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The Role of Competence in EU Implementation and Enforcement of IEAs

- A case study on the Aarhus Convention

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Contents

Summary

The aim of this thesis is to identify and study the division of competence between the EU and its Member States in relation to international environmental agreements (IEAs) and to attempt to ascertain how this division affects the responsibility for implementation and enforcement of IEAs in the EU, and to some extent, the liability towards third parties. In order to establish the role of competence for compliance with IEAs, five research questions were formulated. These concern how the division of competences affect the implementation of IEAs, EU enforcement of IEAs, the attribution of responsibility for non-compliance, the effect on the realisation of IEAs and the practical application of these rules. For the latter, a case study on the Aarhus Convention was completed to study how competence has been approached in relation to an IEA.

Environmental agreements are, as a rule, mixed agreements, meaning that both the EU and its Member States has acceded to the agreement. The reason for this is that competence is, according to Article Article 4 (2)(e) TFEU, shared between the EU and the Member States in environmental matters. According to case law from the Court of Justice of the European Union (CJEU), mixed agreements, just as other international agreements that the EU is a party to, are considered as primary legislation within the EU legal order. When acceding to an IEA, the practice of the EU is to submit a declaration of competence, clarifying the division of competence in relation to the agreement in question, and the responsibilities of the EU and the Member States respectively.

The study shows that the role of compliance varies in relation to different features associated with compliance. The main ones studied in this thesis are: the implementation of an IEA in the EU, commission enforcement of IEAs and the attribution of liability for the fulfilment of IEA obligations. In relation to implementation, the internal competence rules of the EU seem to be fully applied. It is clear from the Aarhus Convention that the EU has the discretion to divide the responsibility for the fulfilment of the obligations of the Convention between itself and its Member States.

The question of Commission enforcement of IEAs is less clear. CJEU case law makes clear that the Commission has a wide competence to bring Member States before the CJEU failing to respect provisions of a mixed agreement. Although it is the responsibility of the Commission to supervise the application of EU legislation, this duty does not seem to be reflected in relation to the supervision of compliance with IEAs.

Regarding liability, the basic rule is that the EU and its Member States are jointly liable for the fulfilment of obligations arising from mixed agreements. However, there are cases where the EU has stated that it is not responsible for the performance of a specific provision, but that it’s Member States carry this responsibility. In relation to the Aarhus Convention, the Compliance Committee has in general taken a pragmatic standpoint that the party that is the ablest to ensure compliance with the Convention is responsible to do so. However, the

committee has also concluded that the EU in some cases has a responsibility to monitor Member State implementation of the Convention. However, it is unclear how far this responsibility stretches.

Sammanfattning

Syftet med denna uppsats är att studera befogenhetsuppdelningen mellan EU och dess medlemsstater gällande internationella miljöavtal. Uppsatsen undersöker hur denna fördelning påverkar ansvaret för genomförandet och genomdrivandet av dessa avtal inom EU. Vidare undersöks om befogenhetsuppdelningen har någon relevans för det rättsliga ansvaret gentemot tredje part. För att kunna undersöka befogenhetsuppdelningens betydelse i olika situationer relaterade till genomförandet av internationella miljöavtal uppställs ett antal frågeställningar. Dessa rör hur uppdelningen av befogenheter påverkar införlivandet av miljökonventioner, EU:s ingripande mot överträdelser, fastställandet av ansvar för en överträdelse, effekten på avtalets förverkligande samt den praktiska tillämpningen av dessa regler. För att kunna undersöka den sistnämnda frågeställningen har Århuskonventionen använts som ett exempel.

Internationella miljöavtal är, som huvudregel, blandade avtal, vilket innebär att både EU och dess medlemsstater är parter till avtalet. Anledningen till detta är att befogenheten på miljörättens område är delad mellan EU och medlemsstaterna. EU-domstolens rättspraxis visar på att blandade avtal, liksom andra internationella avtal som EU har ingått, räknas som primärrätt inom den europeiska rättsordningen. I regel överlämnar EU, när ett blandat avtal ingås, en behörighetsförklaring som klargör uppdelningen av befogenheter och ansvar i relation till avtalet ifråga.

Uppsatsen visar att vikten och effekten av befogenhetsuppdelningen varierar beroende på vilken del av genomförandet av avtalet som åsyftas. I denna uppsats har tre huvudsakliga situationer studerats: införlivandet av avtalet inom EU, EU-kommissionens genomdrivande av avtalet och fördelningen av ansvar vid eventuella överträdelser. Gällande avtalets införlivande är det tydligt att EU:s interna regler om befogenhet styr. Även i förhållande till Århuskonventionen står det klart att EU har rätt att besluta om hur ansvaret för införlivandet ska fördelas mellan EU och medlemsstaterna.

Frågan om kommissionens genomdrivande av internationella miljöavtal är mer komplex. EU-domstolens praxis klargör att kommissionen har stora befogenheter att väcka talan mot en medlemsstat som har underlåtit att fullgöra sina skyldigheter enligt ett blandat avtal. Även om det är kommissionens skyldighet att övervaka tillämpningen och genomförandet av fördragen, så verkar denna skyldighet inte tillämpas i relation till övervakningen av genomförandet av internationella miljöavtal.

Gällande ansvaret för överträdelser av bestämmelser i blandade avtal är grundregeln att EU och medlemsstaterna är gemensamt ansvariga att fullgöra de förpliktelser som följer av avtalet ifråga. Dock förekommer det att EU, med hänvisning till sin behörighetsförklaring, påpekar att dess medlemsstater i vissa fall är fullt ut ansvariga. I relation till Århuskonventionen har dess efterlevnadskommitté intagit en praktisk hållning, och menar att den part som på bästa sätt kan säkerställa efterlevnaden av avtalet även har ansvaret att göra

detta. Kommittén har även dragit slutsatsen att detta i vissa fall kan innebära att EU har en skyldighet att kontrollera och ingripa mot dess medlemsstaters överträdelser av konventionen. Dock är det i nuläget oklart hur långt detta ansvar sträcker sig.

Preface

First, I would like to thank my supervisor, Sanja Bogojević, for her insightful comments and her patience with me and my thesis, which was very nearly left unfinished.

I would also like to express my gratitude for the years of encouragement from my grandfather. You taught me the importance of searching for magic in everyday life.

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Ida Lauridsen

Abbreviations

ACCC	Aarhus Convention Compliance Committee
ACP	African, Caribbean and Pacific Group of States
CFI	Court of First Instance
CJEU	Court of Justice of the European Union
EBRD	European Bank for Reconstruction and Development
ECE	Economic Commission for Europe
EIA	Environmental Impact Assessment
EIB	European Investment Bank
EU	European Union
ICJ	International Court of Justice
IGO	Intergovernmental organisation
IEA	International environmental agreement
MOP	Meeting of the Parties (To the Aarhus Convention)
NGO	Non-governmental organisation
NREAP	National Renewable Energy Action Plan
SEA	Strategic Environmental Assessment
UN	United Nations

1 Introduction

1.1 General Introduction

During the last few decades, the EU has developed its regulation of issues related to the environment. This development has taken place internally, but also, most interestingly for the purpose of this thesis, externally, on the international scene. The international framework of environmental policy and legislation is, seemingly, ever-expanding, and at the same time, the EU is increasingly developing its external environmental policy and has taken a leading role on the international scene in advancing international cooperation on environmental protection. This development has garnered an increased amount of attention in recent years and given rise to several interesting studies.[1]

The implementation and realisation of international environmental agreements (IEAs) have long been challenges, partly due to the division of the responsibility to ensure compliance with the agreements between the EU and its Member States.[2] While much research has been conducted on EU participation in IEAs, the specific issue of enforcement is less explored. Therefore, I have chosen EU competence to enforce IEAs as the main focus of this thesis. Hence, the question of the extent of EU responsibility to ensure the fulfilment of IEAs is an intriguing one to ask. Specifically, what this thesis aims to clarify, is how far this responsibility stretches in relation to EU enforcement of IEAs in the EU Member States, and the importance of the division of competences for the answer to that same question.

1.2 Objectives

The objective of this thesis is to identify the division of competence between the EU and its Member States in relation to IEAs and to attempt to ascertain how this division affects the responsibility for implementation and enforcement of IEAs in the EU, and to some extent, the liability towards third parties.

Since the nature of the interaction between the international legal system, the EU *sui generis* system and the EU Member States is still emerging, the question of where the responsibility to enforce IEAs lies, and to which extent the responsibility can be attributed to the EU is one of great interest.

[1] See e.g. Durán, G., Morgera, E.," Towards environmental integration in EC external relations? A comparative analysis of selected association agreements" Yearbook of European Environmental Law, 6, 2006, p. 179.
[2] Hedemann-Robinson, M., "EU Enforcement of International Environmental Agreements: The Role of the European Commission", European Energy and Environmental Law Review 21, 2012, p. 2.

1.2.1 Research Questions

The overreaching research question of this thesis is "What role does the division of competence between the EU and its Member States play in ensuring compliance with IEAs, with a focus on implementation and enforcement?"

In order to examine this broad question, five research questions have been chosen to focus the study:

- How does the division of competence affect the implementation of IEAs?
- What authority and/or responsibility does the EU have to enforce provisions of IEAs?
- Does the division of competence affect the attribution of responsibility for non-compliance with IEAs?
- Does the division of competences and responsibilities to implement and enforce IEAs between the EU and its Member States impede the realisation of IEAs?
- How has the division of competence been used in practice to attribute responsibility to ensure compliance with IEAs?

1.3 Methodology and Materials

This thesis mainly covers the the responsibility of the EU to enforce IEAs in EU Member States and the role of competence for the purpose of doing so. The thesis is divided into two main parts, first a study of EU legislation related to the question posed, and second, a case study on the Aarhus Convention, focusing on how its compliance committee has approached the question of competence and responsibility for the due performance of obligations undertaken under the Convention.

The first chapter of this thesis aims at identifying the EU legislation relevant to for EU participation in IEAs, the conditions for acceding to IEAs, the accession procedure and the legal status of IEAs in the EU. The emphasis is on mixed agreements, as the absolute majority of environmental agreements are concluded on the basis of shared competence by the EU and its Member States together. EU legislation, judgements from the EU courts and legal doctrine is used for this purpose.

Next, EU enforcement of IEAs is outlined. The focus is on the enforcement initiated by the Commission as the principal EU institution in charge of overseeing and supervising Member State adherence to EU legislation and the international agreements that the EU has entered into. The main recourse for the Commission are infringement proceedings, which are studied in greater detail. For this part of the thesis, two cases from the Court of Justice of the European Union (CJEU) form the basis for the discussion, namely the *Berne Convention* case[3] and *Etang de Berre*[4].

[3] Case C-13/00 *Commission v Ireland* [2002] ECR I-2943.

Chapter 4 of this thesis deals with EU competence in relation to IEAs. The external competence in environmental matters is outlined, and the competence to implement IEAs is studied. Finally, there is a discussion on liability and the responsibility for the performance of IEA obligations, and the role of competence in the attribution of liability.

In order to shed light on this quite theoretical topic, the Aarhus Convention has been used as an example of an IEA that the EU has adopted and consequently become a contracting party to. The Aarhus Convention is a mixed agreement, that is, to which both the EU and its Member States are parties. The Aarhus Convention is also a good example since there is a relatively large amount of information relating to the implementation of the Convention available through the United Nations Economic Commission for Europe (UNECE).

The Aarhus Convention also has a very active compliance committee reviewing the implementation of the Convention, which provides a good opportunity to study how an external compliance mechanism has handled the responsibility of the EU to enforce IEAs, and the division of competence and responsibility between the EU and its Member States. This is interesting to study, because it gives the view of a third party on the importance of the division of competence in the EU in relation to IEAs, and because it illustrates some of the problems arising when there is an issue of non-compliance, and it is not certain who is the responsible party. For this part, there is a focus on the findings of the Compliance Committee of the Aarhus Convention (ACCC) and related material from the communicants and the EU.

1.3.1 Delimitations

In order to get the full picture of the enforcement of IEAs in the EU, it would have been necessary to include information on the implementation and enforcement of IEAs in each individual Member State. A large part of the provisions and obligations stemming from IEAs take effect on the national level, rather than at the Union level, as large legislative areas are left within Member State Competence, especially within the environmental sector.[5] While individual Member States are of course very important actors in enforcing IEAs, their enforcement systems have, almost entirely, been left out of this study to make room for a study of the enforcement system existing at the Union level.

Moreover, it is important to note that the aim of this thesis is not to provide a comprehensive overview of the EU´s enforcement of the various IEAs that it has acceded to. Due to size constraints, only one international agreement has been studied in closer detail. The Aarhus Convention has been chosen as this example for the reasons stated above. The focus is instead on the possibilities and responsibilities the EU has of enforce IEAs as well as if, and how this relates to the EU division of competence. The question of EU compliance with

[4] Case C-293/00 *Commission v France* (*Etang de Berre*) [2004] ECR I-9323.
[5] Hedemann-Robinson 2012, p. 5.

individual international agreements has previously been explored in a number of articles and books, some of which are referred to in this thesis. Furthermore, it would have been interesting to study the implementation of the Aarhus Convention in the EU more deeply, but also this has had to be left outside the study.[6]

[6] For studies on the Aarhus Convention, see e.g. The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law, Pallemaerts, M., ed., 1st ed., Europa Law Publishing, Groningen, 2011, and Access to Justice in Environmental Matters in the EU, Ebbesson, J., ed., 1st ed., Kluwer Law International, The Hague, 2002.

2 The EU and IEAs

2.1 Background

During the 1970s, the EU started its journey towards the role that it has in the international effort to further environmental protection today. The creation of a number of IEAs, some of which the EU acceded to, was a crucial part of this effort. It is these agreements, and EU efforts towards their fulfilment, that this thesis aims to examine. Since the 1970s, the EU has become a contracting party to many treaties on various topics relating to environmental protection.[7] Most of these treaties are framework agreements, accompanied by ancillary protocols, often containing more detailed regulations and binding standards.[8]

It was first when the Single European Act[9] (SEA) came into force in 1987 that the EU received an express legal basis for cooperation with third countries and other international organisations. This was then revised by the Treaty of the European Union[10] (TEU) in 1992 and later the Lisbon Treaty[11] in 2009. The first revision brought with it an increased capacity for the EU to enhance its environmental policy with an international dimension, and facilitated the process used to approve Community ratification of IEAs. The new legislation allowed the Council to approve the accession to such treaties after a vote with qualified majority, instead of as earlier, with unanimity. However, this was subject to certain exceptions under Article 300(2) EC.

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[7] Some of the more notable IEAs that the EU has since acceded to include: 1979 Geneva UNECE Convention on long-range transboundary air pollution (18 ILM 1442) (acceded by the EU virtue of Decision 81/462 (OJ 1981 L171/11)); 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals (19 ILM 15) (acceded by the EU virtue of Decision 82/461 (OJ 1982 L210/10); 1982 Montego Bay UN Convention on the Law of the Sea (UNCLOS) (21 ILM 1261) (acceded by the EU virtue of Decision 98/392 (OJ 1998 L189/14)); 1985 Vienna Convention on the protection of the ozone layer (26 ILM 1529) (acceded by the EU virtue of Decision 88/540 (OJ 1998 L297/8)); 1989 Basel Convention on the trans-boundary movement of hazardous waste (28 ILM 657) (acceded by the EU virtue of Decision 93/98 (OJ 1993 L39/1)); 1991 Espoo Convention on environmental impact assessment in an international context layer (30 ILM 802) (acceded by the EU virtue of unreported Decision of 15.10.1996); 1992 New York UN Framework Convention on Climate Change (31 ILM 851) (acceded by the EU virtue of Decision 94/69 (OJ 1994 L33/11)); 1992 Rio Convention on Biological Diversity (31 ILM 818) (acceded by the EU virtue of Decision 93/96 (OJ 1993 L309/1)); 1994 Geneva International Agreement on Tropic Timber (33 ILM 1014) (acceded by the EU virtue of Decision 96/493 (OJ 1996 L208/1)); 1994 Paris Convention on combating desertification (33 ILM 1016) (acceded by the EU virtue of Decision 98/216 (OJ 1998 L83/1)); 1998 Aarhus UNECE Convention on access to information, public participation and access to justice in environmental matters 38 ILM 517) (acceded by the EU virtue of Decision 2005/370 (OJ 2005 L124/1)); 1998 Rotterdam Convention on the procedure relating to export and import of chemicals (38 ILM 1) (acceded by the EU virtue of Decision 2003/106 (OJ 2003 L63/27)); 2001 Stockholm Convention on persistent organic pollutants (acceded by the EU virtue of Decision 2006/507 (40 ILM 532) (OJ 2006 L209/1)).

[8] An example of this is the Rio Convention on Biological Diversity accompanied by the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (39 ILM 1027) and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity.

[9] OJ 1987 L169/1.

[10] OJ 1992 C191/1.

[11] OJ 2010 C83/10.

The entering into force of the Lisbon Treaty further amended the rules regarding the external dimension of EU policy on the environment. This change is largely related to the transformation of the tripartite pillar system that formerly existed, into the Union that exists today. Information about the processes of accession and implementation of IEAs and the external competences of the EU as the legislation is today, can be found below in Chapters 2.2, 2.3 and 4.

2.2 EU Accession to IEAs

2.2.1 Basic Provisions

According to Article 47 TEU, the EU has a legal personality, which is seen as a precondition for it to enter into international agreements such as the Aarhus Convention.[12] This does, however, not mean that the EU can act beyond the competences granted to it by the Member States in concluding IEAs. The legal basis for the EU to accede to IEAs can be found in Articles 216 and 218 TFEU. Accordingly, the EU has the competence to conclude international agreements with third states as well as international organisations when the Treaties so provide for, and when the measure is necessary to attain one of the objectives of the Treaties or when it is provided for in another legally binding Union act.

The EU´s competence to conclude agreements is based on its internal competence.[13] With regards to the environment the internal competence is as a rule based on Article 4(2)(e) TFEU, which states that the EU and the Member States share competence, and Article 191 TFEU. Especially important in connection to the accession to international agreements in the environmental field is Article 191(4), stating that:

> Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.
>
> The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.

2.2.2 The Accession Procedure

The procedure that is used when IEAs and other international agreements are concluded basically has three steps: First, negotiations are opened after an authorisation given by the Council of Ministers. In the second stage the negotiations are carried out. If it is a mixed

[12] Chalmers, D., Davies, G. and Monti, G., European Union Law, 2nd ed., Cambridge University Press, Cambridge, 2010 p. 632-633.
[13] See further on the competences, e.g. Craig, P. and de Búrca, G., EU Law – Text, Cases and Materials, 5th ed., Oxford University Press, Oxford, 2011 pp. 307-318.

agreement, such as in the case of the Aarhus Convention, the EU Member States are also involved in the negotiation process. Finally, the Council takes the decision to sign the agreement, after acquiring consent from, or consulting the Parliament depending on whether the ordinary or special legislative procedure is to be used. In the case of a mixed agreement individual Member States will also sign the treaty.[14]

A further condition for the EU to be able to partake as a contracting party to an IEA is that the agreement in question allows for this. Today it is accepted as standard practice that regional supranational organisations such as the EU are allowed the possibility of acceding to IEAs, however not all IEAs include this possibility.[15]

2.3 IEAs and the EU

2.3.1 The Legal Status of International Agreements in the EU

International agreements concluded by the EU are binding sources of EU legislation, both in relation to the EU institutions themselves and the Member States. The provision stating this can be found in Article 216(2) TFEU. The fact that international agreements concluded under the Unions exclusive competence are binding was established by the Court of Justice as early as during the 1970s.[16] Consequently, it is clear that IEAs falling under EU competence are integral parts of EU legislation. Moreover, international agreements are considered as primary law within the EU legal order.[17]

However, the legal situation is more complex than it might seem at first glance, mostly due to issues associated with the division of competences between the Union and the Member States respectively. Often, the situation where some provisions of an IEA fall within Union competence, and some not, arises. In these cases it is not so easy as to state that the treaty binds the Union, but one must look at the authority that the Union has in relation to the specific issue at hand. The issue is complex and not completely resolved as will be seen in the latter part of this thesis. Some more information on mixed agreements can be found in the chapter below.

2.3.2 Mixed Agreements

Since competence in the area of environment is, as a rule, shared between the EU and its Member States, the consequence is that typically both the Union and the Member States will, independently, accede to the IEA in question. The result is that the agreement will be what is referred to as a mixed agreement.[18]

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[14] See further Chalmers, Davies and Monti 2010, p. 633.
[15] See, e.g. Hedemann-Robinson 2012, p. 3.
[16] See e.g. Case 181/73 *Haegemann v Belgian State* [1974] ECR 449.
[17] See Hedemann-Robinson 2012, p. 28.
[18] Hedemann-Robinson 2012, p. 6.

Just as it can sometimes be difficult to discern whether a specific internal issue falls within an area of exclusive competence or shared competence, the same applies to international agreements that the EU finds fit to accede to. For example, agreements regulating trade, an area where the Union has exclusive competence according to Article 3(a) and (e), sometimes also touch upon issues related to environmental protection. Also the opposite situation, primarily environmental agreements with a trade dimension, exist. When determining whether an agreement falls within the Union's exclusive competence, or if competence is shared between the Union and the Member States, one must consider whether the agreement in questions principal purpose relates to an area of exclusive or shared competence. The Court of Justice has dealt with a few cases on this topic and confirms that the aim or purpose of the agreement is central to the assessment.[19] In an opinion regarding the conclusion of the Cartagena Protocol and the Division of powers between the Community and the Member States, the Court stated:

> the choice of the legal basis for a measure, including one adopted in order to conclude an international agreement, does not follow from its author's conviction alone, but must rest on objective factors which are amenable to judicial review. Those factors include in particular the aim and the content of the measure. If examination of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component and if one is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be founded on a single legal basis, namely that required by the main or predominant purpose or component. By way of exception, if it is established that the measure simultaneously pursues several objectives which are inseparably linked without one being secondary and indirect in relation to the other, the measure may be founded on the corresponding legal bases.[20]

The Court of Justice has confirmed that mixed agreements, just like international agreements entered into by only the Union under exclusive competence, form integral parts of EU law.[21]

2.3.2.1 Declarations of Competence to Mixed Agreements

When entering into mixed agreements, it is becoming increasingly common for the EU to make sure other contracting parties to an agreement know the boundaries of EU legal competence, and through that the extent of EU responsibility for the fulfilment of obligations stemming from the agreement, as well as Member State compliance with said agreement. The first notable IEA that required such a declaration from participating international organisations was the 1982 UN Convention on Law of the Sea (UNCLOS).[22]

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[19] See eg Case C-281/03 *Commission v Council* (Energy Star Agreement) [2002] ECR I-12049 and Case C-94/03 *Commission v Council* (Rotterdam Convention) [2006] ECR I-1.
[20] Opinion 2/00 (Cartagena Protocol) [2001] ECR I-9713.
[21] See eg Case 12/86 *Demirel v Stadt Schwaebisch Gmuend* [1987] ECR 3719; Case C-13/00 Commission v Ireland [2002] ECR I-2943.
[22] See Art. 305 in conjunction with Annex IX (Participation by International Organisations) of UNCLOS,

According to Hedemann-Robinson, declarations of competence often aim at limiting the EU's international responsibility regarding obligations that lie solely within the Member States' competence. The practice of using these types of declarations is not clearly regulated, and the Treaties give no clear instruction as to the form or the legal effects of the declarations.[23] However, the practice of the EU is to submit a declaration of competence upon the ratification of the IEA, after a decision of the Council of the EU.[24]

2.3.2.2 The view of the CJEU on Declarations of Competence

Initially, the CJEU was sceptical to declarations of competence in particular, and to the need of outwardly accounting for the division of competences between the EU and its Member States in general. This can be seen in the quotation below from Ruling 1/78 On a Draft Convention of the IAEC on the physical protection of nuclear materials, facilities and transports.

> It is further important to state, as was correctly pointed out by the Commission, that it is not necessary to set out and determine, as regards other parties to the Convention, the division of powers in this respect between the Community and the Member States, particularly as it may change in the course of time. It is sufficient to state to the other CPs that the matter gives rise to a division of powers within the Community, it being understood that the exact nature of the division is a domestic question in which third parties have no need to intervene. In the present instance the important thing is that the implementation of the Convention should not be incomplete.[25]

Later, as the use of declarations of competence have become more common, the CJEU has become increasingly positive, and stressed the importance of correct declarations, clearly accounting for the division of competence in relation to specific IEAs.[26] It is possible that this development has come as a reaction to the need of limiting EU responsibility for the performance of obligations that are clearly better achieved by the Member States of the Union.

Towards the EU Member States, the CJEU has chosen to focus on the duty to cooperate and the importance of the Member States allowing the EU to exercise its external competence in developing its international relations on the basis of exclusive or mixed competence.[27]

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[23] Hedemann-Robinson 2012, p. 10.
[24] Hedemann-Robinson 2012, p.11.
[25] Ruling 1/78 On a Draft Convention of the IAEC on the physical protection of nuclear materials, facilities and transports [1978] ECR 2151 at para. 35.
[26] See e.g. Case C-29/99 *Commission v Council* [2002] ECR I-11221.
[27] See e.g. Case C-266/03 *Commission v Luxembourg* (Inland waterway agreement) [2005] ECR I-4805 at para. 58 and C-433/03 *Commission v Germany* (Inland waterway agreement) [2005] ECR-6985 at paras. 63-4.

3 EU Enforcement of IEAs

3.1 Commission Enforcement of IEAs

3.1.1 The Role of the Commission in Supervising Implementation

According to article 17 TEU, the Commission has the responsibility and authority to ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. Moreover, it shall oversee the application of Union law, under the control of the Court of Justice of the European Union. This includes IEAs, due to their status as integral parts of the EU legal order. With a few exceptions, the Commission shall also ensure the Union's external representation in accordance with the same article.

Up until now, the Commission has seemed reluctant to take on the responsibility for ensuring Member State compliance with the international agreements that the EU has adopted. Only in a few cases has the Commission taken action to enforce IEA provisions in EU Member States. Instead, the Commission seems to focus on its internal supervisory task, enforcing EU environmental legislation.[28] Nevertheless, there are a few cases where the Commission has taken action against a Member State failing to comply with an IEA; these will be studied in more detail below.

3.1.2 The Use of Infringement Proceedings to Enforce IEAs

Under Articles 258 and 260 TFEU, the Commission has recourse to infringement proceedings against Member States failing to comply with EU law, including obligations derived from IEAs to which the EU is a contracting party.

According to Article 258 TFEU, if the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. This opportunity is given the Member State through a letter of formal notice stating the issues that the Commission has found. If the State concerned does not comply with the opinion stated in the reasoned opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union. Then, pursuant to Article 260:

1. If the Court of Justice of the European Union finds that a Member State has failed to fulfil an obligation under the Treaties, the State shall be required to take the necessary measures to comply with the judgment of the Court.

[28] Hedemann-Robinson 2012, p. 7.

2. If the Commission considers that the Member State concerned has not taken the necessary measures to comply with the judgment of the Court, it may bring the case before the Court after giving that State the opportunity to submit its observations.

To date, the Commission has been very sparse in its use of the possibility to bring EU Member States before the CJEU for failures to comply with obligations contained in mixed agreements, and even more so concerning failures to comply with environmental agreements. In fact, there has been no infringement proceeding related to the implementation or application of the Aarhus Convention in an EU Member State. Below the most important cases initiated by the Commission before the CJEU regarding compliance with IEAs will be presented.

3.1.2.1 The *Berne Convention* case

A mile stone case on this topic is the so-called *Berne Convention* case from 2004.[29] The case did not concern an environmental agreement, but the application of the Berne Convention dealing with the protection of literary and artistic works. The Commission meant that Ireland had failed to adhere to the Berne Convention and therefore also had failed to comply with EU law. The Court stated that:

> Mixed agreements concluded by the Community, its Member States and non-member countries have the same status in the Community legal order as purely Community agreements, as these are provisions coming within the scope of Community competence. It follows that, in ensuring respect for commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation in relation to the Community, which has assumed responsibility for the due performance of the agreement. The Berne Convention creates rights and obligations in areas covered by Community law, with the result that there is a Community interest in ensuring that all Contracting Parties to the Agreement on the European Economic Area adhere to that Convention.[30]

Thus, it is clear that the Commission has the possibility to bring a Member State before the CJEU when in non-compliance with a mixed agreement. During the proceedings, the UK and Northern Ireland by a statement in intervention to support the standpoint of Ireland, claimed that the mixed character of the agreement meant that the Court had jurisdiction to rule on it only in relation to matters which had been the subject of harmonisation measures at Community level.[31] Though not expressly refuting this statement, the Court made quite clear that the Court had jurisdiction in the case, and that the Commission was authorised to bring the failure to adhere to the Convention before the Court. Hence, the *Berne Convention* case established that the Commission can enforce mixed agreements through infringement

[29] Case C-13/00 *Commission v Ireland* [2002] ECR I-2943.
[30] Case C-13/00 *Commission v Ireland*, para. 14.
[31] Case C-13/00 *Commission v Ireland*, para. 2.

proceedings regardless of whether the agreement has been harmonised in internal legislation of not.

Interestingly, the Court then went on to note that there was no doubt that the Berne Convention in large came within the scope of Union competence, yet there was no comment on whether the provision in question fell into this area.[32] Instead, the argument was that mixed agreements hold the same status as international agreements fully within Union competence, that is as integral parts of the EU legal order, and that Ireland therefore had to adhere to the provisions of the Convention. Hedemann-Robinson asserts that this implies that it is irrelevant whether or not a specific provision has been implemented and has a counterpart within the internal legal order of the EU and that the scope of what can be included in the EU external competence is broadened with this case.[33] This standpoint might be true for this case, but as will be seen later on, the situation is more complex when the liability is laid on the Union itself.

3.1.2.2 Etang de Berre

The first infringement proceeding initiated by the Commission to enforce provisions of an IEA was against France in a case referred to as *Etang de Berre*.[34] The IEA concerned was the 1976 Barcelona Convention for Protection of the Mediterranean Sea against Pollution and its ancillary 1980 Protocol for the protection of the Mediterranean Sea against pollution from land-based sources. The Commission brought the action against France claiming that French authorities had failed to prevent eutrophic pollution, contrary to the two legal instruments.

Also this judgment concerned a mixed agreement, and France meant that the CJEU lacked competence to adjudicate the matter since the material scope of the action still fell within Member State competence, as the EU had not yet implemented the IEAs through internal EU legislation. The CJEU did not agree with this assessment and instead argued in a similar way as it did in the *Berne Convention* case and stated that the matter, irrespective of the lack of internal legislation, in large fell within Union legislation.

Finally, the CJEU concluded that the failure to comply with the Barcelona Convention and its ancillary protocol constituted a breach of primary EU law.

The judgment moreover touched upon an important issue related to the topic of this thesis, namely the interest of the EU as a whole to promote compliance with obligations arising from IEAs. The CJEU stated that:

> Since the Convention and the Protocol thus create rights and obligations in a field covered in large measure by Community legislation, there is a Community interest

[32] Case C-13/00 *Commission v Ireland*, para. 16.
[33] See Hedemann-Robinson 2012, p. 8.
[34] Case C-293/00 *Commission v France* (*Etang de Berre*) [2004] ECR I-9323.

> in compliance by both the Community and its Member States with the commitments entered into under those instruments.[35]

Unfortunately, the CJEU did not develop this reasoning, but several reasons can be suggested as to the importance of the cumulative effort to ensure compliance with IEAs. Hedemann-Robinson stresses the importance for the EU to avoid the situation where it is responsible towards another contracting party to an IEA for the failure of an EU Member State, without having the possibility to take measures to address the problem at the EU level. This, he says, is also a manifestation of the general principle of cooperation in external relations so that the EU institutions and the Member States can present a united front towards the international community, for example in the context of implementing international agreements.[36]

3.2 A Note on Implementation, Enforcement and Compliance

Though different, implementation and enforcement of IEAs are inherently interrelated, as enforcement in many cases can entail ensuring the correct implementation of an IEA. Both are necessary for compliance with an IEA. This is especially noticeable when discussing a legislative act that can be enforced on many levels. In order to exemplify this, the enforcement of the Aarhus Convention in the EU is a very good example. Starting from the bottom level, the Aarhus Convention must be implemented in every single Member State of the EU and applied in relation to individuals. The Member States must also enforce the obligations of the Convention; foremost through ensuring that non-compliance with the Convention can be tried before a court. The Aarhus Convention is a singular example here, as the Convention itself contains an obligation stating that individuals and in some cases non-governmental organisations (NGOs), having had their rights in accordance with certain provisions of the Convention disrespected, must have recourse to a judicial remedy, see Article 9. Therefore an express obligation to enforce the Convention exists and the question of the Member States' duty to enforce the Convention is quite clear.

Next, the Aarhus Convention must be implemented at the EU level. This means that the EU must legislate in such a way that the obligations of the Convention are complied with, both by the EU institutions themselves, and the Member States. It is relatively clear that also the EU must ensure the right of individuals and NGOs to challenge decisions and other acts that violate rights they have been granted through the Convention. However, the extent of this responsibility is debated as will be seen in the latter part of this thesis. Due to the division of competence between the EU and its Member States and the result that the Aarhus Convention exists in an area of shared competence as a mixed agreement, this stage causes a complex legal situation that has not yet been entirely clarified.

[35] Case C-293/00 *Commission v France* (Etang de Berre), para. 29.
[36] Hedemann-Robinson 2012, p. 9.

Lastly, the Aarhus Convention itself has a compliance mechanism tied to it, which will be further examined in Chapter 5.5 below, meant to support and facilitate the implementation of the Convention through monitoring compliance, but one could most definitely argue that it is an enforcement mechanism, in that it is used to pinpoint non-compliance of the parties to the Convention. Though not authorised to give legally binding judgments, the compliance committee does give clear views on the occurrence of non-compliance and deficiencies in the implementation of the Convention, thus contributing to the enforcement of the same.

From this can be concluded that implementation and enforcement are intrinsically interlinked. A failure to implement the Aarhus convention on one level, can result in enforcement measures taken on the same level, or at any level above. The failure of an EU Member State to correctly implement and comply with Aarhus can result in enforcement measures being taken in a Member State Court, prompted by individuals or NGOs, by EU institutions such as the Commission or the CJEU, or by the ACCC. Confusion especially easily arises when an actor is not only responsible for the implementation, but also the enforcement of a legislative act. This is the case with the EU, and especially the Commission. The means of the Commission for enforcing IEAs, and the Aarhus Convention specifically will be examined below in chapter 3. It's potential responsibility for enforcing IEAs in general, and Aarhus in particular, will be discussed in chapter 6, concerning the view of the ACCC on EU enforcement of the Aarhus Convention, and chapter 7 containing a discussion on EU responsibility to enforce IEAs.

4 Competence, Liability and Mixed Agreements

4.1 The External Competence of the EU

4.1.1 Background on EU Competence

The external competence of the EU is a complex topic, mostly due to the structure and *sui generis* nature of the Union. The EU is not a federal state, yet divides power and competence between the Union and its Member States, sometimes exclusively, and sometimes, as in the case of environmental matters, through shared competence. By EU competence I refer to the authority of the EU to legislate within an area, as opposed to areas where individual Member States, in accordance with the principle of subsidiarity and Article 5 TEU, retain the authority to act. The same concept is applied in relation to the Union's external policy. Issues related to this will be discussed in greater detail below in Chapter 4.2.1. Moreover, the division of competence has not been static throughout the development of what has now become the EU, but has developed, and continues to develop and evolve. The issue of the division of competence remains a complex one, and throughout the development of the EU, there have been several calls for clarifications by both the Commission and individual Member States.[37] This has now lead to clearer legislation on the division of competence, foremost in Articles 3-6 TFEU.

Important to note is that external competence is based on the rules on internal competence. Therefore, it is of interest to briefly account for these here. The competence of the EU can be exclusive, shared or complementary. The different types of competence bring different powers for the Union to act in different situations depending foremost on the type of issue involved. When competence is exclusive, this means that the Member States have fully transferred their sovereignty and possibility to act, with regards to the matter in question, to the Union. Article 3(1) TFEU states the areas in which the EU has exclusive competence, which include the:

a) customs union;
b) the establishing of the competition rules necessary for the functioning of the internal market;
c) monetary policy for the Member States whose currency is the euro;
d) the conservation of marine biological resources under the common fisheries policy; and
e) common commercial policy.

[37] This can for example be seen already in Declaration 23 to the Treaty of Nice (2001 OJ 2001 C80) where a process addressing how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity was requested. See generally Craig, P., De Burca, G., EU Law: Text Cases and Materials 4th Ed (2007 Oxford) Chs. 3-4.

Furthermore, Article 3(2) TFEU goes on to state that the EU also has exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope. Thus it is clear that the external competence in this matter follows the internal competence when exclusive to the Union. The environment is not an area where the EU has exclusive competence, though there are some overlap between for example the conservation of marine biological resources under the common fisheries policy and other environmental issues.

Shared competence is regulated in Article 4 TFEU. The provision states that competence is shared between the Union and the Member States when the treaties confer a competence on the Union, which does not relate to the areas referred to in Articles 3 and 6. Article 4 also contains a list of areas where competence is shared, including environment in Article 4 (2)(e) TFEU, but also many other environment-related areas such as:

- agriculture and fisheries, excluding the conservation of marine biological resources;
- environment;
- transport;
- energy;
- common safety concerns in public health matters, for the aspects defined in this treaty.

In areas of shared competence, the main rule is according to Article 2(2) that:

> When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence.

Thus, the Member States must give way to legislation made by the EU if it chooses to exercise its competence in an area of shared competence. Consequently, one could say that the competence, with a few exceptions[38], becomes exclusive when the Union has legislated in an area.

Lastly, the Union has what is sometimes called complementary or ancillary competence in some areas, where EU action is meant to support, coordinate or supplement actions of the Member States. In these areas, the Member States always retain their competence and thus

[38] See Article 4(3)-(4) TFEU where Member States retain their right to exercise their competence, regardless of if the Union has carried out activities or conducted a common policy in the area.

ability to act. These areas for example include the protection and improvement of human health, industry, culture and tourism, see Article 6 TFEU.

Since competence is, in environmental matters, shared, this situation is the focus of the thesis. This issue is also crucial in relation to the case study chosen, namely that of the enforcement of provisions of the Aarhus Convention.

4.1.2 The Duty to Cooperate

The Member States of the EU have a duty to cooperate with the EU institutions in accordance with the principle of sincere cooperation and Article 4(3) TEU. This first of all includes to, in full mutual respect, assist in carrying out tasks which flow from the Treaties. The Member States shall also take any appropriate measure, general or particular, to ensure the fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union and to facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives.

The duty to cooperate is not limited to internal Union acts, but also includes international agreements when those have become part of EU legislation as a result of the EU adopting them. The Court of Justice tackled this issue in a judgment in 2010 following infringement proceedings initiated by the Commission for failure to comply with Article 10 EC, the precedent of Article 4 TEU. The case concerned Sweden's decision to unilaterally propose a substance to be added to Annex A to the Stockholm Convention on Persistent Organic Pollutants. The Court stated that the duty to cooperate applied both in the process of negotiating and concluding an international agreement, and in the fulfilment of the commitments entered into.[39]

4.2 Implementation and Application of IEAs

4.2.1 EU Competence to Implement International Agreements

Separate from the competence to accede to international agreements, is the competence of the EU and the Member States respectively in the implementation of an agreement. The powers of the EU in relation to the implementation of international agreements are related to the attribution of competence in internal situations.[40] Central to the division of powers is the principle of conferred powers set out in Article 5 TEU, which stipulates that EU acts are limited to those within the competence granted by its Member States in the Treaties. Competence that is not clearly conferred to the EU consequently remains with the Member

[39] Case C-246/07 *Commission v Sweden* (Stockholm POPs Convention) [2010] ECR I-3317.
[40] See further Chalmers, Davies and Monti 2010, p. 648.

States and so the Member States should implement the IEA directly without the involvement of the Union.[41]

If the EU adopts legislation in an area of shared competence, the Member States no longer have competence to legislate freely in that area. This applies also in situations where international agreements have been concluded. Thus, the Member State can implement the treaty in question in what manner it considers most appropriate, until the Union has adopted implementations of the agreements limiting Member State competence. This can also have consequences for the issue of whether or not a treaty provision has direct effect. It is up to the national courts to decide if a provision of an IEA has direct effect if it has not been implemented in EU law.[42] Though the CJEU has not been entirely consistent, there are cases where international agreements have been given direct effect even when the EU has adopted implementing legislation.[43]

Where it is apparent that the subject matter of an international agreement falls in part within the competence of the Community and in part within that of the Member States, it is important to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of the commitments entered into. That obligation to cooperate flows from the requirement of unity in the international representation of the Community.

4.2.2 The Direct Applicability of IEAs

As a part of EU law, a provision of an international agreement is also, in some cases, directly applicable. Account must nevertheless be taken of the nature of the agreement and to the provision in question. The obligation has to be clear and precise and not subject to the adoption of any subsequent measure. The result of this direct application is that individuals can rely on the provision of the international agreement against public authorities as a rule of the internal legal order of the Member State.[44] However, the legal situation is complex, and it is not obvious whether or not an obligation contained in an IEA can be directly relied on, before it is tried before an EU court. The example chosen for this thesis is the Aarhus Convention, and the question of direct application has been tried before CJEU once, in relation to Article 9(3) of the Convention.

A Slovak court referred a case to the CJEU for a preliminary reference procedure regarding whether or not Article 9(3) of the Aarhus Convention itself could have direct effect. The CJEU established that Article 9(3) of the Aarhus Convention, although a part of EU law and falling within the scope of both Member State law and EU law, could not be directly applicable. The reason given was that Article 9(3) does not contain a clear and precise

[41] See further on the EU's attributed competence in Craig and de Búrca 2011, pp. 73-75.
[42] See further Chalmers, Davies, and Monti, p. 649.
[43] See e.g. Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641.
[44] See further on direct effect of international agreements e.g. Craig and de Búrca 2011, pp. 344-351.

enough obligation and is also in need of adoption of subsequent measures to be effective. Article 9(3) only gives access to justice to those members of the public meeting the criteria established in national law.[45] The CJEU however still put pressure on Slovakia to give broad access to justice in stating that:

> It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.[46]

Ebbesson finds it likely that the duty to interpret national legislation to the fullest extent possible, in accordance with the Aarhus Convention, applies also to the remedies found in Article 9(4) of the Convention, when rights derived from Article 9(3) are concerned.[47]

4.3 Liability for the Fulfilment of IEA Provisions

Closely tied to the issue of implementing an IEA is the question of which party, the EU or an individual Member State, shall assume liability for the fulfilment of IEA obligations. This question is also a core problem of the present study and is necessary to examine in order to be able to answer the question of whether the EU can be said to have a responsibility to enforce IEAs that it is a contracting party to. The basic rule is that the Union and the Member State both assume liability jointly for the fulfilment of the obligations of IEAs. Case C-316/91 *European Parliament v Council*[48] concerned the fourth ACP-EEC Lomé Convention, an agreement establishing an essentially bilateral cooperation entered into by the EEC and the Member States as one party, and the African, Caribbean and Pacific Group of States (ACP) as the other. The conventions main focus was on development cooperation. The Court concluded that "the Community and its Member States as partners of the ACP States are jointly liable to the latter for the fulfilment of every obligation arising from the commitments undertaken, including those relating to financial assistance."[49] One interesting aspect is that the judgment concerns obligations to other contracting parties to a convention, it does not comment on liability stemming from a failure to fulfil obligations towards individuals or NGOs.

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[45] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR nyr., paras. 42-45.
[46] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, para. 52.
[47] Ebbesson, J., "Access to Justice at the National Level: Impact of the Aarhus Convention and European Union Law", in *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, Pallemaerts, M., ed., 1st ed., Europa Law Publishing, Groningen, 2011, pp. 245-270, at p. 268.
[48] Case C-316/91 *European Parliament v Council* [1994] ECR I-625.
[49] Case C-316/91 *European Parliament v Council*, para 29.

Considering the above, it seems clear that the EU institutions and the Member States share liability for failures to comply with IEAs. This corresponds with the duty to cooperate in matters related to the fulfilment and thus implementation of IEAs. However, in individual cases, it does not seem to be that simple.

4.3.1 Issues Related to Liability and Mixed Agreements

Hedemann-Robinson considers one of the most pressing questions relating to responsibility in ensuring compliance with IEAs to be to what extent Member States are bound by provisions of mixed agreements in areas where the EU has not yet adopted internal legislative instruments to implement the agreement. Does the full liability then fall on the Member State, or does the EU have responsibility to ensure the fulfilment of some obligations?[50]

An important issue that might be problematic for the EU is that it might be considered responsible for shortcomings of its Member States in complying with IEAs. The failure, or non-implementation may be caused either by a Member State that is also a contracting party to the agreement, or a non-signatory Member State. Moreover, it might be a responsibility owed to a third contracting party to the convention in question, or simply an implementation or compliance issue with obligations found in the agreement but not concerning any other party.[51]

It should also be noted that the difficulty in establishing the responsible party for a compliance issue such as non-implementation or other is of course also problematic for the party that the IEA aims at protecting, whether it might be another contracting party, individuals and NGOs, such as in the case of the Aarhus Convention, or the environment itself. In later years, third parties have been known to demand greater clarity regarding the division of competences between the EU and its Member States in relation to mixed agreements, in order to establish the responsible party in cases of compliance issues.[52]

4.3.2 Declarations of Competence – the Solution to Issues of Attributing Responsibility?

One solution to the three problems mentioned above could be the increased and refined use of declarations of competence and clear delimitations as to the EU's and the Member States' respective responsibilities. However also this solution is accompanied by issues. Hedemann-Robinson points out that the effect of a declaration of competence might be that the onus to determine if the EU or a Member State is responsible for the performance of an obligation falls on the party demanding due performance. This task may be difficult for a third country,

[50] Hedemann-Robinson 2012, p. 7.
[51] Hedemann-Robinson 2012, p. 10.
[52] Hedemann-Robinson 2012, p. 10.

and even more for an individual or an NGO, as the declaration itself is mostly not sufficient to determine the responsible party. The work most likely involves researching internal EU legislation as well as a morass of CJEU case law on the internal and external competences of the Union.[53]

Another issue of declarations of competence is that they are rarely updated after the initial submission. This problem subsists also after the confirmation of the CJEU that the accuracy of such declarations is incumbent.[54] Thus, the declaration to a specific agreement might not later on present a complete account of the legal situation as it has developed. The worst-case scenario is of course that the declaration of competence contains faults or misleading information. Regular updates of information on competence seem very rare, if they at all exist.[55]

Finally, Hedemann-Robinson is of the opinion that the use of declarations of competence should be limited. The reason behind this is that he means that these declarations are used to limit the responsibility and the commitment of the EU to ensure full compliance with the obligations of an IEA. Thus undermining environmental protection within the EU.[56]

4.3.3 The Curious Relationship between Competence and Liability

Related to the issues mentioned above is also of course the curious fact that the Commission is, internally, in charge of the supervision of Member State implementation and compliance with EU legislation, including international agreements entered into by the Union. It is unclear how this relates to the shared liability and cooperation in the implementation that the Union and the Member States have.[57] Furthermore, it is from the above clear that the competence of the Commission to bring an action against a Member State for a failure to comply with a mixed agreement has been deemed wide by the CJEU. The *Berne Convention case* and *Etang de Berre* support the use of infringement proceedings also when the issue at hand is not yet covered by internal EU legislation. Thus, the Commission has much room to take legal action against a Member State to ensure compliance. However, it is not clear whether this has any bearing on the question of whether the EU has a duty under the agreement to promote or enforce Member State compliance with an IEA.

In Chapter 6 below I will comment on issues that have arisen due to difficulties in attributing liability, or responsibility, in relation to the Aarhus Convention, and what has been said concerning the link between competence and liability.

[53] Hedemann-Robinson 2012, p. 12.
[54] See Case C-29/99 *Commission v Council* [2002] ECR I-11221.
[55] Hedemann-Robinson 2012, p. 12.
[56] Hedemann-Robinson 2012, p. 30.
[57] Hedemann-Robinson 2012, p. 7.

5 The Aarhus Convention

5.1 Introduction to the Convention

The Aarhus Convention, which was established within the United Nations Economic Commission for Europe (ECE) framework, was adopted in June 1998 in the Danish city of Århus, and entered into force in 2001. As of 16 January 2015, in addition to the European Union, 47 states, including the EU Member States, have become parties to the Aarhus Convention.[58] The EU signed the Aarhus Convention on 25 June 1998 and approved the Convention on 17 May 2005.[59]

The aim of the Convention is according to Article 1 to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being. Aarhus has, according to Marshall, emerged as a leading instrument in the area of public participation.[60] The Aarhus Convention is usually considered to be a groundbreaking environmental instrument mainly because it awards extensive rights to individual members of the public and NGOs, without discrimination as to citizenship, nationality or domicile, see Aarhus Article 3(9), to take action on behalf of public interests.[61] The basic corresponding obligations of the Convention fall on public authorities in the parties to the Convention.

The Convention is a procedural instrument and does not stipulate any substantial environmental standards that NGOs and individuals, and of course the environment, could benefit from. Hence, Aarhus has sometimes been compared with human rights instruments.[62] Instead, it aims to ensure that national environmental law is adhered to through the participation of the public.

Many would say that the core of the Aarhus Convention is public participation or the participation of non-governmental actors in environmental decision-making. Ebbesson makes a difference between two levels of public participation; it takes place either on a domestic level within the public authorities and the courts, or on an international level such as within intergovernmental institutions (IGOs).[63] The Aarhus Convention is primarily focusing on public participation at the domestic level, however also the Convention's institutions apply rules enabling public participation.

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[58] Unece.org, *Status of ratification - UNECE* available at: http://www.unece.org/env/pp/ratification.html [Accessed 22 November, 2015].
[59] Council Decision 2005/370 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 p. 1-3.
[60] See further Marshall, F., "Two Years in the Life: The Pioneering Aarhus Convention Compliance Committee 2004-2006", *International Community Law Review*, 8, 2006, pp. 123-154, at p. 123.
[61] Marshall 2006, p. 125.
[62] Beyerlin, U. and Marauhn, T., *International Environmental Law*, 1st ed., Hart, Oxford, 2011, at p. 239.
[63] Ebbesson, J., "The Notion of Public Participation in International Environmental Law", *Yearbook of International Environmental Law*, 8(1), 1998, pp. 51-97, at p. 54.

In short, the Convention is built on three interacting pillars representing different forms of participation ultimately depending on each other for the full functionality of the Convention.[64] The first pillar of the Convention is covered by Articles 4 and 5 and concerns access to information. The second pillar, regulated in Articles 6 to 8 of Aarhus, establishes rights relating to public participation in different forms of decision-making.

The third and final pillar of Aarhus is found in Article 9 and concerns access to justice in environmental matters and is probably the most interesting to this thesis as it is the one that the EU seemingly has the most trouble enforcing in the EU Member States.[65] Article 9(1) and (2) have direct ties to the first two pillars of the Convention as it obliges contracting parties to grant access to a legal recourse for persons and NGOs who consider that their rights to access information or to participate in decision making have been neglected. Article 9(3), on the other hand, concerns access to justice with the aim of enforcing national environmental legislation. In these circumstances, individuals and NGOs are to be granted access to an administrative or a legal review procedure. In order to ensure the effectiveness of the access to justice, Article 9(4) -(5) contain some requirements, such as the access to injunctive relief when appropriate, an obligation to ensure that the procedures are not "prohibitively expensive" and the requirement that the public must be provided the information on how to access the review procedures.

5.2 The EU and the Aarhus Convention

5.2.1 EU´s Accession to the Aarhus Convention

The Aarhus Convention is a mixed agreement, meaning that both the EU itself and its Member States are parties to the Convention and thus under an international obligation to comply with it.[66] Which party is responsible for implementation of the Convention depends how the competence has been attributed in the given case. Upon signing the Convention, the EU made a declaration in which the importance of covering both EU institutions and national public authorities was stressed.[67] When approving the Convention the EU further declared its competence to enter into an international agreement and to implement it through legislation furthering the objectives of:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilisation of natural resources;

[64] Beyerlin and Marauhn 2011, p. 237.
[65] Hedemann-Robinson 2012, p. 19.
[66] See Articles 216 and 218 TFEU, which provide a legal basis for accessions to MEAs.
[67] The declaration that was made upon signature can be found on the UNECE website at: http://www.unece.org/env/pp/ratification.html [Accessed 1 November 2015].

- promoting measures at international level to deal with regional or worldwide environmental problems.[68]

The EU did not include any specific reservations in the declaration. In the view of Pallemaerts, this could be understood as an intention to adopt the legislation necessary for the full implementation of the Convention.[69] Considering that the EU had a possibility to make such a reservation, or declare that the Member States had liability for the obligations of the Convention, it can be assumed that the EU intended to fulfil the commitments following the EU's adherence.

5.2.2 EU Division of Competenc in Relation to Aarhus

Article 2(d) of the Aarhus Convention stipulates that by assigning an obligation to a public authority in the Convention, the obligation also applies to institutions of regional economic integration organisations that are parties to the Convention. This means, that it is not only the Member States of the EU that have to comply with the Convention, but also EU as a legal organisation. Thus, the Aarhus Convention is a mixed agreement, meaning that obligations fall on both the Union as such and its Member States, depending on which entity has the competence in the given case.[70] Article 19(4)-(5) of the Aarhus Convention further stipulate that:

3. Any organization referred to in article 17 which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organization's member States is a Party to this Convention, the organization and its member States **shall decide on their respective responsibilities for the performance of their obligations** under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under this Convention concurrently.

4. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 **shall declare the extent of their competence with respect to the matters governed by this Convention.** These organizations shall also inform the Depositary of any substantial modification to the extent of their competence.

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[68] The declaration that was made upon approval can be found on the UNECE website at: http://www.unece.org/env/pp/ratification.html [Accessed 1 November 2015] (Hereafter the Declaration upon approval).

[69] Pallemaerts, M., "Access to Environmental Justice at EU Level: Has the 'Aarhus Regulation' Improved the Situation?", in The Aarhus Convention at Ten: Interactions and Tensions Between Conventional International Law and EU Environmental Law, Pallemaerts, M., ed., 1st ed., Europa Law Publishing, Groningen, 2011, pp. 273-312, at p. 274.

[70] Alì, A., "The EU and the Compliance Mechanisms of Multilateral Environmental Agreements: the Case of the Aarhus Convention", in The External Environmental Policy of the European Union: EU and International Law Perspectives, Morgera, E., ed., 1st ed., Cambridge University Press, Cambridge, 2012, pp. 287-303 at p. 288.

Even though there is an obligation to clarify the extent of an organisation's competence, problems can occur. The ACCC has come across issues relating to competence in assessing the compliance of the EU and its Member States, and in deciding which party bears the responsibility for implementing and assuring the application with which parts of the Convention.[71]

The EU has stated in which areas it had competence in the declaration of the approval of the Aarhus Convention. The declaration ends by stating that the EU will apply the Convention on the basis of existing and future legislation on access to documents and other rules of EU law covered by the Convention. Furthermore, the EU declared its responsibility for the performance of Aarhus obligation covered by the Union law in force at the time of approval. Lastly, the EU pointed out that EU competence is subject to development and that changes may occur to the division of responsibilities.[72] This is a clear limitation of the responsibility of the EU. However, the implications of this declaration can be questioned as its legal effects under EU internal law and international law differ.[73]

Not only EU legislation applicable to the Union institutions and bodies is subject to the rules of the Aarhus Convention. Also EU legislation conducting the actions of Member States is governed by the Convention and, of course, within Union competence.[74] The EU has adopted several legislative acts as to ensure compliance with the Convention by its Member States. The ACCC has remarked that when Member States draft national legislation to implement an international agreement, such as Aarhus, that the EU is also a party to, they often primarily rely on the EU law rather than the Convention text itself.[75] Thus, it is only natural if the Commission, when aiming to promote compliance with the Convention, first relies on EU legislation implementing the Convention, though in the light of the original provision of Aarhus.

5.3 Implementation of the Aarhus Convention in the EU

5.3.1 General Information on the Implementation

Which party is responsible for implementation of the Convention depends on how the competence has been attributed in the given case, as was discussed above in Chapter 4.2. When the EU ratified the Aarhus Convention, not all Member States had yet done the same. Neither had the EU adopted all the internal legislation necessary to ensure full compliance with the Convention. This was to a large part due to the Member States' refusal to approve a

[71] See e.g. the ACCCs argumentation in United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Third Meeting, Riga, 11–13 June 2008, ECE/MP.PP/2008/5/Add.10, Report by the Compliance Committee, Compliance by the European Community with its Obligations Under the Convention, ACCC/2006/17 (European Community), (hereafter The EU Kazokiskes report).
[72] Hedemann-Robinson 2012, p. 20.
[73] See Hedemann-Robinson 2012, p. 21.
[74] Alì 2012, p. 290.
[75] The EU Kazokiskes report, para. 49.

legislative proposal by the Commission for a directive on access to justice ensuring the implementation of Article 9 of the Aarhus Convention at the Member State level concerning EU environmental legislation. Access to justice is a topic that the EU continues to work to improve. In the implementation report that was provided by the EU at the first MOP after acceding to the Aarhus Convention, the EU in addition to reporting on the implementation of specific Aarhus rules described the role of IEAs in the EU system.[76] In Paragraph 2 of the report, the EU recalls the binding nature of international agreements, as stipulated by Article 395 TFEU.

5.3.2 EU Legislation Implementing the Aarhus Convention

The following is not a comprehensive account of the internal legislation that the EU has adopted to implement the Aarhus Convention in the Union. However, it provides some background information necessary for the following chapters of this thesis on EU enforcement of the Aarhus Convention and the view of the ACCC on EU compliance with the Convention.

To begin with, EU´s primary legislation reflects provisions that are corresponding to the Aarhus objectives. Accordingly, Article 10(3) TEU states that every citizen shall have the right to participate in the democratic life of the Union and that decisions shall be taken as openly and as closely as possible to the citizen.[77] Both these principles relate to the right to access information and participation in decision-making. However, some legislation has been adopted specifically for the purpose of fulfilling the obligations of the Convention. The most important is perhaps Regulation (EC) No 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[78] (the Aarhus Regulation) adopted on 6 September 2006 by the European Parliament and the Council.[79] The Aarhus Regulation touches upon all three pillars of the Aarhus Convention,

[76] See the implementation report submitted by the European Community, United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Third Meeting, Riga, 11–13 June 2008, ECE/MP.PP/IR/2008/EC, Implementation Report Submitted by the European Community (hereafter the implementation report).
[77] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01.
[78] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, [2006] OJ L 264 p. 13-19.
[79] The Commission has also adopted two decisions to further implement the Aarhus Regulation: Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts [2008] OJ L 13, p. 24–26 and Commission Decision 2008/401/EC, Euratom of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council 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 institution and bodies, [2008] OJ L 140 p. 22-25.

which was a conscious choice aimed at increasing the transparency of the implementation of the Convention.[80]

In the area of access to environmental information, the EU had legislation already before the accession to the Aarhus Convention, having adopted directive 90/313/EEC on the freedom of access to information on the environment in 1990.[81] Ralph Hallo asserts that the EU Member States in comparison with other states participating in the negotiations had a relatively strong tradition of transparency and, in fact, even inspired the development of the first pillar of the Convention.[82] Directive 90/313/EEC has since been replaced by Directive 2003/4/EC on public access to environmental information,[83] which according to Hallo, in return, is strongly influenced by the Aarhus Convention. The Directive is in large parts very similar to the Aarhus Convention in granting access to environmental information and the cases where access to documents can be denied are almost identical; see further Article 4(4) of the Aarhus Convention and Article 4(1)-(2) of Directive 2003/4.

The EU legislation implementing the Convention's rules on participation in decision-making can be found in a number of Directives. The directive adopted with the aim of transposing Aarhus rules on public participation into EU rules applicable to Member States is Directive 2003/35/EC on public participation.[84] It amended the EIA Directive[85] and the IPPC Directive[86], the latter which has now been replaced by the Industrial Emissions Directive.[87]

According to Ebbesson, access to justice in environmental matters has not been a priority question in the EU, and general principles on judicial remedies have been the basis in the area.[88] Legal standing in the EU has according to Ebbesson long rested on what he describes as the "standard liberal" approach that was briefly described in Chapter 2. The criterion has

[80] Paragraph 5 of the Preamble to the Aarhus Regulation.
[81] Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, [1990] OJ L 158 p. 56-58.
[82] See further Hallo, R. "Access to Environmental Information. The Reciprocal Influences of EU Law and the Aarhus Convention", in *The Aarhus Convention at Ten: Interactions and Tensions Between Conventional International Law and EU Environmental Law*, Pallemaerts, M., ed., 1st ed., Europa Law Publishing, Groningen, 2011, pp. 55-65, at p. 57 and 62.
[83] Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EE [2003] OJ L 41 p. 26-32, (Hereafter the Environmental Information Directive).
[84] Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 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 L 156 p. 17-25.
[85] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, [2012] OJ L 26 p. 1-21 as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, [2014] OJ L 124 p. 1-18.
[86] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control [2008] OJ L 24 p. 8-29.
[87] Directive 2010/75/EU of the European Parliament and the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) [2010] OJ L 334, p. 17–119.
[88] Ebbesson, J., "European Community", in *Access to Justice in Environmental Matters in the EU,* Ebbesson, J., ed., 1st ed., Kluwer Law International, The Hague, 2002, pp. 49-100, at pp. 49-50.

been especially hard for NGOs to reach. This is because legal standing and access to justice for a private individual or organisation is so strongly connected to having a private interest in the matter.[89] As stated above, the suggested comprehensive directive on access to justice was refused by the Member States. Nevertheless, some measures have been taken to improve EU legislation on access to justice to comply with the provisions of the Aarhus Convention, though the provisions are found in various acts. For example, the Environmental Information Directive, the EIA Directive, Directive 2004/35/EC on environmental liability[90] and the Aarhus Regulation all contain provisions on access to justice in environmental matters relevant for the implementation of the Aarhus Convention.

5.4 EU Enforcement of the Aarhus Convention

5.4.1 Infringement Proceedings

No infringement proceeding concerning Member State compliance with the Aarhus Convention has as of yet been decided before the CJEU, though proceedings have been initiated. Some Member States have been sent letters of formal notice, and when a Member State has not commented on the compliance issue in a satisfactory way, the Commission has stated the reasons for why it believes the Member State has breached the Aarhus Convention, and through that EU law, in a reasoned opinion.[91] There are however, many cases where the Commission has initiated proceedings based on failures to comply with EU legislation implementing the Convention.[92]

Very few cases where the Commission has aimed to enforce the Aarhus Convention itself have been referred to the CJEU. A recent example is an infringement case against Estonia for a failure to transpose Article 4(1)(e), the second subparagraph of Article 4(1) and the second sentence of the second subparagraph of Article 4(2) of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and provisions of the Aarhus Convention. This directive is part of EU implementation of the Aarhus Convention. For example, Estonia had failed to provide a due process in case of a refusal to provide information. However, before the CJEU delivered a judgment in the case, the Commission and Estonia came to an agreement in which Estonia resolved to correct the legislation concerned, and the CJEU ordered the removal of the case.[93] Thus, though the Commission attempted to enforce provisions of the Aarhus Convention before the CJEU, as in many cases, it was not necessary to await a judgment, but the step

[89] Bogojevic, S., "CJEU, can you hear me? Access to Justice in Environmental Matters", *Europarättslig Tidskrift*, 16, 2013, pp. 728-740, at p. 732.
[90] See Articles 12 and 13 of Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, [2004] OJ L 143 p. 56-75.
[91] A list of ongoing cases, including the Commission's reasoned opinions, as well as cases referred to the CJEU can be found at http://ec.europa.eu/environment/legal/law/press_en.htm [accessed 2015-12-12]
[92] See e.g. Cases C-354/06 *Commission v Luxembourg* [2007] ECR I-116, Case C-69/07 *Commission v Italy* [2008] ECR I-18, Case C-427/07 *Commission v Ireland* [2009] ECR I-6277 and case C-378/09 *Commission v Czech Republic*, 31.7.2010 (OJ 2010 C209/10)
[93] Case C-206/14 *Commission v Estonia*.

taken towards a declaration by the CJEU was enough to reach an agreement and convince the Member State to take action to ensure compliance with the Convention.

Hedemann-Robinson strongly argues that Commission enforcement of access to justice in the EU Member States should not be limited to the internal EU legislation that, perhaps poorly, implements the provisions of the Aarhus Convention. He claims that this leads to the result that Commission enforcement of access to environmental justice is unduly limited in scope and that enforcement of Aarhus should be attempted independently of whether or not the Union has adopted internal legislation on the subject matter. This, he bases on the fact that the Aarhus Convention is, in fact, a legally binding norm with the status of EU primary law. Hedemann-Robinson also believes it to be of even higher importance that the Commission enforces the Aarhus obligations in these cases as to ensure that individuals and NGOs can rely on their rights to access to environmental justice as they are not considered to be directly applicable.[94]

5.5 The Aarhus Convention Compliance Committee

5.5.1 The ACCC, Establishment and Functions

At its first meeting, the Meeting of the Parties adopted Decision I/7[95], establishing a compliance committee determined to promote and improve compliance with the Aarhus Convention in line with Paragraph 1 of the Decision. Marshall describes the ACCC as exceptionally innovative due to its original approach to achieving compliance, especially because individuals and NGOs are allowed such a high degree of influence.[96] The decision establishing the ACCC was based on Article 15 of the Aarhus Convention, which stipulates that the MOP shall establish arrangements for reviewing compliance of a non-confrontational, non-judicial and consultative nature. Rules governing the functions and structure of the ACCC can be found in the annex to Decision I/7.

The ACCC is not a court or a traditional dispute settlement mechanism, but a progressive avenue for reviewing compliance in a non-judicial way. Though parties to the Convention can initiate proceedings regarding the compliance of another party, the ACCC is not the arena for the settlement of disputes between parties. Instead, when a dispute arises between parties to Aarhus, Article 16 of the Aarhus Convention provides a procedure for dispute settlement, first through negotiation or other means of settlement acceptable to the parties and second through submitting the dispute to the International Court of Justice (ICJ) or to an arbitral tribunal in accordance with a procedure set out in Annex II of the Convention. It must be noted, however, that the latter two are only possible measures where both or all parties of the

[94] Hedemann-Robinson 2012, p. 28.
[95] United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, First Meeting, Lucca, 21–23 October 2002, ECE/MP.PP/2/Add.8, *Report of the First Meeting of the Parties, Decision I/7, Review of Compliance* (hereafter Decision I/7).
[96] Marshall 2006, p. 123.

dispute have accepted a common means of dispute settlement in a written declaration to the Depositary.

The ACCC has several functions, which are defined by Article 13 of Decision I/7. Most importantly for this thesis, they ACCC's tasks includes considering submissions, referrals and communications by various actors. However the ACCC's functions also comprise preparing compliance and implementation reports, monitoring, assessing and facilitating reporting requirements and examining compliance issues resulting in recommendations where appropriate. A case can be brought before the ACCC by:

> (1) one or more of the parties to the Convention in accordance with Paragraphs 15 and 16 of the Annex to Decision I/7;
> (2) the Secretariat, in line with Paragraph 17 of the Annex to Decision I/7 or
> (3) of and a member of the public as stipulated in Paragraph 18 of the Annex to Decision I/7.

To date, there has not yet been a referral by the Secretariat and only one submission by a state party.[97] Individuals and NGOs on the other hand, have been more active in submitting communications and during the ten years that the ACCC has accepted cases there have been 98 communications from the public.[98]

As pointed out by Fitzmaurice, the ACCC was established with the objective to improve compliance with the Aarhus Convention rather than to help individuals enforce their rights.[99] The ACCC in its report to the second Meeting of the Parties (MOP) expressed the view that ACCC was not to be seen as a redress procedure for individuals, it does not provide any remedies or injunctive relief but solely aims at increasing compliance and a correct implementation of the Convention. Thus the ACCC also considers that it has discretion in delimiting and extending the scope of considerations of submissions, referrals and communications.[100]

5.5.2 The Nature of ACCC Findings

The ACCC does not have judicial powers; instead, the ACCC issues draft findings, measures and recommendation. In the adoption of those, the ACCC takes into account comments by the parties concerned, including a member of the public submitting a communication, see

[97] See ACCC/S/2004/1, submission by Romania regarding compliance by Ukraine.
[98] For a list of communications from the public, see the ECE website at http://www.unece.org/env/pp/pubcom.html [accessed 20 November 2015].
[99] Fitzmaurice, M., "Environmental Justice through International Complaint Procedures? Comparing the Aarhus Convention and the North American Agreement on Environmental Cooperation", in *Environmental Law and Justice in Context*, Ebbesson, J., and Okowa, P., eds., 1st ed., Cambridge University Press, Cambridge, 2009, pp. 211-227, at p. 215.
[100] United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Second Meeting, Geneva, 25–27 May 2005, ECE/MP.PP/2005/13, *Report of the Compliance Committee*, para.13.

further Paragraph 32 of the Annex to Decision I/7. ACCC findings are not judgments as such, they are not legally binding on the parties and if no further action is taken in relation to a draft recommendation, it solely reflects the view of the ACCC members as stipulated in Paragraph 35 of the Annex to Decision I/7. Nonetheless, these documents may provide valuable insights in the interpretation of the Convention and also signals to the parties that improvements can be made to their legislation relating to access to information, public participation in decision-making or access to justice.

The term measures means actions that can be taken pending consideration by the MOP, intended to be used by the ACCC when they are urgently needed before the next MOP takes place.[101] In consultation with the party concerned, the ACCC may "provide advice and facilitate assistance" in the party's implementation of the Convention. Moreover, where the party agrees to it, the ACCC can in accordance with Paragraphs 36 to the Annex to Decision I/7 adopt certain measures present in Article 37 of the Annex to Decision I/7. The ACCC can then request that the party submits a strategy on how to achieve compliance with the Convention and subsequently report of its development, and make recommendations to the party concerning specific measures to address a matter raised by a member of the public if relevant. Fitzmaurice stresses the fact that the findings of the ACCC are to be regarded as a dialogue with parties aiming to ensure compliance with the Convention, describing the process as consultative.[102] In many cases parties to the Convention are willing to cooperate with the ACCC in order to improve compliance, there are however exceptions.

Recommendations are, according to the guidance document of the ACCC[103] to be understood as recommendations to the MOP to adopt further measures. Whereas no specific legal consequences arise from a draft recommendation itself it is clear that the recommendation carries more weight when endorsed by the MOP. The MOP also has the competence to adopt a wider range of measures. Before every ordinary meeting, the ACCC is to finalize its reports so that the MOP can consider and endeavour to adopt them by consensus. In attempting to ensure full compliance with the Convention, the MOP can resolve to take any of the measures recommended including those mentioned above, but also the measures in Article 37(e)-(h) of Decision I/7. These include issuing declarations of non-compliance, issuing cautions, suspending the party's rights and privileges under the convention in accordance with applicable international law and taking other appropriate non-confrontational, non-judicial and consultative measures.

Regarding the efficiency of the compliance mechanisms, it can be noted that the MOP has so far followed the recommendations of the ACCC, strengthening its authenticity and dependability.[104]

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[101] Marshall 2006, p. 132.
[102] Fitzmaurice 2009, p. 216.
[103] *Guidance Document on the Aarhus Convention Compliance Mechanism,* available on the UNECE website at http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf [accessed 12 November 2015].
[104] Marshall 2006, p. 153.

5.5.3 The EU and External Compliance Mechanisms

On the international level, there is a rapid increase in the number of dispute settlement bodies of different forms, from courts and tribunals to softer compliance mechanisms and quasi-judicial bodies. This development can be seen increasing simultaneously with the international legal order and the EU's partaking on the international arena. Some dispute settlement bodies have the power to produce legally binding judgments, while others simply aim at clarifying the provisions and requirements of the agreement that it is bound to, assisting the contracting parties in their implementation and application.[105]

This leads to the interesting result, regarding EU enforcement of IEAs, that there are sometimes concurrent jurisdictions, meaning that while the EU has competence and a responsibility to enforce the agreement within the Union, there is also a court or a tribunal competent to settle a potential dispute. This gives rise to the possibility that the same dispute could be tried before an international court or tribunal and the CJEU at the same time, meaning that conflicting judgments could result. Conflicting judgments, as well as a legal system with no clear legal hierarchy, risk creating a fragmented application of international law, and therefore possibly a fragmentation of the international legal system.[106]

5.5.4 The EU and the ACCC

With EU´s accession to the Aarhus Convention, the Union has accepted that the ACCC has the competence to work to improve compliance with the Convention as an integral part of the Aarhus regime. The ACCC can, and has, in several cases commented on the compliance by the EU and in some cases the ACCC has suggested improvements to EU legislation implementing the Convention. In the case of the EU, the ACCC, in addition to assessing substantive issues of compliance with Aarhus, has to tackle the issue of assigning responsibility for a case of non-compliance. As stated above, the question is first and foremost handled by the EU itself and based on EU´s internal competences. This issue raises a number of interesting question such as how the ACCC looks at shared responsibility, what responsibility the EU has for implementation at the national level, and what responsibility the CJEU has in relation to IEAs. The ACCC has also handled a communication regarding compliance by the EU and Ireland, before Ireland was a party to the Convention.[107] Even though all EU Member States are now parties to the Aarhus Convention, the case is important

[105] See for example the compliance committee of the Aarhus Convention which is studied in more detail in Chapter 6 of this thesis.
[106] Hedemann-Robinson 2012, p. 23.
[107] See United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Thirty-ninth Meeting, Geneva, 11–14 December 2012, ECE /MP.PP/C.1/2012/12, Findings and Recommendations with Regard to Communication ACCC/C/2010/54 Concerning Compliance by the European Union.

as it raises the question of how much responsibility the EU has for non-compliance by a state that is not party to an IEA.

An important aspect to mention in this context, is that since the EU became a member to the Aarhus Convention, the compliance with Aarhus objectives has been made subject to two review systems for EU Member States: First, the Aarhus system with its reporting system and the review by the ACCC, and second, the EU system with a duty to report implementation, Member State courts and the CJEU.[108] As the EU has adopted legislation to implement the Convention, the Member States must follow both sets of legislation, which will hopefully conform to each other and be interpreted similarly by the ACCC and the CJEU. Also, the EU institutions have to comply with the Convention. This leaves the CJEU with both the competence to review compliance with the Convention and an obligation to ensure compliance in its judgments.[109]

[108] Ebbesson 2011, p. 250.
[109] Ebbesson 2011, p. 249.

6 The View of the ACCC on EU Competence and Responsibility

6.1 Introduction

According to Hedemann-Robinson, a weakness of the CJEU's approach to EU competence in relation to mixed agreements, is that it is difficult to ascertain whether or not the Union has adopted sufficient internal legislation to fulfil the obligations of the agreement in question.[110] As asserted above in Chapter2.3.2.1, the EU has tried to limit its responsibilities through a declaration of competence. Yet, as will be seen below, the ACCC struggles to determine the the responsible party in a few cases based on competence, and draws its own conclusion on the division of competence and its implications for the question on liability or responsibility. Important to note is that there are also a number of cases before the ACCC where the complaint was only directed at a Member State, with no question of responsibility on the EU's part, where it can be assumed that the ACCC had made the assumption that the responsible party was without doubt the Member State and not the EU.[111]

6.1.1 The Kazokiskes Case

6.1.1.1 Background

The *Kazokiskes* case is especially interesting in relation to the question of the division of competences between the EU and the Member States. On the one hand, because the case was the first one reviewing compliance by the EU and on the other hand, because there were in fact two communications: one alleging non-compliance by Lithuania and a corresponding one alleging non-compliance by the EU.[112] The two cases are connected as they concern the same event. Both were initiated by the Lithuanian NGO Association Kazokiskes Community and the alleged breach was the authorisation for and financing of a landfill in the territory of the Kazokiskes village. An important question in the case was which of the parties, that is Lithuania or the EU, was responsible of ensuring compliance with the Aarhus Convention.

In the communication alleging the non-compliance by the EU, the communicant described the plans for a landfill project near the Kazokiskes village that had been authorised by the Lithuanian authorities. The planned project was of such a nature that it fell under Annex I to

[110] Hedemann-Robinson 2012, p. 9.
[111] See e.g. Findings and Recommendations of the Aarhus Convention Compliance Committee with regard to Communication ACCC/C/2008/33 concerning compliance by the UK adopted on 24.9.2010 (ECE/MP.PP/C.1/2010/6/Add.3)
[112] United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Third Meeting, Riga, 11–13 June 2008, ECE/MP.PP/2008/5/Add.6, *Report by the Compliance Committee, Compliance by Lithuania with its Obligations Under the Convention,* ACCC/2006/16 *(Lithuania)* and the *EU Kazokiskes* case.

both the EIA Directive and the IPPC Directive.[113] The role of the EU was that of signing a financial memorandum to finance the landfill with up to 50% of the establishment cost. The communicant argued that the landfill project was not to follow the environmental legislation of neither Lithuania nor the EU. The communicant also maintained that the authorisation procedure in Lithuania had not been carried out in consistency with Articles 6(2), 6(4) and 9(2) of the Aarhus Convention. They had not been allowed to take part in the decision-making procedure and had no possibility to challenge the decision to establish the landfill. Moreover, the communicant claimed that the EU decision to co-finance the landfill had not been subject to a decision-making procedure in accordance with the above Articles of the Aarhus Convention either. They furthermore pointed out that the IPPC Directive did not fulfil Aarhus standards for this type of project.[114]

6.1.1.2 ACCC's Criteria for Attributing Responsibility of the EU

The ACCC pointed out that the EU had a special structure, which separated it from the other parties to the Convention as the function of EU legislation was dependent on the implementation by the Member States and because of the distribution of powers, which was a unique phenomenon. Hence, the ACCC came to the conclusion that the assessment of the case needed a slightly different approach to reflect these differences.[115] In relation to public participation in decision-making, a certain test of significance is normally used by the ACCC. The test that was instead applied by the ACCC in order to assess if the EU was complying with the Convention. The question posed was whether the EIA and IPPC Directives allowed the Member States to make decisions on landfills without a proper notification and opportunities for public participation.[116] EU´s responsibility could then be said to be based on whether or not it allowed for non-compliance by its Member States.

6.1.1.3 The Obligations of the EU

The ACCC also stressed that the EU Member States had a responsibility to implement the EU legislation transposing the Convention and it seems like the ACCC meant that the EU´s responsibility ended when it had legislated in accordance with the Convention.[117] According to Àli the ACCC decided not to adopt a "classic search for responsibility", but instead focused on a more pragmatic approach by assigning responsibility to the party that was best suited to achieve compliance in a concrete manner.[118] In this particular case, that party was Lithuania.[119]

[113] The *EU Kazokiskes* report, para. 15.
[114] The *EU Kazokiskes* report, para. 2.
[115] The EU Kazokiskes report, para. 44.
[116] The EU Kazokiskes report, para. 45.
[117] The EU Kazokiskes report, para. 45.
[118] See further Àli 2012, p. 292.
[119] The EU Kazokiskes report, para. 89.

Moreover, the ACCC stressed that international agreements are indeed superior in rank to the secondary legislation of the EU and that they can sometimes be applied even though they have not been implemented. This does, however, not allow the EU to abstain from transposing the Convention "through a clear, transparent and consistent framework" of EU law. This apparently applies even though the Convention in certain cases could have direct effect and though secondary law shall be interpreted in line with the Aarhus Convention.[120] Thus, the ACCC conclusion strengthened the view that the EU cannot rely on the Member States to transpose the Convention correctly. This also has to be done in EU legislation.

6.1.1.4 The Responsibility to Enforce Non-compliance by Member State

It is noteworthy that the Commission had, prior to the second communication regarding the compliance of the EU was sent, stated that the Lithuanian legislation was in line with the EU law implementing the Aarhus.[121] The applicant therefore in the submitted Communication, argued that the EU had confirmed its own failure to implement the Convention, as the EU did not enforce the breach by Lithuania.[122] Nevertheless, the ACCC came to the conclusion that the EU had not failed to comply with the Aarhus Convention but did not enter into a discussion of this particular issue.[123]

What ACCC did in the *Lithuanian Kazokiskes* case was that it attributed the responsibility to Lithuania for the failure to provide for a proper participation in the decision-making procedure.[124] Yet, the ACCC did not discuss the fact that the Commission considered Lithuanian legislation to fulfil the obligations of the directives in question. Neither did the ACCC discuss the possibility of the Commission to initiate an infringement procedure against Lithuania for non-compliance or mention a potential obligation to enforce compliance with international agreements. Àli interprets this as an intention to focus on how to best encourage conduct that will eventually achieve the greatest compliance with the Convention and to accommodate the EU's internal division of competences.[125]

6.1.1.5 Competences and Access to Justice

Another interesting aspect in the *EU Kazokiskes* case was that the ACCC commented on the occasionally unclear division of competences between the EU and its Member States in relation to access to justice. The ACCC specifically stated that it was difficult to see whether or not procedural issues relating to remedies were part of EU competence, as these in general fall within Member State competence. As a result, the ACCC could not come to a conclusion on the responsibility to implement the provisions relating to remedies. The ACCC left the

[120] The EU Kazokiskes report, para. 58.
[121] See further Àlì 2012, p. 292.
[122] The EU Kazokiskes Communication, p. 6.
[123] The EU Kazokiskes report, para. 61.
[124] The EU Kazokiskes report, para. 89.
[125] See further Àli, p. 293.

question for the EU and the Member States to determine among themselves if the implementation should be done in national law or in EU legislation. [126]

6.1.2 The *Vlora* Case

6.1.2.1 Case Background

The *Vlora* case[127] differs from the case above as it concerns compliance by the EU and a non EU Member State, namely Albania. Thus it does not define how to attribute responsibilities and competences between the EU and its Member States, but touches on the problem whether the EU as such can be found to be in non-compliance with the Aarhus for actions in a third state. Just as in the *Kazokiskes* case above, a NGO had also submitted a communication regarding the compliance by the state, Albania, which resulted in a separate report.[128]

The case was initiated by an Albanian NGO, the Civic Alliance for the Protection of the Bay Vlora. The issue at hand concerned the plans of Albanian authorities to construct a thermal power plant in the bay Vlora in Albania. The involvement of the EU concerned the financing the project through the European Investment Bank (EIB) together with the World Bank and the European Bank for Reconstruction and Development (EBRD).[129] The communicant maintained that the EU had taken the decision to finance the project without ensuring proper public participation.[130] The EIB had furthermore refused to disclose the investment agreement and the applicant meant that the refusal was contrary to their right to access environmental information upon request in accordance with Article 4 of Aarhus. Hence, the allegations concerned Articles 4, 5 and 6 of the Convention. It is also worth mentioning that the ACCC had previously in its report on Albania found the state to be in non-compliance with regard to some requirements for public participation in the decision-making process. The findings of non-compliance to some extent overlap the allegations against the EU.[131]

6.1.2.2 Competence and Liability

In the *Vlora* case, the ACCC did not cover the question of competence in any great detail but began by stating that the provisions of the Aarhus Convention were applicable on EIB

[126] The EU Kazokiskes report, para. 57.
[127] United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Twenty-ninth Meeting, Geneva, 31 March–3 April 2009, ECE/MP.PP/C.1/2009/2/Add.1, *Findings and Recommendations with Regard to Communication ACCC/C/2007/21 Concerning Compliance by the European Community* [Hereafter the *Vlora* report].
[128] See further United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Sixteenth Meeting, Geneva, 13-15 June 2007, ECE /MP.PP/C.1/2007/4/Add.1, *Findings and Recommendations with Regard to Compliance by Albania,* ACCC/C/2005/12 *(Albania),* (Hereafter the Albania report).
[129] The *Vlora* report, para. 15.
[130] The *Vlora* report, para. 2.
[131] The *Albania* report, paras. 92-94.

actions.[132] It is clear that decisions by all EU institutions acting as public authorities have to comply with the Convention and can be considered by the ACCC if there is a communication alleging non-compliance. Moreover, the ACCC stated that the decision to permit the activity was taken by Albanian authorities and recalled that it had already found that Albania was not in compliance with the Convention when it permitted the construction of the power plant.

In Paragraph 36 of the report, the ACCC stated that the EIB did not have the legal authority to conduct an Environmental Impact Assessment (EIA) procedure in Albania and that the EIB had to rely on the state itself to ensure the proper public participation during the decision-making procedure. Undertaking an EIA procedure is clearly within the competence of the Member States and responsibility for completing these procedures could consequently not be attributed to the EU. The ACCC moreover stated that the decision to provide a loan or other financial support by a financial institution was not comparable with a decision to permit an activity. [133] Since the decision to provide financial means is not an activity that should in general be regarded as giving a permit it is difficult to see what actions could potentially be considered non-compliance by the EU for actions in third states.

6.1.3 The ClientEarth Case

6.1.3.1 Background

The *ClientEarth* case was initiated by the NGO ClientEarth and was supported by a number of other organisations and an individual. In contrast to the two cases above no Member State of the EU was involved. The communication was also limited to the issue of access to justice. The basis for the allegations concerned Article 3(1) and Article 9(2)-(5) of Aarhus.[134] The communication was not sent as a response to a certain event or decision by the EU, but was more of a general nature questioning the strict criteria for access to justice in the EU.

There were three main allegations: (1) that the EU through applying the individual concern criterion for granting legal standing to NGOs and individuals before EU courts (CJEU and the Court of First Instance (CFI)) did not comply with the Aarhus rules on access to justice; (2) that the Aarhus Regulation did not fulfil the requirements of the Convention as it did not grant individuals other than NGOs access to the internal review procedure and as the scope of the procedure was limited to administrative acts of an individual nature, and (3) that the costs of a procedure before the EU Courts were too uncertain and possibly prohibitive in the event of a lost case.[135]

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[132] The Vlora report, para. 26.
[133] The *Vlora* report, para. 36.
[134] United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Thirty-second Meeting, Geneva, 11–14 April 2011, ECE /MP.PP/C.1/2011/4/Add1, *Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union*, at para. 1, [Hereafter the *ClientEarth* report].
[135] The *ClientEarth* report, para. 2.

The allegations were mainly based on a number of decisions by the EU Courts as the communicant meant that the EU legislation regarding legal standing for individuals and NGOs had been misinterpreted by the EU Courts.[136] In all of the cases that were referred to, the individual or the NGO requesting a judicial review was denied standing. It must be noted that several of the cases were concluded before the entry into force of the Convention for the EU and all but two initiated before this time. While the *WWF-UK* case was initiated after the entry into force of the Convention, see further below, the Aarhus Regulation was not yet effective. Thus, the *Stichting Milieu* case is the only case that was initiated after the EU had implemented the Aarhus Convention through the Aarhus Regulation. This case had however not yet been concluded at the time of the ACCC report, so possible breaches of the Convention in relation to *Stichting Milieu* case could not lead to findings of non-compliance by the ACCC.[137]

It is also important to mention that at the time of the communication, the Lisbon Treaty had not yet come into force. However, as the Lisbon Treaty entered into force on the 1 December 2009, during the consideration of the communication, the ACCC invited the parties to submit their views on how this would affect the allegations made by the communicant.

It must also be noted that the case is not yet completely settled. The ACCC decided to stay the procedure awaiting a ruling from the CJEU. The second part of the report regarding compliance by the EU will cover issues related to the internal review procedure. The communicant has requested that the ACCC also adopt findings on the second part of the communication as soon as possible.[138]

6.1.3.2 Competence and Liability

The *ClientEarth* case, in contrast to the other cases presented in this Chapter, did not contain any allegations directed at a state but only at the EU as an organisation. This means that the ACCC did not really discuss the issue of competences. However, the ACCC did mention the declaration that was made by the EU upon approval of the Aarhus Convention stating that the Member States of the EU were responsible for the full implementation of Article 9(3) due to the fact that the EU had not yet legislated in this area.[139]

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[136] The *ClientEarth* report, para. 2. The decisions included: WWF-UK Ltd v. Council of the European Union, T-91/07, 2 June 2008; and WWF-UK Ltd v. Council of the European Union and the Commission of the European Communities, C-355/08, 5 May 2009 [Hereafter the WWF case], European Environmental Bureau (EEB) and Stichting Natuur en Milieu v. Commission, joined cases T-236/04 and T-241/04, 28 November 2005 [Hereafter the EEB cases], Região autónoma dos Açores v Council, T-37/04, 1 July 2008 and C-444/08, 26 November 2009 [Hereafter the Azores case] and Stichting Natuur en Milieu and Pesticides Action Network Europe v. Commission, T-338/08, 14 June 2012 [Hereafter the Stichting Milieu case].
[137] the *ClientEarth* report, para. 59.
[138] Letter from the communicant of 20 May 2014 in case ACCC/C/2008/32 (*European Community),* available on the UNECE website at http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/correspondence/frCommC32_20.05.2014.pdf [accessed 20 November 2015].
[139] The ClientEarth report, para. 58.

The ACCC furthermore discussed in some greater length whether the preliminary reference procedure and procedures for access to justice in the Member States could meet the requirements for access to justice in the EU or not. The ACCC, again, based this on the fact that the EU, as a regional integration organisation, was of a special nature. The actions of EU and its Member States therefore and to some extent have to be considered together.[140]

6.1.4 The Irish Renewables Programme Case

6.1.4.1 Background

The *Irish renewables programme* case concerned alleged non-compliance by the EU for having approved and funded a renewable energy programme in Ireland. The case was initiated in 2010, when an individual claimed that the EU had failed to disseminate information in accordance with Article 5 of Aarhus and failed to provide an opportunity for public participation in accordance with Article 7 of Aarhus.[141] When the case came before the ACCC, Ireland had not yet ratified the Convention, which is why only the compliance of the EU was scrutinised.

As stated above, the main allegation concerned the issue of if the EU had failed to disseminate information on the Renewable Energy Feed-In Tariff 1 (REFIT 1) programme in Ireland. The EU was involved in the programme through financing and by approving state aid. According to Article 108 TFEU, state aid is in general prohibited in the EU, but it can sometimes be allowed by the Commission. The communicant also alleged that information had not been disseminated concerning the SEA that was made, and it was argued that the EU was wrong in financing and approving state aid, as the SEA did not comply with the EU legislation that was meant to implement the Aarhus Convention.[142]

Of importance was also the EU Directive on the promotion of the use of energy from renewable sources,[143] the purpose of which is to increase the use of energy from renewable sources and containing targets for the Member States and the EU as a whole. Article 4 of the renewable energy directive moreover requires the Member States to submit national renewable action plans (NREAPs) on how they will reach their respective targets. The communicant alleged that the EU had failed to respect Article 6 and 7 of Aarhus when approving the NREAP of Ireland.[144] At its fifth meeting in 2014, the MOP adopted some of the findings by the ACCC, which strengthened their importance.[145]

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[140] The ClientEarth report, para. 65.
[141] The Irish renewables programme report, para. 1.
[142] The Irish renewables programme report, para. 2.
[143] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140 p. 16-62 [hereafter the renewable energy directive].
[144] The Irish renewables programme report, para. 44.
[145] United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Fifth Session, Maastricht, 30 June and 1 July 2014, ECE/MP.PP/2014/L.16, *Draft Decision V/9g Concerning Compliance by the European Union With its Obligations Under the Convention.*

6.1.4.2 Competence and Liability

In the case, the EU argued that its liability had to be based on its competence as spelled out in the declaration that was made upon approval of the Convention. The EU then maintained that the applicant had not proved that the acts in question fell under EU competence.[146] Interestingly, even though the ACCC had not previously required the EU to monitor compliance by its Member States, the EU argued that it had done its utmost to pursue the alleged breaches by Ireland in relation to EU law implementing the Convention. This has been done through infringement proceedings in accordance with Articles 258 and 260 TFEU. However, Ireland was found not to be in non-compliance.[147] This suggests that the obligation of the EU could go beyond legislating in accordance with the Convention and could also include the enforcement of the legislation, where possible. This approach was also adopted by the ACCC when it stated that the question of on which party the obligations fell needed to be divided into two parts. The ACCC stressed that the following questions needed to be addressed:

1. Is the legal framework of the EU compatible with the Convention?
2. Has the EU fulfilled its responsibility in monitoring the Member States´ implementation of EU law that is transposing the Convention properly?

The ACCC specifically pointed out that this test was to be made for EU responsibility regarding all Member States, including Ireland. Thus, it does not seem to matter whether or not the Member State in question is also a party to the Aarhus Convention.[148] The ACCC continued by assessing how the EU had monitored implementation by Ireland and observed that the EU had not provided evidence on how it has evaluated the acts of Ireland in the light of Article 7 of the Convention. Instead, the EU simply submitted that Ireland had complied with the requirements of Article 7.[149] The ACCC found that the EU had failed to comply with Article 7 of the Convention on both points, a finding which was also endorsed by the MOP in its decision.[150]

6.1.5 The Scottish Renewables Programme Case

6.1.5.1 Background

The *Scottish renewables programme* case was initiated by an individual alleging non-compliance by both the EU and the UK. The allegations related to the renewable energy policy of the EU,[151] the UK's implementation of the policy and two particular projects, a

[146] The Irish renewables programme report, paras. 52-53.
[147] The Irish renewables programme report, paras. 53-54.
[148] The Irish renewables programme report, para. 76.
[149] The Irish renewables programme report, para. 81.
[150] MOP Decision in the Irish renewables programme case, para. 1.
[151] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions "Renewable Energy: a major player in the European energy market" (COM(2012) 271).

wind farm and an access route to the wind farm.[152] The communicant had three main allegations touching upon all pillars of the Convention. They can be summarised as follows: (1) The authorities of the EU and UK had failed to provide information on the renewable energy programme and some individual energy projects as required by Articles 4 and 5 of the Convention. (2) The same authorities had not allowed for effective public participation in accordance with Articles 6 and 7, the main problem, they meant was the lack of transparency throughout the process. Finally, (3) the authorities did not provide adequate review procedures and were therefore in non-compliance with Article 9(1)-(2) and in addition the costs for such procedures were also prohibitively high.[153] The communication also contained concerns on the process that was used when the EU's renewable energy policy was adopted.[154]

UK´s renewable energy program was based on the Renewable Energy Directive, which, as mentioned above, requires EU´s Member States to provide NREAPs, the drafting of which was also questioned in the case.[155] In addition, most of the EU legislation described in Chapter 4 is relevant in the case, including the Aarhus Regulation, the Environmental Information Directive, the EIA Directive and the SEA Directive.[156] In the UK, the main legislation governing these issues was, at the time of the case, the Electricity Act 1989. Accordingly, the construction of power stations, like the one in this case, is subject to an EIA procedure. Consequently, EIA procedures with possibilities for public participation had taken place both in relation to the wind farm and the access route projects, though the communicant meant that these were inadequate and based on figures that were not sufficiently established.[157]

6.1.5.2 Liability

In the *Scottish renewables programme* case, the ACCC did not discuss the competences and responsibilities of the EU specifically as they had done in the previous cases. The communicant in the case had several allegations regarding participation in decision-making covering the actions of both the EU and the UK. Most of the allegations were fully refuted by both parties.[158] In relation to some parts of the allegations, the EU maintained that the communication concerned compliance by the UK rather than compliance by the EU. The issues, EU maintained, had to do with the implementation of the Convention by the UK.

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[152] United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Forty-fourth Meeting, Geneva, 25–28 March 2014, ECE/MP.PP/C.1/2014/5, *Findings and recommendations with regard to communication ACCC/C/2012/68 concerning* compliance *by the European Union and the United Kingdom of Great Britain and Northern Ireland* [hereafter the *Scottish renewables programme* report*],* at para. 1.
[153] The *Scottish renewables programme* report, para. 2.
[154] The *Scottish renewables programme* report, para. 3.
[155] The *Scottish renewables programme* report, para. 57.
[156] The *Scottish renewables programme* report, paras. 17-19.
[157] The *Scottish renewables programme* report, paras. 31-33.
[158] The Scottish renewables programme report, para. 59.

The EU also recalled the special structure of the EU and argued that due to this, it had no responsibility for potential breaches. In support of this view, the EU referred to the *EU Kazokiskes* case.[159] The EU moreover argued that the UK and the Scottish authorities had conducted adequate consultations in relation to the requirements of the relevant EU law.[160] It is hard to draw conclusions regarding why the ACCC decided not to discuss the division of competences in this case. The ACCC neither mentioned the issue of Member State compliance with EU law implementing the Convention, nor did it discuss the responsibility of the EU to monitor Member State compliance with EU law.

6.1.6 Concluding Observations on ACCC's Views on Competences and Responsibilities

First, it is important to note that the ACCC recognises that the EU is a *sui generis* legal system and that it must take this into consideration when assessing allegations of non-compliance. One might conclude from the *EU Kazokiskes* case that the EU is responsible for making sure that its legislation does not allow the Member States to make environmental decisions in such a way that the Aarhus Convention is not respected. In the case, the ACCC pointed out that EU legislation must not allow for Member States' decision-making procedures neglecting proper notification and opportunities for participation. The EU cannot simply depend on the Member States to individually fulfil the obligations of the Aarhus Convention. However, it is also important to note that the Member States have an obligation to implement the EU legislation transposing the Convention. Furthermore, the ACCC seems to have adopted a pragmatic approach in assigning responsibilities, focusing on which party can best ensure compliance with the Convention.

A similar approach was taken in the *Irish renewables programme case,* where it is clearly established that the EU can be held responsible for a violation by its Member States that are not parties to the Convention. In this case, however, the ACCC extended the assessment to also include an obligation to monitor implementation of EU legislation derived from the Convention. It is not certain what caused this different approach. It could be a development of how the ACCC sees the responsibility of the EU or perhaps a result of a greater responsibility of the EU when the Member State has not ratified the Convention. The latter suggestion is in line with the ACCC having a pragmatic approach to liability finding the party most likely to best ensure compliance as proposed by Àli.[161]

The responsibility of the EU for actions in third states seems to be limited. Pure agreements on loans or financial support are not generally regarded as decisions requiring a proper procedure for public participation and it is hard to imagine a hypothetical situation other than financing agreements that could be covered by the Convention. A non EU Member State is

[159] The *Scottish renewables programme* report, para. 49.
[160] The *Scottish renewables programme* report, para. 60.
[161] See further Àli, p. 292.

naturally not bound by EU legislation. Consequently, the EU cannot violate the Convention through non-implementation of the Convention in relation to an action in a third state.

The *ClientEarth* case shows the importance of clarifying the competences between the EU and its Member States. This is foremost important because the division of competences is the basis for the attribution of responsibility for the implementation of the Convention. When it is not apparent which party is responsible, it can be harder for individuals to access the rights granted to them through the Aarhus Convention. It is also useful for the parties themselves to be certain about the demands for the proper implementation of international agreements. The ACCC in its report refrained from establishing the division of competence although the functioning of the Convention could perhaps be improved by finding a responsible party. Instead, the ACCC left it open for the EU and the Member States to determine how to divide the competence between them. An advantage of this approach could be that it enables the EU to find a good solution working for the EU as the special system that it is.

Àli raises several questions connected to the special nature of the EU system and the effect of the accession to the Convention through the adoption of a mixed agreement in the EU. For example, there has not yet been a case brought by an EU Member State against another Member State or the EU. It is not sure whether this would be allowed within the EU with reference to the judgment by the CJEU in the *Mox Plant* case.[162] Moreover, Àli maintains that external compliance mechanisms such as the ACCC are increasingly intruding into the internal matters of the EU with competences being a good example. This could, according to Àli, harden the position taken by the EU in relation to external compliance mechanisms.[163]

[162] Case C-459/03, [2006] ECR I-4635 [*Mox Plant*].
[163] Àli, p. 303.

7 Discussion

The overreaching research question of this thesis is "What role does the division of competence between the EU and its Member States play in ensuring compliance with IEAs, with a focus on implementation and enforcement?" Throughout this thesis, it has become apparent that there is no one simple answer to this question, instead, the answer is highly dependent on the circumstances. EU compliance with an IEA is not one singular action by one party, but rather the result of a complex process achieved through implementation in the EU, implementation in the EU Member States, and enforcement by the EU, foremost by the Commission. Compliance is also promoted by third parties when pointing out compliance issues, and by compliance mechanisms belonging to IEAs if one of these is tied to the IEA in question.

The main situations in which the role of competence have been researched are the following:

- implementation of an IEA in the EU,
- commission enforcement of IEAs, and
- the attribution of liability for the fulfilment of IEA obligations.

In the following subchapters I will account for the findings in relation to each situation and finally comment on my final research question, namely, "Does the division of competences and responsibilities to implement and enforce IEAs between the EU and its Member States impede the realisation of IEAs?".

7.1 Competence and Implementation of IEAs in the EU

Under international law, using the example of the Aarhus Convention, it is apparent that the EU and its Member States have a lot of discretion to divide the responsibility for the fulfilment of the obligations of the Convention. This is stipulated in Article 19(4) of Aarhus. Thus, it can be decided internally which provisions are to be implemented through EU legislation and perhaps later transposed in Member State legislation, and which are to be implemented directly into Member State law.

Declarations of competence to IEAs often give the impression of describing how implementation is to be carried out internally, but a declaration of competence is, by its nature, an international instrument, governing the relation between contracting parties to an agreement. Its purpose is not primarily to regulate the internal division of responsibilities within an international organisation, in this case the EU. That is, as stated above, a question for internal legislation, and in this very case, EU legislation and case law concerning the status of IEAs within the internal legal system of the EU.

Thus, the implementation of IEAs in the EU is to be made on the basis of internal rules of competence. In the case of environmental agreements, the competence is as a rule shared, meaning that both the EU and the Member States can adopt legislation to implement the IEA, though when the EU has adopted legislation in an area, the Member States lose their possibility of legislating in that specific area.

7.2 Competence and Commission Enforcement of IEAs

Cases such as *Etang de Berre,* the *Berne Convention* case and *Lesoochranaárske zoskupiene* clearly confirm that the EU and its Member State must accept that IEAs are integral parts of the EU legal order and, as such, the Commission has an institutional duty to ensure that the EU Member States comply with their obligations. One important measure to take to fulfil this duty is to bring the Member States before the CJEU in cases where the Commission considers the Member States to be in non-compliance.

It is important to distinguish the responsibilities resulting from international law, and the ones following from internal EU legislation. In this case, the internal legislation of the EU seems to emphasise the responsibility of the Commission to ensure compliance with EU law and international agreements entered into by the Union and its Member States. It is possible that obligations for the Commission to do so also follows from international law, such as perhaps in the case of the Aarhus Convention, though the rules differ. This will be further discussed below.

Under EU law, the authority and responsibility of the Commission to enforce an IEA is wide, and is not fully limited to areas where the EU has legislated, but seemingly follows from the fact that IEAs are part of EU primary law. Thus, it is clear that nothing precludes the Commission from using infringement proceedings to enforce provisions found in IEAs that the EU is a contracting party to. There can even be said to exist a responsibility for the Commission to do so. The CJEU has in several cases pointed out that the competence of the EU is extensive and that the area covered by EU legislation is to be interpreted widely, hence limiting Member State competence.

7.3 Competence and the Attribution of Liability

Regarding liability, it must first of all be recalled that joint liability for the EU and its Member States is the main rule in relation to mixed agreements that the EU has entered into. This follows from Case C-316/91 *European Parliament v Council,* where the CJEU pointed out that the EU and the Member States were jointly responsible for *every obligation* arising from the commitments undertaken.

The EU declaration of competence to the Aarhus Convention, in stating that “The European Community is responsible for the performance of those obligations resulting from the

Convention which are covered by Community law in force", according to Hedemann-Robinson, aims at limiting EU responsibility for Member State compliance, and to communicate to other contracting parties to the agreement, to whom they can direct claims of non-compliance, and whom should be seen as liable for omissions.

Several cases from the CJEU emphasise the authority that the EU, mainly through the Commission infringement proceedings, has to supervise Member State compliance with IEAs. In some cases, stretching the competence of the EU very generously, upholding the jurisdiction of the CJEU in such cases also when the EU has not adopted legislation in cases of shared competence, which normally means that the legal area is still within Member State competence. Yet, in relation to the Aarhus Convention, the EU has on several occasions maintained that the fulfilment of obligations arising from the Convention is the responsibility of the Member States, neglecting to bring actions against Member States failing to comply with the Convention. Perhaps the view of the EU is that the supervision of Member State compliance with IEAs is a possibility, rather than a responsibility for the EU. To an extent, the ACCC digresses with this view, and in one case set up a test for discerning whether the EU was in compliance with the Aarhus Convention or not. The ACCC posed the following questions:

1. Is the legal framework of the EU compatible with the Convention?
2. Has the EU fulfilled its responsibility in monitoring the Member States´ implementation of EU law that is transposing the Convention properly?

Thus, the ACCC is implying that the EU could in some cases be obliged under the Convention to enforce Aarhus in its Member States. However, the ACCC does not seem to be entirely consistent in its approach, and in many cases adopts a more practical approach to the issue, focusing on which party is better suited to ensure compliance with the Convention, the EU, or an individual Member State. The question of EU liability for Member State failures to comply with IEAs is thus a complex one.

7.4 Division of Competence and the Realisation of IEAs

Through the Commission limiting itself to enforcing provisions of IEAs that have been implemented in internal EU legislation, there is a risk of a "compliance gap", or a grey area in which neither the EU or the Member States take responsibility for the compliance with an IEA. The standpoint of the ACCC in relation to the Aarhus Convention bridges this "compliance gap", through the application of a more pragmatic approach to the division of responsibility for implementation, enforcement and the attribution of liability in cases of non-compliance.

Considering that the Aarhus Convention foremost grants rights to individuals and NGOs, rather than other states as contracting parties to the Convention, and that individuals and NGOs are not in the best position to demand that their rights originating in the Convention

are granted, it is of utmost importance that a stronger party, such as the Commission, ensures Member State compliance with the obligations. Requiring the Commission to enforce non-compliance by Member States, could therefore be a way of protecting individuals and NGOs and enforcing their right derived from an IEA.

In my view, it is not clear that the liability for non-compliance fully falls within the discretion granted by the Convention, as this makes the "compliance gap" possible. If neither the Union or an individual Member States assumes liability, then what party is to be held responsible? Moreover, it can be very difficult for an individual or an NGO to determine whether to direct a complaint towards the EU or a Member State, as the rules are, at the very least, difficult to navigate. This situation is not clearly regulated, and there has evidently been room for an independent interpretation by the ACCC on how to answer the question of liability.

It is clear that the Aarhus Convention in large falls within the Competence of the EU. Evidence of this is the many Union acts adopted to implement the Convention. Following the argumentation of the judgments in *Etang de Berre* and the *Berne Convention* case, the enforcement of the Aarhus Convention is clearly within the authority of the Commission. Thus it is not very far-fetched that it should also have the responsibility of enforcing the Convention.

8 Concluding Observations

In conclusion, one could say that the question of competence is the most important for the purpose of, internally, determining if the EU or the Member States are responsible for the implementation of an IEA. Competence is seemingly also of relevance as to inform other contracting parties to an IEA that the Union's legal competence, and thus its responsibility, is limited, and that the Member States are responsible in certain cases. The question of competence seems to be of relative less importance when determining whether the Commission has the authority, or responsibility, to enforce IEAs through infringement proceedings, as the CJEU has in this case interpreted competence in such a wide way, and foremost seems to focus on the status of international agreements as integral parts of the EU legal order and the Commission's authority to bring a Member State failing to comply with EU legislation before the CJEU.

In relation to the Aarhus Convention, the ACCC has also attached importance to competence as a way of attributing responsibility to ensure compliance with the Convention, though the attribution of liability does not strictly follow the the internal competence of the Union. Instead it is used as a basis when determining which party is best suited to take responsibility for the compliance with an obligation of the Aarhus Convention. This approach might be useful as it ensures that at least one party will assume liability for a failure to comply with the Convention. However, it is important to clarify the effects of competence in relation to IEAs to ensure that they are fully realised and enforceable, by third parties as well as by individuals and NGOs when applicable.

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