.<sup>67</sup>

The *Nakajima*-exception did not fare any better. The CJEU held that it also could not be relied upon in order to justify the review of the Aarhus Regulation in the light of Article 9(3) of the Aarhus Convention. According to the Grand Chamber, the factual and legal background of *Nakajima* had to be distinguished from the cases at hand. In *Nakajima* the dispute centred on an EU implementing act linked to the antidumping system, which was, according to the Grand Chamber, 'extremely dense in its design and application, in the sense that it provides for measures in respect of undertakings accused of dumping practices'.<sup>68</sup> Accordingly, the CJEU concluded that, in sharp contrast to *Nakajima*, no implementation-scenario had unfolded in the two cases at hand.

As an additional reminder, the CJEU also recalled that Article 9(3) of the Aarhus Convention leaves too much leeway and discretion to the Contracting Parties when defining the rules for the implementation of administrative or judicial procedures in the context of environmental cases.

Most importantly, however, the CJEU underlined that the EU clearly could not have intended to implement the obligations arising from Article 9(3) of the Aarhus Convention since the mentioned administrative or judicial procedures predominantly fell within the competences of the Member States. Having rejected both vested exceptions to the rigid direct effect-approach of EU courts towards international agreements, the CJEU concluded that the General had erred in law in both cases by reviewing the Aarhus Regulation in the light of Article 9(3) of the Aarhus Convention.<sup>69</sup>

<sup>65</sup> *Council and Others v Stichting Natuur en Milieu* (n 12) para 48; *Council and Others v Vereniging Milieudefensie* (n 12) para 55.

<sup>66</sup> Case C-70/87 *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v Commission of the European Communities* [1989] ECR 1781.

<sup>67</sup> *Council and Others v Stichting Natuur en Milieu* (n 12) para 51; *Council and Others v Vereniging Milieudefensie* (n 12) para 58.

<sup>68</sup> *Council and Others v Stichting Natuur en Milieu* (n 12) para 52; *Council and Others v Vereniging Milieudefensie* (n 12) para 59.

<sup>69</sup> *Council and Others v Stichting Natuur en Milieu* (n 12) para 54; *Council and Others v Vereniging Milieudefensie* (n 12) para 61.

### **B. There Is (Was) No Alternative, or Was There?**

With its outright refusal to review the validity of the internal review mechanism in the light of the Aarhus Convention, the CJEU did not have to pronounce itself on the substance of the arguments raised by the environmental NGOs in their original claims. As a consequence of that, the CJEU missed a unique opportunity to pronounce itself on the loopholes in the EU system of judicial protection in environmental cases.

It is thus likely that the shortcomings of the current EU implementing rules as to access to justice in environmental matters will persist through the coming years. In the light of the outcome of the legal proceedings launched against the strict scope of the Aarhus implementations measures, it is very unlikely that the EU institutions will consider a review of the existing Aarhus Regulation any time soon. Therefore the rulings of the CJEU most certainly leave a sour taste in the mouth of the propagators of environmental justice at the EU level. The question now arises whether the CJEU's approach towards the Aarhus Convention is sound, legally speaking. Was there, in the light of the long-vested case law of the ECJ/CJEU on the invocability of international agreements, no other option left than reasserting the traditional stance that is reflected in its rulings of 13 January 2015? Or, differently put: can the CJEU be accused of throwing out the baby with the bathwater with its steadfast refusal to take into account Article 9(3) as a reference criterion for reviewing the legality of the Aarhus Regulation?

#### **1. Progressive at the National Level, Conservative at the EU level?**

In the light of the existing case law of the CJEU on the effects of international agreements in the EU legal order, the reasoning underpinning the rulings of 13 January 2015 looks sound and plausible. As such, Article 216(2) of the TFEU stipulates that agreements concluded by the EU are binding on the institutions of the Union and its Member States. Still, 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 ECJ/CJEU, EU courts may only review the legality of a regulation in the light of an international convention when the nature and the broad logic of the convention do not preclude such an assessment and where, in addition, the provisions of the treaty appear, as regards their consent, to be unconditional and sufficiently precise.<sup>70</sup> As a consequence, a provision of an international agreement needs to have 'direct effect' in order to serve as a touchstone for a legality review of secondary EU acts. Only as recent as in 2008 this viewpoint was explicitly reiterated by the ECJ in its renowned decision in *Intertanko*, where it was held that, the nature and the broad logic of the United Nations Convention on the Law of the Sea (UNCLOS) prevented the ECJ from assessing the validity of a Community measure in its light.<sup>71</sup>

Admittedly, the EU courts have showed some modest openness in some cases. In its recent case law the direct effect of not only bilateral agreements with non-member countries aimed at developing a particular kind of general relationship with such countries<sup>72</sup> but also of environmental multilateral agreements such as, for instance, the Barcelona Convention for the Protection of the Mediterranean Sea against Pollution and its Protocol, has been recognised.<sup>73</sup> However, bearing in mind the fact that the CJEU had, as mentioned earlier on, explicitly denied to accord direct effect to Article 9(3) of the Aarhus Convention in its *Lesoochranárske zoskupenie*-decision, the CJEU's refusal to proceed with the requested legality review should not come as a surprise. Still, notwithstanding the outright logic of the CJEU's approach, its reliance on *Lesoochranárske zoskupenie* is certainly not flawless. In the latter decision the Grand Chamber of the CJEU indeed held that Article 9(3) did not contain any clear and precise obligation capable of directly regulating the legal position of individuals and therefore could not be relied upon before a national court. At the same time, however, the CJEU, went on noting that Article 9(3) of the Aarhus Convention, although drafted in broad terms, still aimed to ensure effective environmental protection at the national level.<sup>74</sup>

Although some scholars have questioned the soundness of the *Lesoochranárske zoskupenie*-ruling out of fear that the CJEU might have 'stepped into the legislature's shoes',<sup>75</sup> the judgment is to be seen as a bold step towards more effective judicial protection in environmental matters within the ambit of EU

<sup>70</sup> Case C-121/06 P *FIAMM and Others v Council and Commission* [2008] ECR I-6513, para 110.

<sup>71</sup> Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-04057, para 45.

<sup>72</sup> See, amongst others, Case C-17/81 *Pabst & Richarz v Hauptzollamt Oldenburg* [1982] ECR 1331, para 25–27.

<sup>73</sup> Case C-213/03 *Syndicat professionnel coordination des pêcheurs de l'étang de Berre v EDF* [2004] ECR I-7357.

<sup>74</sup> *Lesoochranárske zoskupenie* (n 51) para 46.

<sup>75</sup> *Jans* (n 51) 98.

environmental law.<sup>76</sup> This is particularly the case since the CJEU underscored in paragraph 49 of the latter ruling 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’. By doing so, the CJEU underlined the duty of consistent interpretation that is resting upon the national courts in this respect.<sup>77</sup>

Therefore it remains ironic to note that the *Lesoochranárske zoskupenie*-decision was heavily relied upon by the CJEU in order to block the legality review that had been sought for by the environmental NGOs. For, as such, the ruling of the CJEU in *Lesoochranárske zoskupenie* exemplified that it was willing to overstep its classical strict case law on direct effect in order to ensure the effectiveness of environmental law at national level. This begs the question of why a similar rationale has not prevailed in a case concerning internal review at the EU level where, as highlighted by the General Court, no sufficient legal remedies are available for environmental NGOs to directly challenge EU acts before the national courts.

This being the case, the CJEU was, at least in theory, left with two other alternative lines of reasoning for carrying out a legality review of the Aarhus Regulation in the light of Article 9(3) of the Aarhus Convention. The CJEU could have chosen to reassert the application by the General Court of the so-called ‘principle of implementation’, as laid down in the afore-mentioned rulings in *Fediol* and *Nakajima*, or, alternatively, it could have opted for the alternative approach to the requirement of direct effect in the context of a legality review, which was developed by Advocate General Jääskinen in which less importance is to be given to the precise wording of the provision of international law.<sup>78</sup>

In its rulings of 13 January 2015, the CJEU choose to use neither of the two options. In the subsequent analysis both alternative approaches are sketched out and examined more into detail.

However, in order to fully understand the analysis below, a short ‘procedural detour’ is required. For, there might be a more prosaic explanation for the CJEU’s reluctance towards at the alternative approach vis-à-vis the direct effect of Article 9(3) of the Aarhus Convention proposed by the Advocate General – *i.e.* the second line of argumentation that is addressed below. In essence, the reasoning of the Advocate General merely seeks to substitute the grounds relating to the analysis of whether Article 9(3) of the Aarhus Convention may be relied upon. In other words, it exclusively touches upon a part of the reasoning of the rulings under appeal without challenging their final result, being the annulment of the contested decisions. While the CJEU did not explicitly elaborate on its reasons for not considering the Advocate General’s alternative take, it might be submitted that it implicitly provided us with some clues by dismissing the cross-appeal that had been launched by two environmental NGOs in its ruling in *Vereniging Milieudefensie*. Here, the environmental NGOs had argued that, albeit without identifying any specific error of law, the ruling of the General Court was vitiated by its refusal to recognise the direct effect of Article 9(3). Importantly, at least from a procedural point of view, the CJEU decided to dismiss the cross-appeal for not tallying with Articles 169(1) and 178(1) of the Rules of Procedure of the CJEU.<sup>79</sup> Along those lines, it might be argued that the CJEU, taking into account its limited competence in appeal, was thus effectively barred from expressing its view on the additional observations that had been presented to it by Advocate General Jääskinen. The Advocate General, in turn, seemed to be of the opinion that, in the light of the conflicting approaches towards the invocability of provisions of international law within the EU legal order, the proceedings did not allow for a final judgement and thus should be referred back to the General Court. Absent any further motivation in this regard, it remains challenging to second-guess the motivation underpinning the CJEU’s apparent unwillingness to assess the alternative route suggested by the Advocate General. At the same time, the CJEU still decided to give a final judgment in the matter, albeit based on its traditional approach towards the direct effect of provisions of an international agreement. By doing so, some might argue the CJEU, aside any procedural issues, also implicitly debunked the new pathway suggested by the Advocate General.

<sup>76</sup> See Martin Hedeman-Robinson, ‘EU Implementation of the Aarhus Convention’s Third Pillar: Back to the Future over Access to Environmental Justice? – Part 1’ (2014) 23(3) *Eur E & Env’t L Rev* 102, 111; Jean-François Brakeland, ‘Access to Justice in Environmental Matters – Developments at EU level’ (2014) 5 *Gyoseiho-kenkyu* <<http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2014/05/arten-brakelandup.pdf>> accessed 15 March 2015.

<sup>77</sup> The ECJ 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, para 10.

<sup>78</sup> See Piet Eeckhout, *EU External Relations Law* (2nd edn, Oxford University Press 2011) 297.

<sup>79</sup> *Council and Others v Vereniging Milieudefensie* (n 12) paras 32–34.

## 2. A Too Rigid Approach Towards Nakajima?

As has become apparent from the above-presented analysis, the CJEU explicitly refused to apply the *Fediol*- and *Nakajima*-exceptions to the cases at hand. Whereas the reasoning of the CJEU might hold ground at first sight, it is not completely immaculate, especially given the undesirable outcome for environmental justice at the EU level.

In retrospect, the recourse to the so-called 'principle of implementation',<sup>80</sup> as upheld by the General Court in 2012, might have some merits and thus deserves a closer analysis.

Earlier research predicted that the application of the implementation doctrine outside of the scope of the GATT and WTO agreements would remain the proverbial Achilles heel of the rulings of the General Court of 14 June 2012.<sup>81</sup> Pursuant to *Nakajima* case law EU courts are able to review the legality of an EU regulation, where it is intended to implement an international obligation incumbent on the EU, even when the said treaty does not meet the direct effect-criteria. Seemingly, the CJEU's approach confines the application of the *Fediol*- and *Nakajima*-exceptions to the specific context of the GATT and WTO agreements, which are, as also reasserted by Advocate General Jääskinen in its Opinion of 8 May 2014 in *Vereniging Milieudéfensie*, governed by their own logic and system of law.<sup>82</sup>

In particular, the CJEU pointed out that the factual background of both cases could not be compared to the cases that had led to rulings in *Fediol* and *Nakajima*. The simple fact that the GATT and WTO agreements are based on reciprocal and advantageous arrangements appears to hinder the application of the said exceptions outside of the international commercial policy-context.

In itself, the CJEU might have common sense at its side in opting for a restrictive application of the *Fediol*- and *Nakajima*-exceptions. However, it remains unclear whether the Court's take remains convincing when approached from a more broad perspective.

For one thing, the CJEU's strict reading of the *Fediol*- and *Nakajima*-exceptions, if not compensated by a more lenient approach towards direct effect as a precondition for international law to be used as a benchmark for purpose of a legality review of secondary EU measures, could lead to major differences in the level of judicial protection for individuals in cases which relate to the EU's international obligations. Commentators like *Eeckhout* submitted that both *Fediol* and *Nakajima* reflect some type of compromise which was reached within the ECJ at the time, striking a balance between the lack of direct effect of some international agreements and respect for the EU's international commitments.<sup>83</sup> However, by confining both exceptions exclusively to the realm of the GATT and WTO agreements or, alternatively, by limiting the principle of EU law implementing international rules to scenarios in which the provision at stake explicitly refer to the international provision, the CJEU can be accused of having raised the bar for legality review so high that one might wonder if the exceptions might ever be applied again.<sup>84</sup> As rightly held by *Pirker*, the CJEU's apparent scrutiny towards the implementation principle renders 'review scenarios' almost non-existent.<sup>85</sup> Accordingly, the CJEU seems to turn a blind eye to potential non-compliance scenarios that might arise in other domains of international EU policy.

The implications of both rulings are all the more disturbing because, as such, it may not be doubted that the Aarhus Regulation intended to implement the EU's obligations under the Aarhus Convention. This is, amongst others, illustrated by Article 1(1)(d) of the Aarhus Regulation, which explicitly states that the objective of that Regulation was to contribute to the implementation of the obligations arising under the Aarhus Convention by granting, inter alia, 'access to justice in environmental matters at European level under the conditions laid down by this Regulation'.

This being the case, by opting for a rigid interpretation of the implementation principle, the CJEU sends out the message that review of an EU act in the light of international law will remain exceptional. Accordingly, the CJEU might indeed be criticised for not taking into account the official aims of the EU, which is, among others, to contribute to the strict observance and development of international law (Art. 3(5) of the Treaty on European Union (TEU)).<sup>86</sup>

<sup>80</sup> *Nakajima* (n 50) paras 31–32.

<sup>81</sup> *Schoukens* (n 39) 24–25.

<sup>82</sup> Joined cases C-401/12 P, C-402/12 P and C-403/12 P *Council and Others v Vereniging Milieudéfensie and Stichting Stop Luchtverontreiniging Utrecht* [2014], Opinion of AG Jääskinen paras 52–57.

<sup>83</sup> *Eeckhout* (n 78) 361.

<sup>84</sup> *Benedikt Pirker*, 'Cases C-401 to 403/12 and C-404 to 405/12: No Legality Review in the Light of the Aarhus Convention' (European Law Blog, 29 January 2015) <<http://europeanlawblog.eu/?p=2674>> accessed 15 March 2015.

<sup>85</sup> *ibid.*

<sup>86</sup> *ibid.*

Moreover, on a more fundamental level, the CJEU's implicit premise is not without flaws. While it is certainly true that the context of WTO related cases is to be distinguished from environmental cases, the sharp dichotomy between both policy spheres does not appear wholly justified. Critics might advance that most international environmental agreements are the result of hard and difficult negotiations. Not surprisingly, given the major impact the adoption of stricter environmental rules might have on national economic policies, many provisions of international environmental agreements remain vague and lack precise and unconditional wording. Under the CJEU's rigid approach, however, such conventions could almost never be used as a yardstick for the purpose of the legality review of the EU's implementing measures. Thus it is worth pondering whether the distinct treatment of multilateral environmental agreements will not give way to even more non-compliance scenarios in the specific realm of international environmental policy.

All in all, the rulings of 13 January 2015 mask the unwillingness on the part of the CJEU to expose acts of EU institutions to legality review in the light of international law. They are thus characteristic of a more reluctant stance to reviewing EU secondary acts in the light of international obligations incumbent on the EU. It might be feared that, absent any threat of legality review by EU courts, EU institutions will feel virtually immunised from legal challenges when implementing international obligations. Henceforth, an important leverage for the observance of international law falls away within the EU legal framework.

### 3. A More Promising Pathway?

Besides the implementation principle, the CJEU was presented with another, possibly even more appealing, option to take into consideration Article 9(3) of the Aarhus Convention in its assessment of the internal review procedure set out by the Aarhus Regulation. This 'novel' approach was provided to it by Advocate General Jääskinen in its Opinion of 8 May 2014 in *Vereniging Milieudefensie*. As is demonstrated below, the alternative road to legality review suggested by the Advocate General would have allowed the CJEU to carry out the legality review without having to take recourse to the *Fediol* and *Nakajima*-case law. Arguably, it provides a more elegant method to uphold the bedrock principles of its earlier case law without necessarily having to dismiss the use of the Aarhus Convention as yardstick for the purpose of reviewing the material scope of the internal review procedure.

However, since the presented approach would not lead to an alternative outcome of the proceedings but exclusively challenges a part of the reasoning of the rulings of 14 June 2012 of the General Court, the CJEU might have implicitly assumed that assessing the viability of this alternative approach did not fall within its competence on appeal. As alluded to above, one might deduce this from the treatment of the cross-appeal that had been launched by the environmental NGOs in *Vereniging Milieudefensie*. Others might read in the CJEU's referral to its traditional case law with regard to direct effect a more compelling rejection of the alternative approach advocated for by Advocate General Jääskinen. Be that as it may, below, it is further examined whether, irrespective of procedural arguments, an alternative approach to direct effect could have led to a more desirable outcome for the afore-mentioned proceedings, especially in view of the objectives of the Aarhus Convention.

In order to fully grasp the essence of the rationale submitted by the Advocate General, a quick tour through the extensive body of case law of the EU courts on the legal effects of provisions of international law is required.

While often forgotten, the CJEU has already moved away from its strict case law on the legal effects of international agreements within the EU legal framework in some cases. Most famously, the ECJ held in its 2001 *Biotechnology*-decision that, even if the Convention on Biological Diversity did contain provisions which do not fulfil the requirements for direct effect, in the sense that they do not create any right which individuals might rely on directly before EU courts, this did not preclude a review by the courts of compliance with the obligations on the EC as a party to that agreement.<sup>87</sup>

Yet also in its more recent case law the CJEU has showed more openness towards the legal effects of provisions of international agreements in the EU legal order. Reference can be made to the recent ruling of the CJEU in *Air Transport Association of America and Others (ATA)*, in which it was asserted that the principles of customary international law 'may be relied upon by an individual for the purpose of the CJEU's examination of the validity of an act of the European Union in so far as, first, those principles are capable of calling into question the competence of the European Union to adopt that act (...) and, second, the act in question is liable to affect rights which the individual derives from EU law or to create obligations under EU law in this

<sup>87</sup> Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECR I-7079, paras 52–55.

regard'.<sup>88</sup> In support of his reasoning, Advocate General Jääskinen also pointed to the criticism to which the 2008 *Intertanko*-ruling had given rise to, especially since the latter ruling appeared to be incompatible with the earlier case law of the ECJ, in which the latter had afforded individuals the right to refer to UNCLOS as the expression of customary law.<sup>89</sup>

Building on the afore-mentioned case law and, additionally, reasserting the fact that the EU is a community based on the rule of law, Advocate General Jääskinen advocated for a modification of the conditions required for direct reliance on international agreements before EU courts. In particular, the Advocate General made a distinction between the situation in which an individual wishes to invoke an act of international law directly by relying on a right laid down in that law for his benefit, on the one hand, and the situation of reviewing the discretion enjoyed by an institution of the EU during the process of alignment of an act of EU law with an act of international law, on the other hand.<sup>90</sup> This distinction resembles the decisions of the ECJ in *Kraaijeveld*<sup>91</sup> and *World Wildlife Fund*,<sup>92</sup> in which the latter was asked to pronounce itself on the invocability of provisions of EU environmental law before national courts. When faced with preliminary questions on the direct effect of some broadly formulated provisions of the Environmental Impact Assessment (EIA)-Directive, the ECJ did not focus on the exact wording of the said provisions and simply urged the national courts to set aside the incompatible national rules. Some authors see this jurisprudence as an early example of a more generous approach towards the direct effect-requirements in the field of EU environmental law, as EU directives are seldom designed to confer subjective rights upon individuals.<sup>93</sup>

In his Opinion of 8 May 2014 the Advocate General reasoned that, in order to avoid creating an area free of judicial review, the lack of direct effect of a provision of an international agreement should not rule out an examination of an EU act in the light of the former, provided that the characteristics of the said convention in question do not preclude this.<sup>94</sup> For a provision of international law to serve as a yardstick for the purpose of legality review, it must necessarily include sufficiently clear, intelligible and precise elements. However, most importantly, the Advocate General underlined that such a provision does not need an exhaustive rule, allowing that such a provision may be also mixed in nature. Whenever it would remain possible to isolate parts of the content of that provision that satisfy that requirement, it must be possible to use it in the specific context of a legality review.<sup>95</sup> In other words, the mere fact that a provision of international law affords the Contracting Parties significant discretion in certain regards does not preclude that the same provision of international law also contains precise and unconditional rules.

Subsequently, the Advocate General found that Article 9(3) of the Aarhus Convention fulfils the said requirements and thus qualifies as a 'mixed provision'. Whereas the Advocate General concedes that Article 9(3) requires the adoption of subsequent acts and that therefore individuals could not rely upon it, it does contain a clear-cut obligation on the part of the Contracting Parties to ensure that there is a clearly identifiable outcome. The Advocate General based his reasoning partly on *Lesoochranárske zoskupenie*, by referring to the CJEU's statement that '(the provisions of Article 9(3), although drafted in broad terms, are intended to ensure effective environmental protection'.<sup>96</sup>

This ultimately led to the conclusion that, having regard to its objective and its broad logic, Article 9(3) of the Aarhus Convention is in part a sufficiently clear rule that is capable of serving as the basis of a legality review of the Aarhus Regulation.<sup>97</sup> In comparison with the *Nakajima*-approach used by the General Court, the solution offered by the Advocate General has the unmistakable advantage of being better in line with existing case law of the CJEU in relation to provisions of EU environmental law, such as the EIA Directive (see *supra*).

In itself, the Advocate General's take – especially in comparison with the reliance on the *Fediol*- and *Nakajima*-exceptions by the General Court – would offer a more satisfactory solution for the detected loopholes to which the traditional case law of the CJEU on the legal effects of international conventions in the EU

<sup>88</sup> Case C-366/10 *Air Transport Association of America and Others v Secretary of State for Energy and Climate Change* [2011] ECR I-13755, para 110.

<sup>89</sup> *Council and Others v Vereniging Milieudefensie*, Opinion AG Jääskinen (n 82) para 65.

<sup>90</sup> *ibid* para 77.

<sup>91</sup> Case C-72/95 *Aannemersbedrijf P.K. Kraaijeveld BV e.a. v Gedeputeerde Staten van Zuid-Holland* [1996] ECR I-5403.

<sup>92</sup> Case C-435/97 *World Wildlife Fund (WWF) and Others v Autonome Provinz Bozen and Others* [1999] ECR I-5613.

<sup>93</sup> See eg Wennerås (n 37) 18; Koen Lenaerts and José A Gutiérrez-Fons, 'The General System of EU Environmental Law Enforcement' (2011) 30(1) YB Eur L 3, 27.

<sup>94</sup> *Council and Others v Vereniging Milieudefensie*, Opinion AG Jääskinen (n 82) para 78.

<sup>95</sup> *ibid* para 80.

<sup>96</sup> *ibid* para 93.

<sup>97</sup> *ibid* para 94.

legal order has led. For, whereas the more widespread application of the implementation-approach would arguably lead to more guarantees in the context of the international obligations incumbent on the EU, it does not present a long-term fix to the perennial issues in this regard. For instance, it might not allow for a legality review in cases where the EU act did not explicitly refer to an international agreement. In retrospect, it would have been interesting to hear the CJEU's view in this respect, especially given the fact that the lowering down of the direct effect-requirement in the context of a legality review might constitute a more comprehensive solution for the Aarhus-related shortcomings at the EU level in the long run.

The alternative take of the Advocate General seems plausible. In order to be used as a yardstick for the purpose of a legality review of an EU act, a provision of international law does not necessarily need to be exhaustive. As long as a provision of international law at least in part contains sufficient precise and unequivocal wordings and sets forth a clear outcome, it would in most instances be able to serve as a reference criterion for the purpose of a legality review. In addition, the Advocate General's stance, if applied on a more general scale, also might also help fostering the effectiveness of international environmental agreements within the EU legal order. Under this approach, individuals and environmental NGOs will now be able to hold EU institutions more easily accountable for the non-observance of the EU's international commitments before national courts.

However, on the downside, as alluded to above, the CJEU might have had some procedural arguments at its disposal not to explicitly consider this alternative approach to direct effect in the afore-mentioned proceedings. Yet, at the end of the day, the explicit reference to its *Intertanko*-decision at least implicitly underlines the reluctance of the CJEU to revise its well-vested approach. Indeed, the support for a more progressive approach towards the requirement of direct effect in the CJEU's recent case law appears to be rather limited. In the recent case law – perhaps with the notable exception of the afore-mentioned ruling in *ATA* – the conservative approach seems to have taken the upper hand again. Hence the direct effect of a provision of international law still remains a prerequisite for a legality review of a secondary EU act. Opting for the Advocate General's approach would therefore urge the CJEU to reconsider its earlier case law on this fundamental point. In addition, some commentators downplayed the relevance of the ruling of the ECJ in *Biotechnology*, one of the major references of the Advocate General. In this regard, it is maintained that the latter ruling was probably aimed at tackling the incapacity of Member States to seek judicial review on grounds of violation of certain agreements, particularly agreements, to which they are themselves as much committed as is the EU.<sup>98</sup> It would thus not be appropriate to apply this rationale in cases where natural persons or environmental NGOs seek for a legality review.<sup>99</sup>

As rightly pointed out by Advocate General Jääskinen, however, the automatic and unreserved application of the traditional case law of the CJEU in relation to the legal effects of international agreements would, in conjunction with the CJEU's earlier decision in *Lesoochránárske zoskupenie*, result in the CJEU ruling out any substantial judicial review of the EU's compliance with its obligations under the Aarhus Convention as far as access to justice at the EU level is concerned.

Therefore it remains regrettable that the General Court had not applied a similar rationale in its decisions of 14 June 2012, which in turn would have forced the CJEU to explicitly treat the additional arguments raised by the Advocate General. Still, with its explicit reference to the *Intertanko*-rationale, the CJEU ultimately underlined that the CJEU was more preoccupied with preserving its traditional approach towards the legal effects of international agreements than guaranteeing sufficient access to justice in environmental cases at the EU level.

## **IV. The Unfortunate Legacy of the Rulings of 13 January 2015: No Distance Left to Run?**

### **A. Practice What You Preach?**

With its obstinate refusal to review the internal review procedure in the light of the Aarhus Convention, the CJEU has made itself vulnerable to many critiques. It might be tempting to label the CJEU's stance as outdated in the light of the international and EU developments towards environmental democracy. Roger, for one, has accused the CJEU of having missed an important opportunity for assessing the adequacy of the EU system of legal remedies in the light of the Aarhus Convention.<sup>100</sup> While some might credit the CJEU for

<sup>98</sup> Eeckhout (n 78) 298.

<sup>99</sup> See also Schoukens (n 39) 23–26.

<sup>100</sup> See eg Apolline JC Roger, 'A Lost Opportunity for Improving Access to Justice in Environmental Matters: The CJEU on the Invocability of the Aarhus Convention' (EU Law Analysis, 15 February 2015) <<http://eulawanalysis.blogspot.be/2015/02/a-lost-opportunity-for->

sticking to its well-established traditional jurisprudence on the direct effect of provisions of international law in the EU legal order, it can be expected that many will criticise the CJEU for having opted for a rather legalistic approach to the Aarhus-related claims. Instead of moving forward on the path set out by the Aarhus Convention, the rulings of the CJEU could be tagged as a significant step backwards for the protection of judicial protection in environmental cases. Critics of the CJEU might argue that the lack of direct effect of Article 9(3) of the Aarhus Convention provided the CJEU with a convenient excuse to reject a plea for reconsideration of its well-vested approach towards access to justice in environmental matters. Others might detect a certain ambivalence in the CJEU's refusal to apply the implementation principle outside the scope of WTO and contend that it missed the momentum for reshaping judicial review in the context of environmental cases.

Either way, as a result of the CJEU's hands off-approach, the compatibility of the Aarhus Regulation with the EU's international obligations, will probably not be reconsidered by the EU institutions any time soon. This implies that the internal review procedure will only remain accessible in the context of individual acts, leaving the bulk of the EU decisions and measures in the environmental sphere outside the material scope of the Aarhus Regulation. Having explicitly overturned the rulings of the General Court, the CJEU thus took away all remaining hope for substantial enhancement of the position of environmental NGOs in the near or distant future.

In a certain way, the rulings of 13 January 2015 also stand in sharp contrast to the CJEU's recent progressive stance on access to justice before national courts.

As is widely known, the CJEU has recently revealed itself as a big proponent of wide access to justice for environmental NGOs at national level, both in the context of the provisions on access to justice regarding the second pillar of Aarhus, which have been explicitly implemented in EU law and as regards general environmental law enforcement, as provided for by Article 9(3) of the Aarhus Convention.<sup>101</sup> For instance, as portrayed by its decision in *Lesoochránárske zoskupenie*, the CJEU did certainly not shy away from urging national courts to reconsider their traditional strict approach towards standing for environmental NGOs in its case law.

It is important to highlight that the CJEU's decision in *Lesoochránárske zoskupenie* was by no means exceptional. In its 2011 decision in *Bund für Umwelt und Naturschutz Deutschland*, the CJEU also compelled German courts to reconsider their well-rooted '*Schutznormtheorie*', under which individuals and environmental NGOs only have standing to invoke legal proceedings that are designed to protect their specific interest, in the light of the Aarhus Convention.<sup>102</sup> Likewise, the decisions of the CJEU in *Boxus*<sup>103</sup> and *Solvay*,<sup>104</sup> aptly illustrate that both the Aarhus Convention and the EIA Directive require national courts to trump national procedural law, whenever this would be necessary to review legislative acts in the light of the substantive requirements set out by the EU environmental directives.<sup>105</sup>

It is thus clear that, when reviewing access to justice in environmental cases at national level, the CJEU does not feel hindered by well-vested national procedural rules or case law. In the light of the consistent stream of seemingly progressive case law from Luxemburg on access to justice at national level, the CJEU's conservative approach towards access to justice at the EU level is thus even more puzzling. It is hard to reconcile with the strict scrutiny it applies when assessing national procedural laws in the context of environmental litigation. As noted by among others Roger, the recent rulings of the CJEU indeed lay bare the two different standards for access to justice at the EU and national levels.<sup>106</sup> It can be concluded that while national courts are increasingly forced by the CJEU to relinquish their well-vested traditional approaches to standing for environmental NGOs, the CJEU itself seems unwilling to reconsider its well-entrenched *Plaumann*-doctrine for direct actions.

improving-access.htm> accessed 15 March 2015.

<sup>101</sup> See more extensively Martin Hedeman-Robinson, 'EU Implementation of the Aarhus Convention's Third Pillar: Back to the Future over Access to Environmental Justice? – Part 2' (2014) 23(4) Eur E & Envtl L Rev 151–160.

<sup>102</sup> Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* [2011] ECR I-03673, para 46.

<sup>103</sup> Case C-128/09 *Antoine Boxus and Willy Roua*, Case C-129/09 *Guido Durllet and Others*, Case C-130/09 *Paul Fastrez and Henriette Fastrez*, Case C-131/09 *Philippe Daras*, C-134/09 and C-135/09 *Association des riverains et habitants des communes proches de l'aéroport BSCA (Brussels South Charleroi Airport) (ARACH)*, Case C-134/09 *Bernard Page* and Case C-135/09 *Léon L'Hoir and Nadine Dartois v Région wallonne* [2011] ECR I-09711.

<sup>104</sup> Case C-182/10 *Marie-Noëlle Solvay and Others v Région wallonne* (CJEU, 16 February 2012).

<sup>105</sup> *Antoine Boxus and Willy Roua* (n 103) para 54; *Marie-Noëlle Solvay and Others* (n 104) para 50.

<sup>106</sup> Roger (n 100).

It goes without saying that the CJEU's reasoning is subject to practice-what-you-preach criticism. However, against the backdrop of the CJEU's previous case law in relation to access to justice at the EU level, the outcome of the above-examined cases can hardly be called surprising. In line with its earlier case law, in which the CJEU consistently dismissed pleas for a more lenient interpretation of the standing requirements before the EU courts, the CJEU again referred to the dual-track nature of the so-called 'complete system of judicial protection' upon which the EU legal order is based.

In sharp contrast to the rationale used by the General Courts in its 2012 rulings, the CJEU denied the argumentation advanced by the environmental NGOs by holding that the Aarhus Regulation concerns 'only one of the remedies available to individuals for ensuring compliance with EU environmental law' and, in addition, underscoring that the implementation of Article 9(3) of the Aarhus Convention is primarily a competence of the Member States.<sup>107</sup>

The reliance on the dual-track nature of the system of legal remedies is understandable in itself, especially when taking into account the entry into force of Article 19(1) of the TEU. This provision intended to strengthen legal protection in the field covered by EU law before national courts. It can therefore be maintained that the coherence of the judicial system of the EU does indeed not rest solely on having direct access to EU courts, but rather on the interlocking system of jurisdiction of EU courts and national courts.<sup>108</sup> Yet, while the national courts have a crucial role to play in filling gaps in the system of judicial protection, they will not be able to provide an all-encompassing solution to the loopholes that are present at the EU level, where still a lot of barriers prevent environmental NGOs and individuals from having broad access to justice in conformity with the requirements set out in Article 9(3) of the Aarhus Convention. Moreover, the preliminary ruling procedure under EU law is not available as a matter of right since it is up to the national courts to refer a question relating to the legality of a contested EU act to the CJEU. Thus national court proceedings therefore will not serve as a panacea for all ills.

In this respect, it remains useful to recall that, as alluded to above, the General Court had already rejected recourse to national proceedings as justification for the limited scope of the internal review procedure in its 2012 rulings, as no national measure appeared to be available to question before national courts.<sup>109</sup> Interestingly, the Aarhus Compliance Committee also reached a similar conclusion in its above-discussed findings and recommendations of April 2011.<sup>110</sup> Whereas the Aarhus Compliance Committee recognised the system of judicial review in the national courts of the Member States and the request for a preliminary ruling as significant elements for ensuring consistent and proper implementation of EU law in the Member States, it pointed out that indirect legality review through national courts 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.<sup>111</sup> This appears all the more relevant since the draft directive on access to justice in environmental cases has not entered into force as EU law. Such considerations, however, have not been withheld on appeal by the CJEU in its rulings of 13 January 2015.

Given the importance of the latter arguments in the rulings of 13 January 2015, some important additional elements are to be raised here.

*First*, within the so-called dual-track approach, the possibility of challenging decisions of the European institutions would depend entirely on the legal protection afforded by the national courts. As illustrated by recent studies, the implementation of Article 9(3) and (4) of the Aarhus Convention can be tagged as 'diverging, random and inconsistent'.<sup>112</sup> *Second*, the preliminary proceedings often last several years during which, in order to safeguard the effectiveness of the legality review before the CJEU, 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 acts.<sup>113</sup> The large delays and costs that are involved in such proceedings make them disadvantageous in many instances.<sup>114</sup> *Third*, an exclusive reliance on national proceedings increases the risk

<sup>107</sup> *Council and Others v Stichting Natuur en Milieu* (n 12) para 53; *Council and Others v Vereniging Milieudefensie* (n 12) para 60.

<sup>108</sup> Schoukens (n 39) 37–39.

<sup>109</sup> *Vereniging Milieudefensie* (n 11) para 76.

<sup>110</sup> ACCC European Union (n 28) para 89.

<sup>111</sup> *ibid* para 90.

<sup>112</sup> See 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) <[http://ec.europa.eu/environment/aarhus/access\\_studies.htm](http://ec.europa.eu/environment/aarhus/access_studies.htm)> accessed 15 March 2015.

<sup>113</sup> Wennerås (n 37) 213.

<sup>114</sup> See also Eliantonio (n 51) 789.

of *fait accompli*-scenarios, which, in turn, goes against the effectiveness-requirements set out by Article 9(4) of the Aarhus Convention.

While the continuous development of the CJEU's case law with respect to judicial protection before national courts must certainly be welcomed 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 environmental NGOs and the wider public.

It thus remains highly questionable whether national proceedings can, in cases where national implementing measures are present, serve as a useful and practical fallback option.<sup>115</sup> The latter stance was also endorsed by Advocate General Jääskinen, who stressed that the preliminary ruling procedure is in itself not capable of remedying or filling gaps arising from a restrictive approach towards the implementation of an international obligation incumbent on the EU.<sup>116</sup>

He additionally pointed out that the EU cannot require Member States to ensure a particular level of review in order to fill the gaps of secondary EU law, especially in the absence of any general directive on access to justice in environmental matters aimed at implementing Article 9(3) of the Aarhus Convention.<sup>117</sup>

In addition, although not explicitly alluded to by the CJEU, the CJEU might have implicitly taken into consideration the modifications on the provisions on direct access for annulment by natural or legal persons in its rulings of 13 January 2015.

Indeed, Article 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'. However, 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.<sup>118</sup> Jans even explicitly referred to the decision of the European Commission that was at stake in *Greenpeace*, stating that, in any event, this decision could not be qualified as a 'regulatory act'.<sup>119</sup> 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 sector.<sup>120</sup> That said, in its recent *Inuit Tapiriit Kanatami*-decision, the General Court, after having carried out a literal, historical and teleological interpretation of the latter provision,<sup>121</sup> held that 'regulatory acts' must be understood as covering all acts of general application apart from legislative acts.<sup>122</sup> In October 2013 this view was confirmed by the CJEU.<sup>123</sup> In *Microban* the General Court accepted that a decision that was adopted by the Commission in the exercise of its implementing powers, could be qualified as a 'regulatory act'.<sup>124</sup> Notwithstanding the low expectations of some commentators, the recent case law on Article 263(4) of the TFEU thus seems capable of lessening the burden of admissibility for annulment actions, at least to a certain extent.

Still, ironically, the high hopes for a more broad access to justice were soon brought back down by the rigid stance of the EU courts on the condition of 'direct concern' in the same case law. For, seeing that the General Court's recent case law indicates that having its economic situation affected by a decision is not enough to be directly concerned by a regulatory act and to be granted standing before EU courts, it remains to be seen to what extent 'mere' environmental effects linked could be qualified as having 'direct concern' for private individuals or environmental NGOs.<sup>125</sup>

## **B. Beyond the Aarhus Regulation?**

The above-featured analysis evinces that the rationale underpinning the CJEU's stance on access to justice in environmental cases contains some major flaws, especially taking into account the limited evidence so far that the detour via the national courts is effectively capable of bridging the major loopholes in the system

<sup>115</sup> Schoukens (n 39) 37–39. See in similar vein Roger (n 100).

<sup>116</sup> *Council and Others v Vereniging Milieudefensie*, Opinion AG Jääskinen (n 82) para 120.

<sup>117</sup> *ibid* paras 121–122.

<sup>118</sup> See eg René Barents, 'The Court of Justice after the Treaty of Lisbon' (2010) 47(3) CML Rev 709.

<sup>119</sup> Jans (n 37) 485.

<sup>120</sup> See, amongst others, Brakeland (n 76) 3.

<sup>121</sup> Case T-18/10 *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2011] ECR II-75.

<sup>122</sup> *ibid* para 56.

<sup>123</sup> Case C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* (CJEU, 3 October 2013) para 60.

<sup>124</sup> Case T-262/10 *Microban International Ltd and Microban (Europe) Ltd v European Commission* [2011] ECR II-07697, para 22.

<sup>125</sup> Berthier (n 60) 96–97.

of judicial protection present at the EU level for direct environmental actions. Likewise, the recent case law reinforces the view that the CJEU is not willing to put its well-settled *Plaumann*-approach up for debate. Neither does it seem prepared to let it go its traditional 'dual-track interpretation' of the EU system of legal remedies.

Faced with the highly conservative approach of the EU courts concerning admissibility requirements, an obvious solution would be an amendment of the TFEU in order to allow for a better access to justice in environmental cases at the EU level. However, as already held by other commentators, it is impossible to envisage that the Member States would be prepared to initiate an intergovernmental conference only to consider an amendment to Article 263(4) of the TFEU any time soon.<sup>126</sup> In fact, with the adoption of the Aarhus Regulation the EU legislator wanted to circumvent the impossibility to amend *ex Article 230(4)* of the TEC merely to allow a more broad access to justice in environmental cases.

In the face of the limited options to improve the EU system of legal remedies against the backdrop of the international environmental obligations incumbent upon the EU, a number of commentators blame the CJEU for having missed out a unique chance for 'an easy fix' of its blatant inadequacies.<sup>127</sup> Up to a certain point this reasoning holds ground. Arguably, a more generous approach towards the Aarhus Convention by the CJEU might have served as a catalyst for environmental justice at the EU level and, perhaps even more importantly, a wake up-call for the EU legislator. In addition, it is abundantly clear that widening up the scope *ratione materiae* of the Aarhus Regulation was necessary to come forward to the requirements of Article 9(3) of the Aarhus Convention.<sup>128</sup> As aptly pointed out by Advocate General Jääskinen in his Opinion of 8 May 2014, the European Commission could only come up with one single example of the specific application of the internal review procedure, namely the authorisation to place a GMO on the market. Consequently, the field of GMOs and the placement on the market of chemicals in accordance with the REACH Regulation appear to be the main area in which the internal review procedure will be applied by the EU institutions in the near future.<sup>129</sup>

Having said this, it remains at best doubtful if another outcome of the proceedings – for instance a scenario in which the CJEU would have upheld the view of the General Court – would have significantly bettered the position of the environmental NGOs before the EU courts. Even more so, it might be portended that the General Court, with its exclusive reliance on the implementation principle, barred the CJEU from assessing the direct effect of Article 9(3) of the Aarhus Convention from a different viewpoint.

Both the Aarhus Compliance Committee and the General Court seem to presuppose that the existing internal review procedure, provided its material scope is further widened, might be capable of fulfilling the requirements of Article 9(3) and (4) of the Aarhus Convention. However, a number of observers, including myself, questioned this premise in earlier writings.<sup>130</sup> In itself, Article 9(3) of the Aarhus Convention does not lay down many specific requirements as to the substantial guarantees that have to be provided in the context of the available administrative *or* judicial procedures to challenges acts or omissions that might contravene the applicable provisions of environmental law. Still, it remains uncontested that Article 9(3) of the Aarhus Convention should be read in conjunction with Article 9(4) and (5) of the Aarhus Convention, which requires that the procedures chosen for must provide adequate and effective remedies, they must be fair, equitable and timely and not prohibitively expensive. As Ebbesson rightly pointed out, the requirements of fair and equitable procedures will be the key considerations when administrative procedures are to be examined in the light of the Aarhus Convention standards.<sup>131</sup>

As such, the internal review mechanism, even if it would also encompass acts of a general nature, cannot be qualified as an 'adequate and effective' legal remedy in the light of the third pillar of the Aarhus Convention.<sup>132</sup>

*First*, the internal review procedure merely allows environmental NGOs to request the EU bodies and institutions to reconsider the contested acts. In contrast to other administrative review procedures, such as the review by the *European Ombudsman*, an internal review does not offer a review track that can be qualified as impartial, adequate and fair. Obviously, EU institutions and bodies will not be very keen on frequently

<sup>126</sup> Marc Pallemmaerts, 'Access to Environmental Justice at EU Level: Has the 'Aarhus Regulation' Improved the Situation' in Marc Pallemmaerts (ed), *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing 2011) 312.

<sup>127</sup> Roger (n 100).

<sup>128</sup> Schoukens (n 39) 27–28.

<sup>129</sup> *Council and Others v Vereniging Milieudefensie*, Opinion AG Jääskinen (n 82) para 129.

<sup>130</sup> Schoukens (n 39) 34–35.

<sup>131</sup> Jonas Ebbesson, 'Impact of the Aarhus Convention and European Union Law' in Marc Pallemmaerts (ed), *The Aarhus Convention at Ten – Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing 2011) 264.

<sup>132</sup> Schoukens (n 39) 35.

reviewing their own acts, which are often the result of hard and long negotiations and political compromises. This is also illustrated by the above-analysed administrative practice of the internal review to date. So far not a single EU act has been reconsidered by the EU institutions under the internal review procedure.

*Second*, actions brought before EU courts pursuant to Article 12 of the Aarhus Regulation only concern the written reply of the EU institution and thus not relate to the underlying administrative act. Admittedly, an eventual finding that a written reply is vitiated by an error of law will inevitably reflect back on the legality of the underlying decisions. In addition, environmental NGOs might also request an examination of the substance of matter by means of a plea of illegality. This being the case, it still remains doubtful whether such indirect legality review would suffice in the light of the Aarhus Convention. In fact, the possibilities to pursue an effective substantial legal review of an EU act are further compounded by the important time delays that come into play when the internal review procedure is followed up by a subsequent legal challenge before court. To illustrate this point further, one merely has to measure up the length of the proceedings that led to the rulings of the CJEU in *Vereniging Milieudefensie*. All in all, it took a staggering six years for the EU courts to pronounce themselves on the merits of the case, which did not even relate to a 'substantial' written reply. Some of the actions had in the meantime already lost their purpose since they related to decisions that already expired in 2012. Absent any effective access to injunctive relief before EU courts in such cases and taking into consideration the consistent prevalence of the *Plaumann*-test for direct legal challenges of EU acts, it remains hard to submit that the requirements set out by Article 9(4) of the Aarhus Convention will be observed whenever a more encompassing internal review procedure will be established.

*Third*, it must be reiterated that the personal scope of the Aarhus Regulation does not comply with Article 9(3) of the Aarhus Convention as natural persons have been left out of the personal scope of the internal review procedure.

Thus the harsh criticism on the rulings of the CJEU needs to be adjusted in some ways. In contrast to what has been upheld by some commentators, a different outcome of the lawsuit before the CJEU would not necessarily have led to an 'easy fix' for the inadequacy of the EU's system of legal remedies. In fact, it might be portended that even when the CJEU would have upheld the rulings of the General Court the battle for a better access to justice in environmental cases would be far from over. Absent any more effective means of administrative review procedure, the EU would still fall short in complying with its obligations under Article 9(3) of the Aarhus Convention. Internal review procedures, even with a more broad material scope, are ill equipped to implement the requirements set out by the Aarhus Convention as regards access to justice. It must indeed be expected that requests for internal review will hardly ever urge the competent EU institution to reconsider its original decision.

## V. Outlook

From all the foregoing it can be concluded that the pursuit of a better access to justice in environmental cases at the EU level has given rise to a scenario with distinct Kafkaesque features, in which procedural arguments have so far succeeded in blocking access to EU courts for environmental NGOs and the wider public. After a decade of fruitless efforts to gain direct access to the EU courts in order to challenge EU acts, environmental civil society associations had hoped that the Aarhus Regulation might do away with the persistent obstructions for environmental litigation at the EU level.

However, the woes of the environmental NGOs are far from over. As has become evident from the above-conducted analysis, this hope proved to be false. Instead of being a catalyst for more environmental justice at the EU level, the rulings of the CJEU of 13 January 2015 have taken away any prospect of tangible progress for the coming years. Just as Kafka's doorkeeper kept 'the man from the country' waiting for years before finally closing down the gate he was guarding, the CJEU re-closed the door that had been cautiously opened by the rulings of the General Court of 14 June 2012 and reaffirmed the restrictive interpretation of the internal review procedure. With its refusal to use the Aarhus Convention as a reference criterion for the purpose of reviewing the legality of the Aarhus Regulation, the CJEU quashed all expectations on the part of those who believed that the EU judges would finally be found prepared to call time upon its restrictive and, according to many, outdated *Plaumann*-approach in environmental cases.

Strikingly reminiscent of Kafka's doorkeeper, the CJEU decided to disregard Article 9(3) of the Aarhus Convention, this in spite of the explicit reference to the latter provision in the Aarhus Regulation. The indirect result thereof is that it confined the relevance of the Aarhus Regulation to decisions that are capable of affecting the interests of the addressees of those decisions, thereby excluding administrative review for the major bulk of the EU acts in the environmental sphere.

Although the rulings of the CJEU can be framed in its long-standing case law on the invocability of provisions of international agreements, they remain disappointing on many levels. Not only do the rulings create

the impression of a court that is unprepared to apply the same rigour it is demanding from national courts with regard to standing requirements in environmental cases, they also underscore the unwillingness of the CJEU to rethink its much-criticised approach towards the Aarhus Convention. The outcome of the appeal is all the more disturbing since the CJEU had before it two alternative approaches which might have allowed it to carry out a legality review of the Aarhus Regulation without moving too far away from its traditional case law on the legal effects of international agreements in the EU legal order. Admittedly, some might submit that part of the blame needs be attributed to the General Court which, through its exclusive reliance on the implementation principle, undeliberately barred the CJEU from assessing the direct effect of Article 9(3) of the Aarhus Convention in a more broad perspective. That said, the CJEU's repudiation of the Aarhus Convention still stands in sharp contrast to the explicit commitment on the part of the EU legislator to implement Article 9(3) of the Aarhus Convention by the internal review procedure. Whereas some might argue that the recent progressive case law of the CJEU as regards access to justice at the national level partly offsets its restrictive case law in relation to direct actions against EU acts, this article amply revealed that preliminary ruling procedures before national courts – if available – are incapable of completely remedying the loopholes in legal review at the EU level in the context of environmental cases. It is submitted that enhanced protection for national courts should rather be seen as a complement for the review-options available at the EU level than as a justification for the EU courts to uphold their well-established *Plaumann*-test in the context of direct challenges to EU acts. Along those lines, the recent rulings of the CJEU serve as a stark reminder of the sharp inconsistency that is currently present in the case law at the EU level.

However, there might be a silver lining to this dark cloud hanging over public interest litigation at the EU level. In spite of the ample criticism to which the rulings of the CJEU will undoubtedly lead, they still have the benefit of clarity. It may serve as a wake up-call for the EU legislator. Indeed, the decisions of the General Court of 14 June 2012, while arguably more progressive in relation to the Aarhus Convention, would have brought about only limited changes to the precarious position of environmental NGOs before the EU courts. Even if the rulings had been confirmed by the CJEU on appeal, they would leave the other obvious deficiencies that are attached to the internal review procedure unaddressed.

However, most fundamentally, pursuant to Article 216 of the TFEU the EU courts themselves are bound by the international agreements that are concluded by the EU. As was pointed out by the Aarhus Compliance Committee in 2011, the relevant provisions of the TFEU are drafted in such a way that they can be interpreted in line with the standards enshrined in the Aarhus Convention. Rather than sticking to an essentially flawed and outdated internal review procedure, a reconsideration of the quasi-constitutional status of the *Plaumann*-doctrine by the EU courts probably constitutes the most comprehensive solution to the decade-long stand-off between the environmental NGOs and the EU judges. In the light of the disappointing outcome of the first string of cases in relation to the internal review procedure, the CJEU should reconsider its vehement rejection of the Aarhus Convention in relation to direct actions against EU acts. Embracing the logic underpinning the third pillar of the Aarhus Convention would mean a great leap forward in the pursuit of the rule of law in environmental cases at the EU level. Sooner or later the CJEU will have to cross the Rubicon and come to terms with the Aarhus Convention. A future non-compliance finding by the Aarhus Compliance Committee might serve as an additional trigger.

## Competing Interests

The author declares that they have no competing interests.

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