THE AARHUS CONVENTION'S THIRD PILLAR IN THE EU FROM A PROCEDURAL LAW PERSPECTIVE WITH SPECIAL REGARD TO REGULATORY ACTS

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ABSTRACT: *Since its adoption in 1998, the Aarhus Convention has become one of the most significant international environmental agreements. Its unique structure based on three pillars and the range of rights included in it also provides fundamental rights for individuals and organisations of the NGO sphere. However, accession to the Convention posed challenges for the European Union concerning the right of access to justice in environmental matters. The topic raises several procedural issues to which the Authors seek to approach with a thorough explanation that also considers the specificities of EU law. As a preliminary point, it can be said that the introduction of the category of regulatory acts and the development of case-law could only partially refine the CJEU's reluctance. The European Union is striving to be at the forefront of the political integration of environmental issues. Still, criticisms and dissenting views on the third pillar of the Aarhus Convention are increasingly calling into question the genuine commitment to the objectives of the international treaty. However, it is true, that due to the special legal order of the European Union, even the slightest changes can modify a whole range of procedural requirements concerning the CJEU's proceedings.*

KEYWORDS: *Aarhus Convention; regulatory acts; access to environmental justice; the Law of the European Union; implementation.*
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1. INTRODUCTION AND METHODOLOGY

Access to justice is one of the most important fundamental rights of European citizens that can be found in the Charter of Fundamental Right of the European Union as well. The Aarhus Convention is an innovative environmental agreement concerning the European sphere (SZIEBIG, 2019). The Convention was signed on 25 June 1998 and entered into force in October 2001. The Aarhus Convention' third pillar provides the right of access to justice, especially in environmental matters. The Aarhus Convention's

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Compliance Committee[1] started to investigate the European Union's compliance to the international treaty in 2008 after an environmental NGO – *Client Earth* – had submitted a complaint to the ACCC. Because the CJEU's[2] highly restricted practice has been criticised for a long time by environmental non-governmental organisations, it was not surprising that several other organisations backed up the allegations of Client Earth. The ACCC's recommendations arrived at the European Union in March 2017, stating that the European Union and its Member States all failed to implement the (3) and (4) paragraphs of Article 9.[3] Furthermore, the practice of the CJUE is in non-compliance with the requirements of the international convention, especially with Article 9. The legal sources that were adopted to implement the Aarhus Convention – especially the so-called *Aarhus Regulation*[4] – and the case law are aggregately restricting the right of private persons and NGOs to access to environmental justice (PÁNOVICS, 2017, pp. 15-16.).

The Author's main research aim is to disclose the significant circumstances leading to the heated critics towards the European Union in a historical approach and to provide recommendations to possible answers. The anticipatory assumption is that the non-governmental organisation's procedural rights and *locus standi* are the core issues.[5] A contradictory approach is applied to show both sides of the coin, listing all the arguments that strengthening the widening of procedural rights. Besides, the article provides counterarguments in the aspects of coherence of EU Law (Law of the European Union) and legal procedures, justifying the long-standing and consistent restrictive approach of the CJEU. The process consists of deductive conclusions based on premises proved by syntactic analysis. The researched topic requires a strong procedural law viewpoint, so the Authors would like to verify the findings with the classic methods of case studies to justify the hypotheses inductively. The formulation of premises and hypotheses aims to reach verified conclusions.

2. THE AARHUS CONVENTION AS AN ENVIRONMENTAL TREATY

2.1. The Aarhus Convention as an international environmental agreement (IEA)

The Aarhus Convention occupies a unique space in the long line of international environmental treaties. Not just because of its trichotomous structure, but also the European Union is a party to the Convention and several other Member States as well. The Convention's speciality is the structure based on three main pillars: firstly, access to environmental information, secondly the public participation in decision making and

[1] ACCC: Aarhus Convention's Compliance Committee.
[2] CJEU: Court of Justice of the European Union.
[3] The full communication between the Compliance Committee and the European Union is available at https://www.unece.org/?id=48110 (ACCC/M/2017/3 European Union).
[4] Regulation 2006/1367/EC 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 264/13.
[5] As it was highlighted in the Opinion of the European Economic and Social Committee on 'Communication from the Commission of 28 April 2017 — Commission Notice on Access to Justice in Environmental Matters' C(2017) 2616 final 3.6. 'The EESC takes the position that effectively implemented environmental law provides clarity and certainty for markets and for investors, facilitating sustainable development in the process.'

lastly, access to environmental justice. We can raise the question, whether the Aarhus Convention can be considered as an international environmental agreement or it is the instrument of human rights law? The international treaty was adopted in the frames of UNECE[6] and one of the few international conventions concerning principle 10 of the Rio Declaration.[7]

The Protocol on Pollutant Release and Transfer Registers 2003 (2009) attached to the Aarhus Convention is based on the principle 10 of the Rio Declaration. In the communication of the UNECE, the Aarhus Convention appears as a new type of environmental agreements that develops a connection between environmental and human rights, considering the rights of future generations and sustainable development.[8] The aim of the Convention is not the direct protection of the environment, so it cannot be labelled as a simple tool of international or European environmental protection efforts. Instead, the ecocentric approach can be mentioned, and the new way of environmental ethics, when human rights broadened by new dimensions and the international treaties motivate governments and other stakeholders to develop regulations based on modern standards. There is a strong connection between human rights and the environment, and the international environmental legislation contributes to the protection of human rights as well (JANKUV, 2019).

2.2. The Aarhus Convention's unique characteristics within the Law of the European Union

Agreements established under paragraph 2 of Article 216 Treaty on Functioning of the European Union,[9] are obligatory for the European Union's institutions and the Member States. At the area of environment,[10] the Member States and the European Union have shared competences, meaning that the legislative power is not exclusive. Still, both the EU[11] and the Member States can accept legislation in the matter and adopt legally binding acts. Suppose the negotiated international treaty consists of provisions overstepping the boundaries of EU competencies. In this case, the international agreement can be concluded only as a mixed agreement, involving the Member States (*principle of parallelism*). The *mixed contracts* are concluded by the European Union (European Communities), the Member States and third countries. They have the same legal status within the EU's rule of law (community law) as the purely EU (community) agreements if the provisions of the mixed agreement concern EU (community)

[6] UNECE: United Nations Economic Commission for Europe.

[7] 1992 Rio Declaration, principle 10: *'Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided*.'

[8] UNECE official webpage, About. https://www.unece.org/env/pp/introduction.html.

[9] TFEU: Treaty on Functioning the European Union.

[10] Paragraph (2) Article 4 TFEU point e).

[11] EU: European Union.

competences.[12] This principle appears in the case-law of the CJEU. The EU specifications are the same as the obligations not based on conventions because the international agreements are indefeasible part of the EU's rule of law.[13] The Aarhus's Convention's interpretation in preliminary ruling belongs to the competences of the CJEU.[14]

The problem is caused by the double enforcement obligation of Member States. The Member States who directly signed the international agreement has to fulfil the obligations of the Convention. But international treaties signed by the European Union or the mixed agreements (concluded by the EU and the MSs[15]) also can result in a requirement for national legislation, causing another obligation for implementation. Several infringement procedures[16] against the Member States prove that in such case, the MS enforce EU law properly if they fulfil the commitments of agreements concluded by EU institutions. The CJEU inferred the following in a case between the European Commission and France: '*…in ensuring compliance with commitments arising from an agreement concluded by the Community institutions, the Member States fulfil, within the Community system, an obligation concerning the Community, which has assumed responsibility for the due performance of the agreement*.'[17] Correspondence with the EU law characteristics, the Member States and the EU institutions have to cooperate closely to fulfil commitments arising from the mixed agreements concluded within shared competences.[18] This characteristic also means that the Member States have to ensure the correct implementation of multi-layered norms. At the same time, the EU law-making also has to fulfil the requirements of the international agreement. Because of this double implementation requirement, the MSs and the European Union also can be in the state of non-compliance.

2.3. Obligations of the European Union from the Aarhus Convention

The European Union – through the adoption of new directives and the modification of earlier legislation – had already successfully implemented the first and second pillars of the Aarhus Convention. The rights of the first two pillars already had a long history in European integration, especially the access to environmental information. The signature of the Aarhus Convention is considered as the further encouragement of public

[12] Case 12/86 *Meryem Demirel v Stadt Schwäbisch Gmünd*, ECLI:EU:C:1987:400, para 9. and Case C13/00 *Commission of the European Communities v Ireland*, ECLI:EU:C:2002:184, para 14.

[13] Case C-243/15 *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín*, ECLI:EU:C:2016:838, para 45. and Case C-344/04 *The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport*, ECLI:EU:C:2006:10, para 36.

[14] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, ECLI:EU:C:2011:125, para 30. and Case 181/73 *R. & V. Haegeman v Belgian State*, ECLI:EU:C:1974:41, para 14.

[15] MS or MSs: Member State or Member States.

[16] Case C-13/00 *Commission of the European Communities v Ireland*, ECLI:EU:C:2002:184, para 15; Case C-239/03 *Commission of the European Communities v French Republic*, ECLI:EU:C:2004:598, para 26; Case C-459/03 *Commission of the European Communities v Ireland*, ECLI:EU:C:2006:345, para 85.

[17] Case C-239/03 *Commission of the European Communities v French Republic*, ECLI:EU:C:2004:598, para 26.

[18] Joint cases C-300/98 and C-392/98 *Parfums Christian Dior SA v TUK Consultancy BV and Assco Gerüste GmbH and Rob van Dijk v Wilhelm Layher GmbH & Co. KG and Layher BV*., ECLI:EU:C:2000:688, para 36.

awareness in environmental matters by the European Union. Besides, the European Union would like to strengthen the environmental regulation's better implementation in the European sphere in correspondence with sustainable development.[19] One important aim is to clarify the general terms of the Aarhus Convention – such as environmental information; programmes and plans concerning the environment – in the unique EU legal order.

Hereinafter the Authors would like to list the significant EU legislation providing access to environmental information:

(i) 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/EEC, [2003] OJ L 41/26.

(ii) Regulation 2001/1049/EC of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, [2001] OJ L 145/43.

(iii) Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the Europe\n Community, of the Convention on access to information public participation in decision making and access to justice in environmental matters, [2005] OJ L 124/1.

(iv) Regulation 2006/1367/EC 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 264/13.

(v) Directive 2007/2/EC of the European Parliament and of the Council of 14 March 2007 establishing an Infrastructure for Spatial Information in the European Community (INSPIRE), [2007] OJ L 108/1.

Also, several legal sources had been accepted to provide the second pillar's right to public participation in environmental decision making. It is essential to highlight that public participation in decision making is limited to the activities listed in the Annex I. of the Aarhus Convention. The activities are mainly industrial, causing severe or significant environmental impact.[20]

(i) 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 - Statement by the Commission, [2003] OJ L 156/17.

(ii) Council Decision 2006/957/EC of 18 December 2006 on the conclusion, on behalf of the European Community, of an amendment to the Convention on access to information, public participation in decision-making and access to justice in environmental matters, [2006] OJ L 386/46.

(iii) Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified

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[19] UNTC Aarhus Convention, Declarations and Reservations https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27#EndDec.

[20] The Annex distinguishes between 19 category: for example energy sector, mineral industry, waste management and other activities. For full list see Aarhus Convention, Annex I. List of activities referred to in Article 6, paragraph 1 (a) points 1-22.

organisms and repealing Council Directive 90/220/EEC - Commission Declaration, [2001] OJ L 106/1.

(iv) Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (Text with EEA relevance), [2003] OJ L 268/1.

Several other EU legal sources contain provisions that provide public participation in the decision-making process. The third pillar: access to environmental justice, proved to be a challenge for the European Union. The Aarhus Convention's three pillars: access to environmental information, public participation in decision making, access to environmental justice have a definite connection with each other. In the issue of access to environmental justice, the right of action can be guaranteed if the potential claimers are aware of sufficient information, and they can participate in the authorities' procedure. The correlation between the Aarhus Convention's three pillars results that the problems arising from the implementation of the third pillar directly affect the prevailing of the other rights.

3. ACCESS TO JUSTICE GENERALLY AND IN ENVIRONMENTAL MATTERS

In the most general sense, access to justice means, that every citizen has the right to find legal protection and an adequate remedy. Access to justice can be defined as the capacity of legal entities to find a remedy for their harms throughout formal or informal judicial bodies. Access to justice is a fundamental principle of the rule of law, as the CJEU already defined that in 1986.[21] Providing equal opportunity to access to justice is a long running aim for European integration. Equality in access to justice primarily means the right to an effective remedy before judicial forums, especially in the case of breach of a person's rights. The definition of access to justice includes guaranteeing the prerequisites to judicial review.

Article 47 of the European Union's Charter of Fundamental Rights includes the right to an effective remedy and a fair trial:

'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by and independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice. '

The right to an *effective remedy* ensures that in case of a breach, that persons can enforce the rights in question before courts or other independent bodies (GOMBOS, 2020). The relevant procedure or procedures have to provide a sufficient remedy in compensation of the breach of right. In environmental matters, access to justice usually appears in legal redress against authorities' decisions; in this correlation, procedural rights guarantee a *fair procedure*.

[21] C 294/83 *Parti écologiste "Les Verts" v European Parliament*, ECLI:EU:C:1986:166, para 23.

The right of access to justice is based on two main pillars in the context of the aforementioned. Firstly, it consists of the right to a fair procedure, secondly the right to an effective remedy.[22] The Charter of Fundamental Rights provides both of them, respectively, the scope of application in Article 51. (FRA, 2016, pp. 20-22). Equal access to justice guaranteed by the European Union Law may have a significance at environmental procedures in several aspects. The commentary of the Charter defined that it does not aim to change the basic order of judicial review as it is stated in the Treaties, especially the requirements of claims' acceptability before the CJEU (AALTO, et al., 2014). In the same time, the interpretation of Article 47 still modified the judicial review of the European Union in correlation with the small changes in paragraph 4 Article 263 TFEU, by the Lisbon Treaty. The relevant paragraph considers the requirements of access to justice.

Access to justice has a special significance concerning the article's topic because it provides a tool for those persons and institutions that fulfil concrete terms to challenge decisions or to pursue environmental interests. Access to justice opens a path to environmental legislation, false administrative regulations, the findings and failures of relevant authorities to overpersuade them to conduct proper procedures (EBBESSON, 2011). Out of the Aarhus Convention's three pillars, access to justice is the most challenging to secure (DROSS, 2004, p. 721). Access to justice is a fundamental principle of modern democracies, and every legal system provides this fundamental right through a set of special regulation. Although public international law and human rights conventions do not spare access to justice either.[23] Under the rule of the Convention, access to justice has to be secured in an impartial, fair procedure if those members of the public concerned '*having a sufficient interest or maintaining impairment of a right, where the administrative, procedural law of a Party requires this as a precondition*.' Furthermore, the procedure has to be expeditious, appropriate, fair, equitable, timely and not prohibitively expensive.[24] If the party to the Convention '*provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law*.'[25] The Aarhus Convention establishes a connection between the right of access to justice and access to information (BECHTEL, et al., 2019). The prior is secured if any person considers that '*his or her request for information under article 4 has been*

[22] The legal basis is Article 19 Treaty on the European Union paragraph 1: *'Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.'*

[23] See the following international human rights conventions: Universal Declaration of Human Rights, 1948, Article 8: '*Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law*.' European Convention on Human Rights, 1950, Article 6, paragraph 1: '*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…*' American Convention on Human Rights, 1969, Article 25: '*Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts…*'.

[24] Aarhus Convention Article 9 paragraphs (1)-(5).

[25] Aarhus Convention Article 9 paragraph (1) second turn.

ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article.'[26]

In the last fifteen years, the European Union has not accepted any specific legislation or regulation in connection with access to environmental justice. As a result, the Member States' administrative bodies and judicial forums have to bear the responsibility because the European Union leans on the domestic courts to apply and enforce the EU norms. In the same time, the rules of the European Union Law usually 'does not always fit comfortably' within the national legislative and judicial systems, resulting in a less adequate application (RYALL, 2009, p. 257). Nowadays, severe indifferences can be identified between the Member States' regulations providing access to environmental justice. Minimum standards are existing only in those Member States, that successfully implemented the relevant EU norms and harmonised the legislation with the secondary sources such as the result of the implementation of EIA (Environment Impact Assessment) Directive. In the viewpoint of the European Union, the domestic judicial forums must pursue the case-law of the CJEU and minister the recommendations about access to environmental justice. The European Union had modified the European Union Law in some context to enforce the Aarhus Convention's third pillar – for example, in the case of forests' protection. But lack of specific regulation and harmonisation among the Member States' legislation are continuously posing a considerable challenge for the domestic judicial bodies, especially the national courts (EU, 2016, pp. 1-5).

4. THE EUROPEAN UNION'S STEPS TOWARDS COMPLIANCE WITH THE THIRD PILLAR

Legislation concerning the third pillar has a long, but rather unfortunate history in European Union Law. The European Union officially became a party to the Convention in 2005, but the Aarhus inspired legislation had been started two years earlier. One of the most important sources is *Regulation 2006/1367/EC* of the European Parliament and 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 institutions and bodies. In favour of harmonisation, negotiation had started about the acceptation of a new directive, sentenced to access to environmental justice (WETZEL, 2012, pp. 87-89).

The European Commission proposed a draft directive to implement the Aarhus Convention's third pillar and to repair the incompleteness of EU environmental law. The essential aims were the justification of legislative procedure and to develop a legal basis for the future directive.[27] In 2004 the European Parliament and the Economic and Social Committee provided a detailed opinion about the proposal, attaching several modifications for consideration.[28] The European Commission held the last discussion

[26] Aarhus Convention Article 9 paragraph (1) second turn.

[27] Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters. COM/2003/0624 final - COD 2003/0246, in the following: proposal.

[28] European Parliament legislative resolution on the proposal for a European Parliament and Council regulation on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies COM(2003) 622 – C5-0505/2003 – 2003/0242(COD) and Opinion of the European Economic and Social

about the proposal in 2005. For a six-year term, between 2006 and 2012, there had not been any step forward concerning the earlier proposed directive.

The *second phase* of the third pillar's enforcement had started in 2012 and ended in 2014. In 2012 the European Commission published a communication, especially sentenced to the better enforcement of access to environmental justice.[29] Finally, in 2014 the proposal was officially withdrawn. Meanwhile, comparative analyses were conducted about access to justice in environmental matters, and other communications were published to fasten the legislative procedure. As the relevant sources clearly define, only a couple of legislative acts consider access to justice. There is a concrete indication to the Commission's proposal as well: '*a 2003 Commission proposal aimed at facilitating more comprehensive access has not progressed but the broader context has changed, in particular the Court of Justice has confirmed recently that national courts must interpret access to justice rules in a way which is compliant with the Aarhus Convention*'(European Commission, 2012, p. 9). At the time when the review of the 6th Environmental Action Program had started, the European Parliament also highlighted the need for complete compliance with the Aarhus Convention's third pillar.

'*Underlines that the 7th EAP should provide for the full implementation of the Aarhus Convention, in particular regarding access to justice; stresses in this connection, the urgent need to adopt the directive on access to justice; calls on the Council to respect its obligations resulting from the Arhus Convention and to adopt a common position on the corresponding Commission proposal before the end of 2012.*'(European Parliament, 2012, p. 10).

Another decade had started since the withdraw of the proposal and the European Union still searching for new ways and means to fully comply with the Aarhus Convention's third pillar – as it is stated in the timeline of the European Commission as well. The European Union's difficulties did not miss the sight of the Compliance Committee, and in 2008 a detailed opinion was published by the ACCC. In 2017 the ACCC provided another summon toward the European Union, recommending, that the CJEU should modify its practice. Other suggested solutions were the adoption of a new legislative act or the modification – rather completion – of the Aarhus Regulation.[30] In 2017 at the Conference of the Parties were not able to agree on the European Union's case, so the decision was postponed to the next CoP in 2021.

In 2018 the European Commission published a *timeframe* concerning the third pillar and started a consultation about the access to justice in environmental matters.[31] As part

Committee on the 'Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to In-formation, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies' 2004/C 117/13.

[29] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness COM(2012) 95 final.

[30] Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union Adopted by the Compliance Committee on 17 March 2017.

[31] EU implementation of the Aarhus Convention in the area of access to justice in environmental matters https://ec.europa.eu/info/law/better-regulation/initiatives/Ares-2018-2432060.

of the same process, the Council adopted a new resolution, based on two aspects. Firstly, the Council asked the Commission for the preparation of a new report. The report aims to determine how access to environmental justice can be better enforced in the European Union and how it can be fitted to the European Union's legal order and judicial proceedings. Furthermore, the Commission was asked to submit a proposal and an impact assessment for the modification of Regulation 2006/1367/EC till 30 September 2020. Or inform the Council about other relevant acts and proposals.[32]

The report – called *Milieu-report* – was published in September 2019.[33] In between, in 2017, the European Commission has adopted a *notice* about access to justice in environmental matters. The notice aims to serve as a guide for persons and non-governmental organisations, how to enforce their third pillars' rights.[34]

Evaluating the European Union's acts about the Aarhus Convention's third pillar, the result can be alarming. The European Union had started the legislative procedure in time to implement the Aarhus Convention's third pillar and to adopt a new directive, aiming to harmonise the Member States' relevant legislation. Several non-compulsory acts were published, but in the last more than one decade, the European Union was not able to successfully finish the legislative procedure. In 2019, the report provided detailed research concerning access to environmental justice. Still, the European Union's communication was not for the best after the ACCC raised its complaints in 2008 and 2017. Several excuses followed up the Compliance Committee's critiques, resulting in more negative thoughts from the NGO sphere. As it is clear from the Council's resolution, the European Union considers the Aarhus Regulation as a key solution. The European Union heavily relies on the national judicial systems and does not strive for new legislation. In the upcoming sections, the Authors would like to analyse the main issues about the enforcement of the third pillar.

4.1. Critical issues resulting in non-compliance with the third pillar

A detailed comparison of the ACCC's critiques and responses of the European Union can be found in the report of the European Commission published in October 2019 (European Commission, 2019). The European Union is hiding behind the unique characteristics of EU Law, strengthening the dismissive view that is evident in the beforementioned document.

The first set of critiques concern the *administrative revisionary approaches*. In the Compliance Committee's opinion, the procedures and the requirements have to be much more clarified and more available for persons and the NGOs. In the European Union's response, this aspect raised the issue of *'who'* can be entitled to start such a procedure (European Commission, 2019, p. 24). The determination of possibly eligible plaintiffs proved to be a burden for the European Union – especially in the case of an action for annulment. When the European Union signed the Aarhus Convention, it committed to

[32] Council decision 2018/881/EU requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006.

[33] Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters Final report September 2019 07.0203/2018/786407/SER/ENV.E.4. 384.

[34] Commission Notice on access to justice in environmental matters 2017/C 275/01.

consolidating the relevant legislation with the three pillars. Formally, the EU fulfilled its obligations with the adoption of the Aarhus Regulation, that provides a certain right for non-governmental organisations to start annulment procedures or to ensure that the EU takes action (actions for failure to act). In this interpretation, the Aarhus Regulation is a step forward, but due to the strict interpretation of procedural rights, the European Union fails to meet with the Convention's requirements completely.

Secondly, the ACCC disapproved that the possibility of review should apply not only to acts of an individual nature but also to *legal acts of general force*. In this respect, the CJEU has emphasised that the European Union has a unique catalogue of sources of law. The EU institutions and bodies have the power to adopt a wide range of acts which are capable of producing a variety of legal effects. Furthermore, the ACCC and the European Union have a completely different perspective, as in the Compliance Committee's position any act, even of an administrative nature, could be reviewed if it has the slightest environmental impact. For the European Union, the scope of acts subject to review (the issue of '*what*') is limited to acts adopted as part of environmental law (European Commission, 2019, pp. 22-23).

Finally, according to the findings of the ACCC, *not only binding* but also other acts may be subject to review procedures. In the meantime, the European Union interprets the law set out in the third pillar only concerning binding acts that give rise to external legal effects. And the explanation is in one of the principles of the Union's functioning, namely the separation of powers (European Commission, 2019, p. 24). The Court's position in this area is clear from the fact that, in situations where there is another legal solution, it avoids answering questions concerning the interpretation of the Aarhus Convention.[35]

In the following, the Authors would like to concentrate on the issue of *'who'* and provide detailed procedural law analyses focusing on the actions for annulment.

4.2. Action for annulment – unique among specials

The action for annulment is generally can be labelled as a complicated procedure, and the procedural requirements have a long history of interpretive issues, especially in the case of non-preferential plaintiffs. The procedural preconditions are even more debated in environmental matters (VÁRADI, 2018, pp. 97-114). The structure of Article 263 TFEU results that only the addressed acts can be considered as exact and punctual wording that does not need further interpretation.[36]

Out of the procedural preconditions, the definition of *directly concerned* requires further explanation. The case-law had formulated the content of directly concerned, that requires the joint existence of two different criteria. Firstly, the disputed act of the European Union directly affects the legal situation of the individual and leaves no discretion to those implementing it.[37] An act directly affects a person, meaning a

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[35] Case C-411/17 *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres*, ECLI:EU:C:2019:622, para. 163-166.

[36] Natural and legal persons to whom the act is addressed shall have the right to request a review of the legality of such sources of law. See Case C-175/73 *Union syndicale - Amalgamated European Public Service Union - Brussels, Denise Massa and Roswitha Kortner v Council of the European Communities*, ECLI:EU:C:1974:95, para 17-20.

[37] See especially Case C-404/96 *Glencore Grain Ltd, formerly Richco Commodities Ltd v Commission of the European Communities*, ECLI:EU:C:1998:196, para. 41. Case C-486/01 *Front national v European*

regulatory act which is of direct concern to him and does not entail implementing measures.[38] These two criteria have less relevance for non-preferential plaintiffs who would like to start a procedure in environmental matters, but the upcoming procedural preconditions are raising several interpretation issues.

Individually concerned requires that the decision affects the plaintiffs by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from other persons and by virtue of these factors distinguishes them individually just as in the case the person addressed.[39] As a result, the act does distinguish the applicant concerning the contested decision as in the case of the addressee.[40] During the evaluation of individual concern, the CJEU holds a high benchmark, and the interpretation of this precondition is quite strict, resulting in a limited scope.[41] In the classic *Plaumann case*, where the plaintiff wanted to challenge a Commission resolution concerning import decision, the CJEU articulated, the fact alone that the applicant belongs to the importers, does not constitute individual concern. The claim to be acceptable requires additional eligibility that closes the path in front of future importers to get under the scope of the resolution. Without proof of additional eligibility, the closed category (the claimer belongs to a class of persons that is entirely closed) similar to the original addressee cannot be established (*Plaumann-test*).[42] In other cases, the CJEU pointed out that even if legal entities establish an association to foster a shared interest does not constitute the criteria of direct and individual concern. If one objective factor can be proved, that distinguishes the claimer in the scope of the resolution from other possible legal entities, the closed category is ascertainable, and the future plaintiff is eligible to start an annulment procedure.[43]

Since the middle of the '90s, the CJEU denied access to justice in environmental matters several times, especially at the non-governmental organisations' expense. The Court required preconditions similar to the Plaumann-test without there is no possibility to start a procedure.

Parliament, ECLI:EU:C:2004:394, para 34 and Case C-417/04 *Regione Siciliana v Commission of the European Communities*, ECLI:EU:C:2006:282, para 28.

[38] Case C-222/83 *Municipality of Differdange and Others v Commission of the European Communities*, ECLI:EU:C:1984:266.

[39] Case C-456/13 *T & L Sugars Ltd and Sidul Açúcares, Unipessoal Lda v European Commission*, ECLI:EU:C:2015:284, para. 63.

[40] Case C-25/62 *Plaumann & Co. v Commission of the European Economic Community*, ECLI:EU:C:1963:17; Case C-106/98 *Comité d'entreprise de la Société française de production, Syndicat national de radiodiffusion et de télévision CGT (SNRT-CGT), Syndicat unifié de radio et de télévision CFDT (SURT-CFDT), Syndicat national Force ouvrière de radiodiffusion et de télévision and Syndicat national de l'encadrement audiovisuel CFE-CGC (SNEA-CFE-CGC) v Commission of the European Communitie*, ECLI:EU:C:2000:277, para. 39 and Case T-435/93 *Association of Sorbitol Producers within the EC (ASPEC), Cerestar Holding BV, Roquette Frères SA and Merck oHG v Commission of the European Communities*, ECLI:EU:T:1995:79, para. 62.

[41] This rigor has been criticized by many in the legal literature, and a critical transcendence of the principle has also been articulated in Advocate General's Opinions. The amendments to the Lisbon Treaty have alleviated this by removing personal involvement from the conditions for litigation in the case of regulatory acts.

[42] Case C-25/62 *Plaumann & Co. v Commission of the European Economic Community*, ECLI:EU:C:1963:17.

[43] Case C-358/89 *Extramet Industrie SA v Council of the European Communities*, ECLI:EU:C:1991:214 and Case C-152/88 *Sofrimport SARL v Commission of the European Communities*, ECLI:EU:C:1990:259.

4.3. The definition and procedural effects of regulatory acts

The Lisbon Treaty introduced the category of *regulatory acts* in Article 263, paragraph 3 TFEU. The acceptability of claims became more flexible because regulatory acts provide the acceptability of annulment procedures without the confirmation of individual concerns.[44]

The definition of the regulatory act needs judicial interpretation, with particular regard to the lack of legal definition. Furthermore, the category cannot be fitted into the European Union's legislative order. In the Arcelor SA case, the General Court clarified that the existence of regulatory acts could not be excluded in the context of the annulment procedure.[45] In the beforementioned case, the source of law was a directive. Consequently, to define regulatory acts, the form of the legislation is inconclusive. All the legal acts must be considered that settle a matter with normative power, similar to a regulation. In the newest case-law: '*the meaning of 'regulatory act' for the purposes of the fourth paragraph of Article 263 TFEU must be understood as covering all acts of general application apart from legislative acts*.'[46] So, a regulatory act can appear in all the forms non-legislative acts of general application. A legislative act of general application if it applies to determine situations objectively and produces legal effects concerning categories of persons envisaged broadly and abstractly.[47] Under the scope of this definition, the Commission resolutions aiming to permit or forbid some national legislation can be considered as regulatory acts.[48]

Only those regulatory acts can be attacked that does not require further actions of implementation:

Article 263 subparagraph 4 last turn: '*Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.*'(EU, 2012).

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[44] Case C-583/11 *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, ECLI:EU:C:2013:625, para. 57; Case C-622/16 *Scuola Elementare Maria Montessori Srl v European Commission*, ECLI:EU:C:2018:873, para. 22.

[45] Case T 16/04 *Arcelor SA v European Parliament and Council of the European Union*, ECLI:EU:T:2010:54. In that judgment, the General Court pointed out that the new rules which entered into force during the proceedings would not significantly affect the conditions for the admissibility of the application in the specific case as regards the wording of a regulation.

[46] Case T-262/10 *Microban International Ltd and Microban (Europe) Ltd v European Commission*, ECLI:EU:T:2011:623, para. 21; Case T-18/10 *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:T:2011:419, para. 56 and Case C-583/11 *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union*, ECLI:EU:C:2013:625, para. 61.

[47] Case C-622/16 *Scuola Elementare Maria Montessori Srl v European Commission, European Commission v Scuola Elementare Maria Montessori Srl and European Commission v Pietro Ferracci*, ECLI:EU:C:2018:873, para 29; Case C-6/68 *Zuckerfabrik Watenstedt GmbH v Council of the European Communities*, ECLI:EU:C:1968:43; Case C-171/00 *Alain Libéros v European Commission*, ECLI:EU:C:2002:17, para 28 and Case C-221/09 *AJD Tuna Ltd v Direttur tal-Agrikoltura u s-Sajd and Avukat Generali*, ECLI:EU:C:2011:153, para. 51.

[48] Case C-487/06 *British Aggregates Association v Commission of the European Communities and United Kingdom*, ECLI:EU:C:2008:757, para. 31; Case C-519/07 *Commission of the European Communities v Koninklijke FrieslandCampina NV*, ECLI:EU:C:2009:556, para. 53 and Case C-219/16 *Lowell Financial Services GmbH v European Commission*, ECLI:EU:C:2018:508, para. 42.

This requirement stipulates another procedural precondition. At the supranational European Union level, an implementing measure is always, in legal terms, an EU act ordering implementation. A Member State level, an implementing measure is both an act of a Member State (legislation) and a specific administrative act implementing a regulatory act of the European Union, whether based on it or without national legislation (typically an administrative decision, including other decisions but resolutions).

As can be seen from the above, the right to bring an action for annulment raises many questions of interpretation even at the European Union Law. Still, in environmental matters, this issue is even more complicated. The Aarhus Conventions implementation – due to the nature of a mixed agreement – conducted at two levels, so that the legal matters of enforcement must be examined separately at the level of the courts of the Member States and the European Union. There are differences not only in the ranks of enforcement but also in the available procedural options. Access to justice in the legal systems of the Member States, especially in the case of legislation implementing EU law, can be adequately guaranteed if the right of action also provided directly from EU Law. Before the CJEU the interdependence of proceedings must be considered and the obligation to maintain the coherence of the EU legal system.

4.4. The newest tendencies in the CJEU's case-law

Having regard to the previous statements, it can be said that the case-law of the CJEU is intended to broaden the right of action, in particular with the need to work off the enforcement deficit in the Member States' administrative systems (LENAERTS, 2007, pp. 1625-1659). Private parties also can assert claims based on EU law directly before the courts of their Member State, under the doctrines established by the CJEU based on specific directly applicable EU norms (DOUGAN, 2004). If a private party wishes to assert a claim under EU law before a domestic court – in the absence of applicable EU rules – the procedural rules of domestic law must be followed (BLUTMAN, 2004, pp. 12-18). EU law can be referred only as of the substantive legal basis for the claim (*principle of procedural autonomy*) (GOMBOS, 2018, pp. 24-32). In essence, this means that, in the absence of relevant rules of EU law, the rules of procedure are a matter of domestic law.[49] The CJEU has laid down doctrines to limit the scope of the Member States' procedural autonomy. Firstly, the rules governing enforcement in the Member States may not be less favourable than in similar domestic cases (*principle of equivalence*) (MUZSALYI, 2018, pp. 1-9) or render impossible in practice or excessively difficult the exercise of rights conferred by EU law (*principle of*

[49] Case C-439/08 *Vlaamse federatie van verenigingen van Brood- en Banketbakkers, Ijsbereiders en Chocoladebewerkers (VEBIC) VZW*, ECLI:EU:C:2010:739, para. 63-64.

effectiveness).[50] These criteria can also be concretised in environmental cases, ensuring broad access to justice, outlining the conditions for the principle of effectiveness.[51]

In ensuring adequate access to justice, the CJEU plays a relatively active role in enforcing the rights of individuals under EU law at a Member State level. We can also say that the tendency of legal interpretation can be described in the creation of the conditions for the ever-expanding enforcement of private law[52] in various fields of law, in the widening of the right of litigation of private parties as widely as possible. This approach is also valid in environmental claims at Member State level, where the principle of procedural autonomy and effective redress came into collision, and the latter principle prevails. The Aarhus Convention and the CJEU define the right of action of non-governmental organisations with an objective public interest quite broadly. In the context of the right of action, the CJEU's case-law highlights the correlation between Articles 6 and 9. The rules of remedy for the right of public participation in decision-making have to provide access to justice widely.[53]

The latest case-law of the CJEU declared several classic domestic procedural traditions as outdated. *Case C-263/08*[54] can be mentioned as an example where the CJEU expressed its opinion about a Swedish administrative rule which guarantees a right of action in environmental matters only associations with at least 2000 members. The CJEU recognised the domestic entitlement to determine a minimum membership number to prove the association's existence and function. Still, the national legislation cannot demand a number that is contradictory with the aim of Directive 1985/337, primarily in connection with relevant operations which are amenable to judicial review.[55] Because there were only two environmental associations in Sweden that fulfilled the criteria of membership, the CJEU declared the concrete domestic measures which stipulate a minimum membership number conflicting with the Directive's aims, in the scope of access to justice. In *case C-115/09*[56] the Court of Justice declared a German legal act

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[50] Case C-378/07 *Kiriaki Angelidaki and Others v Organismos Nomarchiakis Autodioikisis Rethymnis (C-378/07), Charikleia Giannoudi v Dimos Geropotamou (C-379/07) and Georgios Karabousanos and Sofoklis Michopoulos v Dimos Geropotamou (C-380/07)*, ECLI:EU:C:2009:250, para. 159; Case C-212/04 *Konstantinos Adeneler and Others v Ellinikos Organismos Galaktos (ELOG)*, ECLI:EU:C:2006:443, para 95; Case C-53/04 *Cristiano Marrosu and Gianluca Sardino v Azienda Ospedaliera Ospedale San Martino di Genova e Cliniche Universitarie Convenzionate*, ECLI:EU:C:2006:517, para. 37 and Case C-364/07 *Spyridon Vassilakis and Others v Dimos Kerkyraion*, ECLI:EU:C:2008:346, para. 126.

[51] Case C-280/18 *Alain Flausch and Others v Ypourgos Perivallontos kai Energeias and Others*, ECLI:EU:C:2019:928, para. 56-57.

[52] See Case C-297/19 *Naturschutzbund Deutschland - Landesverband Schleswig-Holstein e.V. v Kreis Nordfriesland*, ECLI:EU:C:2020:533, in case the CJEU has ruled that legal persons governed by public law may be liable for environmental damage caused by activities carried out in the public interest under a statutory delegation, such as the operation of a pumping station for the drainage of agricultural land. Thus, the widespread use of the concept of the state is also a trend in environmental law matters.

[53] Case C-260/11 *David Edwards and Lilian Pallikaropoulos v Environment Agency and Others*, ECLI:EU:C:2013:221, para. 31 and 44; and Case C-167/17 *Volkmar Klohn v An Bord Pleanála*, ECLI:EU:C:2018:833, para. 35.

[54] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, ECLI:EU:C:2009:631.

[55] Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*, ECLI:EU:C:2009:631, para. 47.

[56] Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg*, ECLI:EU:C:2011:289.

incompatible with the Directive's purposes that excluded the non-governmental organisations' right to claim in such events when the *injuria* arise in cases where the legal norm protected the interests of the community and not the person. The CJEU pointed out that the Member States can determine what to recognise as *injuria*, but in the same time they have to consider the aim to provide access to justice in a broad sense for the public.

In 2008, in the *Janecek-case* the CJEU dealt with criteria of direct concern in a preliminary ruling. Here the definition appeared in a context of a domestic measure:

'where there is a risk that the limit values or alert thresholds may be exceeded, persons directly concerned must be in a position to require the competent national authorities to draw up an action plan, even though, under national law, those persons may have other courses of action available to them for requiring those authorities to take measures to combat tmospheric pollution'[57]

In the *Slovak brown bear preliminary ruling*,[58] the CJEU has directly stated that restrictions in Member States' procedural law must not undermine the enforcement of the Aarhus Convention, whether or not these requirements have been implemented into EU law. In this case, the CJEU ruled that the Aarhus Convention's third paragraph of Article 9[59] cannot be considered a '*self-enforcing*' rule in the law of Member States, so the relevant article of the Aarhus Convention does not have direct effect under European Union law. In the main proceeding, the applicant was a Slovak non-governmental organisation (VLK "LZ") wishing to participate in an administrative procedure. The administrative procedure was related to areas and species protected by the Habitats Directive, in particular brown bears. The Court of Justice has pointed out that the relevant legislation must be applied in the broadest possible sense to allow an environmental organisation to challenge administrative decisions that are contrary to European Union Law in legal proceedings (SZEGEDI, 2018, pp. 118-131). In 2011, the case raised several issues related to mixed agreements, as until the European Union adopts new legislation to implement the third pillar of the Aarhus Convention, Member States will be responsible for its enforcement and application.[60]

In the last years, the Court of Justice has examined several aspects of environmentally related procedures and provided an interpretation of the following *terms* in the lights of Directive 2011/92/EU: right of members of the public concerned to a review procedure,[61]

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[57] Case C-237/07 *Dieter Janecek v Freistaat Bayern*, ECLI:EU:C:2008:447, para 42.

[58] Case C-240/09 *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, ECLI:EU:C:2011:125.

[59] Aarhus Convention Article 9 paragraph 3. '*In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*'

[60] Council decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters. Declaration by the European Community in accordance with Article 19 of Convention on access to information, public participation in decision-making and access to justice in environmental matters. 2005/370/EC.

[61] Case C-826/18 *Stichting Varkens in Nood and Others* also see the Opinion of Advocat General Michal Bobek in Case *Stichting Varkens in Nood and Others* ECLI:EU:C:2020:514.

the meaning of not prohibitively expensive judicial proceedings,[62] and about acts or omissions subject to the public participation provisions of the directive.[63] The CJEU has also dealt with the *locus standi* of environmental organisations and the recognition of their status as clients participating in administrative proceedings on several occasions.[64]

From the expansive interpretation of the right to action before Member States' judicial forums, many tend to conclude that this may also apply to direct procedures before the CJEU as well and will result in widening the non-governmental organisations' right to bring an action. A contrary, in the direct procedures, the CJEU interprets the applicants' right to bring action strictly, so the CJEU takes a relatively conservative approach. This is the reason why the relevant literature articulates that the Aarhus-requirements for access to justice concerning the right to bring an action can be considered as ambiguous. There have also been attempts in case law to set aside or exceed the Plaumann-test, which imposes rather strict conditions.

In *case T-177/01*, the Court of First Instance (now the General Court) chose this path. Still, during the appeal, the CJEU rendered the claim unacceptable in *case of C-263/02 P*, maintaining the determination of strict procedural preconditions.[65] The reasons for this can be summarised in the fact that, in the specific system of EU Law, the CJEU provides *indirect judicial review* of EU norms with a general effect in preliminary rulings.

Procedural preconditions are needed because if one regulatory act consists of *implementing measures*, judicial review of respect of the EU legal order is provided, regardless to the origin of the regulation (whether its an EU norm or its a law of a Member State). When the implementation of such an act is the responsibility of EU institutions, bodies, offices or agencies, natural or legal persons may, under the conditions laid down in the fourth paragraph of Article 263 TFEU, bring a direct action before the CJEU against implementing acts. In order the establish the claim, they may plead the illegality of the act on which the measure in question is based. Where such enforcement is the responsibility of the Member States, the claimers may invoke the invalidity of such act before the domestic courts and request them to refer questions to the Court of Justice for a preliminary ruling under Article 267 TFEU.[66]

The question of whether *regulatory act* entails implementing measures must be determined individually, having regard to the situation of the person claiming the right of action. It is irrelevant whether the act in question entails implementing measures against the other legal entities.[67] If the applicant seeks only the partial annulment of the act, only

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[62] Case C-260/11 *David Edwards and Lilian Pallikaropoulos v Environment Agency and Others*, ECLI:EU:C:2013:221, para. 27-28.

[63] Case C-470/16 *North East Pylon Pressure Campaign Limited and Maura Sheehy v An Bord Pleanála and Others*, ECLI:EU:C:2018:185.

[64] Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, ECLI:EU:C:2017:987.

[65] Case C-263/02 P *Commission of the European Communities v Jégo-Quéré & Cie SA*, ECLI:EU:C:2004:210.

[66] Case C-145/17 *Internacional de Productos Metálicos, SA v European Commission*, ECLI:EU:C:2018:839, para 51; Case C-456/13 *T & L Sugars Ltd and Sidul Açúcares, Unipessoal Lda v European Commission*, ECLI:EU:C:2015:284, para. 31; Case C-244/16 *Industrias Químicas del Vallés SA v European Commission*, ECLI:EU:C:2018:177, para. 44.

[67] *T & L Sugars Ltd and Sidul Açúcares, Unipessoal Lda v European Commission*, ECLI:EU:C:2015:284, para 32 and Case C-244/16 *Industrias Químicas del Vallés SA v European Commission*, ECLI:EU:C:2018:177, para. 45.

those implementing measures must be taken into account which that disputed part of the act may entail.[68] It is also irrelevant whether or not those implementing measures are mechanical in nature or not.

To sum up the arguments on one side of the coin: this precondition has a significant effect on the possibilities of the law enforcement because, if the enforcement of the act concerned requires the adoption of an implementing act, the private party has the right to challenge the enforcement act, so the exclusion of double claim is justified under Article 263 TFEU. On the other side of the coin, environmental law's foremost researchers (PALLEMAERTS , 2011) disagree with the conservative approach of maintaining the distinction between preferential and non-preferential plaintiffs in environmental matters under the current strict litigation conditions, despite the partial clarification of the requirements for enforcement.

Compared to the restrictive general rules on bringing an action, *Regulation 2006/1367/EC*, which can be considered as an implementation of the Aarhus Convention in the EU, imposes additional preconditions for the enforcement of claims. The Regulation allows non-governmental organisations to initiate annulment and default procedures, but only if the strict conditions set out in the regulation are met. The Regulation imposes an obligation to carry out a precautionary procedure for judicial review.[69] It also defines an administrative act that can be challenged in a domestic review as a '*measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects*'.[70] A further condition for bringing an action is that only organisations with legal personality can bring an action before the CJEU. The beforementioned approach of the CJEU introduced a barrier to initiating a procedure similar to the Plaumann-test, which makes it difficult to enforce the claim.

4.5. Case-law concerning the locus standi of non-governmental organisations

The first round regarding the legal status of the NGO sector was the famous *Greenpeace case* in 1998 when the well-known international NGO wanted to question some of the European Commission's decisions. Between 1991 and 1993, the European Commission decided to allocate funds from the European Regional Development Fund to Spain on several occasions to finance the costs of two power plants in the Canary Islands.[71] According to the ruling of the CJEU, the Greenpeace, a non-governmental organisation in action for annulment, could not prove that it was directly concerned by the European Commission's decisions. As a result, the requirements of the Plaumann-test[72] could not be established. In 2017, the CJEU delivered another ruling against Greenpeace, again in action for annulment. This time, the NGO wanted to challenge the

[68] Case C-553/14 *Kyocera Mita Europe BV v European Commission*, ECLI:EU:C:2015:805, para. 45 and Case C-244/16 *Industrias Químicas del Vallés, SA v European Commission*, ECLI:EU:C:2018:177, para. 54.
[69] 2006/1367/EC Article 10 paragraph (1).
[70] 2006/1367/EC Article 2 paragraph (1) point g).
[71] Case C-321/95 P *Stichting Greenpeace Council (Greenpeace International) and Others v Commission of the European Communities*, ECLI:EU:C:1998:153.
[72] Case C-25/62 *Plaumann & Co. v Commission of the European Economic Community*, ECLI:EU:C:1963:17.

state aid decision of the *Hinkley Point C.* nuclear power plant, but the Plaumann-test again prevented the proceeding.[73]

According to environmental NGOs, the CJEU significantly restricts the right to access to justice, as none of the relevant NGOs can meet the requirements. As a result, they are virtually excluded from the possibility to review environmental decisions before judicial forums. As it was highlighted earlier, the scope of the Plaumann-test is limited, as it is the benchmark for nullity proceedings only where non-privileged claimants want to initiate proceedings (GOMBOS, 2019, pp. 91-95). Non-governmental organisations have a prominent role in environmental policy, they have a kind of *watchdog* role,[74] so they must have some form of an opportunity to challenge individual environmental decisions. Interestingly, the NGO sector in the European Union as a whole is playing a relatively restrained role in the absence of the possibility of formalised participation in the decision-making process (ELIANTONIO, 2018, pp. 753-767). Thus, the incomplete implementation of the third pillar of the Aarhus Convention only adds to a problem that is already present at the EU level.

The issue of proving individual concern could be remedied by a change in interpretation, as Advocate General Jacobs pointed out in his Opinion about the case *Unión de Pequeños Agricultores v Council*.[75] According to the Advocate General: '*...it should therefore be accepted that a person is to be regarded as individually concerned by a Community measure where, because of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests*.'[76] Several arguments supported his proposals for a change in interpretation. For example, in many cases, this would be the only way to rule out a complete lack of judicial protection and would mean a more straightforward application of the law before courts.[77]

5. CONCLUSION AND CLOSING REMARKS

"*Justice is open to all like the Ritz hotel*" (SALMON, 1998, p. 11). This highly pertinent quote is most often used to illustrate how expensive litigation and court proceedings can be, displacing just those from the judicial system who are directly and most affected by governmental and administrative decisions. In the European Union, the third pillar of the Aarhus Convention has not lived up to expectations and NGOs are, in their view, virtually excluded from proceedings before the CJEU, in particular in actions for annulment. The problems related to the third pillar can be summarised as follows:

(i) Although the European Commission planned to adopt a *new directive* with harmonisation objectives before the EU became a party to the Convention, the legislative process has practically failed. The focus is still mainly on the case law, the role of the Member States and possible amendments to Regulation 2006/1367/EC. The NGO sector

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[73] Case C-640/16 P *Greenpeace Energy eG v European Commission*, ECLI:EU:C:2017:752.

[74] H. Jacobsen, 'NGOs launch watchdog to keep an eye on the Commission's 'Better Regulation'' https://www.euractiv.com/section/science-policymaking/news/ngos-launch-watchdog-to-keep-an-eye-on-the-commission-s-better-regulation/.

[75] Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union*, ECLI:EU:C:2002:462.

[76] Opinion of Advocate General Jacobs in *case Unión de Pequeños Agricultores v Council of the European Union*, ECLI:EU:C:2002:197, para. 60.

[77] Ibid.

sees the solution as the adoption of a new directive setting out minimum standard rules (Justice and Earth, 2010, p. 21).

(ii) Due to the failure of the legislative process, the European Union has placed the third pillar's burden on the *Member States*, the MSs' administrative and judicial systems. However, preliminary ruling proceedings from the Member States' judicial bodies instances that Member States' law enforcers have *difficulty* in interpreting the right to access to justice in environmental matters. Moreover, the law in question varies significantly from one Member State to another; there is no harmonisation at all, except for the successful transformation of some secondary sources of law.

(iii) The European Union has *specific features of EU Law* as a shield against the findings of the ACCC. However, the communications issued by the institutions show that the incomplete implementation of the third pillar is well known.

(iv) Concerning the legal standing of organisations in the NGO sphere (*locus standi*), the communication issued in 2017 by the Commission is the latest relevant source. In the absence of a legal provision, the status requirements should be interpreted in the light of CJEU case-law.

'A few EU environmental directives contain access to justice provisions expressly requiring Member States to provide legal standing. However, express provisions on access to justice, include standing, are absent in most EU secondary environmental legislation. Nevertheless, despite the absence of express legislative provisions, the requirements concerning legal standing have to be interpreted in the light of the principles established in the case –law of the CJEU.' [78]

(v) Some directives adopted as part of environmental law have *some specific rules* on legal standing.[79] Still, the access right to justice is an unknown concept for most secondary sources of law. Although the European Union appears to have fulfilled its obligations under the Aarhus Convention, as a party it has incompletely implemented the third pillar. The European Union's adherence to the practice developed by the CJEU over many decades is understandable, but the development of a set of conditions with new and more precise requirements can be considered timely.

The right of access to environmental justice is one of the essential tools in the hands of the NGO sector to challenge certain decisions based on the rights of future generations and environmental concerns. The agony of the European Union that has lasted for almost two decades makes it virtually impossible for NGOs to play their role. In the Authors' view, the final solution would be to adopt a new directive that would define the right of access to environmental justice, the legal standing and opportunities of the NGO sphere. As it seems from the case-law, the relevant actors cannot rely on the evolutive interpretation of legislation before the CJEU. For the time being, the situation absorbs all the possibilities that the right guaranteed in the third pillar would hold, and it also calls into question the European Union's commitment to the environment. As it is, for now, the right of access to environmental justice stands as a 'black hole' (SZIEBIG, 2019, p. 216) in the European Union's legal order. The implementation of the third pillar in the

[78] Commission Notice on access to justice in environmental matters 2017/C 275/01 para. 59.
[79] Ibid.

European Union is expected to resume in the third quarter of 2020, which will hopefully bring an end to this long-running era of controversy and conflict.[80]

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