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# Access to Justice in Environmental Matters in the EU Member States

A study of the case law from the European Court of Justice  
on access to national courts for non-governmental organizations  
and the costs of environmental proceedings

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# Summary

The United Nation Economic Commission for Europe's Convention on access to information, public participation in decision-making, access to justice in environmental matters (hereafter the Aarhus Convention) is considered to be the main legally binding instrument protecting the public's environmental rights. It is based on the idea that procedural rights relating to environmental matters should contribute to the protection of the right of every person, including future generations, to live in an environment adequate to his or her health and well-being. Access to justice in environmental matters is of significant importance as it may add to the protection of public environmental interests, enforce the implementation of existing environmental laws, and increase the legitimacy of environmental decisions. As the environment has no voice of its own it has been argued that for instance Non-Governmental Organizations (hereafter NGOs), should be granted access to court in order to speak on behalf of the environment.

Both the EU and the Member States are part of the Aarhus Convention, and the aim of this thesis is to examine the CJEU's interpretation of access to justice in environmental matters at EU Member State level. The first question investigated is how the CJEU interprets the national standing requirements for environmental NGOs. Additionally, the CJEU's rulings on questions concerning the allowed costs of judicial national proceedings are examined, as high litigation costs may be an indirect hinder to access to justice. Moreover, the thesis also aims to study the rationale behind granting wide access to justice in environmental matters, in particular for environmental NGOs in the EU Member States. Lastly, this thesis will cast light on the question whether there is a need for the EU legislator to harmonise the right to access to justice on environmental matters.

It is clear from the examination that the EU's and the Member States' implementation of, and compliance with, the Aarhus Convention has not been unproblematic. In fact, there have been several legal ambiguities both regarding the EU legal order and the internal legal order of numerous EU Member States. For example when EU became part of the Aarhus convention there were discussions regarding the construction of a directive on access to justice in environmental matters, but as the Member States opposed this idea due to the principle of subsidiarity the directive was never finalized. Furthermore, access to justice in environmental matters still varies throughout the Union, and in several of the Member states there are a number of barriers potential applicants have to overcome.

The conclusion drawn from analysing the judgements delivered by the CJEU, is that the Court has taken a progressive approach and played a key role regarding the interpretation of the Aarhus Convention, and the relevant EU legislation. Of particular importance is the fact that the CJEU, while

interpreting the Member States' standing rules for Non-Governmental Organisations in environmental matters, has highlighted the role of these organisations and emphasized that they should enjoy wide access to justice. Regarding the allowed costs of environmental proceedings, the CJEU has concluded that the costs must be examined in the light of the objective of the Aarhus Convention to establish wide access to justice in environmental matters. Consequently, these judgements may increase the ability for environmental NGOs to take action in national courts on behalf of the environment.

Nevertheless, there are still issues regarding access to justice in environmental matters that need to be resolved. In order to enforce EU environmental legislation and achieve legal certainty throughout the Union, the conclusion drawn in this thesis, is that there should be harmonizing measures taken by the EU legislator in order to guarantee access to justice in environmental matters in the EU Member States.

# Sammanfattning

Förenta Nationernas Ekonomiska Kommission för Europas Konvention om tillgång till information, allmänhetens deltagande i beslutsprocesser och tillgång till rättslig prövning i miljöfrågor (Århuskonventionen) anses vara det essentiella rättsligt bindande instrumentet för skyddet av allmänhetens miljörelaterade rättigheter. Konventionen bygger på uppfattningen att processuella rättigheter i samband med miljöfrågor kan bidra till att skydda rätten för varje person, inklusive framtida generationer, att leva i en miljö som är förenlig med hälsa och välbefinnande. Tillgång till rättslig prövning i miljöfrågor är av stor betydelse eftersom det kan bidra till att öka skyddet för allmänna miljöintressen, verkställa genomförandet av befintliga miljölagar, och öka miljöbesluts legitimitet. Eftersom miljön inte har någon möjlighet att själv väcka talan har det hävdats att till exempel miljöorganisationer bör ges möjlighet att ha talerätt i miljöfrågor.

Både EU och medlemsstaterna är part till Århuskonventionen, och syftet med denna uppsats är att undersöka EU-domstolens tolkning av tillgång till rättslig prövning i miljöfrågor i EU- medlemsstaterna. Den första frågan som undersöks är hur EU-domstolen tolkar de nationella talerättsreglerna för miljöorganisationer. Vidare undersöks EU-domstolens avgöranden i frågor som rör de tillåtna processkostnaderna för prövning i miljöfrågor, eftersom höga processkostnader kan utgöra ett indirekt hinder för tillgången till rättslig prövning i miljöfrågor. Därutöver utreds syftet med att ge miljöorganisationer en omfattande rätt till rättslig prövning i miljöfrågor i EU: s medlemsstater. Slutligen avser uppsatsen att bringa klarhet i frågan om det finns ett behov av att EU: s lagstiftaren harmoniserar rätten till rättslig prövning i miljöfrågor på medlemsstatsnivå.

Det framgår av uppsatsen att EU:s och medlemsstaternas införlivande, och efterlevnad, av Århuskonventionen inte har varit oproblematiske. I själva verket har det funnits flera rättsliga oklarheter både vad gäller EU: s rättsordning och den interna rättsordningen i många av medlemsstaterna. Exempelvis pågick diskussioner om att utarbeta ett direktiv om rätten att få tillgång till rättslig prövning i miljöfrågor när EU blev part till Århuskonventionen, men eftersom medlemsstaterna motsatte sig detta på grund av subsidiaritetsprincipen verkställdes det inte. Därtill varierar rätten att få tillgång till rättslig prövning i miljöfrågor fortfarande i EU, och i flera av medlemsstaterna finns det ett flertal hinder potentiella klaganden måste övervinna.

Analysen av rättsfallen visar att EU-domstolen har haft ett progressivt tillvägagångssätt, och därmed spelat en nyckelroll avseende tolkningen av Århuskonventionen och relevant EU lagstiftning. Framför allt har EU-domstolen, vid tolkningen av medlemsstaternas talerättsregler för Miljöorganisation, uppmärksammat betydelsen av dessa organisationers medverkan i miljöfrågor och betonat att de bör ha vid talerätt. Gällande

kostnaderna för domstolsförfaranden i miljöärenden, konstaterade EU-domstolen att kostnaderna måste prövas mot bakgrund av Århuskonventionens syfte att upprätta en omfattande möjlighet till rättslig prövning i miljöfrågor. Följaktligen kan dessa domar vidga möjligheten för miljöorganisationer att väcka talan vid nationella domstolar.

Trots detta finns det fortfarande frågor som behöver lösas avseende möjlighet att ha tillgång till rättsprövning i miljöfrågor. För att förstärka EU:s miljölagstiftning och uppnå rättssäkerhet i hela Unionen är den slutsats som dras i denna uppsats att det finns ett behov av harmoniseringsåtgärder från EU-lagstiftarens sida för att garantera rätten till domstolsprövning i miljöfrågor i EU:s medlemsstater.



# Preface

First of all I want to thank my supervisor Sanja Bogojevic for her guidance. Additionally, I want to thank the Legal Secretariat at the Swedish Ministry for Foreign Affairs for giving me the opportunity to do an internship while writing this thesis, which increased my interest in EU law. Lastly, I want to thank Emma Johansson and Elisabeth Karlsbad for all the support.

# Abbreviations

ACCC	Aarhus Compliance Committee
CJEU	Court of Justice of the European Union
COM	European Commission
EAP	Environment Action Programme
EU	European Union
EUCFR	European Charter of Fundamental Rights
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
IPPC	Integrated Pollution Prevention Control
NGO	Non-Governmental Organization
TEU	Treaty of the European Union
TFEU	Treaty on the Functioning of the European Union
UNECE	United Nations Economic Commission for Europe

# 1 Introduction

## 1.1 Background

In the 10<sup>th</sup> principle of the Rio Declaration from 1992 it was established that access to information, public participation in decision-making and access to justice constitute core principles of environmental protection.<sup>1</sup> This acknowledgment became the foundation of the United Nation Economic Commission for Europe's Convention on Access to Information, Public Participating in decision-making and access to justice in environmental matters, adopted in June 1998 in Aarhus, (hereafter the Aarhus Convention).<sup>2</sup> The Convention is considered to be the main legally binding instrument protecting the public's environmental rights.<sup>3</sup> It is based on the idea that procedural rights relating to environmental matters should contribute to the protection of the right of every person, including future generations, to live in an environment adequate to his or her health and well-being.<sup>4</sup> It is important to underline the fact that the Convention does not create a substantive right to a healthy environment; instead it is focused on forming procedural rights relating to the concept.<sup>5</sup> The main purpose of the convention is to engage the civil society in the environmental policy-making process in order to increase its democratic nature and legitimacy.<sup>6</sup> Likewise, access to information, public participation in decision-making and access to justice are central to ensure the legitimacy and effective operation of a democratic government, as well as crucial for safeguarding human rights and protecting the environment.<sup>7</sup> In fact, it has been stated in the doctrine that denial of procedural rights in environmental matters, both endangers the protection of substantive human rights and upsurges the probability of "irreversible environmental degradation."<sup>8</sup>

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<sup>1</sup> The Rio Declaration UN Doc. A/CONF/151/5/Rev.1

<sup>2</sup> United Nation Economic Commission for Europe's Convention on Access to Information, public participation in decision-making, access to justice in environmental matters (adopted 25 July 1998, entered into force 30 October 2001) 2161 UNTS 447 (the Aarhus Convention)

<sup>3</sup> Pánovics A, The need for an EU-directive on access to justice in environmental matters, 147 *Studia Iuridica Auctoritate Universitatis Pecs*, Budapest, 2010, at 136 (Pánovics)

<sup>4</sup> The Aarhus Convention, *supra* note 2 at Article 1

<sup>5</sup> Pánovics (2010) *supra* note 3 at 140

<sup>6</sup> Pallemmaerts M, The Aarhus Convention at ten – interactions and tensions between convention international law and EU environmental law, Europa Law publishing, 2011, at 3 (Pallemmaerts)

<sup>7</sup> Bisman A, The violence of silence: some reflections on access to information, public participation in decision-making, and access to justice in matters concerning the environment, *Crime Law Soc. Change*, 2013, at 292 (Bisman)

<sup>8</sup> Hunter D, *International environmental law and policy*, 4. ed., Foundation Press, 2011, at 1336

The Commission, on behalf of the European Union (hereafter EU), first signed the Aarhus Convention in 1998, and through a Council decision on 17 February 2005 the Convention was concluded.<sup>9</sup> It is stated in the preamble of this decision that the objectives of the Aarhus Convention are “consistent with the objectives of the Community’s environmental policy, listed in Article 174 of the Treaty, (now article 191 in the Treaty of the functioning of the European Union) pursuant to which the Community, which shares competence with its Member States, has already adopted a comprehensive set of legislation which is evolving and contributes to the achievement of the objectives of the Convention, not only by its own institutions, but also by public authorities in its Member States.”<sup>10</sup> Since environmental policy is a shared competence, as noted above, the Member States are also parties to the Convention and therefore it is a mixed agreement.<sup>11</sup>

## 1.2 Access to justice in environmental matters

The focus of this thesis is laid upon what is said to be the most controversial part of the Convention, namely access to justice in environmental matters.<sup>12</sup> This specific right is of importance for three reasons. First; it may add to the protection of public environmental interests, second; the existing environmental laws can be more efficiently implemented, third; the expanded possibility for challenging environmental decisions before courts may increase the public acceptance and the overall accuracy of the decisions in question, and thereby increasing their legitimacy.<sup>13</sup> In fact, as argued in the doctrine “the legitimacy of law depends on the procedures and involvement of the public in the adaptation as well as the application of legal norms”.<sup>14</sup>

The preamble of the Aarhus Convention states that effective judicial mechanisms should be accessible to the public, including organisations, in order to protect legitimate interests, and enable environmental law to be enforced. The provisions on access to justice in environmental matters in the Aarhus Convention are based on the presumption that the natural environment belongs to all of us, as well as the responsibility to prevent

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<sup>9</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 L 124/1 (Decision 2005/370/EC)

<sup>10</sup> *Ibid.*, at recital 7 in the preamble

<sup>11</sup> According to Article 4 TFEU, which is also reflected in Article 191(4) TFEU regarding external relations, and it follows from Article 216(2) TFEU that it is binding upon the community institutions as well as the Member States.

<sup>12</sup> Pallemarts (2011) *supra* note 6, at 13

<sup>13</sup> Ebbesson J, (red.), Access to justice in environmental matters in the EU = Accès à la justice en matière d'environnement dans l'UE, Kluwer, The Hague, 2002, at 7 (Ebbesson)

<sup>14</sup> *Ibid.*, at 7

environmental damage.<sup>15</sup> Since breaches of environmental law tend to be of concern for the population as a whole without any particular person having a significant personal concern, it is often very difficult to enforce environmental law based on the traditional rules of *locus standi*.<sup>16</sup> As Christopher Stone expressed it already in 1972; the mere fact that the environment has no voice of its own should not deprive it from having legal rights.<sup>17</sup> Accordingly, a guardian, for instance a Non-Governmental Organization (hereafter NGO), should be enabled to have standing in order to speak on behalf of the environment.<sup>18</sup> The Aarhus Convention has brought novel solutions to governance problems relating to environmental protection, by highlighting the role of the citizens and NGOs promoting environmental protection, by increasing their ability to take action in court.<sup>19</sup> Moreover, as the costs of the proceedings might compose an indirect access to court, the Convention proclaims that the costs of environmental proceedings may not be prohibitively expensive.<sup>20</sup>

Access to justice is believed to be crucial for environmental protection, as environmental law tends to suffer from an enforcement deficit due to several varying reasons; from the inability to the unwillingness for national governments to implement the legislation in a sufficient manner, and the fact that the majority of environmental law does not confer rights on individuals that can be invoked in court.<sup>21</sup> Regarding EU environmental law, the European Commission has stated that the main reason why this legislation is less fully enforced, compared to laws concerning for instance the internal market, is the lack of financial motivation in environmental protection cases.<sup>22</sup> Moreover, from the Union perspective, the functioning of the internal market may be distorted if environmental laws are not fully enforced, as this creates unequal terms of economic competition throughout the Union, depending on the concerned Member State, which might give economic operators that do not comply with their obligations an economic advantage over those that respect the environmental legislation.<sup>23</sup> To counteract this tendency, and enforce environmental protection, the EU Commissioner for the environment Janez Potočnik has stated that the

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<sup>15</sup> AG Sharpston opinion in Case C-263/08 Djurgården-Lilla Värtans Miljöskyddsförening (2009) para. 59

<sup>16</sup> Oliver P, Access to information and justice in EU environmental law: The Aarhus Convention, Fordham International Law Journal 2013, at 1431 (Oliver)

<sup>17</sup> Stone C D, (2010). Should trees have standing? law, morality, and the environment. 3rd ed. New York, N.Y.: Oxford University Press, at 1-31

<sup>18</sup> *Ibid.*, 1-31

<sup>19</sup> Oliver (2013) *supra* note 16, at 1469

<sup>20</sup> The Aarhus Convention, *supra* note 2 at Article 9(4)

<sup>21</sup> Zengerling C, Greening International Jurisprudence: Environmental NGOs before International Courts, Tribunals, and Compliance Committees (2013). Leiden: BRILL, at 2

<sup>22</sup> Commission of the European communities, Proposal for a Directive on access to justice in environmental matters, COM (2003) at 624

<sup>23</sup> *Ibid.*, Explanatory Memorandum 1.1

environment must be seen as a public good, and be supported by a public voice.<sup>24</sup>

Regarding the EU Member States' application of the Aarhus Convention, the national compliance reports that have been submitted to the Aarhus Compliance Committee have shown that several countries have changed their legislation in order to be in line with the Aarhus convention, and the EU implementation of it.<sup>25</sup> Although the Convention itself does not give standing rights, which will be further discussed in the next chapter, it has in fact influenced the national standing rules. Nevertheless, the right to access to justice in environmental matters still tends to vary throughout the Union, due to for example the different legal cultures,<sup>26</sup> and the inaction from the EU legislator, which will be discussed in further detail in chapter two.<sup>27</sup> In particular, the standing requirements for environmental NGOs as well as the costs of the proceedings, which indirectly affect the accessibility of the courts, differ between the countries.<sup>28</sup> In fact, "the cost of the judicial procedures is considered to be an obstacle to environmental justice – or at least to have a dissuasive effect thereupon", in the majority of the EU Member States.<sup>29</sup> Due to the hurdles individuals and environmental NGOs have to overcome in order to access the national courts in several Member States, it has been argued in the doctrine that "the weak enforcement of EU environmental law is deemed to be one of the main weaknesses of environmental protection within the EU".<sup>30</sup> Therefore, the focus in the following presentation will be put on how these issues have been addressed by the Court of Justice of the European Union (hereafter CJEU). Consequently, the aim of this thesis is to examine the right to access to justice in environmental matters at EU Member State level, in the light of the Aarhus Convention, according to judgements delivered by the CJEU.

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<sup>24</sup> SPEECH712/856 Potočnik J, "The fish cannot go to Court" – the environment is a public good that must be supported by a public voice, European Commission, 23/11/2012 at 5 (SPEECH Potočnik)

<sup>25</sup> Jans J H, Judicial Dialogue, Judicial Competition and Global environmental law – a case study on the UNECE Convention on access to information, public participation in decision-making and access to justice in environmental matters, in Jans J.H, Marcory R, Moreno Molina A-M, National courts and EU environmental law, Europa Lw publishing, 2013, at 151 (Jans, Judicial Dialogue)

<sup>26</sup> Faure M, Philipsen N, Backes C, Choukroune L, Fernhout F, Mühl M G, Final Report, Possible initiatives on Access to justice in Environmental Matters and their socio-economic implications, Maastricht University Faculty of Law, Metro Institute, 9 January 2013 (Faure et al.)

<sup>27</sup> COM(2003) 624 final, *supra* note 22

<sup>28</sup> Därpö J, Effective justice? Synthesis of the 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, 2013-10-11/Final at 3-15 (Därpö)

<sup>29</sup> *Ibid.*, at 21

<sup>30</sup> De Sadeleer N, Enforcing EUCHR Principles and fundamental rights in environmental cases, Nordic Journal of International law 81 (2012) at 58

## 1.3 Research questions

The aim of this thesis is to examine the CJEU's interpretation of access to justice in environmental matters at EU Member State level. The two main questions investigated are; first, how does the CJEU interpret the national standing requirements for environmental NGOs, and second, what are the implications of CJEU's reasoning concerning the rule that environmental proceedings may not be prohibitively expensive. It should be underlined that the purpose is not to examine the national standing rules as such; instead the focus is put on the CJEU's interpretation of the national standing requirements in light of the Aarhus Convention and the Aarhus Regulation. Moreover, CJEU's rulings on questions concerning the allowed costs of judicial national proceedings are also investigated, as high litigation costs may be an indirect hinder to access to justice. Related, sub-questions include investigating how the CJEU interprets the right to access to justice in environmental matters at Member State level, which legal base it uses in such instances, examining also the implications thereof. With that in mind, the thesis also aims at examining the rationale behind granting wide access to justice in environmental matters, in particular for environmental NGOs, in the EU Member States. Lastly, this thesis will cast light on the question whether there is a need for EU legislators to harmonise the right to access to justice on environmental matters.

## 1.4 Structure

In order to set out the context of the analysis of the case law delivered by the CJEU concerning the right to access to justice in environmental matters at EU Member State level, this thesis will commence with a presentation of the legal basis of these judgements. First, the Aarhus Convention will be examined, since the standing requirements as well as the costs provisions, originally derive from it. In particular, the role of environmental NGOs according to the Convention will be examined. This will be followed by a presentation on how these provisions have been implemented into Union law, namely via the Aarhus Regulation and the Directive on public participation<sup>31</sup> as well as the Directive on access to information.<sup>32</sup> This will be followed by an examination of the current state of the debate on whether there is a need of a Directive on access to justice in environmental matters. Lastly, the question on the possibility of the provisions of the Aarhus Convention to have direct effect will be discussed.

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<sup>31</sup> Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (2003) OJ L156/17 (Directive 2003/35/EC)

<sup>32</sup> Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC (2003) OJ L41/27

The purpose of the next chapter is to give an overview of the right to an effective judicial protection as well as the principles of effectiveness and equivalence in relation to the principle of procedural autonomy, and how this might interact with the rights originated from the Aarhus Convention. This is done in order to comprehend the reasoning of the Court in the case law presented in chapter four. In this regard, especially the European Charter of fundamental rights (hereafter the Charter) with focus on Article 47 the right to an effective remedy is of importance.

The fourth chapter aims to investigate how the CJEU has interpreted national standing rules for environmental NGOs in the light of the Aarhus Convention, and the relevant EU legislation implementing its provisions. The purpose is not to examine the case law only dealing with standing requirements as such, but also the cases concerning the cost of litigation as this has an indirect effect on the accessibility to court, especially for the smaller NGOs. The first part of the case law presentation concerns the core of this thesis, namely the right to access for environmental NGOs. The aim is not to examine standing for NGOs *per se* but how the CJEU interprets national laws on standing for environmental NGOs. This will be followed by a concluding analysis of the judgements where the opinions delivered by Advocate General Sharpston will be taken into account. Afterwards, the case law concerning the costs of the proceedings will be presented, concluded by an analysis including references to the opinions delivered by Advocate General Kokott. Thereafter, a conclusion on the effects and outcomes of the judgements will be given.

The fifth chapter constitutes a concluding analysis on the right of access to justice at EU Member State level, in the light of the Aarhus Convention and relevant EU law, based on the examined judgements. Afterwards, the rationale behind granting wide access to justice in environmental matters, in particular for environmental NGOs, in the EU Member States, will be examined. This will begin with an examination of the arguments put forward in the doctrine as well as by the EU institutions. Next, the reasoning of the Court in this matter will be taken into account. The analysis will end with a discussion on the plausible effect and actual outcome of the examined case law, steering towards the question whether there is a need of further clarification on this matter from the Court, or harmonizing measures from the EU legislator. Lastly, in the sixth chapter a conclusion of the thesis will be given.

## 1.5 Methods and materials

The method used is traditional legal theory, meaning the focus has been put on examining the relevant legislation, doctrine and, in particular, the case law from the CJEU. The given starting point of this thesis has been the Aarhus Convention, in particular Article 9 concerning the right to access to justice in environmental matters. As other provisions of the convention is of importance for the scope of this thesis, both regarding the role of NGOs and



the cost of litigation, these have been taken into account as well. Moreover, the EU implementation of the Convention has been an important basis for this study, namely the Aarhus Regulation,<sup>33</sup> Directive 2003/4/EC on public access to environmental information, Directive 2003/35 on public participation in respect of the drawing up of certain plans and programmes relating to the environment amending the EIA and the IPPC Directive, as well as the proposed Directive on access to justice in environmental matters.

In order to present different points of views several studies carried out on access to justice in environmental matters in the EU Member States, as well as speeches, and a broad range of books and articles from legal scholars have been used. Of particular importance, has been the Synthesis report of the study, ordered by the EU Commission, on the implementation of Article 9(3) and 9(4) of the Aarhus Convention in the Member States of the European Union,<sup>34</sup> as it provides useful, and updated insights, relevant for the scope of this thesis. The main basis, however, is the case law concerning the right to access to justice in environmental matters at EU Member State level developed by the CJEU. The central judgements analysed concern the issues of standing for non-governmental organisations promoting environmental protection, and the rule that environmental procedures cannot be prohibitively expensive.

Lastly, it should be noted that the European Union will consequently be referred to as EU or the Union and references to the treaties of the Union will be constructed after the Treaty of the European Union (hereafter TEU) and the Treaty of the functioning of the European Union (hereafter TFEU). When referring to former treaty legislation, a reference will be made to the relevant provisions in the current legislation.

## 1.6 Delimitations

The focus of this thesis is put on access to justice to the national courts in environmental matters, in the light of the Aarhus Convention, according to the CJEU. Therefore, the case law concerning access directly to the CJEU through Article 263(4) TFEU will not be examined. Nevertheless, it should be noted that the CJEU has been restrictive when granting direct access to the Union courts in challenges towards the EU institutions via Article 263(4).<sup>35</sup>

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<sup>33</sup> Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to information, public participation in decision-making and access to justice in environmental matters to Community Institutions and bodies, (2006) OJ L264/13 (Regulation 1367/2006)

<sup>34</sup> Därpö (2013) *supra* note 28

<sup>35</sup> For example Case C-321/95 P Stichting Greenpeace (1998) ECR I-1651, Case C-263/02 P Jégo Quéré v Comission (2004) ECR I-3425, Case C-50/00 P Union de pequeños agricultores v Council (2002) ECR I-6677.

Moreover, environmental directives enabling individuals to directly rely on them in order to have access to justice in environmental matters, and where these provisions do not originate from the Aarhus Convention, will not be considered.<sup>36</sup> In addition to this, it should be pointed out that the CJEU has handled down several more judgements than the ones contained in this presentation, regarding the right to access to justice in environmental matters at EU Member State level, where the Court has interpreted the Aarhus Convention and the EU implementation of it. Nevertheless, as these judgements do not concern access to justice for environmental NGOs, or the costs of the proceedings, they fall outside the scope of this thesis. It could be argued that the case law concerning individuals' right to access to justice in environmental matters might influence environmental NGOs standing rights, but in order to centre the research and thereby provide a more in-depth analysis, these judgements will not be examined. One of the cases concerning the costs of the proceedings stems from a case initiated by a private litigant, but as this section deals with costs and not standing requirements per se, the fact that none of the cases concerning the issue of costs have been initiated by environmental NGOs, is irrelevant.

Despite the fact that the implementation and efficiency of the Aarhus Convention is monitored and ensured by the Aarhus Convention Compliance Committee,<sup>37</sup> this case law will not be examined, despite from a few illustrative references to these judgements, as the focus instead is put on the CJEU's interpretation of, and influence on, access to justice in environmental matters at EU Member State level. For the same reason, the European Convention of Human Rights, and the case law arising from it, falls outside the scope of this examination, despite a few references made to it in the presentation of the European Charter of fundamental rights.

Lastly, there will be no in-depth analysis on the legal situation in the EU Member States, regarding the right to access to justice in environmental matters. Instead, only an overview of the varying problems and hindrances to access to justice in these matters will be given. In particular, this will be demonstrated through the judgements presented in chapter four as they stem from requests for preliminary rulings made by the national courts, as well as infringements proceedings against the Member States. Likewise, the national perspective will partly be taken into account through the references of the effects of some of the CJEU's judgements, as this is illustrated by examples of changed national legislation as well as judgements delivered by the Member States' courts.

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<sup>36</sup> See for instance Case C-237/07 *Janecek* (2008) ECR I-6221, point 38. Even though the case concerned access to justice in environmental matters the Aarhus Convention was not mentioned, instead the CJEU relied on the interpretation of Directive 96/62 of 27 September 1996 on ambient air quality assessment and management, OJ 1996 L296, p.55, as amended by Regulation (EC) No 1882/2003 of the European Parliament and of the Council of 29 September 2003 OJ 2003 L 284. As the air quality legislation in question was designed to protect the public health, this was recognised as constituting a right of standing.

<sup>37</sup> Dellinger M, Ten years of the Aarhus Convention: How procedural democracy is paving the way for substantive change in national and international environmental law, 23 *Colorado Journal of International Environmental Law and Policy* 309 2012, at 322

## 2 The Aarhus Convention

The Aarhus Convention is the first multilateral environmental agreement that exclusively focuses on the states' obligations towards their citizens, instead of the Parties' rights and obligations towards each other.<sup>38</sup> The purpose of the Convention is to establish new means for environmental protection, by approaching environmental concerns via democratic changes, established by its three pillars. The first pillar sets out the right to access to information, the second regards public participation in decision-making, and the third pillar concerns access to justice in environmental matters. By granting citizens the right of access to environmental information it is believed public awareness of environmental concerns would be raised and the transparency of the national administrations and institutions improved.<sup>39</sup> The purpose of the second pillar is to create a greater public involvement in the decision-making process in order to strengthen the public support for decisions affecting the environment.<sup>40</sup> The objective of the third pillar is to enable individuals and environmental organisations to challenge decisions through effective judicial mechanisms.

### 2.1 Definitions

The first paragraph of Article 3, that sets out the general provisions of the Convention, states “Each Party shall take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in the Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention”.

The Convention solely applies to acts of “public authorities” which is defined in Article 2(2) in a rather broad manner but expressively exclude “bodies or institutions acting in a judicial or legislative capacity”.<sup>41</sup> What constitutes the “environment” or “environmental matter” on the other hand is not defined in the Convention despite the fact it is crucial in order to understand the scope application.<sup>42</sup> On the other hand, it follows from the definition of “environmental information” that this could be perceived as a broad concept.<sup>43</sup> One of the major questions of this thesis is the issue of *who*

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<sup>38</sup> *Ibid.*, at 322

<sup>39</sup> Poncelet C, Access to justice in environmental matters – does the European union comply with its obligations, *Journal of environmental law*, 24:2, Oxford University press, 2012, at 288

<sup>40</sup> *Ibid.*, at 288

<sup>41</sup> Oliver (2013) *supra* note 16, at 1428

<sup>42</sup> *Ibid.*, at 1431

<sup>43</sup> The Aarhus Convention *supra* note 2 at Article 2(3)(b), at 5-6

should have access to court. The significant concepts of "the public" and "public concerned" are explained in Article 2(4) respectively in Article 2(5). The former mentioned article states "the public" includes environmental organisations fulfilling the requirements under national law. The second is defined as "the public affected or likely to be affected by", or "having an interest in", the environmental decision-making. Thereby, the Convention establishes provisions designated to fit into different legal cultures, by distinguishing between the systems that require the impairment of a right and those that do not. The objective of this approach is to reach a uniform standard, and oblige the states that require an impairment of a right to consider cases of violations of the provisions laid down in the Convention.<sup>44</sup> In addition to this, it should be emphasized that Article 2(5) establishes that non-governmental organisations promoting environmental protection, and meeting the requirements under national law, shall be deemed to have an interest, and the implications of this article will be examined further down the presentation.

## 2.2 Access to justice

The provisions regarding access to justice in environmental matters are laid down in Article 9. It is defined as "access for the public to procedures where legal review of alleged violations of the Convention and national law relating to the environment can be requested".<sup>45</sup> There are five important issues that the Convention stipulates regarding access to court. First, the review procedure shall enable any person to enforce his/her rights of access to information under article 4 of the Convention.<sup>46</sup> Second, the review of decisions, acts or omissions subject to the provisions under article 6 of the Convention regarding public participation.<sup>47</sup> Third, each party to the Convention shall ensure that members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities that contravene provisions of national law relating to the environment.<sup>48</sup> It is worth to note that details for such procedures are not provided in the article, nor are the requirements the members of the public have to meet in order to access such procedures specified.<sup>49</sup> Article 9(3) only states the members of the public, where they meet the criteria in national law of the parties to the convention, shall enjoy such access rights. Consequently, the parties to the convention retain a

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<sup>44</sup> Jendroska J, Aarhus Convention and Community law: the interplay, 2 Journal of European Environmental & Planning Law 12 2005, at 18

<sup>45</sup> The Aarhus Convention: An implementation guide, second edition, 2013, to be found at [http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus\\_Implementation\\_Guide\\_second\\_edition\\_-\\_text\\_only.pdf](http://www.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus_Implementation_Guide_second_edition_-_text_only.pdf) at 193

<sup>46</sup> The Aarhus Convention *supra* note 2 at Article 9(1)

<sup>47</sup> *Ibid.*, Article 9(2)

<sup>48</sup> *Ibid.*, Article 9(3)

<sup>49</sup> Garçon G, The right of access to justice in environmental matters in the EU, the third pillar of the Aarhus Convention, EFL, 2, 2013, at 79

broad discretion on the implementation of the obligations set out in article 9(3) since it only outlines a general requirement. Thereby, the parties are free to define their own national laws and conditions for access to procedures, as long as this general provision is met. Four, the parties to oblige is that the proceedings must provide adequate and effective remedies, and among other things be fair, equitable, timely and not prohibitively expensive.<sup>50</sup> Lastly, in order to strengthen the effectiveness of the provisions, the fifth paragraph adds that each Party shall ensure information on access to administrative and judicial review procedures is provided to the public, and in addition to this they should consider establishing appropriate assistance mechanism to remove or reduce financial and other barriers to access to justice.<sup>51</sup> Nevertheless, it is important to note that according to article 3(8) national courts are able to award reasonable costs in judicial proceedings.

## 2.3 The role of environmental NGOs

The Aarhus Convention acknowledges the essential role NGOs can play in environmental protection. Most importantly, as stated in the introduction, environmental NGOs could function as “the voice of the environment”.<sup>52</sup>

Regarding the review of procedure under article 9(2), it is expressly defined that an NGOs that meets the requirements set out in article 2(5) of the Convention shall be deemed sufficient for the purpose of allowing access to the procedure covered by the article. Such NGOs also have rights under article 9(3), yet again because of Article 2(5), but these are conditioned by the provisions set out in national law, which shows the parties of the convention retain a broad discretion on the admissibility of NGO request for review and access to justice.<sup>53</sup> Thereby, it should be underlined that the Aarhus legal framework does not give environmental NGOs a right to standing, it simply deems “NGOs promoting environmental protection” as having “sufficient interest” to have standing, but leaves it up to the Member States to define what constitutes a “sufficient interest”.<sup>54</sup> Nevertheless, the Aarhus Compliance Committee has made it clear that a broad interpretation of the Convention should be the rule and not the exception.<sup>55</sup>

The arguments put forward why environmental NGOs should have a wide access to justice are several, but most importantly it is believed to improve the enforcement of environmental laws. Moreover, granting these organisations wide access to justice might have a preventing effect, for example by putting pressure on the administrations to enforce the legislation

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<sup>50</sup> The Aarhus Convention *supra* note 2 at Article 9(4)

<sup>51</sup> *Ibid.*, Article 9(5)

<sup>52</sup> Stone (2010) *supra* note 17 at 1-31

<sup>53</sup> Garçon (2013) *supra* note 49 at 79

<sup>54</sup> Bogojevic S, CJEU, can you here me? Access to justice in environmental matters, *Europarättslig tidskrift* nr 4 2013, at 736 (Bogojevic)

<sup>55</sup> Jans, *Judicial Dialogue* (2013) *supra* note 25 at 156

due to the fear of facing legal challenges.<sup>56</sup> In addition to this, it is said to be in the interest of the industry that there are a consistent degree of enforcement of environmental law throughout the Union.<sup>57</sup> On the other hand, broad access to justice in environmental matters for NGOs has been argued to risk overloading the courts. Nevertheless, there are indications the effect actually tends to be the opposite, since well-functioning NGOs have proven to be able to streamline and channel the cases put before the courts.<sup>58</sup> Furthermore, the high success-rate of the actions initiated by environmental NGOs implies these organisations concentrate on the significant cases, and provide sound arguments due to their expert knowledge in the environmental field.<sup>59</sup>

By giving environmental NGOs broad access to justice, the Aarhus Convention constitutes a compromise between the maximalist approach of the *actio popularis* and the minimalist approach that the right of individual action only should be available to parties with a direct interest.<sup>60</sup> Consequently, the Aarhus Convention enforces the role of environmental NGOs, and thereby enables the environment to have a voice, with the purpose of strengthening the decisions taken by the national authorities and improve the efficiency of procedures designated to prevent environmental damage.<sup>61</sup>

## 2.4 The EU implementation of the Aarhus Convention

Due to the EU's conclusion of the Aarhus Convention, significant legal development took place in the Union.<sup>62</sup> Especially, access to justice before national courts were expanded, and the possibility of standing for environmental NGOs were improved.<sup>63</sup> In order to monitor that the Member States adapt to this legislation, the European Commission can initiate infringement proceedings<sup>64</sup> against the Member States that do not comply with their obligations originating from the Convention, and take them to the CJEU.<sup>65</sup> In fact, two of the judgements presented in chapter four stems from infringements proceedings.

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<sup>56</sup> Dross Miriam, Access to justice in EU Member States, 2 Journal of European Environmental & Planning Law 2005, at 29

<sup>57</sup> *Ibid.*, at 29

<sup>58</sup> Faure et al. (2013) *supra* note 26 at 126 and 130

<sup>59</sup> Dross (2005) *supra* note 56 at 29

<sup>60</sup> AG Sharpston opinion in Case C-263/08 Djurgården-Lilla Värtans Miljöskyddsförening (2009) para. 63

<sup>61</sup> *Ibid.*, para. 64

<sup>62</sup> De Sadeleer N, EU environmental law and the internal market, Oxford University press, 2014, at 99 (De Sadeleer)

<sup>63</sup> *Ibid.*, at 99

<sup>64</sup> Article 258 TFEU

<sup>65</sup> Article 260 TFEU

## 2.4.1 The Aarhus Regulation

The regulation 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 was adopted on 6 September 2006, entered into force on 28 September and became applicable on 17 July 2007 (hereafter the Aarhus Regulation).<sup>66</sup> The Regulation covers the institutions, bodies, offices and agencies established on the basis of the treaty. The main problem of the drafting of the Regulation was to combine the requirements laid down in Article 9(3) of the Convention, with the restrictive access to the EU Courts due to Article 230 of the Treaty (today altered and consisting of Article 263 TFEU). In particular ensuring that NGOs should file lawsuits without being “directly and individually concerned”, proved to be a complicated task.<sup>67</sup>

The Aarhus Regulation adopts a two-step approach regarding access to justice in environmental matters. First, there is a possibility of internal review of administrative acts adopted by the EU institutions according to its Article 10. It is stipulated in the Aarhus Regulation that NGOs meeting certain criteria, such as being able to verify that they are independent and accountable organisations whose primary objective is to promote environmental protection, to request internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of a claimed administrative omission, should have adopted such an act.<sup>68</sup> Note that since the EU institutions do not take decisions falling under Article 9(2) of the Convention, the Aarhus Regulation in particular deals with Article 9(3).<sup>69</sup> Through Article 12, environmental NGOs who made a request for internal review have the possibility to request judicial review by the CJEU, in accordance with relevant provisions of the Treaty. Nevertheless, it has been questioned, both in the doctrine and by the Aarhus Compliance Committee, whether EU actually obliges to the obligations established by the Aarhus Convention, especially regarding access to justice in environmental matters, as the access to the EU Courts is very restrictive.<sup>70</sup>

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<sup>66</sup> Regulation 1367/2006 *supra* note 33 at 13

<sup>67</sup> Jendroska (2005) *supra* note 44 at 20

<sup>68</sup> Regulation 1367/2006 *supra* note 33 at Article 10-11 & para. 20 in the preamble.

<sup>69</sup> Jans, *Judicial Dialogue* (2013) *supra* note 25 at 148

<sup>70</sup> Pallemmaerts (2011) *supra* note 6 at 309-312, as well as findings made by the Aarhus Compliance Committee in case ACCC/C/2008/32

## 2.4.2 The Directives

The directives concerning the first and the second pillar were adopted in 2003, namely Directive 2003/4/EC on public access to environmental information repealing Council Directive 90/313/EC, and Directive 2003/35/EC on public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending, with regard to public participation and access to justice, the Environmental Assessment Directive (the EIA Directive)<sup>71</sup> and the Directive concerning integrated pollution prevention and control (the IPPC Directive).<sup>72</sup> Both Directive 2003/4/EC and Directive 2003/35/EC contain provisions on access to justice, relating to the rights contained in the pillars they are implementing. In that remark it should be noted the provisions on access to justice in the EIA Directive and IPPC Directive are identical, and more or less an exact copy of Article 9(2) and 9(4) of the Aarhus Convention.<sup>73</sup>

## 2.4.3 The proposed Directive on Access to Justice in Environmental Matters

As part of the implementation of the Aarhus Convention into Union law, the Commission made a proposal for a directive on access to justice in environmental matters in 2003.<sup>74</sup> The aim of the proposal was to put the third pillar of the Aarhus convention into EU law, particularly Article 9(3), and secure environmental organisations have a right of standing in national courts when EU environmental law is breached.<sup>75</sup> The proposal was based on art 175 EC (now art 192 TFEU) and supported by the European Parliament that wanted to strengthen the provisions.<sup>76</sup> The proposal covered a double objective, namely to contribute to the implementation of the Aarhus Convention as well as fulfilling shortcomings, described in the introduction, regarding the control of the application of environmental law.<sup>77</sup> In the proposal for the Directive it was underlined that while the Union legislation in the environmental field mainly focused on changing the substantive law, the procedural provisions and mechanisms to ensure its

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<sup>71</sup> Directive 85/337 on the assessment of the effects of certain public and private projects on the environment (1985) OJ L175/40. Today, the EIA Directive and its amendments have been codified into Directive 2011/92 on the assessment of the effects of certain public and private projects on the environment (2011) OJ L26/1

<sup>72</sup> Directive 96/61 concerning integrated pollution prevention and control (1996) OJ L257/26, which is now replaced by the Industrial Emissions Directive 2010/75 on industrial emissions (integrated pollution prevention and control) (2010) OJ L344/17

<sup>73</sup> Article 10a of the EIA Directive, Article 15a of the IPPC Directive, for more info see Jans J.H, Vedder H, European environmental law after Lisbon, 4 edition, Europa law publishing, Amsterdam at 376

<sup>74</sup> COM(2003) 624 final, *supra* note 22

<sup>75</sup> Krämer L, EU environmental law, 7th edition, Sweet & Maxwell, London, 2011, at 146 (Krämer)

<sup>76</sup> *Ibid.*, at 146

<sup>77</sup> COM(2003) 624 final, *supra* note 22 at Explanatory Memorandum 1.1



effective application had been left to the Member States, which has resulted in “considerable differences in the practical application of environmental law”.<sup>78</sup> Thereby, the proposed Directive sought to set out a common framework for the Member States to ensure EU environmental laws were respected, as inaction from the EU legislator was argued to result in different levels of environmental protection as well as different standards of environmental law enforcement in the Member States.<sup>79</sup> Nevertheless, the proposal was never made into a directive since it met considerable objection in the Council as the Member States believed that access to national courts belonged to their competence due to the principle of subsidiarity.<sup>80</sup> Moreover, the Directive was considered by some Member State experts to go further than Article 9(3) of the Aarhus Convention required.<sup>81</sup> Due to this inaction from the EU legislator, the requirements in article 9.3 of the Convention were left to the member states, resulting in great disparities between the national legal systems in this area.<sup>82</sup> For instance, in some member states standing rules are too restrictive or litigation too costly and inefficient.<sup>83</sup> Especially standing requirements for environmental NGOs tend to be very limiting in some member states.<sup>84</sup>

From a political perspective today, there is now a clear interest from the EU institutions to improve access to justice at national level.<sup>85</sup> In the 7<sup>th</sup> Environment Action Programme (hereafter EAP), which will be guiding EU environmental policy to 2020, the importance of better access to justice in environmental matters in order to maximise the benefits of EU environmental legislation by improving its implementation was recognized.<sup>86</sup> In addition to this, the Commission has ordered several studies on the subject; one with focus on the Member States’ implementation of Articles 9(3) and 9(4) in the Member States,<sup>87</sup> a second on the Member States’ complaint handling and mediation mechanisms in the environmental field,<sup>88</sup> and a third concerning the possible economic implications of widening access to justice in environmental decision-making in the union.<sup>89</sup> The studies are intended to be utilized by the Commission when deciding on how to strengthen the enforcement of EU environmental law throughout the Union.<sup>90</sup>

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<sup>78</sup> *Ibid.*, at Explanatory Memorandum 3.2

<sup>79</sup> *Ibid.*, at Memorandum 3.4

<sup>80</sup> Krämer (2011) *supra* note 75 at 147

<sup>81</sup> Faure et al. (2013) *supra* note 26 at 8

<sup>82</sup> Därpö (2013) *supra* note 28 at 3

<sup>83</sup> SPEECH Potočnik (2012) *supra* note 24 at 2

<sup>84</sup> *Ibid.*, at 2

<sup>85</sup> *Ibid.*, at 4

<sup>86</sup> Decision 1386/2013/EU of the European Parliament and the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 “*Living well, within the limits of our planet*” OJ L 354, 28/12/2013, p. 171–200

<sup>87</sup> Därpö (2013) *supra* note 28

<sup>88</sup> André et al. Final, Study on environmental complaint-handling and mediation mechanisms at national level, Ecologic Institute, Berlin 12/12/2012 to be found at [http://ec.europa.eu/environment/aarhus/pdf/mediation\\_and\\_complaint-handling.pdf](http://ec.europa.eu/environment/aarhus/pdf/mediation_and_complaint-handling.pdf)

<sup>89</sup> Faure et al. (2013) *supra* note 26 at 126 and 130

<sup>90</sup> Därpö (2013) *supra* note 28 at 7

In the third study mentioned it was argued there are now reasons to put the idea of a Directive on access to justice in environmental matters back on the political agenda due to the fact that the Lisbon Treaty has now entered into force, and in particular because of the potential cost of inaction.<sup>91</sup> Part of the goal of the research was to investigate to what extent the absence of a EU-wide regime for access to justice in environmental matters is disadvantageous for operators. In fact, it was found in the study it could be argued non-action can result in substantial uncertainty and difference between Member States that are costly for operators.<sup>92</sup> Therefore, it was presented in the report that harmonization from the EU-legislator could be used as a means to create legal certainty and thereby levelling the playing field.<sup>93</sup>

The same conclusion was presented in the “Synthesis report of the study on the implementation of Article 9.3 and 9.4 in EU Member States”, where Jan Därpö found there is a need for a EU legislative framework to create a level playing field for environmental democracy in the union.<sup>94</sup> In his opinion, a directive on access to justice in environmental matters would be necessary to promote predictability and legal certainty.<sup>95</sup> He argued that the alternative, namely letting the CJEU lead this development through the preliminary rulings procedure under Article 267, is too ineffective and time consuming. Despite the fact that the Court so far has delivered several important judgements on access to justice in environmental matters at national level, which will be explained in further detail in the next part of this paper, not all Member States have yet adopted their legislation to be consistent with all aspects of this case law.<sup>96</sup> Therefore, Jan Därpö found the option rely solely on the CJEU, and the Member States adaptation to the case law, to be too slow and too uncertain. Despite this, he underlined that “the jurisprudence of the CJEU will continue to play a dynamic role in this area since a legislative framework at the Union level on access to justice in environmental matters will have to be quite basic, dealing only with the main elements of judicial review of administrative decision in a general way”.<sup>97</sup>

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<sup>91</sup> Faure et al. (2013) *supra* note 26 at 8

<sup>92</sup> *Ibid.*, at 121

<sup>93</sup> *Ibid.*, at 121

<sup>94</sup> Därpö (2013) *supra* note 28 at 7

<sup>95</sup> *Ibid.*, at 25

<sup>96</sup> See Därpö (2013) *supra* note 28 at 25 where the national reports in the study showed that several of the Member States had not yet adapted their legislation to Case C-237/07 Janecek (2008) ECR I-6221.

<sup>97</sup> Därpö (2013) *supra* note 28 at 25

## 2.5 Direct effect?

Do the provisions in the Aarhus Convention and the EU Directives have direct effect, meaning individuals and organisations can rely on them before national courts? To begin with, the principle of direct effect was first established in 1962 in *Van Gend en Loos*, where the CJEU ruled individuals should be able to invoke, or rely, on a specific EU legal rule before a national court if the rule in question is clear, precise and unconditional.<sup>98</sup> In the *Demirel* case the Court extended this to be applicable on international treaties.<sup>99</sup> Moreover, it has been established by the CJEU that provisions of EU law must as far as possible be interpreted in consistency with international agreements concluded by the Union.<sup>100</sup> In addition to this, the national courts also have an obligation to interpret national procedural rules as far as possible in the light of the EU's international commitments.<sup>101</sup>

From the national perspective, the constitution in several member states declares that international treaties and conventions can have direct effect in the national legal order and/or overrule national law.<sup>102</sup> On the other hand, there are member states where such primacy rules are non-existent. Nevertheless, several EU Member States' constitutional law (written or unwritten) provide that national law must be interpreted in the light of international law in order to comply with it. Regarding the possible direct effect of specific provisions in the Aarhus Convention, this has been subject to detailed analysis for instance in some Member States for instance France, resulting in precise opinions concerning direct effect of certain parts of the Convention.<sup>103</sup> In other countries, for instance Poland and the Czech Republic, the courts have had a cautious approach concerning the acceptance of any direct effect of the Convention.<sup>104</sup>

Regarding the judgements delivered by the CJEU, in the field of environmental protection, the application of the principle of direct effect was first made in *Pêcheurs de l'étang de Berre*.<sup>105</sup> Regarding the Aarhus Convention, the Court has found it to be an integral part of the EU legal order due to the fact that it was signed by the Union and thereafter approved by Decision 2005/370.<sup>106</sup> The question whether the provisions of the

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<sup>98</sup> Case 26/62 *Van Gend en Loos* (1963) ECR 3

<sup>99</sup> Case 12/86 *Demirel* (1987) ECR I-3719

<sup>100</sup> Case C-284/95 *Safety Hi-tech* (1998) ECA 1-4301, para 22, regarding the Aarhus Convention Case C-240/09 *Lesoochránárske zoskupenie*, judgement of 8 March 2011, especially paras.50-51

<sup>101</sup> Case C-53/96 *Hermès International* (1998) ECA 1-3603, para. 28

<sup>102</sup> Jans, *Judicial Dialogue* (2013) *supra* note 25 at 151

<sup>103</sup> Jendroska J, *Citizens rights in European Environmental law: Stock-taking of key challenges and current developments in relation to public access to information, participation and access to justice*, *Journal of European Environmental & Planning Law* 9.1 (2012) at 79

<sup>104</sup> *Ibid.*, at 79

<sup>105</sup> Case C-213/03 *Syndicat professionnel coordination de Pêcheurs de l'étang de Berre v Electricité de France* (2004) ECR I-7359

<sup>106</sup> Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia*

Convention have direct effect has been addressed by the CJEU on several occasions, for instance in *Boxuz*,<sup>107</sup> *Trianel*<sup>108</sup> and the *Slovak Brown Bear* case.<sup>109</sup>

Due to the fact that the Aarhus Convention is a mixed agreement, the Union made a declaration of competence stating that “the legal instruments in force do not cover fully the implementation of the obligations resulting from article 9(3) of the Convention as they related to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by article 1(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of community law covering the implementation of those obligations”.<sup>110</sup> Thereby, it was claimed that the EU Member States’ possible violation of article 9(3) could not result in international liability for the Union. As a result of this declaration it had been questioned whether the CJEU had the authority to interpret certain provisions of this mixed agreement.<sup>111</sup> Nevertheless, this turned out not to be the case as the CJEU has given a judgement on article 9(3) in the *Slovak Brown Bear* case. The case will be examined in further detail in the case law analysis, but in essence the Court found the provisions in the article in question not to have direct effect as members of the public or environmental organisations only have access to court when they comply with the requirements laid down in national law. Nevertheless, the Court opened the door for giving the provision in question indirect effect as it was stated that national courts are obliged to interpret EU environmental law, and the national law transposing it, so individuals and environmental organisations gain access to justice “to the fullest extent possible”, in order to enforce this law.

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Slovenskej republiky,(2011) ECR I-01255 (Case C-240/09 Lesoochránárske zoskupenie VLK) with reference to, by analogy, Case C-344/04 IATA and ELFAA (2006) ECR I-403, para. 36 and Case C-459/03 Commission v. Ireland (2006) ECR I-4635, para. 82

<sup>107</sup> C-128/09 *Boxus* (2011)

<sup>108</sup> Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg Trianel Kohlekraftwerk Lünen (intervening)*(2011) I-03673 (Case C-115/09 *Trianel Kohlekraftwerk Lünen*)

<sup>109</sup> Case C-240/09 *Lesoochránárske zoskupenie VLK* (2011) *supra* note 106

<sup>110</sup> See Decision 2005/370/EC, Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision making and access to justice in environmental matters. OJ 2005 L 124/1 and OJ 2006 L 164/17

<sup>111</sup> Jans, *Judicial Dialogue* (2013) *supra* note 25 at 149

## 2.6 Concluding remarks

The Aarhus Convention has been upheld as a significant instrument to strengthen, and interlink, democracy and environmental protection. Accordingly, the Convention is expected to enforce the transparency and liability of governments. The increased ability for environmental NGOs to have standing is said to be its greatest innovation, by making them capable of bringing certain judicial proceedings “on behalf of the environment”.<sup>112</sup> As the costs of the proceedings might constitute an indirect hinder to access to justice in environmental matters, the rule established by the Convention that the costs must not be prohibitively expensive is also of substantial importance.

The parties of the Aarhus Convention have an obligation “to ensure that the legitimate interest in protecting the environment and law enforcement are guaranteed by effective judicial mechanisms”.<sup>113</sup> In the next chapter an overview of the right to effective judicial protection as well as the principles of effectiveness and equivalence in relation to the principle of procedural autonomy, as well as the European Charter of fundamental rights, and how this might interact with the rights originated from the Aarhus Convention, will be given. This is made with the purpose to increase the comprehension of the CJEU’s reasoning in chapter four.

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<sup>112</sup> Oliver (2013) *supra* note 16, at 1432

<sup>113</sup> Recitals 6, 8, and 18 of the Aarhus Convention *supra* note 2

## 3 Corresponding principles of EU law

It has been stated that Article 47 in the Charter and Article 19 TEU “are the given starting points” when discussing access to justice in environmental matters at EU Member State level.<sup>114</sup> Article 47 guarantees the right to an effective remedy and a fair trial, and Article 19.1(2) TEU goes further by obliging Member States to provide sufficient remedies in order to ensure effective legal protection in the fields covered by EU law.<sup>115</sup> As a result, those who are affected by Union law provisions relating to the environment must have the possibility to, in a national court, challenge any action, or inaction, by the public authority. Thereby, it has been suggested, that Article 19.1(2) confirms the principle of effective judicial protection developed by the CJEU.<sup>116</sup>

### 3.1 The principle of procedural autonomy

It follows from the principle of subsidiarity, now enriched in Article 5(3) TEU, that the decisions should be taken as close to the citizens as possible. Consequently, every competence not given to the Union belongs to the Member States. As the Union has a strictly limited competence in the area of procedural rules, it is up to the Member States to define their competent courts and lay down the procedural rules in the national legislation, which is known as the principle of procedural autonomy. Therefore, the way in which a provision of Union law can be invoked before national courts largely depends on national law.<sup>117</sup> It has been established that national procedural environmental law varies between the member states.<sup>118</sup>

Therefore, in absence of harmonized rules, procedural law regarding access to justice in environmental matters remains to be determined by the member states.<sup>119</sup> As a result, there have been difficulties for private individuals and environmental NGOs to gain access to the member state courts due to, for instance, restrictions imposed on the interest to sue, duration of the proceedings, and financial risks which altogether creates obstacles to the invocation of an EU law provision incorrectly transposed before the national courts.<sup>120</sup> It has been argued that these national hinders weaken the environmental protection within EU.<sup>121</sup> Due to the number of hurdles

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<sup>114</sup> Därpö (2013) *supra* note 28 at 26

<sup>115</sup> *Ibid.*, at 27

<sup>116</sup> *Ibid.*, at 27

<sup>117</sup> Jans, *Judicial Dialogue* (2013) *supra* note 25 at 145

<sup>118</sup> *Ibid.*, at 145

<sup>119</sup> De Sadeleer (2014) *supra* note 62 at 102

<sup>120</sup> *Ibid.*, at 102

<sup>121</sup> *Ibid.*, at 102

applicants have to overcome in some Member States in order to gain access to court in environmental matters, it could be questioned whether the Member States' procedural autonomy will have to be undermined by the principle of effective judicial protection and *effet utile*.<sup>122</sup> On the other hand, national procedural rules should not lightly be set aside as they may be deeply rooted in, and reflect, the cultural and ethical values of the Member State in question.<sup>123</sup>

The principle of national procedural autonomy was first established in the *Rewe/Comet* case.<sup>124</sup> The Court concluded that on one hand, where EU law confers personal or individual rights, it follows from the principle of cooperation, today laid down in Art 4(3) TEU, that the national courts are obligated to protect these rights. As a result, individuals can rely on their rights in national courts, but in the absence of EU rules on the matter, it is up to the domestic legal system of each Member State to designate the competent courts and determine the procedural rights citizens have from the direct effect of EU law.<sup>125</sup> Moreover, it was established that the principle of procedural autonomy is subject to two conditions. First, the national procedural rules designated to uphold an individual's rights under EU law must be no less favourable than those relating to similar actions of a domestic nature, today known as the principle of equivalence. Second, procedural conditions laid down in national law may not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law, today known as the principle of effectiveness. It is important to emphasize that this doctrine is only applicable in the absence of union rules on procedural matters.<sup>126</sup> Moreover, the interpretation of principle of procedural autonomy in the *Rewe/Comet* case law is not absolute.<sup>127</sup>

An example on the balancing between the Member States' procedural autonomy and the principles of effectiveness and equivalence, from the case law concerning the interpretation of the right to access to justice in environmental matters originating from the Aarhus Convention is the *Trianel* case.<sup>128</sup> The circumstances and outcome of the case will be examined in further detail in the next chapter, but in this context it should be noted the Court based its judgement, besides from the Aarhus Convention and the EU implementation of it, on an extensive interpreted principle of

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<sup>122</sup> *Ibid.*, at 102

<sup>123</sup> Arnall A, The principle of effective judicial protection in EU law: An unruly horse? *European Law review* 36(1) (2011) at 52, with reference to J. Delicostopoulos, Towards European procedural primacy in national legal systems, 9 *European Law Journal* (2003) at 599

<sup>124</sup> Case C-33/76 *Rewe v Comet* (1976) ECR 1523

<sup>125</sup> *Ibid.*, at para. 54

<sup>126</sup> Jans J.H, Vedder H, *European environmental law after Lisbon*, 4 edition, Europa law publishing, Amsterdam at 231

<sup>127</sup> De Sadeleer N, *EU environmental law and the internal market*, Oxford University press, 2014, at 103

<sup>128</sup> Case C-115/09 *Trianel Kohlekraftwerk Lünen* (2011) *supra* note 108

effectiveness.<sup>129</sup> In addition to this, Advocate General Sharpston concluded in the *Djurgården* case, which also will be presented in further detail in the next part, that the application of the principle of effectiveness would have the same result as the application of the specific provisions on effective judicial protection provided for in Article 9 of the Convention, inserted in Article 10a of Directive 85/337.<sup>130</sup>

## 3.2 The principle of effective judicial protection

Alongside the development of the principle of effectiveness, the principle of effective judicial protection was established by the CJEU. It originates from the *Johnston* case,<sup>131</sup> and through the case law it was later developed into a general principle of Union law.<sup>132</sup> Due to the principle of effective judicial protection national courts are required to adjust national procedures to secure the rights deriving from EU law are protected.<sup>133</sup> In *Unibet*<sup>134</sup> the CJEU found the principle had been reaffirmed in Article 47 of the European Charter of fundamental rights, which guarantees the right to an effective remedy and a fair trial. Furthermore, the Court underlined that the Member State are responsible for ensuring judicial protection of an individual's rights under EU law, due to the principle of sincere co-operation which today is found in Article 4(3) TEU. Moreover, it was concluded that due to the principle of effective judicial protection the national courts have a duty of consistent interpretation similar to the one laid down the *Marleasing* judgement.<sup>135</sup> Consequently, the judgement made in *Unibet* made it clear that the overriding consideration for the national courts should be the safeguarding of union law rights, by stating that national procedural

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<sup>129</sup> Lohse E, Surprise? Surprise! – Case C-115/09 (Kohlekraftwerk Lünen) – A victory for the environment and a loss for procedural autonomy of the Member States? European Public Law 18, no.2 (2012) Kluwer Law International, at 249 (Lohse)

<sup>130</sup> Opinion of AG Sharpston delivered on 2 July 2009 in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* para. 80

<sup>131</sup> Case C-222/84 *Marguerite Johnston v. Chief Constable of the Royal Ulster Constabulary* (1986) ECR 1651

<sup>132</sup> case C-125/01 *Peter Pflücke v. Bundesanstalt für Arbeit* (2003) ECR I-9375, Case C-432/05 *Unibet* (2007) ECR I-2271 para.37, Case C-279/09 *DEB* (2010) ECR I-13849, para.29

<sup>133</sup> *Elia Antonio M, C-240/09 Lesoochránárske zoskupeni VLK v. Ministerstvo zivotného prostredia Slovenskej republiky*, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011, nyr, and Case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landsverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg* (intervening party. *Trianel Kohlekraftwerk Lünen GmbH & Co. KG*) Judgment of the Court of Justice (Fourth Chamber) of 12 May 2011, nyr, Common Market and law review 49, 2012, at 768 (Elia Antonio)

<sup>134</sup> Case C-432/05 *Unibet* (2007) ECR I-2271

<sup>135</sup> Case C-106/89 *Marleasing SA v La Comercial International de Alimentation SA* (1990) ECR I-4135



autonomy in merely an aspect of the broader principle of effective judicial protection.<sup>136</sup>

Lastly, what is the distinction between the principle of effective judicial protection and the principle of effectiveness? To begin with it should be underlined that this question is debated in the doctrine. In fact, it has been questioned if there is a need to make a distinction at all, with the argument that these two principles are now subsumed under Article 47 of the Charter of fundamental rights.<sup>137</sup> Additionally, there are more similarities than differences between the two principles. On the other hand it has been suggested recent judgements delivered by the Court could be interpreted as redefining the relationship between the two principles, implying they should be seen as separate.<sup>138</sup> In the doctrine, for instance Sacha Prechal, judge in the CJEU, argued a separate application of these principles is desirable as they "serve different purposes and are driven by different rationales".<sup>139</sup> Sacha Prechal states the principle of effectiveness, in combination with the principle of equivalence, aim to guarantee the effective application of substantive EU law, while the primary aim of the principle of effective judicial protection is further interlinked with the fundamental right of access to court, and accordingly with the concept of the rule of law. As a result, he reasons the principle of effectiveness, essentially functions as the "outer limits" to the Member States' national procedural autonomy, and is mainly relevant in legal areas not yet covered by the requirement of effective judicial protection.<sup>140</sup>

### 3.3 The European Charter of Fundamental Rights

According to Article 47 of The European Charter of fundamental rights (hereafter EUCFR), everyone whose rights and freedoms, guaranteed by Union law, have been violated have the right to an effective remedy. Article 6(1) TEU states that the Union recognizes the rights, freedoms and principles set out in the Charter, and that these have the same legal value as the treaties.

Regarding access to justice in environmental matters, it should also be remembered that article 37 of the Charter provides for the integration of a high level of environmental protection and the improvement of the quality of the environment into the policies of the union. It is, however, notable that while article 47 constitutes a right; article 37 is merely a principle, which is

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<sup>136</sup> Arnall A, The principle of effective judicial protection in EU law: An unruly horse? European Law review 36(1) (2011) at 55

<sup>137</sup> Prechal S, Redefining the relationship between "Rewe-effectiveness" and effective judicial protection, Review of European administrative law; vol 4, nr 2, (2011) Paris legal publishers at 31

<sup>138</sup> *Ibid.*, at 50

<sup>139</sup> *Ibid.*, at 50

<sup>140</sup> *Ibid.*, at 49

more of a policy requirement rather than an individual right.<sup>141</sup> As a result Article 37, in contrast to Article 47, can not be invoked directly which follows from the interpretation of Article 52(5) EUCFR. Thus, the main, relevant part of the Charter in this context therefore is Article 47. Since the origin and significance of a segment of its underlying principles, namely the principle of effectiveness, equivalence and effective judicial protection, was examined in the previous part, the following presentation will focus on the specific role of the provisions embedded in Article 47 due to the status of the Charter.

Through the entry into force of the Lisbon Treaty Article 47 in the Charter of the previously presented principle of effective judicial protection has acquired written, primary law status.<sup>142</sup> The CJEU relatively often refers to this codification of the principle, actually even before the Charter became binding for the Union and the Member States, for instance in *Unibet*.<sup>143</sup> Concerning the interpretation of the rights stemming from the Aarhus Convention, General Advocate Kokott in her opinion in *Commission v Ireland* concerning the costs of environmental proceedings, relied on the Charter for guidance before it had any binding legal effect comparable with primary law.<sup>144</sup>

The scope of the rights corresponding to rights laid down in ECHR should be interpreted in the light of the Convention itself and the case law of the ECtHR.<sup>145</sup> In fact, the CJEU's interpretation of the principle of effective judicial protection, and consequently Article 47, is influenced of the case law from the ECtHR on Article 6, the right to a fair trial, and Article 13 the right to an effective remedy.<sup>146</sup> Since the application of the Convention of Human Rights falls outside the scope of this thesis, its influence on the CJEU will not be further analysed. Nevertheless, it should be noted that since Article 47 of the Charter must be given the "same meaning and scope" as the corresponding provisions in the ECHR, which have been interpreted by the ECtHR as guaranteeing access to justice and an effective remedy in environmental matters,<sup>147</sup> both EU and the national Courts should apply Article 47 in the light of this case law.<sup>148</sup> Due to the fact that the EU and the Member States are parties to the Aarhus Convention, this interpretation is further supported by the obligations related to access to justice in environmental matters.<sup>149</sup>

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<sup>141</sup> De Sadeleer N, Principle of subsidiarity and the EU environmental policy, *Journal of European Environmental & Planning Law* 9.1 (2012) p.109

<sup>142</sup> Prechal (2011) *supra* note 137 at 37

<sup>143</sup> Case C-432/05 *Unibet* (2007) ECR I-2271

<sup>144</sup> AG Kokotts opinion in Case C-427/07 *Commission v Ireland* (2009) para.91

<sup>145</sup> Article 52(4) of the Charter and the explanation of it.

<sup>146</sup> Prechal (2011) *supra* note 137 at 38, with reference to Case C-279/09 *DEB*, Judgement of 22 December 2010, nyr.

<sup>147</sup> For a further discussion of the relevant case law see N de Sadeleer, *Enforcing EUCHR Principles and Fundamental rights in environmental cases'* (2012) 81 *Nordic Journal of international law* 39, at 60-73

<sup>148</sup> Peers, Steve, Hervey, Tamara, Kenner, Jeff & Ward, Angela (red.), *The EU Charter of fundamental rights: a commentary*, Hart Pub Ltd, Oxford, 2014, at 1000

<sup>149</sup> *Ibid.*, at 1000

### 3.4 Concluding remarks

The aim of the previous presentation has been to provide an overview of sources of EU law that might interact with the right established by the Aarhus Convention regarding access to justice in environmental matters. For example, it was found in *Edwards and Pallikaropoulos*, which will be further explained in the next part, that the requirement that the costs of environmental proceedings should not be prohibitively expensive relates to the observance of the right to an effective remedy enshrined in Article 47 in the European Charter of fundamental rights.<sup>150</sup> In addition to this, the CJEU referred to the principle of effectiveness as well, since detailed procedural rules governing actions for safeguarding individuals' rights under EU law must not make it impossible or excessively difficult to exercise rights under EU law. Thereby, the CJEU's interpretation of access to justice in environmental matters, established by the Aarhus Convention, is influenced by the fundamental principles EU law, which will be further elaborated in the next chapter.

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<sup>150</sup> Case C-260/11 *The Queen, on the application of David Edwards and Another v Environment Agency and Others*, judgement of 11 April 2013, para. 33 (Case C-260/11 *Edwards and Pallikaropoulos*)

# 4 Case law from the European Court of Justice

The aim of this section is to investigate how the CJEU has interpreted national standing rules in the light of the Aarhus Convention, and the relevant EU legislation, in particular the Aarhus Regulation but also Directive 2003/35 amending the EIA and the IPPC Directive. The purpose is not to examine the case law only dealing with standing rights *per se*, but also the cases concerning the cost of litigation as this has an indirect effect on the national courts' accessibility.

First, the core of the thesis, namely the CJEU's interpretation on national requirements for environmental NGOs will be presented. This will be followed by a concluding analysis of the judgements occasionally illustrated and compared with the opinions delivered by Advocate General Sharpston. On this remark, the opinions of the Advocate General are of significant importance as they highlight and evaluate the possible role environmental NGOs can play in the protection of the environment, in this context. Thereafter, the case law concerning the cost of litigation will be examined, accomplished by an analysis where the opinions delivered by Advocate General Kokott will be taken into account. Lastly, some final remarks on the effects and outcomes of the judgements will be given.

## 4.1 The role of environmental NGOs

The purpose of this section is to examine how the CJEU interprets national legislation concerning standing requirements for NGOs promoting environmental protection, as well as the Court's reasoning concerning the role of these organisations in the light of the Aarhus Convention, and the relevant EU legislation.

### 4.1.1 Djurgården-Lilla Värtans Miljöskyddsförening

The main question of the case is to what extent Member States are able to impose restrictions on environmental NGOs access to justice. The case concerned a Swedish legislation that only allowed standing for Environmental NGOs with at least 2000 members.

The NGO Djurgården-Lilla Värtans Miljöförening appealed a judgement by the Environmental Chamber of the district court of Stockholm that granted

development consent in the area of Hjorthagen. Due to the fact that the NGO in question had not fulfilled the requirement under national law on having at least 2000 members to be allowed standing, the appeal was found to be inadmissible. The NGO challenged the decision before the Supreme Court that referred the case to the CJEU for a preliminary ruling asking in essence whether the Swedish rule was too restrictive in relation to the EIA Directive and the Aarhus Convention.

First, the CJEU found that members of the public concerned must have access to a review procedure unconditioned by their role in the decision-making procedure.<sup>151</sup> Regarding the Swedish requirements for NGOs to have 2000 Members to have access to justice, the CJEU stated Article 1(2) read in conjunction with article 10a of the EIA Directive, which implements the Aarhus Convention, states that the NGOs meeting any requirement under national law are to be seen either as having sufficient interest or as having rights that are capable of being impaired by projects falling within the scope of the Directive.<sup>152</sup> Even though the previously mentioned articles leave it up to the national legislation to determine the conditions that may be required for NGOs to have the right to appeal, these rules must ensure wide access to justice. Moreover, these national rules must not be liable to nullify Union provisions designated to enable qualified applicants to have access to justice in environmental matters.<sup>153</sup> The condition that an environmental protection association must have a minimum number of members may be relevant to ensure that it does exist and that it is active, but the number cannot be at such a level that it runs counter to the objectives of facilitating judicial review.<sup>154</sup> Moreover, with reference to the opinion of the Advocate General, the Court noted the Swedish legislation deprived small, local NGOs of the right to any judicial remedy.<sup>155</sup> In fact there were only two environmental NGOs in Sweden that had more than 2000 members, and these organizations may not have the same interest in smaller, regional projects as the local organisations. In conclusion, the court therefore found that national legislation could not limit the standing for NGOs to organizations that have at least 2000 members as it would run counter to the objective of giving environmental NGOs wide access to justice.

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<sup>151</sup> Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* (2009) ECR I-9967 para. 39

<sup>152</sup> *Ibid.*, at para. 44

<sup>153</sup> *Ibid.*, at para. 45

<sup>154</sup> *Ibid.*, at para. 47

<sup>155</sup> *Ibid.*, at para. 50

## 4.1.2 Trianel Kohlekraftwerk Lünen

The case concerns access to justice for environmental NGOs aiming to enforce the provisions providing for public participation in decision-making, under the EIA Directive.<sup>156</sup>

The company Trianel had been granted a permit to build and operate a coal-fired power plant, situated within 8 km of five special conservation areas protected under the Habitats Directive. The NGO Friends of the Earth sought to have the permit annulled, arguing it infringed the German law that transposed the Habitat Directive.<sup>157</sup> The German court, however, found that according to national law, neither an environmental NGO nor any other claimant could bring an action for an infringement of law without any alleged impairment of individual rights. As the law in question did not protect individual rights, the NGO could not seek an annulment of the permit. According to Article 10a of the EIA Directive, that reflects Article 9(2) in the Aarhus Convention, Member States are required to allow members of the public concerned who either have sufficient interest or maintain an impairment of a right to have access to a judicial appeals process. Moreover, it states that national legislation defining sufficient interest and impairment of a right must be consistent with the objective of giving the public concerned wide access to justice. Since the German Court questioned whether the national legislation undermined the provisions of art 10a of the EIA Directive they asked the CJEU for a preliminary ruling.

The CJEU stated it followed from Article 10a of the EIA Directive, in the light of the objectives of the Aarhus Convention and the Directive, that environmental NGOs should be given a broad right to standing in order to safeguard the effective implementation of laws designed to protect the environment.<sup>158</sup> The Court therefore found environmental NGOs meeting the requirement set up in article 1(2) of the EIA Directive deemed to have a sufficient interest and rights capable of being impaired in rules which are precise and not subject to other conditions. As a result these environmental NGOs should have a right to standing before national courts, in an action contesting decision authorising projects that are considered likely to have an significant effect on the environment. Consequently, the Court found the German legislation to be too restrictive and thereby hinder the objective of giving environmental NGOs wide access to justice.

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<sup>156</sup> Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment O.J 1985, L 175/40 as amended by Directive 97/11/EC, O.J. 1997, L73/5 and Directive 2003/35/EC, O.J. 2003, L156/17

<sup>157</sup> Directive 93/43/EEC

<sup>158</sup> Case C-115/09 Trianel Kohlekraftwek Lünen, *supra* note 108 paras 41-48

### 4.1.3 Lesoochránárske zoskupenie VLK

The case, often referred to as the *Slovak Brown Bear* case, concerned, in essence, the interpretation of Article 9(3) of the Aarhus Convention, and in particular the question on whether it has direct effect.

The environmental NGO Lesoochránárske zoskupenie VLK sought to in court contest the Slovakian Government's grant of licences to hunt brown bears. The request was rejected, and the NGO appealed to the Supreme Court which referred the case to the CJEU for a preliminary ruling regarding whether and how a particular aspect of the Slovak administrative procedural law was affected by article 9(3) in the Aarhus Convention.

The first two questions concerned the issue whether individuals, and in particular environmental organisations, seeking to challenge a decision to derogate from a system of environmental protection such as the one established by the Habitats Directive,<sup>159</sup> might derive a right to bring proceedings under EU law, and in that matter, if Article 9(3) of the Aarhus Convention has direct effect. To begin with, the Court noted that it followed from settled case law that since the Aarhus Convention was signed by the Union and subsequently approved by Decision 2005/370, its provisions constitute an integral part of the EU legal order.<sup>160</sup> As a result, the CJEU has jurisdiction to give preliminary rulings concerning such agreement, within the framework of that legal order.<sup>161</sup> Therefore, it had to be determined if the EU legislator has exercised its powers in the field covered by Article 9(3) of the Aarhus Convention.<sup>162</sup> With that in mind, the Court first underlined the fact that the Union has explicit external competence in the field of environmental protection.<sup>163</sup> Regarding the circumstances of the case, the CJEU found the issue fell within the scope of EU law since the Slovakian brown bears were protected under the EU Habitats Directive.<sup>164</sup> The Court continued by noting that it was stated in the declaration of competence made in accordance with Article 19(5) of the Aarhus Convention and annexed to Decision 2005/370, that 'the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the EU and will remain so unless

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<sup>159</sup> Directive 93/43/EEC

<sup>160</sup> See, by analogy, Case C-344/04 IATA and ELFAA (2006) ECR I-403, paragraph 36, and Case C-459/03 Commission v Ireland (2006) ECR I-4635, paragraph 82

<sup>161</sup> see, inter alia, Case 181/73 Haegeman (1974) ECR 449, paragraphs 4 to 6, and Case 12/86 Demirel (1987) ECR 3719, paragraph 7

<sup>162</sup> see, by analogy, Dior and Others, paragraph 48 and MerckGenéricos – Produtos Farmacêuticos, paragraph 34

<sup>163</sup> see, Commission v Ireland, paras. 94-95

<sup>164</sup> Case C-240/09 Lesoochránárske zoskupenie VLK (2011) *supra* note 106 at paras. 37-38

and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations'.<sup>165</sup> Despite this, the Court emphasized the fact that a specific issue that has not yet been subject to EU legislation still may fall within the scope of EU law if it relates to a field covered in large measure by it. In that remark, Article 9(3) has been incorporated into EU law through the Regulation 1367/2006, hereafter the Aarhus Regulation. The Court emphasized it was irrelevant that the Aarhus Regulation only concerns the institutions of the European Union, and therefore cannot be seen as an implementation of Article 9(3) with respect for national administrative or judicial proceedings. Hence, the CJEU found that "where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of EU law, it is clearly in the interest of the latter that, in order to forestall future differences of interpretation, that the provisions should be interpreted uniformly."<sup>166</sup>

Consequently, regarding the possible direct effect of the provision, the court concluded the Union had exercised its powers under article 9(3), and the Court therefore was competent to give a ruling, but found that as the provision did not contain a clear and precise obligation it did not have direct effect.<sup>167</sup> Nevertheless, the CJEU underlined that national courts are obliged to interpret EU environmental law, and the national law that transposes EU law, in order to ensure individuals and environmental organisations gain access to justice "to the fullest extent possible", in order to enforce this law.<sup>168</sup> The CJEU therefore concluded the national courts must, whenever they can, give standing in such cases to make sure EU environmental law is properly enforced.

#### 4.1.4 Comment

The rulings from the CJEU have improved and widened environmental NGO's access to the Member States' courts in environmental matters, by making clear that environmental NGOs must have standing in national courts during certain circumstances. In addition to the judgement of the Court, the opinions of Advocate General Sharpston is worth some attention due to the arguments she put forward regarding the role NGOs could play in environmental proceedings.

First, in the *Djurgarden* case the CJEU proclaimed that national requirements cannot be too restrictive and they have to be interpreted in the light of the objectives of the Aarhus Convention, which includes giving

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<sup>165</sup> *Ibid.*, at para. 39

<sup>166</sup> *Ibid.*, at paras. 41-42 with reference to Case C-130/95 *Giloy* (1997) ECR I-4291, paragraph 28, and Case C-53/96 *Hermès* (1998) ECR I-3603, paragraph 32

<sup>167</sup> *Ibid.*, at paras 44-45

<sup>168</sup> *Ibid.*, at para. 52



NGOs wide access to the courts.<sup>169</sup> In the opinion delivered by Advocate General Sharpston, she examined the potential role of NGOs. She concluded there are several reasons to grant environmental NGOs wide access to justice, and the underlying logic is the fact that “the individual is better protected by acting in a group and the group is collectively strengthened by its individual members.”<sup>170</sup> Successively, she argued, environmental NGOs can give expression to collective interest, and through their capacity of representing several different parties they have the ability to protect general objectives.<sup>171</sup> She emphasized that environmental NGOs can play an important role in strengthening the function of the courts, by their ability to bring together claims from several individuals into one single action. Moreover, as the environmental NGOs possess specialized knowledge in the environmental field, it enables them to distinguish the important cases, and thereby they have the capacity to rationalise how various conflicting interests are voiced and placed before the courts.<sup>172</sup> Subsequently, the Advocate General concluded that any national restrictions whose effect is to *hinder* rather than to *facilitate* access to justice for environmental NGOs must be rejected.<sup>173</sup>

Despite the fact that the Court did not go as far as the General Advocate Sharpston did in her opinion where she concluded that any environmental NGO, within the definition set out in national legislation in accordance with Article 1(2) in the EIA Directive, has an *automatic* right to standing, the judgement of the Court shows it intends to ensure environmental NGOs have an effective right to access to justice.<sup>174</sup> Moreover, this is in line with previous case law from the Court showing Member States cannot introduce procedural rules that make the exercise of the rights guaranteed by EU law impossible.<sup>175</sup> In conclusion, the judgement of the Court is noteworthy as it highlights the role of small, local NGOs as enforcers of EU environmental law.<sup>176</sup> On the other hand, it has been argued it is unfortunate neither the CJEU or the Advocate General addressed the inherent contradiction between the Member States’ expressed right, both in the Aarhus Convention and the relevant EU Directives, to lay down the standing requirements for environmental NGOs and their obligation to ensure “wide access to justice”.<sup>177</sup> Thereby, the limited guidance provided by the Court in the case

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<sup>169</sup> Müller B, Access to the courts of the Member States for NGOs in environmental matters under European Union law, Journal of Environmental Law, 2011, Oxford University Press, at 516

<sup>170</sup> Opinion of AG Sharpston delivered on 2 July 2009 in Case C-263/08 Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd para. 59

<sup>171</sup> *Ibid.*, at para. 61

<sup>172</sup> *Ibid.*, at para. 61

<sup>173</sup> *Ibid.*, at para. 74

<sup>174</sup> Poncelet C, Case study Access to justice in environmental matters: Recent developments, International Community Law review 14 (2012) at 183

<sup>175</sup> *Ibid.*, at 183, see for instance Case C-430/93 §17 Van Schijndel and Van Veen, 14 December 1995, Case C-129/00 §25 Commission v. Italy, 9 December 2003

<sup>176</sup> Ryall Áine, Case C-263/08, Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd, Common Market Law review 47, 2010, Kluwer Law International, at 1515

<sup>177</sup> *Ibid.*, at 1521

does not increase the legal certainty in these matters.<sup>178</sup> Lastly, it should be noted that due to the judgement in *Djurgården* the Swedish legislation has been changed, and today any organization with 100 members or more can appeal decision on permits and near-related issues, which has not increased the workload of the Swedish administrative courts<sup>179</sup>

In *Trianel* the CJEU ruled that NGO's must fulfil the requirement under national law, and they must also contend an infringement of provisions originated from EU environmental law regardless of the fact that they give rights not only to individuals but to the general public.<sup>180</sup> As Advocate General Sharpston put it in her opinion, the environmental NGO in the case was seeking to act on behalf of the environment, which was not possible under the German legislation as a party wishing to bring an action for judicial review had to rely on the infringement of a substantive individual right.<sup>181</sup> As a result, environmental NGOs could not request a review of an administrative action only because it violates a provision protecting the environment as such. Advocate General Sharpston underlined the fact that one of the express objectives of the Aarhus Convention is to widen access to justice in environmental matters. Regarding the argument put forward by the German government that this might overload the national courts, she stated that allowing environmental NGOs to bring actions before the courts may have the opposite effect, as it “may result in a more efficient and cost-efficient use of limited judicial resources”.<sup>182</sup> Moreover, she noted that in reality a very small percentage of the environmental actions in Germany are brought by environmental NGOs. Unlike the Advocate General, the CJEU also interpreted the German legislation via the principle of effectiveness and concluded in the specific case the interpretation of Article 10a of the EIA Directive lead to a limitation of the national procedural autonomy as the approach taken by Germany was in breach of the principle of effectiveness. Even though both Article 9(2) of the Aarhus Convention and Article 10a of the Directive says the implementation of its provisions should be done “in accordance with the relevant legal system” and that it is up to the Member State to determine what constitutes a “sufficient impairment of a right” resulting in right to access to justice, the Court’s judgement thereby limited the Member States’ margin of implementation in this matter.<sup>183</sup>

Due to the outcome of the case, it is arguable that there has been an increased ability for environmental NGOs to act as the voice of the environment, as the Court disqualified the German legislation for being too restrictive concerning environmental NGOs access to court. The judgement of the case put environmental NGOs in a “privileged position”, regarding

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<sup>178</sup> *Ibid.*, at 1521

<sup>179</sup> Brakeland J-F, Access to justice in environmental matters – developments at EU level, [http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2013/04/10pjp\\_brakeland.pdf](http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2013/04/10pjp_brakeland.pdf), Last updated 1 October 2013, at 9 (Brakeland)

<sup>180</sup> Müller (2011) *supra* note 169 at 516

<sup>181</sup> AG Sharpston opinion, Case C-115/09 *Trianel Kohlekraftwerk Lünen*, (2011) paras 1-2

<sup>182</sup> *Ibid.*, at paras 73, 78, 80

<sup>183</sup> Lohse (2012) *supra* note 129 at 249

their *locus standi*.<sup>184</sup> Despite the fact that the judgement relates to the implementation of Article 9(2) of the Convention, it has been suggested the reasoning could apply to the obligations arising from Article 9(3).<sup>185</sup> Moreover, the case has had significant outcome on the interpretation of the national law by the German courts, illustrated by the fact that a list of 17 judgements given by German administrative courts applying the *Trianel* judgement that was submitted by the German government to the Compliance Committee in case ACCC/C/2008/31.<sup>186</sup> In addition to this, Germany amended its legislation in order to comply with the judgement. However, the European Commission found the modifications of the German legislation to be insufficient, and therefore the Commission decided to take Germany to the CJEU over access to justice in environmental matters.<sup>187</sup>

In *Lesoochránske zoskupenie VLK* the CJEU clarified that environmental NGO's must not only have access to national courts in order to enforce their right to environmental information or their right to public participation, they should also be given access to court in other matters governed by EU environmental law, in line with Article 9(3) of the Aarhus Convention.<sup>188</sup> Nevertheless, the Court found the provision laid down in Article 9(3) did not have direct effect. As Advocate General Sharpston put it in her opinion, "Article 9(3) does not contain obligations that are sufficient clear and precise to govern the legal position of individuals directly, without further clarification or precision".<sup>189</sup> She highlighted the fact that the right for members of the public, by virtue of Article 9(3), to have access to administrative or judicial procedures is conditioned under the criteria laid down in national law, and neither the article itself nor other provisions of the Convention clarifies "what those criteria might or should be".<sup>190</sup> Actually, she noted, the intention of the drafters of the Convention seems to be that this definition should be left to the parties. Consequently, in absence of express limitation, the potential scope of the article might be very wide, and if Article 9(3) would be given direct effect the possibility for Member States to lay down specific criteria would be bypassed, resulting in consequences equal to establishing an *actio popularis*. Subsequently, she underlined that the Directive on access to justice in environmental matters remains un-adopted, and therefore it would be inappropriate for the judiciary to take this step instead of the EU legislature.<sup>191</sup>

It should be noted that the *Slovak Brown Bear* case was decided in grand chamber, which both gives the judgement weight and makes it unlikely to

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<sup>184</sup> Müller (2011) *supra* note 169 at 512

<sup>185</sup> Brakeland (2013) *supra* note 179 at 9

<sup>186</sup> *Ibid.*, at 16

<sup>187</sup> PRESS RELEASE European Commission 17 October 2013 Environment: European Commission takes Germany to Court over Access to Justice IP/13/967 Brussels, to be found at [http://europa.eu/rapid/press-release\\_IP-13-967\\_en.htm](http://europa.eu/rapid/press-release_IP-13-967_en.htm)

<sup>188</sup> Müller (2011) *supra* note 169 at 516

<sup>189</sup> Opinion of AG Sharpston delivered on 15 July 2010 in Case C-240/09 *Lesoochránske zoskupenie VLK* para. 87

<sup>190</sup> *Ibid.*, at para. 88

<sup>191</sup> *Ibid.*, at para. 89

be changed. Nevertheless, it has been argued in the doctrine that the practical effect of article 9(3), due to this judgement, can be questioned.<sup>192</sup> As a result of the case, applicants will have to persuade the national courts of the objective and spirit of article 9(3) in order to be given standing and since courts have a tendency to be rather conservative, the effect of the judgement will be that article 9(3) will not be very relevant in practice.<sup>193</sup> Therefore, it has been suggested it was possible for the Court to declare that the provisions of article 9(3) to be directly applicable and give standing for members of the public, until the Member State had laid down conditions to restrict such actions.<sup>194</sup> Instead of acknowledging the burden of legislation laid upon the Member States, the Court practically allowed them to benefit of their own positivity to lay down specific conditions.<sup>195</sup> Moreover, this is not in line with previous judgements delivered by the court regarding direct effect, as the court actually has argued that Member States should not be allowed to invoke its own omission to act to oppose the notion of direct effect of a EU provision.<sup>196</sup>

On the other hand, there have been judgements delivered from national courts contravening this prediction. To begin with, as a result of the judgement delivered in the *Slovak Brown Bear* case, the Supreme Court of the Slovak Republic decided to give standing to the NGOs concerning the authorisations to hunt the brown bears.<sup>197</sup> Through this decision, the court actually went beyond the requirement of “confirm interpretation” that been laid down by the CJEU, since it was in fact not possible to merely interpret the national law which clearly denied standing for NGOs.<sup>198</sup> As a result, the Slovakian Supreme Court gave the obligations of Article 9(3) of the Convention direct effect, by dis-applying the conflicting standing rules laid down in national law.<sup>199</sup> Furthermore, it has been suggested that the judgement may have implications on, and increase the possibility for environmental NGOs to have the right to standing, in other legal systems such as Slovenia, Hungary and the Czech Republic.<sup>200</sup> In addition to this, the Stockholm Administrative Court in Sweden has relied on the ruling in the *Slovak Brown Bear* case.<sup>201</sup> The case concerned the governmental decision to authorise the killing of wolves, a strictly protected species under the Habitats Directive.<sup>202</sup> These policies have been the subject to an on-going infringement proceeding by the European Commission.<sup>203</sup> According

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<sup>192</sup> Krämer (2011) *supra* note 75 at 147

<sup>193</sup> *Ibid.*, at 147

<sup>194</sup> *Ibid.*, at 147

<sup>195</sup> *Ibid.*, at

<sup>196</sup> *Ibid.*, at

<sup>197</sup> Brakeland (2013) *supra* note 179 at 17

<sup>198</sup> *Ibid.*, at 15

<sup>199</sup> *Ibid.*, at 17

<sup>200</sup> Eliantonio (2012) *supra* note 133 at 785

<sup>201</sup> Case 2428-23 ruling of 2 May 2013

<sup>202</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, at 7-50

<sup>203</sup> Epstein Y & Därpö J, The wild has no words: Environmental NGOs empowered to speak for protected species as Swedish Courts apply EU and international environmental

to Swedish procedural law, only the government is able to represent the public interest in administrative decision making and in the court, but as the national Court applied the ruling in the *Slovak Brown Bear* case, the national law was interpreted in order to allow environmental NGOs the possibility to challenge administrative decision for the protection of species under the Habitat Directive.<sup>204</sup>

In conclusion, the previously presented judgements on how the CJEU interprets national standing rules, have clarified the role of environmental NGOs, as well as giving effect for these organisations to have a broad right to standing before the national courts. The judgements in the *Trianel Case* and *Lesoochránárske zoskupenie VLK* “can be seen as a trend following the ruling in the *Djurgården Case*”.<sup>205</sup> The judgements have not solely been based on the Aarhus Convention, and the EU Directives implementing it. For instance, the Aarhus Regulation, despite the fact that it applies to the EU institutions and bodies, was of significant importance for the Court interpretation regarding their ability to give a judgement on Article 9(3) of the Convention. Furthermore, the need for natural procedural rules in this matter to be consistent with, and respect, the principle of effectiveness and effective judicial protection has had a substantial influence on the reasoning of the CJEU.<sup>206</sup> Lastly, these judgements are of significant importance for the full application of the rights guaranteed by the Aarhus Convention, and the Union implementation of it, at EU Member State level.

## 4.2 The costs of environmental proceedings

Due to the fact that the costs of the proceedings might constitute a barrier to access to justice in environmental matters, the scope and the definition of the rule established by the Aarhus Convention that the costs in environmental proceedings must not be prohibitively expensive is of significant importance.<sup>207</sup> The term “costs” includes participation or administrative appeal fees, court fees and other court costs, lawyers’ experts’ and witness’ fees, as well as securities or cross-undertakings in damages. It has been concluded that “the cost of the judicial procedures is considered to be an obstacle to environmental justice – or at least to have a dissuasive effect thereupon”, in the majority of the EU Member States.<sup>208</sup>

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law, *Journal of European Environmental & Planning Law* 10.3 (2013) at 250 (Epstein & Därpö)

<sup>204</sup> *Ibid.*, at 250

<sup>205</sup> Eliantonio (2012) *supra* note 133 at 776

<sup>206</sup> *Ibid.*, at 790

<sup>207</sup> See Article 9(4) the Aarhus Convention as well as Article 9(5); presented in chapter 2.2

<sup>208</sup> Därpö (2013) *supra* note 28

The CJEU has delivered three significant judgements on this matter; two stemming from infringements proceedings, and one from a request for a preliminary ruling. In the next part, a presentation of these judgments will be given, followed by a concluding analysis.

## 4.2.1 Commission v Ireland

The case concerns, in essence, the Commission's claim that Ireland had failed to transpose a number of EU law provisions<sup>209</sup> concerning access to justice, such as the obligation to inform the public about their rights in this matter, as well as the rule that the proceedings cannot be prohibitively expensive, into national law. The most relevant outcome of the case, in the context of this thesis, concerns the Court's reasoning regarding the costs of the proceedings.

To begin with, the CJEU underlined it follows from established case-law that the provisions of a directive must be implemented with unquestionable binding force and with specificity, precision and clarity required to satisfy the need for legal certainty, which requires that, regarding a directive conferring rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights.<sup>210</sup> The CJEU found Ireland had failed to transpose the Directive regarding the requirement that the procedures in question must not be prohibitively expensive. The CJEU stressed the fact that in Ireland there was no applicable ceiling on the amount that a successful applicant would have to pay, nor were there any legal provisions referring to the rule that the procedure would not be prohibitively expensive. The Court concluded it is clear from Article 10a of the EIA Directive, inserted by Article 3(7) of Directive 2003/35, and Article 15a of the IPPC Directive, inserted by Article 4(4) of Directive 2003/35, that procedures established in the context of those provisions must not be prohibitively expensive.<sup>211</sup> The CJEU underlined this only covers costs arising from participation in such procedures, and the condition does not hinder the courts from making an order for costs if the amount in question complies with that requirement. Furthermore, the CJEU held that the fact that it is common ground that the courts in Ireland may decline to order the unsuccessful party to pay the costs of the procedure, and in addition order expenditure incurred by the unsuccessful party to be borne by the other, cannot by its definition be certain.<sup>212</sup> As a result, this cannot be seen as a correct implementation of the Aarhus Conventions condition that environmental proceedings must not be "prohibitively expensive".

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<sup>209</sup> To be precise, the obligations under Articles 2(1), 4(2-4) of Directive 85/337/EEC and Articles 3(1-7) and 4(1-6) of Directive 2003/35/EC.

<sup>210</sup> Case C-427/07 Commission v Ireland (2009) I-06277 para.55 (Case C-427/07 Commission v Ireland)

<sup>211</sup> *Ibid.*, at para.92

<sup>212</sup> *Ibid.*, at paras 93-94

## 4.2.2 Edwards and Pallikaropoulos

The case concerned the rule that judicial proceedings should not be prohibitively expensive, laid down in Article 9(5) of the Aarhus Convention and implemented by Article 10a paragraph five of the EIA Directive and the Article 15a paragraph 5 of the IPPC Directive, as amended by Directive 2003/35/EC.

Mr Edwards had brought an action for judicial review of a permit for a large cement work, relying on the fact that the project had not been subject to an environmental impact assessment. The action was dismissed, and even though he appealed the case he eventually decided to withdraw and instead Ms Pallikaropoulos took part as the appellant. When she lost the case she was ordered to bear her own costs and pay the respondent's litigation cost at approximately GBP 90 000, which she appealed to the British Supreme Court that asked the CJEU for a preliminary ruling.

To begin with, the CJEU underlined the fact that the requirement that costs should not be prohibitively expensive does not prevent national courts from making an order of costs.<sup>213</sup> In that regard the Court made a reference to the Aarhus Convention, as this is explicitly expressed in its Article 3(8).

The CJEU found, in essence, that the requirement that litigation should not be prohibitively expensive concerns all the costs relating to participation in the judicial proceedings and therefore the costs must be assessed as a whole, and include all the costs borne by the concerned party.<sup>214</sup> Moreover, the CJEU affirmed that the assessment of what must be seen as prohibitively expensive is not solely a matter of national law due to the need for the uniform application of EU law, and the principle of equality, by taking the context and the purpose of the provision into account.<sup>215</sup> As the objective of the EU legislature is to give the public wide access to justice, so they can play an active role in protecting and improving the quality of the environment, the requirement that cost shall not be prohibitively expensive relates to the fulfilment of the right to effective remedy enshrined in article 47 of the Charter of fundamental rights.<sup>216</sup> Furthermore, it relates to the principle of effectiveness, meaning detailed procedural rules governing actions for safeguarding an individual's rights under EU law must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law.<sup>217</sup> The CJEU stated the requirement that judicial proceedings should not be prohibitively expensive means the persons covered by those

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<sup>213</sup> Case C-260/11 *Edwards and Pallikaropoulos* (2013) *supra* note 150, para. 25, with reference to Case C-427/07 *Commission v Ireland* (2009) para.92

<sup>214</sup> Case C-260/11 *Edwards and Pallikaropoulos* (2013) *supra* note 150, paras 27- 28

<sup>215</sup> *Ibid.*, at paras 29-30

<sup>216</sup> *Ibid.*, at para. 33

<sup>217</sup> See inter alia Case C-240/09 *Lesoochranské zoskupenie VLK* (2011) *supra* note 106

provisions should not be prevented from seeking, or pursuing claim for a review by the courts due to the financial burden this might cause.<sup>218</sup>

Moreover, the CJEU stated it must be recalled that where EU law lacks precision Member States retrain a broad discretion, when transposing a directive, to ensure it is fully effective, concerning the choice of methods.<sup>219</sup> In order to assess the costs the CJEU proclaimed it is not enough to look at the financial situation of the person concerned, this must also be based on an objective analysis of the amount of the cost, as the cost of proceedings must not appear for the public as being objectively unreasonable.<sup>220</sup> When deciding the figure, other factors relevant are the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and the protection of the environment, the complexity of relevant law and procedure, the “potentially frivolous nature of the claim” at its different stages and the existence of a national legal aid scheme or a cost of protection regime.<sup>221</sup> Additionally, the CJEU found that the fact that the claimant has not been deterred from asserting the claim is not in itself sufficient to establish that the costs have not been prohibitively expensive for that person. Lastly, the CJEU added that the assessment of the costs cannot be conducted according to diverse criteria depending on whether it is made at the termination of a first-instance proceeding, an appeal or a second appeal.

### 4.2.3 Commission v United Kingdom

The Commission brought infringement proceedings against the United Kingdom claiming they had failed to fully transpose and correctly apply Article 3(7) and 4(4) of Directive 2003/35/EC on public participation, amending the EIA Directive respectively the IPPC Directive with regard to public participation and access to justice, and thereby not obliged to the rule that proceedings cannot be prohibitively expensive. The Commission claimed the potential financial costs of losing procedures might prevent NGOs and individuals from challenging public authorities’ decisions in environmental matters.

In the United Kingdom, in the end of a case, a so called “protective cost orders” can be granted in order to limit the amount a public authority is able to recover, but the Commission argued that the lack of clear rules for giving such orders, as well as its discretionary and unpredictable nature, is not in accordance with the Directive. Moreover, the national norm is still that the losing party pays the winner’s costs. In addition to this, the Commission was concerned that the national law, obliging applicants for interim measures and injunctions suspending work on projects, to provide a “cross undertaking in damages”, meaning they promise to pay damages if

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<sup>218</sup> Case C-260/11 *Edwards and Pallikaropoulos* (2013) *supra* note 150, para 35

<sup>219</sup> *Ibid.*, at para 37, with reference to Case C-427/07 *Commission v Ireland* (2009) para.92

<sup>220</sup> *Ibid.*, at paras 40-41

<sup>221</sup> *Ibid.*, at paras 42 and 46



the measure turns out to be unfounded, hinders potential applications to make such orders.

To begin with, the CJEU underlined that according to settled case law the transposition of a directive does not necessarily require the provisions to be enacted in a specific, express provision of national law, instead it may be sufficient if it is laid down in a general legal context.<sup>222</sup> The Court stressed that “where a relevant provision is designated to create rights for individuals, the legal situation must be sufficiently precise and clear, and the person concerned must be put in a position to know the full extent of their rights and, where appropriate, to be able to rely on them before the national courts.”<sup>223</sup> Nevertheless, the CJEU stressed that not every judicial practice is uncertain and inherently incapable of meeting these requirements. Furthermore, with reference to the requirements laid down in *Edwards and Pallikaropoulos*,<sup>224</sup> the Court stated that the discretion available to the national courts when applying the national costs regime is not in itself incompatible with the requirement that proceedings must not be prohibitively expensive, and the possibility for the court hearing a case of granting a protective costs order actually ensures greater predictability of the costs of the proceedings and contributes to compliance with that requirement.<sup>225</sup> Nevertheless, the CJEU concluded that the mere fact there ought to be a comprehensive analysis and assess of the effect of a body of case law to determine whether national law meets the objectives of Directive 2003/35, while EU law confers on individuals’ specific rights that need to be unequivocal to be effective, suggests that the national transposition is not sufficient clear and precise.<sup>226</sup> Moreover, the regime laid down by the national case law does not assure possible claimants reasonable predictability of the total amount of the proceedings, despite the fact that this is particularly necessary in a country like the United Kingdom where the costs of litigations are known to be high.<sup>227</sup>

Regarding the cross-undertakings in respect of the grant of interim relief, the Court repeated its statement in *Edwards and Pallikaropoulos* that in order to determine if the costs are not prohibitively expensive within the meaning of the Directive, all financial costs must be assessed as a whole.<sup>228</sup> Moreover, the Court noted it follows from case law that a national court, in a dispute governed by EU law, must be able to grant interim relief to

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<sup>222</sup> C-530/11 *Commission v United Kingdom* (2014) Judgement delivered 13 February 2014, para.33 (C-530/11 *Commission v United Kingdom*) with reference to Case 29/84 *Commission v Germany* (1985) ECR 1661, paragraph 23, and previously presented *Commission v Ireland*, para 54

<sup>223</sup> *Ibid.*, at para.34, with reference to Case C-233/00 *Commission v France* (2003) ECR I-6625, para 76

<sup>224</sup> *Ibid.*, at para.44-51, with reference to Case C-260/11 *Edwards and Pallikaropoulos* (2013) *supra* note 150, paras 25, 26, 28, 35, 37, 38, 40-43, 45

<sup>225</sup> *Ibid.*, at para. 54

<sup>226</sup> *Ibid.*, at para.56

<sup>227</sup> *Ibid.*, at para.58

<sup>228</sup> *Ibid.*, at para.64, with reference to Case C-260/11 *Edwards and Pallikaropoulos* (2013) *supra* note 150, paras. 27-28

guarantee the full effectiveness of the judgement to be given on rights claimed under EU-law, which includes EU environmental law.<sup>229</sup> Consequently, when a dispute falls within Directive 2003/35, amending the EIA Directive and the IPPC Directive, the requirement that proceedings are not to be prohibitively expensive is also applicable to costs arising from measures national courts might impose as a condition for granting interim measures.<sup>230</sup> The CJEU, however, underlined that besides this fact, the conditions for such interim relief are in principle a matter for national law alone, as long as the principle of effectiveness and equivalence is observed. Thereby, the “not prohibitively expensive-rule” does not preclude the application of financial guarantees as such. Still, the national courts must make sure the resulting financial risk for the claimant is included in the total amounts of the proceedings when the court assesses whether the proceedings are prohibitively expensive.<sup>231</sup> Thereby, the CJEU found the system of cross-undertakings in respect for the grant of interim relief to compose an additional element of uncertainty and imprecision regarding the costs of the proceedings.<sup>232</sup>

Consequently, the Court held the United Kingdom had failed to correctly transpose Articles 3(7) and 4(4) of Directive 2003/35 regarding the requirement that proceedings must not be prohibitively expensive.

#### 4.2.4 Comment

The previously presented case law is of significant importance regarding the interpretation of the scope and meaning of the rule, established by the Aarhus Convention, that the costs of environmental proceedings must not prohibitively expensive. In addition to this, the opinions delivered by the Advocate General Kokott in the three cases, also provide guidance, especially regarding the interaction between the Aarhus Convention and fundamental EU law in this matter.

To begin with, as the Advocate General Kokott pointed out in her opinion in *Edwards and Pallikaropoulos*, the interpretation of the prevention of prohibitively expensive judicial proceedings can be derived from the wording of the provision, but also from its context, and therefore other articles of the Aarhus Convention should be taken into account. In addition to this, the general requirements governing the transposition and implementation of EU law are significant, such as the need for sufficiently clear transposition, the principle of effectiveness and equivalence, and fundamental rights under EU law.<sup>233</sup> Furthermore, she pointed out that the discretion of the EU Member States regarding the implementation of these provisions is particularly broad since they “do not contain any further rules

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<sup>229</sup> *Ibid.*, at with reference to Case C-416/10 Jozef Krizan v. Slovenská inspekcia zivotného prostredia, Judgment of the Court of Justice of 15 January 2013, paras. 107 and 109

<sup>230</sup> *Ibid.*, at para.66

<sup>231</sup> *Ibid.*, at paras. 67-68

<sup>232</sup> *Ibid.*, at para.71

<sup>233</sup> AG Kokott opinion in Case C-260/11 Edwards and Pallikaropoulos (2013) para.26

on how prohibitively costs are specifically to be prevented”.<sup>234</sup> She underlined the fact that the great diversity of cost regimes in the Member States highlights the need for that discretion, and neither Article 9(4) of the Convention, nor the Directives implementing it, are intended to comprehensively harmonize these systems, instead they only require necessary adaptations.<sup>235</sup> Despite this fact, she continued, the discretion enjoyed by the Member States is not unlimited, as they are responsible for ensuring that the rights stemming from EU law are effectively protected in each case and therefore the Member States’ rules must ensure in each individual case that the costs of the judicial proceedings are not prohibitively expensive.<sup>236</sup> Still, according to the study made on the implementation of Article 9(3) and 9(4) in the EU Member States, the costs of judicial procedures are believed to have a “clear chilling effect” to access to justice in environmental matters in several of the examined legal systems.<sup>237</sup> Actually, there are Member States where the costs even might constitute an obstacle.<sup>238</sup> The main issues relate to high court fees, the mandatory use of attorneys in court in combination with high lawyers’ fees, expenses for expert witnesses and high bonds for obtaining injunctive relief, and the loser pays principle in relation to cost liability for the lawyers of the operator and/or authorities.<sup>239</sup> In particular, the uncertainties concerning the costs are found to be a barrier to the willingness to challenge administrative decisions in environmental matters.<sup>240</sup>

In *Commission v Ireland* the CJEU ruled that a judicial practice under which the Courts simply have the power to decline to order an unsuccessful party to pay the costs and can order expenditure incurred by the unsuccessful party to be borne by the other party, is by definition uncertain and therefore does not meet the requirements of clarity and precision needed to be seen as a valid implementation of the obligations laid down in Directive 2003/35, relating to the not prohibitively expensive requirement.<sup>241</sup> Moreover, as Advocate General Kokott pointed out in her opinion of the case, Article 9(5) of the Aarhus Convention stating that “each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice” must, regardless of any express mention in Directive 2003/35, be taken into account when interpreting Article 9(4) of the Convention, and the provisions in the Directives designed to reflect it.<sup>242</sup> Furthermore, Advocate General Kokott found that Article 47 of the Charter of fundamental rights, requiring legal aid to be granted in so far as such aid is necessary to ensure access to justice, as it by that time did not have legal

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<sup>234</sup> *Ibid.*, at para.20

<sup>235</sup> *Ibid.*, at para.21

<sup>236</sup> *Ibid.*, at paras 23-24

<sup>237</sup> Därpö (2013) *supra* note 28 at 38

<sup>238</sup> *Ibid.*, at 38

<sup>239</sup> *Ibid.*, at 38

<sup>240</sup> *Ibid.*, at 38

<sup>241</sup> Case C-427/07 *Commission v Ireland* (2009) *supra* note 210, para.94

<sup>242</sup> AG Kokott Case C-427/07 *Commission v Ireland* (2009) para.91

effect comparable of that of primary law, should serve as a source of legal guidance.<sup>243</sup>

In *Edwards and Pallikaropoulos* the CJEU delivered further clarification of the meaning of the not prohibitively expensive rule, by stating that it does not prevent the national courts from making an order for costs in judicial proceedings provided the amount is reasonable, and that the whole costs are taken into account when assessing whether they are not prohibitively expensive.<sup>244</sup> Moreover, the both the interest of the person seeking to defend his/her rights and the public interest in the protection of the environment must be taken into account.<sup>245</sup> Of most importance, as the Advocate General stated in her opinion, “the proceedings may not be so expensive that the costs threaten to prevent them from being conducted”.<sup>246</sup> In that remark she underlined that it is significant that provisions of the Aarhus Convention on judicial proceedings are interpreted in the light of the aim to ensure “wide access to justice”. Even though “wide access to justice” is only expressively mentioned in Article 9(2), Advocate General Kokott emphasized it is clear that this is a general objective of the Convention, and must therefore be applied while examining what constitutes permissible costs of the proceedings.

Lastly, in *Commission v United Kingdom* the CJEU provided further guidance concerning costs and interim relief measures in environmental cases.<sup>247</sup> As Advocate General Kokott put it; the ruling in *Edwards and Pallikaropoulos* was of significant importance when examining the circumstances of the case. The CJEU as well, relied both on the requirements laid down in the Edwards Case, and also referred to what had been established in the Commission v Ireland Case, when examining if the United Kingdom had fully transposed and correctly applied the rule that environmental proceedings must not be prohibitively expensive. The Court found, in essence, that the British regime laid down by the case law did not assure possible claimants reasonable predictability of the costs of the proceedings, and regarding the cross-undertakings in respect for the grant of interim relief, the Court underlined all financial costs must be assessed as a whole.

In conclusion, the judgements delivered by the Court concerning the costs of environmental proceedings, are of significant importance as the costs might compose a hinder to access to justice in environmental matters. Through these judgements the Court outlined several conditions they found to be embedded in the requirement that proceedings must not be prohibitively expensive, and clarified the meaning of the EU implementation of Article 9(4) and 9(5) of the Aarhus Convention.

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<sup>243</sup> *Ibid.*, at para.92

<sup>244</sup> Case C-260/11 *Edwards and Pallikaropoulos* (2013) *supra* note 150, paras 25, 26, 28

<sup>245</sup> *Ibid.*, at para. 35

<sup>246</sup> AG Kokott opinion in Case C-260/11 *Edwards and Pallikaropoulos* (2013) para.29

<sup>247</sup> C-530/11 *Commission v United Kingdom* (2014) *supra* note 222

### 4.3 Concluding remarks

The main outcome of this case law is that the allowed national standing requirements for environmental NGOs and costs of the proceedings, in the light of the Aarhus Convention and the relevant EU legislation, have been clarified. Moreover, the CJEU has broadened access to justice for environmental NGOs in several Member States. Lastly, it should be mentioned that since the case law from the CJEU shows the right to access the EU Courts in order to challenge decisions of EU institutions is very limited, especially for environmental NGOs, it has been suggested, originally from the Court itself,<sup>248</sup> that a more plausible route to question the validity of EU law could be made through national courts via their request for a preliminary ruling.<sup>249</sup> Thereby, the broadened access to the national courts, established by this case law, might increase this possibility.<sup>250</sup>

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<sup>248</sup> Case C-263/02 *Jégo-Quéré v Commission* (2004) ECR I-3443

<sup>249</sup> *Bogojevic* (2013) *supra* note 54 at 730

<sup>250</sup> *Ibid.*, at 739

## 5 Analysis

The EU and the Member States' implementation of, and compliance with, the Aarhus Convention have not been unproblematic. In fact, there have been several legal ambiguities both regarding the EU legal order and the internal legal order of several EU Member States.<sup>251</sup> For example, as part of the implementation of the Aarhus Convention, examined in chapter two, the Commission made a proposal for a Directive on access to justice in environmental matters, but the Member States opposed this suggestion due to the principle of subsidiarity. Consequently, access to justice in environmental matters still varies throughout the Union, and in several Member States there are a number of barriers potential applicants have to overcome.<sup>252</sup> Thereby, the judgements delivered by the CJEU on access to justice in environmental matters at EU Member State level are of particular importance, especially considering the progressive approach taken by the Court. The main focus of this thesis has been put on the part of this case law addressing national standing requirements for environmental NGOs as well as the costs of the environmental proceedings, in the light of the Aarhus Convention and the relevant EU legislation.

It is clear from the previous presentation that the CJEU has played an important role concerning the interpretation of access to the EU Member States courts in environmental matters. First it should be noted that the Court has not solely relied on the Aarhus Convention, and the EU implementation of it, instead the reasoning of the Court is also based on the principle of effectiveness of EU law, the right to effective judicial protection, as well as Article 47 of the Charter of fundamental rights.<sup>253</sup> In that remark, the judgements delivered by the Court, for instance the judgement in *Trianel*, have resulted in a growing influence of the Aarhus Convention in the EU Member States, partly due to an excessive interpretation of the principle of effectiveness.<sup>254</sup> Thereby, the rulings of the CJEU in this aspect are bound to have a significant outcome for the Member States. For instance in Sweden, the national courts' interpretation of this case law, through the application of the principle of effectiveness along with the implementation of the Aarhus Convention has resulted in significant changes of Swedish procedural law, including areas that fall outside the scope of the national environmental legislation.<sup>255</sup>

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<sup>251</sup> Pallemarts (2011) *supra* note 6 at 5

<sup>252</sup> See Därpö (2013) *supra* note 28

<sup>253</sup> Brakeland (2013) *supra* note 179 at 23

<sup>254</sup> Epstein & Därpö (2013) *supra* note 203 at 254 as well as Lohse (2012) *supra* note 129 at 249

<sup>255</sup> Epstein & Därpö (2013) *supra* note 203 at 255

The main outcome of the studied case law from the CJEU is the widened access to the EU Member State Courts. Before returning to the analysis of these judgements there will be an examination of the arguments put forward, both on the political level and in the doctrine, to broaden the access to justice in environmental matters at EU Member State level. As stated in the introduction, the general reasons why enforcing access to justice in environmental matters are; it may add to the protection of public environmental interests, enforce the implementation of existing environmental laws, and increase the legitimacy of environmental decisions.<sup>256</sup> Moreover, as the environment has no voice of its own, in order to enforce the protection of it, for instance environmental NGOs must be able to speak on behalf of it.<sup>257</sup>

According to the Commission, the main reason why EU environmental law is less fully enforced compared to laws concerning for instance the internal market, is the lack of financial motivation in these cases.<sup>258</sup> In addition, these variations between the Member States, and the irregular enforcement of EU environmental law, may distort the functioning of the internal market, as this give economic operators in Member States that do not comply with their obligations an economic advantage over those that respect the environmental legislation.<sup>259</sup> Also, the potential costs of the lack of enforcement should be taken into account. Thereby, there are also economic incitements to broaden access to justice in environmental matters in the EU Member States. Consequently, increasing for instance the ability of environmental NGOs to have access to court, relying on infringement or lack of enforcement of EU environmental law, would not only serve the purpose to protect the environment as such.

In the judgements delivered by the CJEU, the role of NGOs in environmental protection has been highlighted, even though not to the same extent as in the opinions delivered by Advocate General Sharpston. Nevertheless, it is clear the Court has facilitated access to justice for environmental NGOs in the EU Member State. Thereby, the question arises what consequences this will lead to for the Member States? It has been argued that broad access to justice in environmental matters could risk overloading the courts, but this has showed not to be the case in the EU Member States where the legislation has been changed in order to allow wider access.<sup>260</sup> Additionally, broad access to justice for environmental NGOs can actually increase the efficiency of the procedures, as these organisations both may filter the number of applicants and provide with expert knowledge in the environmental field.<sup>261</sup> Moreover, the European Commission has acknowledged that the practical experience gained from granting legal standing for environmental NGOs indicates that this improves

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<sup>256</sup> Ebbesson (2002) *supra* note 13 at 7

<sup>257</sup> See; Stone (2010) *supra* note 17 at 1-31

<sup>258</sup> COM(2003) 624 final, *supra* note 22 at 624

<sup>259</sup> *Ibid.*, at Explanatory Memorandum 1.1

<sup>260</sup> Därpö (2013) *supra* note 28

<sup>261</sup> Faure et al. (2013) *supra* note 26 at

the implementation of environmental law.<sup>262</sup> The judgements delivered by the CJEU on access to the EU Member States courts for environmental NGOs, and in particular the opinions delivered by the Advocate General, are well in line with this reasoning. Thereby, through the CJEU's interpretation of the national standing requirements environmental NGOs access to the national courts has been broadened and facilitated. As Advocate General Sharpston put it in *Djurgaarden*; wide access to justice for environmental NGOs could ensure the representation of public interest with a high level of technical specialisation, and give the environment the voice it needs.<sup>263</sup>

As the costs of the proceedings might constitute an indirect hinder to access to justice in environmental matters, the CJEU's judgements clarifying the rule that costs must not be prohibitively expensive might have a significant effect on the accessibility to the EU Member State courts, especially in systems where the legal fees tend to be high. Thereby, I believe these judgements to have an impact on environmental NGOs ability to take action in court, especially for the smaller, local organisations with limited resources. As a result, these judgements, in combination with the outcome in the *Djurgaarden* case where the importance of local NGOs was highlighted, the smaller environmental NGOs possibilities to have an influence on environmental matters have increased. Consequently, their competence to enforce environmental protection, through the national courts, at the local level is enhanced. Moreover, as these cases *Commission v Ireland* and *Commission v United Kingdom*, concern the so far only judicial outcome of the Commissions infringement proceedings against Member States for failing to oblige to their obligation originating from the Aarhus Convention's provisions on access to justice in environmental matters, they are significant in order to put focus on these issues. Moreover, these cases indicate the Commission monitors this legal area and thereby the Member States' obligation to adjust both to the EU legislation, and the corresponding case law from the CJEU, is highlighted.

The last question to answer is if there is a need of further clarification from the CJEU, or harmonizing measures from the EU legislator. According to the 7<sup>th</sup> EAP, that set up to ensure that "the principle of effective legal protection for citizen and their organizations is facilitated,"<sup>264</sup> the maximisation of the benefits of EU environmental legislation can only be achieved if the national provisions on access to justice in environmental matter reflect the case law of the CJEU.<sup>265</sup> To begin with, it should be underlined that the EU Directives put in place to implement the provisions of the Aarhus Convention, do not cover all aspects of the Convention. Access to justice regarding public participation in decision-making,

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<sup>262</sup> COM(2003) 624 final, *supra* note 22 at Explanatory Memorandum 3.1

<sup>263</sup> Opinion of AG Sharpston delivered on 2 July 2009 in Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* para. 61

<sup>264</sup> Decision 1386/2013/EU of the European Parliament and the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet" OJ L 354, 28/12/2013, point 65(e)

<sup>265</sup> *Ibid.*, at point 65(v)



established through Directive 2003/35, only applies to situations covered by the EIA and the IPPC Directive. Above all, Article 9(3) of the Convention regarding access to justice to challenge acts and omissions by private persons and public authorities which violate provisions of national law relating to the environment, has not yet been implemented by any directive. Nevertheless, it has been argued that the broad access to justice contained in the proposed directive on access to justice in environmental matters, which the Member States opposed, seems to be realized to a certain extent through the case law developed by the CJEU, in particular due to the judgement in the *Slovak Brown Bear* case.<sup>266</sup> Still, this will not ensure the full application of Article 9(3) of the Convention in all Member States, due to the fact that such Aarhus-conform interpretation of national law depends both on the wording of the national law in question as well as the national doctrine on conform interpretation of international law.<sup>267</sup> Moreover, to await for the Member State to adjust to the case law from the CJEU will be too time consuming and uncertain.<sup>268</sup> In that remark, it should be remembered, as noted above, that there are still ambiguities regarding the right to access to justice at EU Member State level for environmental NGOs. Furthermore, as stated in the proposed Directive on access to justice, “environmental law will only produce the desired effects if its enforcement is possible throughout the Union”.<sup>269</sup> Consequently, in order to level the playing field and achieve legal certainty, the conclusion drawn in this thesis, based on the analysis of the examined case law as well as arguments put forward both in the doctrine and studies on this matter, is that there is a need of further clarification from the CJEU, or preferably, legislative measures taken at Union level.<sup>270</sup>

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<sup>266</sup> Faure et al. (2013) *supra* note 26 at 13

<sup>267</sup> *Ibid.*, at 13

<sup>268</sup> Därpö (2013) *supra* note 28 at 25

<sup>269</sup> COM(2003) 624 final, *supra* note 22 at Explanatory Memorandum 1.2

<sup>270</sup> See for instance Pánovics (2010) *supra* note 3

## 6 Conclusion

Already in the Rio Declaration it was proclaimed that an informed and active society could play a crucial role in the preservation of the environment.<sup>271</sup> This acknowledgement later became the foundation of the UNECE's Convention on access to information, participation in decision-making, and access to justice in environmental matters. The focus on this thesis has been put on what is said to be the most controversial part of the Convention, and the EU legislation implementing it, namely access to justice in environmental matters.<sup>272</sup>

It is beyond doubt the CJEU has played a key role when it comes to the interpretation of the Aarhus Convention, and the EU implementation of it. The presented judgements have had significant effect on access to court in the EU Member States. To begin with, when the CJEU's interpreted the national standing requirements for environmental NGOs the Court highlighted the important role of these organisations as well as the objective of the Aarhus Convention to grant NGOs wide access to justice in environmental matters. Furthermore, as the costs of environmental proceedings might constitute an indirect hinder to access to justice, the CJEU has concluded that the costs must be examined in the light of the objective of the Aarhus Convention to establish wide access to justice in environmental matter. Consequently, these judgements may increase the ability for both individuals and environmental organisations to take action in court.

Nevertheless, there are still issues regarding the right to access to justice in environmental matters that need to be resolved.<sup>273</sup> In order to enforce EU environmental legislation and achieve legal certainty throughout the Union, the conclusion drawn in this thesis, based on the analysis of the examined case law as well as arguments put forward both in the doctrine<sup>274</sup> and in studies ordered by the Commission in order to investigate this subject,<sup>275</sup> is that there should be measures taken by the EU legislator. What approaches the EU legislator will take, whether deciding to take action and outline a Directive on access to justice in environmental matter, or leave it up to the CJEU to continue to clarify this legal area, remains to be seen.

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<sup>271</sup> See Bisman (2013) *supra* note 7 at 293

<sup>272</sup> Pallemarts (2011) *supra* note 6 at 13

<sup>273</sup> Oliver (2013) *supra* note 16 at 1470

<sup>274</sup> Pánovics (2010) *supra* note 3 at 136-140

<sup>275</sup> Därpö (2013) *supra* note 28 & Faure et al. (2013) *supra* note 26

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Case C-416/10 *Jozef Krizan v. Slovenská inspekcia životného prostredia*, Judgment of 15 January 2013

Case C-72/12 *Gemeinde Altrip and Others v Land Rheinland*, judgement of 7 November 2013

Case C-530/11 *Commission v United Kingdom*, Judgement of 13 February 2014

## **OPINIONS OF THE ADVOCATE GENERAL**

Opinion of AG Kokott delivered on 18 October 2012  
Case C-260/11 *The Queen, on the application of David Edwards and Another v Environment Agency and Others*

Opinion of AG Kokott delivered on 15 January 2009  
Case C-427/07 *Commission v Ireland*

Opinion of AG Kokott delivered on 12 September 2013  
Case C-530/11 *Commission v United Kingdom*

Opinion of AG Sharpston delivered on 2 July 2009  
Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*

Opinion of AG Sharpston delivered on 15 July 2010  
Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*

Opinion of AG Sharpston delivered on 16 December 2010  
Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg Trianel Kohlekraftwerk Lünen (intervening)*

# Legislation

## INTERNATIONAL LEGISLATION

The Rio Declaration UN Doc. A/CONF/151/5/Rev.1

United Nation Economic Commission for Europe's Convention on Access to Information, public participation in decision-making, access to justice in environmental matters (adopted 25 July 1998, entered into force 30 October 2001) 2161 UNTS 447

## EUROPEAN UNION LEGISLATION

### *Treaties*

Treaty on the European Union (Consolidated version) (2010) OJ C83/13

Treaty on the Functioning of the European Union (Consolidated version) (2010) OJ C83/47

Charter of Fundamental Rights of the European Union (2010) OJ C83/389

### *Secondary legislation*

Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to information, public participation in decision-making and access to justice in environmental matters to Community Institutions and bodies, (2006) OJ L264/13

Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC (2003) OJ L41/27

Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (2003) OJ L156/17

Directive 96/61 concerning integrated pollution prevention and control (1996) OJ L257/26

Directive 2010/75 on industrial emissions (integrated pollution prevention and control) (2010) OJ L344/17

Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment (1985) OJ L175/40

Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (1992) OJ L 206

Directive 85/337 on the assessment of the effects of certain public and private projects on the environment (1985) OJ L175/40

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

Decision 1386/2013/EU of the European Parliament and the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 "*Living well, within the limits of our planet*" OJ L 354, 28/12/2013, p. 171–200

