The European Union
Aarhus Centre

The Aarhus Convention: Implementation and compliance in EU law

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ClientEarth

Furthering transparency, public participation and access to justice in the EU.

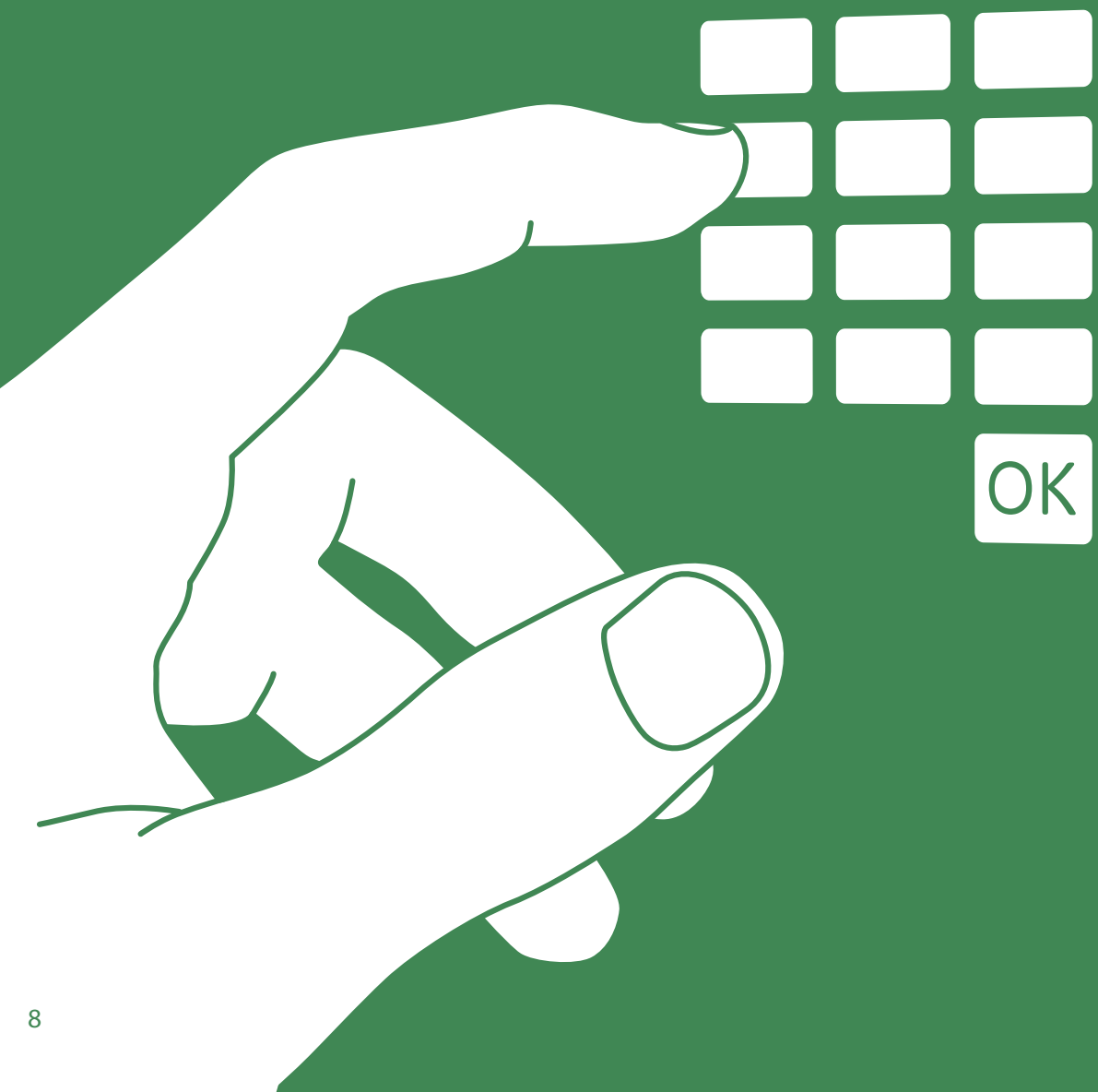
Contents

Introduction

The Aarhus Convention is one of the most ambitious international agreements in advancing democracy and the protection of the environment through procedural rights in environmental matters. The Convention requires public authorities to provide access to information, to enable the public to participate in the decision-making process and to challenge decisions which infringe environmental law. It is one of the most essential legal tools for the public at large and the NGO community in particular, to ensure their right to live in an adequate and healthy environment can be asserted. The Convention was approved by the EU[1] which makes it an integral part of the EU legal order and binds the EU institutions, agencies and bodies as well as the Member States.[2] It has been transposed into EU law to apply at both EU institutional and national levels, through different pieces of legislation. Some directives and regulations only aim to transpose the Convention into the EU legal order while others have been amended to integrate the Convention's provisions.

After monitoring the implementation of the Convention by EU institutions and some Member States for some years, the EU Aarhus Centre within ClientEarth publishes this analysis of the implementing legislation of the Convention and addresses the remaining discrepancies between EU law and the Convention. In some cases, despite the correct transposition of the Convention, the practice and interpretation of the Convention by the institutions lead to a bad implementation of the rights enshrined in the Convention. In these cases, citizens are deprived of their rights to access information on decisions that affect their everyday life, and are prevented from having a say in the decision-making processes which would contribute to establishing a truly participatory political scene. The stakes are also high since creating an open and transparent EU public administration will increase public faith in the institutions and in the EU that is critically lacking today.

1. Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ L 124/1.
2. Article 216(2) TFEU, *"agreements concluded by the Union are binding on the institutions of the Union and on its Member States"*.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Access to environmental information at EU institutional and national levels

Access to information under the Aarhus Convention

The Treaty on European Union (TEU)[3] contained a declaration (Declaration No. 17) on the right of access to information. In 1993, the Commission and the Council adopted a Code of Conduct on Access to Documents,[4] establishing the principles which would govern access to Commission and Council documents.

The Treaty of Amsterdam incorporated the right of access to information in the Treaty establishing the European Community (TEC). Article 255 TEC provided that any citizen of the European Union shall have a right of access to European Parliament, Council and Commission documents, subject to principles and conditions, notably regarding limitations on access aimed at protecting legitimate public and private interests, to be defined in implementing legislation enacted by the Parliament and Council. The Parliament and Council implemented this right in adopting Regulation 1049/2001 on public access to European, Council and Commission documents.[5]

The TEU stresses principles of openness and proximity of decision-making to the citizen enshrined in Article 1 (2) TEU and reiterated in Article 10(3) TEU.

The Treaty on the Functioning of the European Union (TFEU)[6] reinforces the right of access to documents provided by Article 255 TEC and extends its scope beyond documents of the Parliament, Council and Commission, by providing in its Article 15(3) that "*[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium*".

The Charter of Fundamental Rights of the European Union (CFR), which has become legally binding on the European Union, its institutions and the Member States under Article 6(1) of the TEU, reiterates the general right of access to documents. This makes the right a fundamental right. Article 42 of the CFR reads "*[a]ny citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions*".

As for any fundamental rights, the limitations on the exercise of a right must respect the essence of that right and limitations may only be made if they are necessary and genuinely meet objectives of general interest recognised by the European Union, as provided by Article 52(1) of the CFR. This reads: *"Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of*

3. Signed at Maastricht on 7 February 1992.
4. OJ 1993 L 340, p 41.
5. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents.
6. Entered into force on 1 December 2009.

general interest recognised by the Union."

Regulation 1049/2001 further develops the general principle of the right of access to all documents held by the European institutions by providing the principles, conditions and limits governing the right of access to documents.

Article 4 of Regulation 1049/2001 provides exceptions according to which access can be refused.

In view of the underlying objectives and principles of transparency, the exceptions to the right of access to documents provided by Regulation 1049/2001 must be interpreted and applied strictly.[7]

With regard to environmental information, a specific legal framework was adopted through the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed on 25 June 1998, (the Aarhus Convention). The access to information provisions of the Aarhus Convention are twofold; they provide for the way access on requests must be handled by public authorities and the measures which need to be taken to ensure the collection and dissemination of environmental information.

Article 2(3) of the Convention defines environmental information quite extensively.

Article 4 of the Convention provides for the conditions under which environmental information should be provided and may be refused through a series of exceptions to the right of access protecting certain public and private interests.

Article 5 of the Convention requires Parties to ensure the collection and dissemination of environmental information through databases, registers, lists or files.

Article 9(1) of the Convention provides the right to challenge decisions of public authorities when the person who made the requests considers that his/her request has not been dealt with in compliance with Article 4.

Following the signature of the Aarhus Convention by the EU, Directive 90/313 on the freedom of access to information on the environment was replaced by Directive 2003/4[8] to apply the access to information provisions of the Convention in Member States and Regulation 1367/2006 was adopted to apply the Aarhus Convention to EU institutions and bodies.[9] With regard to access to information, Regulation 1367/2006 mainly refers to Regulation 1049/2001, which governs the right of access to documents held by EU institutions.

7. Case C-64/05 P, Sweden v Commission and Others, [2007] ECR I-11389, para 66 and Joined cases C-39/05 P and C-52/05 P, Sweden and Turco v Council, [2008] ECR I-4723, para 36.
8. Directive 2003/4 on public access to environmental information, OJ 2003, L 41 p.26.
9. Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in environmental Matters to Community institutions and bodies, OJ 2006, L 264 p.13.

The EU Treaties are the "*constitution*" of the European Union, and all provisions which are contained in regulations, directives or decisions – "*secondary legislation*" or "*secondary law*" – must be interpreted in a way which allows the objectives, principles and orientations of the TEU and the TFEU to be optimised and made fully operational.

Any interpretation of EU legislation on access to information will have to be based on these principles. The Court of Justice also held that: *"Regulation 1049/2001 is designed to confer on the public as wide a right of access as possible to documents of the institutions."*[10]

The provisions of the Aarhus Convention prevail over EU secondary law. Therefore where a provision of EU law on access to information contradicts a provision of the Aarhus Convention, the contradicting provision must be set aside. The Court of Justice expressed this hierarchy of norms in the following terms: *"Article 300(7) EC [now Article 216(2) TFEU] provides that 'agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'. In accordance with the Court's case law, those agreements prevail over secondary Community law."* [11]

Regulation 1049/2001 explicitly recognises this priority in Article 2(6): *"This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law or acts of the institutions implementing them."*

It is in that legal context that this paper analysis the way the Aarhus Convention provisions have been transposed at EU level and the potential instances of non-compliance. This publication therefore does not provide guidelines on how to request access to information, nor does it explain the procedure to follow to challenge decisions of public authorities holding the information. We refer to our *Guide on access to documents and environmental information*; this provides an analysis of the access to information provisions of the Convention, Regulation 1049/2001 on access to documents held by EU institutions and Regulation 1367/2006, the substantial right of access and the way it has been interpreted by the European Courts, as well as the procedure to follow both by the persons requesting information and the public authorities deciding whether or not to provide access.

In the first section we will analyse the way the access to information provisions of the Convention are transposed in EU law at EU institutional level. In the second section, we will focus on the transposition of the same provisions at national level in the jurisdiction of the Member State parties to the Convention.

10. Case C-139/07P, *Commission v. Technische Glaswerke Ilmenau,* [2010] I-05885, paragraph 51.
11. Case C-344/04, IATA and ELFAA, ECR 2006, p.I-403, paragraph 35; see also cases C-61/96, *Commission v Germany,* ECR [1996], I-3989, paragraph 52; C-286/02 Bellio Fratelli, ECR 2004, p.I-3465, paragraph 33.

1. Application of the access to information provisions of the Convention to EU institutions, agencies and bodies

Regulation 1367/2006 was adopted specifically to apply the provisions of the Aarhus Convention to EU institutions, bodies and agencies. The regulation makes some adjustments to the access to documents regime set up under Regulation 1049/2001, which governs the right to access documents held by EU institutions to ensure the correct transposition of some of the access to information provisions of the Aarhus Convention. However, with regard to access to information, the Regulation mainly refers to Regulation 1049/2001. Article 3 of Regulation 1367/2006 provides that *"Regulation (EC) No 1049/2001 shall apply to any request by an applicant for access to environmental information held by Community institutions and bodies"*. Regulation 1049/2001 provides the conditions upon which documents containing non-environmental information shall be granted or withheld on the basis of exceptions protecting certain public and private interests. For environmental information, however, these exceptions can only apply to the extent that they conform to the ones enshrined in the Aarhus Convention, which is allegedly not the case for all of them. However, no measures have been taken to achieve full compatibility between the provisions of the Aarhus Convention and of Regulation 1049/2001. The recast of Regulation 1049/2001 in 2008[12] would have been the opportunity to bring about compliance, however, the European Commission's proposal did not address the matter. On the contrary, the Commission's proposal aimed almost exclusively at restricting the scope of the right of access in several ways, in amending the definition of a "*document*", reducing the categories of documents that would be made publicly accessible, adding new exceptions to the right of access and extending the time limits to reply to requests.[13]

On the other hand, the European Parliament, through the MEP rapporteur, proposed amendments quite significantly increasing transparency in the decision-making process of the EU institutions.[14] However, the Council of the EU then proposed even more amendments in favour of confidentiality, some of the proposals even circumventing and rendering ineffective some landmark decisions of the Court of Justice of the EU, like the *Turco* case[15] in which the Court of Justice stressed the need for openness within legislative processes and required the Council to disclose its legal service's opinions. The whole review process of the regulation eventually stalled in the Council. This is for the best because the Regulation as reviewed would have allowed the EU institutions to keep more information confidential and make the EU institutions' decision-making process even more opaque.

12. Commission's proposal for a Regulation of the European Parliament and of the Council concerning public access to European Parliament, Council and Commission documents, 30 April 2008, COM(2008)229 final.
13. Commission's proposal, Articles 2, 3, 4, 7 and 8.
14. Report on the proposal for a Regulation of the European Parliament and of the Council concerning public access to European Parliament, Council and Commission documents, 30 April 2008, (COM(2008)229final - C6(0184/2008–2008/0090(COD)), 29 November 2011, rapporteur Michael Cashman.
15. Joined cases C-39/05P and C-52/05P, *Sweden and Turco v Council*, [2008] I-047235

Persons entitled to request access to information

Access to environmental information, as opposed to non-environmental information, in the Aarhus Convention and Regulation 1367/2006 is organised as a fundamental right, it is provided to any natural or legal person in the world, "*without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities*".[16]

The type of information

As opposed to Regulation 1049/2001, in environmental matters, the Aarhus Convention and Regulation 1367/2006 provide access not only to documents but to information. The right of access is therefore broader.

There is a right to access a wide range of environmental information which is defined in Article 2(1)(d) of Regulation 1367/2006 as:

"Any information in written, visual, aural, electronic or any other form on:

i. *The state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;*

ii. *Factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i);*

iii. *Measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements;*

iv. *Reports on the implementation of environmental legislation;*

v. *Cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in point (iii);*

16. Regulation 1367/2006, Article 3.

vi. The state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures in as much as they are or may be affected by the state of the elements of the environment referred to in point (i) or, through those elements, by any of the matters referred to in points (ii) and (iii)."

This definition of Regulation 1367/2006 corresponds word for word with that of Article 2(1)(a) of Directive 2003/4 on access to environmental information applying the Convention at Member State level,[17] and is broader than the provisions of the Aarhus Convention.[18] The Aarhus Convention definition does not include the words *"emissions, discharges and other releases into the environment"*, *"waste, including radioactive waste"*, or *"the contamination of the food chain"*.[19] This broadening is significant as the definition of the environmental information is often the object of questions from private companies.

The Aarhus Convention provides for access to environmental information which is held by a *"public authority"*. A public authority is defined as including *"the institutions of any regional economic integration organisation"* which is a Party to the Convention.[20] This definition includes the institutions of the EU. As the EU is a Party to the Aarhus Convention, its institutions – including its bodies, offices or agencies – are "public authorities" for the purpose of the Convention. This also applies, where an institution concludes a private contract or otherwise acts under private law, as neither the Aarhus Convention nor Regulations 1049/2001 or 1367/2006 differentiate between information under civil law and public law – or indeed criminal law.

Regulation 1049/2001 on access to documents grants access to documents which are held by the European Parliament, Council or Commission. Other bodies, offices or agencies are not explicitly covered by that Regulation. However, Article 15(3) TFEU now gives a right of access to documents *"of the Union institutions, bodies, offices and agencies."* As the provisions of the EU Treaties prevail over secondary EU law, the right of access is therefore now available to information which is held by EU bodies – such as the Committee of the Regions – offices (for example the Office of the European Ombudsman or the Publications Office) or agencies, such as the European Chemical Agency or the European Food Safety Authority. An EU body, office or agency is not allowed to refuse access to information on the ground that Regulation 1049/2001 is limited to the institutions of the European Parliament, the Council and the Commission.[21] Access to documents held by the Court, the European Investment Bank or the European Central Bank is only granted, when these institutions exercise administrative tasks.[22]

17. Directive 2003/4 on public access to environmental information, OJ 2003, L 41, p.26.
18. Aarhus Convention, Article 2(3).
19. Aarhus Convention, Article 2(3).
20. Aarhus Convention, Article 2(2)(d).
21. For reasons of simplification, this publication will only mention "institutions" where institutions, bodies, offices and agencies are meant.
22. Article 15(3), 4th subparagraph, *"The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks"*.

In environmental matters, Regulation 1367/2006, Article 1(1), gives access to information held by EU *"institutions and bodies"*. The term *"bodies"* refers to all administrations set up by the EU institutions and includes in particular agencies and offices. However, the exception for the Court of Justice, the European Investment Bank and the European Central Bank, laid down in Article 15(3) TFEU, also applies with regard to environmental information. However, the Aarhus Convention does not provide for such an exemption to the rights of access to environmental information. We can only regret the integration to the Treaty of that provision. However, the terms *"administrative tasks"* are rather vague and must be read in conjunction and in light of the other provisions of the EU Treaties mentioned in the introduction of this section stressing the need for the EU institutions to act openly and transparently.

Additionally, *"administrative tasks"* include a broad range of tasks as evidenced by the Regulation 1367/2006 itself. The regulation provides that measures taken by EU institutions in their capacity as an *"administrative review body"* include measures adopted under competition rules, infringement proceedings, Ombudsman proceedings and OLAF proceedings.[23] It can be inferred from that provision that the administrative capacity of EU institutions and bodies covers crucial activities and measures and not only subsidiary ones. However, since the terms *"administrative tasks"* are not defined in the Treaty or in Regulation 1049/2001, their interpretation will require a decision of the Court of Justice of the EU to clarify the scope of application of that exemption.

With regard to the format in which the information must be provided, Regulation 1367/2006 goes further than the Convention in that it requires institutions to *"make all reasonable efforts to maintain environmental information held by them in forms or formats that are readily reproducible and accessible by computer telecommunications or by other electronic means"* (Article 4(1)). This requirement bears important implications especially with regard to information on chemicals and pesticides testing and analysis provided to institutions in authorisation procedures. For example, EFSA and industry regularly conduct analyses upon which they base opinions delivered to the European Commission, so that the Commission can decide whether to authorise the placement on the market of certain products. NGOs request access to these analyses – but to date these have only been provided in PDF format. This does not allow the independent scientific community to reproduce the tests and analyses conducted.

23. Article 2(2) of Regulation 1367/2006: "Administrative acts and omissions shall not include measures taken or omissions by a Community institution or body in its capacity as an administrative review body, such as under:
(a) Articles 81, 82, 86 and 87 of the Treaty (competition rules);
(b) Articles 226 and 228 of the Treaty (infringement proceedings);
(c) Article 195 of the Treaty (Ombudsman Proceedings);
(d) Article 280 of the Treaty (OLAF proceedings)..."

Exceptions to the right of access

Some of the exceptions set out in Article 4 of Regulation 1049/2001, to which Regulation 1367/2006 refers, are not provided for by the Aarhus Convention. Other exceptions are provided by the Aarhus Convention but are not as broad as the ones of the Regulation. However, the exceptions laid down in the Aarhus Convention may not be expanded or added to by any of the exceptions mentioned in Regulation 1049/2001, because the Convention prevails over secondary EU legislation.[24] The fundamental right of access to information in environmental matters, granted by the Aarhus Convention and its ratification by the EU, cannot be restricted by secondary EU legislation.

This is clearly set out in the Convention's implementation guide which states that *"(i) national legislation should set out a framework for the process of answering information requests in accordance with the Convention and that (ii) national legislation may limit access to information in accordance with the optional exceptions outlined in Article 4, paragraphs 3 and 4"*.[25] The guide adds that *"paragraphs 3 and 4 [of Article 4 of the Convention] outline the only circumstances under which exceptions to the general rule apply"*.[26] The framework established at national level, in the present case at EU level, may therefore only reproduce the one provided for by the Convention. Indeed, Parties have very limited discretion as to the information that must be withheld. Furthermore, any exception to the right of access to environmental information has to be interpreted in a restrictive way.[27] Article 4(4), last indent, of the Convention provides that the *"aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and taking into account whether the information requested relates to emissions into the environment"*.

This provision is mirrored at EU level by Article 6(1) of Regulation 1367/2006, which also requires a restrictive interpretation of the exceptions to the right of access to environmental information:

> *"As regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, with the exception of investigations, in particular those concerning possible infringements of Community law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment. As regards the other exceptions set out in Article 4 of Regulation (EC) No 1049/2001, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment."*

24. See case C-344/04, IATA and ELFA, paragraph 35: *"Article 300(7) EC [now Article 216(2) TFEU] provides that 'agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States'. In accordance with the Court's case law, those agreements prevail over provisions of secondary Community law".*
25. United Nations Economic Commission for Europe, *The Aarhus Convention, an implementation guide*, prepared by S. Stec and S. Casey-Lefkowitz in collaboration with J. Jendroska, p.54.
26. *The Aarhus Convention*, *an implementation guide*, ibid, p.53.
27. Joined cases C-39/05 and 52/05, Sweden and Turco v. Council, [2008] ECR I-00001; joined cases T-391/03 and T-70/04, Franchet and Byc, [2006] ECR II-2023; Case T-188/98 Kuijer v Council [2000] ECR II-1959; Case T-2/03 Verein für Konsumenteninformation v Commission [2005] ECR II-0000, 'VKI'.

The EU institutions, however, systematically apply all the exceptions provided under Article 4 of Regulation 1049/2001 including the ones that are much broader than the ones allowed under the Convention, in environmental matters, which is a clear violation of Article 3(1) and Article 4 of the Aarhus Convention.

Absolute exceptions versus relative ones

Regulation 1049/2001 provides for *"absolute"* grounds for refusal. Article 4(1) and (2) provide that *"the institutions shall refuse access…"*, whereas Article 4 of the Aarhus Convention states that *"a request for environmental information may be refused if…"*. Where the Regulation sets out an obligation to refuse access, the Convention only provides the possibility of doing so. An official working for an EU institution is obliged to withhold a piece of information if it falls under the scope of an exception in Regulation 1049/2001 whereas she/he is offered a choice in deciding whether to disclose information despite the fact that an exception provided by the Aarhus Convention applies with regard to environmental information. As Regulation 1367/2006 refers to Article 4 of Regulation 1049/2001,[28] the distinction between the obligation and the mere possibility to refuse to provide access is not correctly transposed and as a result, the quantity of information that is made publicly accessible is reduced.

Protection of military matters

Article 4(1)(a), second indent, of Regulation 1049/2001 provides that the institutions shall refuse access to a document where disclosure would undermine the protection of *"military matters"*. This is not an exception that the Convention allows, as Article 4 (4)(b) of the Convention only allows public authorities to refuse access to protect *"national defence"*. Military matters are not necessarily defence matters. For example, in a case decided by the German Bundesverwaltungsgericht (the Supreme Administrative Court), the administration of a military airport had concluded a contract which allowed a private parachuting association to use the airport for flights. The contract in question concerned military, but not defence matters. The German court granted access to the contract.[29]

28. Article 3 of Regulation 1367/2006 provides that *"Regulation (EC) No 1049/2001 shall apply to any request by an applicant for access to environmental information"*. Article 6 of the same regulation refers to the application of exceptions provided under Regulation 1049/2001.
29. See Bundesverwaltungsgericht, 7C5.04, Decision of 5 December 2007.

Protection of the financial, monetary and economic policy of the Community or a Member State

Article 4(1)(a), fourth indent, of Regulation 1049/2001 provides that the institutions shall refuse access to a document where disclosure would undermine the protection of the financial, monetary or economic policy of the Community or a Member State. This is not an exception that the Convention allows. Yet, despite the fact that the exception protecting the economic policy of a State is not provided in the Convention and thus not applicable to environmental information, the European Commission has applied this exception, at least once, to withhold environmental information. The Commission refused to grant access to a letter it received from a Member State relating to a declassification of a site protected under Directive 92/43/EEC,[30] on the basis of the exception regarding the economic policy of a Member State, pursuant to the fourth indent of Article 4(1)(a) of Regulation 1049/2001. The Commission did not even consider whether the requested information constituted environmental information. However, the decision to declassify a protected site is clearly environmental information, under the Aarhus Convention and Regulation 1367/2006, the exception covering the economic policy of a State should therefore not have been applied in this case. The General Court upheld the Commission's decision in case T-362/08[31] which illustrates the consequence that bad transposition of the provisions of the Convention may have. Even judges ignore the provisions of the Convention and only apply the ones of the implementing legislation which results in decisions that are not in compliance with the Convention and allow confidentiality of environmental information on incorrect legal grounds. On appeal the Court of Justice of the EU quashed that Court decision, but for reasons that were not related to the Aarhus Convention.[32]

Protection of personal data

In environmental matters, the Aarhus Convention allows the EU institutions to refuse disclosure of information, if disclosure would adversely affect *"the confidentiality of personal data and/or files relating to a natural person"*, where the individual (natural person, not company or association) has not consented to the disclosure.[33] In addition, the confidentiality of that type of data must be provided for in a national law for the documents to be withheld. Regulation 1049/2001 and Regulation 45/2001 constitute "national law" for the purpose of Article 4(4)(f) of the Convention.

Article 4(1)(b) of Regulation 1049/2001 protects *"privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data"* and requires EU institutions to refuse access to documents where their disclosure *"would undermine the protection"*

30. Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and wild fauna and flora. OJ 1992 L206, p.7.
31. Case T-362/08, *IFAW Internationaler Tierschutz-Fonds v Commission*, [2011] I-00011.
32. C-135/11P, *IFAW v Commission.*
33. Article 4(4)(f).

of these interests. The EU adopted Regulation 45/2001 on the protection of privacy,[34] to which Article 4(1)(b) of Regulation 1049/2001 indirectly refers. Under Regulation 45/2001, the person whose data has been requested to be released may object to such a transfer citing *"compelling legitimate grounds relating to his or her particular situation"*.[35] However, a person who requested access to data to which Regulation 45/2001 applies must establish the need for having the data transferred.[36]

Article 8 of the Regulation provides that "*without prejudice to Articles 4, 5, 6 and 10, personal data shall only be transferred to recipients subject to the national law adopted for the implementation of Directive 95/46/EC:*

> *(a) If the recipient establishes that the data are necessary for the performance of a task carried out in the public interest or subject to the exercise of public authority, or;*
>
> *(b) If the recipient establishes the necessity of having the data transferred and if there is no reason to assume that the data subject's legitimate interests might be prejudiced*".

This is not in line with Article 4(1) of the Aarhus Convention which provides that information must be made available "*without an interest to be stated*".

This prevents the public from having access to data that would shed light on possible conflicts of interests such as when independent experts advise EU institutions (case T-214/11 *ClientEarth and PAN Europe v EFSA*, ECLI:EU:T:2013:483).

Protection of commercial interests

Article 4(2), first indent of Regulation 1049/2001, requires the EU institutions to refuse access to a document where disclosure would undermine *"the protection of commercial interests of a natural or legal person"*. Whereas Article 4(4)(d) of the Aarhus Convention provides that *"a request for environmental information may be refused if the disclosure would adversely affect the confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest"*.

This exception is twofold. Firstly, it implies that there must be some law protecting the confidentiality of the specific commercial or industrial interests that would be adversely affected by disclosure. Consequently, it is necessary for there to be a law other than Regulation 1049/2001 which provides that the information at stake must remain confidential.

34. Regulation 45/2001 on the protection of individuals with regard to the processing of personal data and the free movement of such data. OJ 2001, L 8 p.1.
35. Regulation 45/2001, Article 18.
36. Regulation 45/2001, Article 8(b).

The Guide on the implementation of the Convention confirms this interpretation, as it states that:

> *"Under the Convention, public authorities are allowed to withhold certain limited types of commercial and industrial information from the public. For the public authorities to be able to withhold information from the public on the basis of commercial confidentiality, that information must pass several tests.*
>
> *First, national law must expressly protect the confidentiality of that information. This means that the national law must explicitly protect the type of information in question as commercial or industrial secrets."*[37]

Secondly, the confidentiality must protect a *"legitimate economic interest"*.

However, the European Commission has sometimes resorted to the exception protecting commercial interests, even when the economic interests were not "*legitimate*", to allow non–disclosure, and when no other law protected the confidentiality of the specific commercial or industrial interests. For example, information has been withheld to protect the image or reputation of a company which sent the information to EU institutions, which is clearly not a legitimate economic interest. One example is lobbying letters sent by the industry to the European Commission.[38]

As an exception to the exception, Article 4(2) of the Convention further adds, "*within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed*". This means the exception on the protection of commercial and industrial information does not apply when the information requested relates to emissions into the environment. This requirement is mentioned in Regulation 1367/2006 as well. Article 6(1) of the Regulation provides that:

> *"As regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, with the exception of investigations, in particular those concerning possible infringements of Community law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment."*

Accordingly, where an institution receives an access request for information relating to emissions into the environment, it must disclose it, even if disclosure is liable to undermine the protection of private commercial interests. Regulation 1367/2006 goes further than the Aarhus Convention since it extends the application of the exception on information on emissions into the environment to documents pertaining to inspections and audits mentioned in Article 4(2) third indent of Regulation 149/2001.

In *Stichting Greenpeace Nederland and Pesticide Action Network Europe v European Commission* (Case T-545/11) the General Court ruled that the European Commission was required to disclose environmental pesticide testing information to NGOs, even where disclosure could undermine the commercial interests of the companies involved.

37. *The Aarhus Convention, an implementation guide,* UNECE, p.60.
38. Ludwig Kramer, *"The EU, access to environmental information and the open society"*, ERA Forum, Journal of the Academy of European Law, 2013.

The applicants had requested access to documents relating to the Commission's decision to authorise the placing on the market of the active substance glyphosate. The Commission refused, claiming that disclosure would undermine the commercial interests of the companies involved. The Commission considered that the information requested did not relate to emissions into the environment, and that there was no overriding public interest in disclosure. The Commission submitted that the notion of emissions into the environment should be interpreted restrictively. It claimed that the Aarhus Implementation Guide 2000 refers to the definition of emissions in the IPPC Directive (96/61/EC) as meaning the direct or indirect release of substances from installations (i.e. factories).

However, the information requested in this case did not relate to the release of substances from installations. Rather it concerned the composition of the active substance, the process by which the substance was produced, and the composition of the finished product, which would be released into the air, by spraying.

The Court reasserted its settled case-law that any exceptions to disclosure should be interpreted as restrictively as possible, and that the Aarhus Implementation guide was not legally binding.[39] The Court rejected the Commission's claim that the notion of emissions into the environment should be interpreted restrictively. It ruled that, in order for the disclosure to be lawful, it suffices that the information requested relates in a sufficiently direct manner to emissions into the environment. The Court concluded that in the present case, the *"identity and the quantity of each impurity contained in such a substance constitutes information relating, in a sufficiently direct manner, to emissions in the environment"*. This decision could have far-reaching implications for companies by restricting their discretion to refuse access to environmental information on the grounds of commercial confidentiality.

Regulation 1367/2006 specifies the scope of the exemption in recital 15 of its preamble in stating that: *"The term 'commercial interests' covers confidentiality agreements concluded by institutions or bodies acting in a banking capacity."* This provision clearly covers the activities of the European Investment Bank, which is an EU body subject to the Aarhus Convention. However, banking activities are not addressed by the Aarhus Convention. It is also unclear what confidentiality agreements it is referred to. It is not the Bank's decision whether its agreements with project partners should be confidential. Moreover, the Aarhus Convention Compliance Committee found that parts of the financial agreements concluded by the EIB and environmental information contained therein must be disclosed.[40] The Compliance Committee found that:

39. As already held in Case C-204/09 Flachglas Torgau, [2012] ECR 1-0000.
40. Communication ACCC/C/2005/21 Report by the Compliance Committee on Compliance by the European Community with its obligations under the Convention, 8 February 2011.

"The argument of the Party concerned that almost none of the finance contract constitutes environmental information in the sense of the Convention appears to be based on a narrow interpretation of the definition of "environmental information." That definition includes "factors... and activities or measures... affecting or likely to affect the elements of the environment...

"A list of examples of types of "activities or measures" that fall within the definition ("administrative measures, environmental agreements, policies, legislation, plans and programmes") is preceded by the word "including", implying that this is a non-exhaustive list and recognizing that other types of activities or measures that affect or are likely to affect the environment are covered by the definition.

Thus, financing agreements, even though not listed explicitly in the definition, may sometimes amount to "measures ... that affect or are likely to affect the elements of the environment". For example, if a financing agreement deals with specific measures concerning the environment, such as the protection of a natural site, it is to be seen as containing environmental information. Therefore, whether the provisions of a financing agreement are to be regarded as environmental information cannot be decided in a general manner, but has to be determined on a case-by-case basis."[41]

Protection of legal advice and court proceedings

Contrary to Article 4(2) second indent of Regulation 1049/2001 requires EU institutions to refuse access to legal advice if their disclosure would undermine the protection of legal advice. For environmental information, there is no exception protecting legal advice, as the Aarhus Convention does not contain any corresponding provision. Exceptions do apply, however, when the legal advice constitutes *"material in the course of completion"*, or *"internal communications"* of EU institutions or where disclosure would adversely affect *"the confidentiality of proceedings of public authorities"*.[42]

The CJEU ruled in Turco that opinions of the Council's legal service must, in principle, be disclosed as *"Regulation 1049/2001 seeks, as indicated in recital 4 of the preamble and Article 1, to give the public a right of access to documents of the institutions which is as wide as possible"*.[43] This ruling also applies in environmental matters.

Protection of investigations, inspections and audits

Article 4(2) third indent of Regulation 1049/2001 provides that access shall be refused where disclosure would undermine the protection of the purpose of inspections, investigations and audits, unless there there is an overriding public interest in disclosure. With respect to environmental

41. Communication ACCC/C/2005/21, paragraph 30(b) page 6.
42. Article 4(3)(c) and 4(4)(a) of the Aarhus Convention.
43. Joined cases C-39/05 and C-52/05P, *Sweden and Turco v Council and Commission*, paragraph 35.

information, the Aarhus Convention does not provide any exception for *"inspections, investigations and audits"* in such general terms. The only exception that relates to investigations is the one provided under Article 4(4)(c) of the Convention, on enquiries of a criminal or disciplinary nature.

Article 4(4)(c) of the Aarhus Convention states that: *"A request for environmental information may be refused if the disclosure would adversely affect (. . .) the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature."* Regulation 1367/2006 only refers to Regulation 1049/2001, completely ignoring the difference between both provisions.

The application of Article 4(2) third indent of Regulation 1049/2001 to environmental information results in the withholding of information when no provision of the Aarhus Convention allows the EU institutions to take such decisions. The Commission uses this exception to withhold information pertaining to infringement proceedings with Member States. It refuses access to letters of formal notice and reasoned opinions sent to Member States as part of infringement proceedings under Article 258 TFEU.[44] Similarly, it withholds conformity checking studies on the way Member States transpose EU Directives in environmental matters.[45] However, neither of these documents are held while conducting enquiries of criminal or disciplinary nature as the Commission cannot be considered to be conducting criminal or disciplinary investigations against Member States. These documents should therefore not be protected under any exception to the right of access to environmental information.

In joined cases C-514/11P and 605/11P[46] the Court upheld a Commission decision not to disclose documents which had been adopted during an infringement procedure (Article 258 TFEU) between the Commission and Portugal. That infringement procedure, which had been initiated following a complaint by LPN, the NGO applicant, was terminated by the Commission. Subsequently, LPN obtained only partial access to the requested documents.

The CJEU confirmed that the procedure under Article 258 TFEU constituted an *"investigation"* for the purpose of Article 4(2) third indent of Regulation 1049/2001 on access to documents which entitled the Commission to decide that documents, generated during that procedure, could be withheld. The Court even went further in creating a presumption of confidentiality applying to all the documents adopted during that procedure. The CJEU held that there was a general presumption that disclosure of the documents in the administrative file relating to an infringement procedure at the pre-litigation stage would undermine the protection of the purpose of the investigation. The Court added that disclosure would *"be likely to change the nature and progress of that procedure, given that, in those circumstances, it could prove even more difficult to begin a process of negotiation and to reach an agreement between the Commission and the Member State concerned putting an end to the infringement alleged"*.

44. Joined Cases C- 514/11 P and C-605/11P, *Liga para a Protecçao da Natureza and Finland v Commission,* ECLI:EU:C:2011:728.
45. Case T-111/11 ClientEarth v Commission, ECLI:EU:T:2013:482. under appeal C-612/13.
46. Case C-514/11P and 605/11P, *Liga para a Protecçao da Natureza and Finland v Commission,* 14 November 2013.

The Court relied on one of its prior decisions in a state aid case[47] in which it recognised the existence of a general presumption of confidentiality applicable to the administrative file relating to the aid. It considered that infringement procedures had characteristics comparable to those of state aid review procedures and it extended the scope of the presumption. That is very contestable, as state aid procedures are regulated by specific pieces of legislation,[48] including conditions under which access to information is given and the constitution of an administrative file, from which the Court was able to draw the existence of a presumption of confidentiality.

However, no such legislative framework exists with regard to infringement procedures. Both legal contexts are therefore completely distinct and should not be subject to the same presumption of confidentiality. Not only is this judgment contestable in law, but also the length of the infringement procedures show that allowing the European Commission to negotiate with the Member States behind closed doors when infringements of EU law are established does not speed up compliance by the governments. On the contrary, transparency and openness in the infringement proceedings would enable the public to scrutinise the procedure, exert pressure on their governments to bring about compliance and make the Commission accountable for its obligation under Article 17 TEU to ensure the correct application of EU law.

Moreover, in the LPN case, the requested information was environmental information. The NGO applicant was alleging infringement of Directive 92/43 on the conservation of natural habitats and wild fauna and flora by the European Commission decision to allow the construction of a dam on the River Sabor in Portugal. The information request should have been dealt with in accordance with the Aarhus Convention, which does not provide any exception to the right of access on the protection of the purpose of investigations, except for criminal or disciplinary ones. Infringement proceedings are neither criminal nor disciplinary, the environmental information adopted within these proceedings should therefore not be protected under Article 4(2) third indent of Regulation 1049/2001.

The Court held that it remains possible that the applicant proved that the general presumption of confidentiality did not apply with regard to a specific document. The Court also rejected the arguments of the applicants as to the existence of an overriding public interest in disclosure as they did not rely on specific interests justifying the disclosure of the documents in question, but merely on the importance of the availability of environmental information as regards the protection of the environment and human health.

It is not clear what kind of interest an applicant must demonstrate to exist to justify disclosure. Official exchanges between the Commission and the Member States on violation of EU

47. Case C-139/07, *Commission v Technische Glaswerke Ilmenau,* [2010] I-05885.
48. Regulation 659/1999 of 22 March 19999 laying down detailed rules for the application of [Article 88] of the EC Treaty, OJ 1999 L83, p.1.

environmental law by some governments is clearly information of public interest. The Court does not provide any clear indication of the type of interest that would be likely to override the protection of the dialogue and negotiations between the Commission and the Member States. The burden of proof is entirely placed on the applicant which has not had access to the substance of the letters sent to the Member States and the positions taken by both sides in the procedure and cannot therefore provide any other arguments demonstrating the need for disclosure than arguing the fact that there is a need that the whole process be transparent and the Commission and the infringing State accountable. The case-law of the Court has thus established a vicious circle that ensures the confidentiality of the infringement procedure while giving the impression that reversing the confidentiality presumption is possible.

In case T-111/11, *ClientEarth v Commission*[49] (under appeal, case C-612/13P), an NGO requested access to conformity-checking studies that are carried out by consultants at the request of the Commission on the way Member States transpose EU directives in the environmental field. These studies compare the provisions of the relevant directives, the ones of the national legislation transposing them and concludes whether the States are in compliance or not. The Commission provided partial access; it disclosed the studies which indicated the correct transposition of the EU directives in question and withheld the studies which were linked to ongoing infringement proceedings or which could potentially lead to such proceedings. The General Court upheld the Commission's decision.

The General Court stretched the applicability of Article 4(2) third indent of Regulation 1049/2001 even further in that case and supported the Commission decision to continue to negotiate behind closed doors with Member States infringing EU law. The refusal to allow any public pressure and questioning further increases the secrecy around decision-making in the Commission. The ruling also makes the Commission immune from being accountable in the way it fulfils its obligation to monitor and enforce EU law. This adds opaqueness to the already contestable fact that the opening of infringement proceedings is at the complete discretion of the Commission and does not fall under the scrutiny of the Court.

Even if these studies constitute a source of information for the Commission to decide to initiate a proceeding, this is no reason the keep them confidential. On the contrary, the citizens and the public in general have the right to know if their governments comply with EU environmental law or not, more specifically what provisions of the directives are violated and what measures are being adopted to bring about compliance at national and EU level. Moreover, these studies are not part of the infringement proceedings, they are not drafted by the Commission itself. They only constitute one source of information for the Commission to assess the extent of the breach of EU law. They are

49. Case T-111/11, *ClientEarth v Commission*, please see footnote 45.

not exchanges and do not contain any confidential information, only a legal analysis of the way the Member States have transposed the directive into their national law that any lawyers could carry out themselves if they had the time and the necessary financial capacity.

The Court supports the Commission's argument that confidentiality is needed to increase the chances of the States complying with the law and reaching an amicable settlement even during the judicial proceedings before the EU courts. However, these proceedings can last for years. It takes sometimes as many as seven years before the Court adopts a decision in cases taken by the Commission against Member States. During this time the public has no information on the status of the case.

Also, giving access to studies that indicate that the directives have been correctly transposed and keeping confidential the ones that raise breaches is really contestable. The Commission's policy masks Member States' inaction, while withholding data that could affect their reputations.

One way to prevent the incorrect implementation of the Convention would be to transpose Article 4 of the Convention in Regulation 1367/2006 in an identical way. Since that has not been done, another possibility would be for the Court to recognise the direct applicability of this provision. However, the General Court rejected that possibility and held that Article 4 of the Aarhus Convention was not unconditional and sufficiently precise to be directly applicable.

The General Court held that *"all parties to that convention have a wide discretion in respect of how to organise the ways in which environmental information requested from public authorities is made available to the public"*.[50]

Additionally, the General Court held that *"in particular, there is nothing in Article 4(4)(c), or in the other provisions of the Aarhus Convention, which makes it possible to interpret the concepts used in that provision and to determine whether an investigation relating to infringement proceedings can be covered by such concepts"*.[51] It can be inferred from the finding that the Court admits Article 4(4)(c) does not apply to both conformity studies and investigations within infringement proceedings and there is therefore doubt on the compatibility of Article 4(2) third indent of Regulation 1049/2001 with Article 4(4)(c) of the Convention. However, instead of recognising it, the General Court holds that this provision is not directly applicable to EU institutions. In point of fact, the General Court implicitly recognises that Article 4(4)(c) is sufficiently precise to be directly applicable to State parties but makes an exception for the EU institutions in stating that *"Article 4(4)(c) is not sufficiently precise to be directly applicable, at least in relation to the institutions of regional economic integration"*.[52] This puts into question the applicability of international conventions to the EU and creates an *"à la carte"* option for the EU institutions.

50. Case T-111/11, paragraph 94.
51. Case T-111/11, paragraph 96.
52. Case T111/11, paragraph 95.

However, first, this holding constitutes an erroneous application of the Aarhus Convention. Article 2(d) of the Convention provides a definition of *"public authority"* which is the entity subject to all the provisions of the Convention. Article 2(d) includes EU institutions in referring to *"the institutions of any regional economic integration organization referred to in article 17 which is a party to the Convention."* Article 17 of the Convention provides that *"this Convention shall be open for signature ... by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe",* EU institutions are thus expressly referred to and constitute *"public authorities"* for the purpose of the Convention and are thus subject to all the provisions of the Convention without distinction or exception from the other parties to the Convention. Further, the EU (at the time, the European Community) participated - along with the other parties - in the negotiation of the Aarhus Convention. It could have therefore made a reservation as to the application of the exceptions to the right of access to information provisions of the Convention if it had considered that its *"specific features"* referred to by the court did not allow the same application as for the States parties. However, no reservation was made by the EU on that point.

Second, the Convention cannot be applied differently by the parties to it. The EU has ratified the Convention and cannot argue *a posteriori* that it is not applicable to its institutions. Reservations cannot be made after the ratification of a treaty. Article 216(2) TFEU and Article 26 of the Vienna Convention[53] prohibit such an interpretation. Article 27 of the Vienna Convention also provides that a party to an international treaty *"may not invoke the provisions of its internal law as justification for its failure to perform a treaty"*. Specific features are therefore not accepted as a justification for non-application of a convention. This judgment of the General Court deprives the addressees of the Convention of any legal certainty about the application of the limits to the right of access to information.

This is not the first time that a party to the Aarhus Convention has attempted to invoke its *"specific features"* to avoid the application of the Convention. Belgium, for instance, invoked its constitutional system in an attempt to avoid application of the access to justice provisions of the Convention. The Aarhus Convention Compliance Committee rejected that argument relying on Article 27 of the Vienna Convention.[54] In another case, the UK invoked its dual system in an attempt to avoid compliance with the banning of prohibitive costs of access to justice. Again, the Compliance Committee rejected that argument.[55] The European Union has also invoked its specificities in an attempt to avoid application of Article 9(3) of the Aarhus Convention. Once again, the Compliance Committee rejected the argument.[56]

53. Vienna Convention on the law of Treaties concluded on 23 May 1969.
54. Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium), Findings and recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice, ECE/MP.PP/C.1/2006/4/Add.2 28 July 2006.
55. Communication ACCC/C/2008/33 by ClientEarth, Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland, 24 September 2010.
56. Communication ACCC/C/2008/32 by ClientEarth, Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, ECE/MP.PP/C.1/2011/4/Add.1, 24 August 2011.

Moreover, it is settled case-law that since the exceptions to the right of access derogate from the principle of the widest possible public access to documents, those exceptions must be interpreted and applied strictly (Case C-506/08P *Sweden v MyTravel and Commission,* [2011] ECR I-6237, par. 74 and 75). Article 4(4) last indent of the Convention also provides that "*aforementioned grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure ...)*".

Even if they were considered part of "*enquiries*" for the purpose of Article 4(4)(c) of the Convention, the studies at issue would still not be part of criminal or disciplinary enquiries – nor would they lead to them in any way. Criminal and disciplinary enquiries are not the same as administrative and civil inquiries.

Investigations carried out within infringement proceedings are carried out in the administrative capacity of the European Commission. The specification by the Convention of the types of enquiries that are covered by the exception allowing authorities to keep information confidential illustrates the intent of the drafters of the Convention to limit this discretion. It would be wise and legally sound from the Court of Justice of the EU in the appeal of this case to take this intent into consideration and not to allow the extension of the scope of the exception to any other types of investigations.

It follows from the foregoing that the way Article 4(2) third indent of Regulation 1049/2001 is applied by the Commission in the EU courts is not compatible with Article 4(4)(c) of the Convention.

The protection of the internal decision-making process of EU institutions

Article 4(3) first paragraph of Regulation 1049/2001 to which Regulation 1367/2006 refers with regard to environmental information provides that: *"Access to a document, drawn up by an institution for internal use or received by an institution, which relates to a matter where the decision has not been taken by the institution, shall be refused if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."*

In the second paragraph it further adds that: *"Access to a document containing opinions for internal use as part of deliberations and preliminary consultations within the institution concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure."*

For environmental information, there are no similar provisions to protect the decision-making process of public authorities. However, Article 4(3)(c) of the Aarhus Convention states that disclosure of environmental information may be refused *"if the request concerns material "in the course of completion*

or concerns internal communications of public authorities" where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure".[57]

Information may also be withheld where disclosure would adversely affect *"the confidentiality of proceedings of public authorities, where such confidentiality is provided for under "national law".* The term *"national law"* has to be understood, as regards the EU institutions and bodies, as meaning *"EU law"*,[58] that is Regulations 1049/2001 and 1367/2006 on the application of the provisions of the Aarhus Convention.

Article 6(1) of Regulation 1367/2006 requires the institution, when using the exception for the protection of their decision-making process, to interpret the exception in a restrictive way, taking into account both the public interest served by disclosure and whether the information requested relates to emissions into the environment.

In case C-204/09, *Flachglas Torgau*,[59] in a preliminary ruling initiated by a German court, the Court of Justice of the EU was asked to provide an interpretation of what it means to have an exemption *"provided for by law"* as stated in Article 4(3)(c) of the Convention regarding the confidentiality of *"the proceedings of national authorities"*. The Court held that this condition could be considered to be fulfilled by the existence, in the national law of the Member State concerned, of a rule which provides, generally, that the confidentiality of the proceedings of public authorities is a ground for refusing access to environmental information held by those authorities, in so far as that national law clearly defines the concept of 'proceedings'. Nevertheless, the Court specified that this term *"refers to the final stages of the decision-making process of public authorities"*.[60] The Court indicated that that rule also applied to EU institutions.

Protection of information from third parties

The EU institution to which a request for disclosure is addressed, must consult any third party which had transferred a document to that institution about whether or not one of the exceptions of Regulation 1049/2001 applies - *"unless it is clear that the document shall or shall not be disclosed"*.[61] A third party can be anybody other than the institution which had received the request; in particular it includes other EU institutions, Member States, third countries, or citizens.[62] However, the final decision whether or not to disclose the document lies with the institution to which the application for access was made.

57. Aarhus Convention, Article 4(3)(c).
58. Aarhus Convention, Article 4(4)(a).
59. [2012] ECR 1-0000 Case C-204/09 Flachglas Torgau.
60. Para 63.
61. Regulation 1049/2001, Article 4(4).
62. See the definition of third party in Regulation 1049/2001, Article 3(b).

When a document originates from a Member State, Article 4(5) of Regulation 1049/2001 states that the Member State must agree to the disclosure. However, the Member State has to invoke one of the exceptions provided under Article 4 of Regulation 1049/2001. The EU institution must then assess this request and decide whether or not access to the document is granted.[63]

Requests for environmental information may be refused if disclosure *"would adversely affect the interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material"*. [64] The Aarhus Convention draws a distinction between information that must be provided by third parties to public authorities as a consequence of a legal obligation and information that is provided on a voluntary basis. Only for the latter may the third party refuse that the information be disclosed. A Member State which objects, as a third party, to a disclosure, will have to demonstrate that its interests would be adversely affected by the disclosure of the documents it voluntarily transmitted to the institution. However, it will not be able to oppose to the disclosure if it were required to supply the institution with it. That is a significant difference and requires for broader access to information. Regulation 1049/2001 and Regulation 1367/2006 therefore do not comply with Article 4(4)(g) of the Aarhus Convention.

The specific case of legislative documents

Transparency under Regulation 1049/2001 is even more required for legislative documents than for other types of documents. On this aspect the Regulation requires EU institutions to ensure greater transparency than the Aarhus Convention and Directive 2003/4, which applies the Convention to Member States (please see p.41). Regulation 1049/2001 contains specific provisions insisting on the need for transparency within the legislative process. Article 12(2) of the Regulation states that: *"Legislative documents, that is to say, documents drawn up or received in the course of procedures for the adoption of acts which are legally binding in or for the Member States should, subject to Articles 4 and 9,"* be made directly accessible. Recital 6 of the Regulation's preamble further adds, *"wider access should be granted to documents in cases where the institutions are acting in their legislative capacity, including delegated powers, while at the same time preserving the effectiveness of the institutions' decision-making process. Such documents should be made directly accessible to the greatest possible extent"*.

Institutions must therefore interpret the exceptions provided under Article 4 of Regulation 1049/2001 more narrowly when the documents requested are adopted within a legislative process. No similar provisions are enshrined in the Aarhus Convention.

63. See Case C-135/11P (footnote 32).
64. Aarhus Convention, Article 4(4)(g).

Despite this emphasis on the need for public accessibility of legislative documents, legislative processes are still not as transparent as they should be. Documents containing crucial information to understand, follow and participate in the adoption of the laws being discussed at EU institutional level are still being withheld from the public and kept confidential.

Trilogue meetings are an example of the confidentiality that reigns over legislative processes. Trilogues are informal meetings attended by representatives of the European Parliament, the Presidency of the Council and the Commission in which they discuss and decide the amendments to be adopted and rejected and the final draft of the directive or regulation being adopted. These discussions are completely opaque and undemocratic. The procedure does not have any legal basis in the EU Treaties. However, trilogue meetings are increasingly held before the European Parliament has held a plenary vote on the piece of legislation, making the final decision illegitimate. The European Parliament's position within these meetings may indeed not be representative as only few members of the European Parliament attend, only the rapporteur of the file and the shadow rapporteurs, sometimes not even all shadows attend. The negotiations take place behind closed doors where vested and personal interests may take precedence over the stakes stemming from the piece of law discussed. Discussions taking place within trilogue meetings as well as technical meetings are only partially disclosed, the detailed discussion is kept confidential. Only the European Parliament provides access to the minutes of the meetings which are however quite short, and consist of one page. The Council and the Commission refuse to provide access to their positions within these discussions until the directive or regulation is finally adopted.

Impact assessments carried out by the European Commission before EU directives and regulations proposals are adopted are also kept confidential until the official legislative proposal of the Commission is adopted. The Commission argues that *"the impact assessment is an important element of the internal decision-making process aiming to ensure early co-ordination within the Commission and to prepare evidence for the political decision-makers on the advantages and disadvantages of possible policy options. Therefore, if the information contained [in the impact assessment] is released before the [legislative proposal is adopted], it would seriously compromise and undermine the ongoing decision-making process of the Commission"*.[65] The Commission further argues that it is unable to identify an overriding public interest in disclosure. However, these assessments are crucial to know on what basis and according to what criteria the Commission decides to adopt or not adopt legislation, the objectives of the directive/regulation and the priorities set.

The legal service of the Council's opinions adopted within legislative processes and the names of the delegations adopting positions within the Council are made public only recently after battling

65. Commission's reply to ClientEarth access to document request. Case lodged against the Commission before the General Court on the 11 June 2014. At this date, no number has been allocated to the case yet.

before the Court of Justice of the EU and the adoption of the decisions in the *Turco* and *Access-Info-Europe* cases.[66] In *Turco* the ECJ ruled that *"it is precisely openness in this regard that contributes to conferring greater legitimacy on the institutions in the eyes of European citizens and increasing their confidence in them by allowing divergences between various points of view to be openly debated"* and that *"it is in fact rather a lack of information and debate which is capable of giving rise to doubts in the minds of citizens, not only as regards the lawfulness of an isolated act, but also as regards the legitimacy of the decision-making process as a whole"*.[67]

Active dissemination of environmental information

The Aarhus Convention, Regulations 1049/2001 and 1367/2006 provide that electronically accessible public registers of documents shall be established by the EU institutions.

Article 5 (2) of the Aarhus Convention provides that:

> *"Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, inter alia, by:*
>
> *(a) Providing sufficient information to the public about the type and scope of environmental information held by the relevant public authorities, the basic terms and conditions under which such information is made available and accessible and the process by which it can be obtained;*
>
> *(b) Establishing and maintaining practical arrangements, such as:*
>
> *(i) Publicly accessible lists, registers or files;*
>
> *(ii) Requiring officials to support the public in seeking access to information under this Convention; and*
>
> *(iii) The identification of points of contact; and*
>
> *(c) Providing access to the environmental information contained in lists, registers or files as referred to in subparagraph (b) (i) above free of charge."*
>
> Article 5(3) of the Aarhus Convention adds that:
>
> *"Each party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks."*

66. Case C-280/11P, Council v Access-Info-Europe, ECLI:EU:2013:671.
67. Joined cases C-39/05 and C-52/05P, paragraph 59.

Certain types of information are then listed as examples of what should be included in the registers provided that the information is already available in electronic form.[68] This information includes reports on the state of the environment, texts of legislation on or relating to the environment; policies, plans and programmes on or relating to the environment *"as appropriate"*, and environmental agreements, *"other information to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention"* is also mentioned.

The Convention also requires the Parties to *"take measures within the framework of [their] legislation for the purpose of disseminating, inter alia:*

> *(a) legislation and policy documents such as documents on strategies, policies, programmes*
>
> *and action plans relating to the environment, and progress reports on their implementation, prepared at various levels of government;*
>
> *(b) International treaties, conventions and agreements on environmental issues; and*
>
> *(c) other significant international documents on environmental issues, as appropriate."* [69]

Article 5(7) imposes an obligation to publish *"the facts and analyses of facts which [the Party] considers relevant and important in framing major environmental policy proposals"*. This requirement should cover the impact assessments carried out within legislative processes by the European Commission mentioned above. These are not disseminated in public registers or made accessible on request until the legislative proposals are adopted by the Commission. Publishing the impact assessment before the legislative proposal is adopted would make the legislative process genuinely transparent and make the Commission accountable with regard to the way they assess the different policy options and scope of future legislation.

Parties are also required to publish "*available explanatory material on its dealings with the public in matters falling within the scope of the convention*" (Article 5(7)(b)). Information on the States' performance of public functions or the provision of public services relating to the environment by government at all levels must also be provided (Article 5(7)(c)).

The other provisions of the Convention concerning active dissemination are product-related and *"encourage operators whose activities have a significant impact on the environment to inform the public regularly of the environmental impact of their activities and products, where appropriate within the framework of voluntary eco-labelling or eco-auditing schemes or by other means"*. (Article 5(6)). Linked to that parties are required to *"develop mechanisms with a view to ensuring that sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices"* (Article 5(8)).

68. Article 5(3) of the Aarhus Convention.
69. Article 5(3) of the Aarhus Convention.

In accordance with Article 5(9) of the Convention, the Protocol on Pollutant Release and Transfer Registers (PRTR) has been adopted and ratified by 32 countries and the EU. The Protocol's objective is *"to enhance public access to information through the establishment of coherent, nationwide pollutant release and transfer registers (PRTRs)."* PRTRs are inventories of pollution from industrial sites and other sources. Although regulating information on pollution, rather than pollution directly, the Protocol is expected to exert a significant downward pressure on levels of pollution, as no company will want to be identified as among the biggest polluters.

Active dissemination at EU institutional level

At EU institutional level, the obligation to actively disseminate information is mirrored in Article 4 of Regulation 1367/2006, which provides that:

> *"1. Community institutions and bodies shall organise the environmental information which is relevant to their functions and which is held by them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and / or electronic technology in accordance with Articles 11(1) and (2), and 12 of Regulation No 1049/2001. They shall make this environmental information progressively available in electronic databases that are easily accessible to the public through public telecommunication networks. To that end, they shall place the environmental information that they hold on databases and equip these with search aids and other forms of software designed to assist the public in locating the information they require."*

Article 11 of Regulation 1049/2001 referred to by Article 4 of Regulation 1367/2006 sets out the obligation to provide public access to a register of documents, in electronic form, and adds that "*References to documents shall be recorded in the register without delay*". The register should have been operational since 3 June 2002. A noticeable difference with Article 5 of the Aarhus Convention is that Article 4 of Regulation 1367/2006 requires *"the active and systematic"* dissemination of the information to the public. The obligation is thus more stringent than under the Convention and covers a greater quantity of information.

For each document the register shall contain a reference number (including, where applicable, the inter-institutional reference), the subject matter and/or a short description of the content of the document and the date on which it was received or drawn up and recorded in the register. References shall be made in a manner that does not undermine the protection of the interests in Article 4.[70] Article 12 of Regulation 1049/2001 further specifies the obligation to have a register which makes the documents directly accessible to the public.

70. Article 11(2) of Regulation 1049/2001.

The obligation is more specific regarding environmental information than Article 5 of the Aarhus Convention, as Article 4(2) of Regulation 1367/2006 lists the type of documents that should be made accessible in the register. The obligation provided by the Convention is mirrored with regard to texts of legislation, international treaties, conventions, policies, plans and programmes and reports on the state of the environment. The regulation however further adds other types of information to be disseminated: progress reports on the implementation of EU environmental law; steps taken in proceedings for infringements of Community law from the stage of the reasoned opinion; data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment; authorisations with a significant impact on the environment; environmental agreements; environmental impact studies and risk assessments concerning environmental elements; or, references to the places where such information can be requested or accessed.

The type of information required to be disseminated is therefore more specific than that listed in the Convention. The list is not exhaustive as Article 4(2) of the Regulation provides that *"the databases or registers shall include the following"*. However, product-related information likely to enable consumers to make informed environmental choices required by Article 5 of the Convention to be published is not mentioned in the Regulation. This information is required to be made available in other pieces of legislation. REACH, the Regulation on the Registration, Evaluation, Authorisation and Restriction of Chemicals[71] provides for some obligations on the European Chemicals Agency to guarantee consumers information about substances on their own, in mixtures or in articles placed on the market. Article 77(2)(e) of REACH Regulation provides that the Agency shall establish and maintain database(s) with information on all registered substances, the classification and labelling inventory and the harmonised classification and labelling list established in accordance with Regulation (EC) No 1272/2008.[72]

Article 119 of REACH lists the information that shall be made publicly available on the internet. However, the industry producing a substance may make a confidentiality claim under Article 10(a)(xi) and oppose the publication of the information. The Agency then needs to assess the claim and decide whether it is legitimate or not. It is questionable whether such claims are allowed under the Convention. The compliance of the decisions not to publish information on certain chemicals will depend upon the assessment made by the Agency and on the correct application of the exception protecting commercial interests provided by the Convention. However, since this exception is not accurately transposed in Regulation 1049/2001, which does not state that only "*legitimate*" economic interests may be protected, it is likely that some information will remain confidential where the Aarhus Convention would require it to be actively disseminated.

71. European Parliament and Council Regulation (EC) No 1907/2006, REACH, Registration, Evaluation, Authorisation and restriction of Chemicals.
72. Regulation 1272/2008 of 16 December 2008 of the European Parliament and of the Council on the classification, labelling and packaging of substances and mixtures amending and repealing Directive 67/548/EEC and 1999/45/EC, and amending Regulation 1907/2006.

Other pieces of legislation provide for active dissemination obligations and contain such presumptions of confidentiality. With regard to pesticides, Article 57 of Regulation 1107/2009 requires the Member States to make relevant information publicly accessible and updated every three months. However, similarly to REACH, Article 63 provides a lists of information the disclosure of which shall be deemed to undermine the protection of commercial interests or of privacy and the integrity of the individuals concerned. The same applies to biocidal products under Regulation 528/2012 (Articles 66 and 67). Climate change legislation also requires the Member States to disclose information; Directive 2003/87 as amended by Directive 2009/29 provides an example of an obligation to disseminate information.

The same legal remedies apply to challenge refusal to provide access to this type of information, that is to lodge a complaint with the European Ombudsman or before the Court of Justice under the conditions laid down in Articles 228 and 260 of the TFEU respectively.

EFSA, the European Food Safety Authority, also subject to the Aarhus Convention and its implementing EU regulations, provides access to the scientific information related to the food products which it assesses to advise the European Commission on whether they should be authorised and placed on the market. However, at the time of this publication, EFSA does not publish on its website the relevant information it holds and which has been provided by the companies producing the products assessed. The information enshrines scientific studies on the hazardousness of the products, tests and assessments done by the industry. The industry is strongly opposed to that active disclosure for fear of unfair competition. They fear that a competitor could then use the available information to submit an application to EFSA without having to prepare the required file and have to pay for it. A balancing of interests needs to be made between the commercial and industrial interests of the food industry and the public's interests and rights in making informed environmental and health choices.

Despite the correct transposition of the Aarhus Convention in EU law, part of the environmental information that should be actively disseminated is still being withheld by EU institution. The register only concerns decisions adopted by the Commission as a whole, and some accessory documents. DG Environment, the department dealing with environmental matters within the Commission, does not have any publicly accessible lists or registers as required by the Convention and Regulation 1367/2006. The only documents that are actively disseminated are the ones put on the website of DG Environment. It is therefore clear that the Commission is in breach of its obligation in that regard.

Additionally, the existing register of the Commission only contains COM-, SEC- and C-documents. It is therefore limited to documents that reached the Secretariat General and received a COM (SEC or C) number. Thus, first drafts, for example those that went out for consultation with stakeholders or with Member States, are not included. Neither is any correspondence concerning specific topics, nor documents drafted by the different DGs, including the legal service, and other documents, which are below the level of the college of the Commission. Minutes of official meetings are not made available either. Documents adopted within legislative processes should be placed in the registers as soon as adopted or received so the public may genuinely participate in the adoption of the laws, minutes of trilogue and technical meetings as well as amendments proposed by the different institutions to the legislative proposals. Currently, the time to make an access to document request and for the institution to reply does not allow the applicants to have access to the information early enough.

It follows from this that the Commission's register does not comply with Article 11 of Regulation 1049/2001, let alone with Article 4 of Regulation 1367/2006. It would probably be necessary for each DG in the European Commission to establish its own register where documents (correspondence, internal notes, opinions, studies etc) on each specific topic are listed.

Also, some of the information that should be placed in the register or listed on the websites such as EUR-LEX are not fully provided. For example, Article 4(2)(b) and (a) of Regulation 1367/2006 is not fully complied with, since the progress reports on the implementation of EU legislation on the environment or relating to it are not provided. Indeed, the Member States' reports on the transposition and application of EU directives are not on any register. Only the title of national legislation which transposes a directive is mentioned, but not the text of the transposing legislation itself.

The Court of Justice of the EU ruled on the right to have access to a public register in case T-392/07.[73] At the time of writing, the judgment was only available in French and German, and the numbering of paragraphs was not yet established.

An individual wanted to have access to a considerable number of documents held by the European Commission. The Commission first refused access, and later granted partial access. The applicant asked the Court to grant him access to the extract of the register, where the documents to which he wanted to have access, were registered. The Commission argued that it had not established such a register.

73. Case T-392/07, *Strack v. Commission*, ECLI:EU:T:2013:8, under appeal C-127/13.

Under Article 6 of Regulation 1049/2001, the Commission is not obliged to establish a document which does not exist, for example a statistic. However, the applicant has a right of access to documents, and it would be against the requirement of transparency if the administration could invoke the non-existence of the document to avoid the application of the Regulation. The Court ruled that *"the effective exercise of the right of access to documents supposes that the affected institutions establish and conserve, if any possible and in a non-arbitrary and foreseeable way, documentation concerning their activities"* (ClientEarth translation).

In the present case, the Commission had adopted legal acts, *"the presence of which in the register must be considered compulsory"* (ClientEarth translation). The Court continued by arguing that it was in the hands of the Commission to grant or refuse access to the document and that apparently no technical barrier prevented the Commission from including the decisions in its register. *"In these circumstances, it must be held that the Commission acted arbitrarily and unforeseeably by omitting to include in the register all confirmatory decisions on the total or partial refusal of access to documents adopted after 1 January 2005. Thus, it has to be concluded that the Commission, arguing that the extract of the register did not exist, has infringed the applicant's right of access to the register, as foreseen in Article 2 of Regulation 1049/2001"* (ClientEarth translation).

The Court recognised that there is a right of access to a register and that the EU institutions may not invoke the fact that they did not establish such a register.

Because of the lack of the required registered and accessible databases, the citizen's right of access to information/documents, provided under the Aarhus Convention Article 4, and Article 2 of Regulation 1049/2001, is being impaired, because the citizen does not know what kind of or how many documents exist relating to certain matters, and cannot therefore make proper use of his/her right. The setting up of a comprehensive register would remedy this situation. It would also reduce the workload of the EU institutions' staff, as the more information that is actively disseminated, the fewer requests the institutions will receive and have to process. Although setting up the register will require time and reflection, once established, it will save time for EU institutions' staff and foster more transparent practices.

In terms of reporting, Article 17 of Regulation 1049/2001 requires each institution to *"publish annually a report for the preceding year including the number of cases in which the institution refused to grant access to documents, the reasons for such refusals and the number of sensitive documents not recorded in the register"*.

The Commission was also required to publish a report on the implementation of the principles of the Regulation and make recommendations, and adopt a proposal for the revision of the Regulation 1049/2001.[74]

The Commission did propose to review the Regulation in 2008. The proposal, as explained above, mainly aimed at restricting the scope of the right of access, increasing the categories of documents being kept confidential by adding new exceptions to the right of access and amending the definition of a *"document"*. The process got stalled in the Council after the adoption of the first reading position of the European Parliament (please see p. 13). There is no consensus between the Commission, Council and European Parliament as to the way access to information should be regulated and the degree of transparency and openness that should exist within the EU decision-making process.

Although the Aarhus Convention is correctly transposed into EU law, the practice is far from complying with the requirements that *"environmental information progressively becomes available in electronic databases which are easily accessible to the public"*.[75] Article 298 TFEU provides for an open, efficient and independent European administration. The European Parliament report on public access to documents, adopted in 2014, calls *"on the EU institutions, bodies, offices and agencies to develop further a more proactive approach on transparency by making publicly accessible on their internet websites as many categories of documents as possible, including internal administrative documents, and by including these in their public registries; considers that this approach helps ensure effective transparency as well as prevent unnecessary litigation that may cause unnecessary costs and burdens for both the institutions and the citizens"*.[76]

EU institutions therefore ought to take steps to ensure they comply with their obligation to set up a register in accordance with Article 5(2)(3) of the Aarhus Convention, Articles 11 and 12 of Regulation 1049/2001 and Article 4 of Regulation 1367/2006 in line with the enhanced commitment to openness and transparency established in the Treaties.

74. Article 17 of Regulation 1049/2001.
75. article 5(3) of the Convention.
76. Report on public access to documents (Rule 104(7)) for the years 2011/2013 (2013/2155(INI)), paragraph 8.

2. The application of the access to information provisions of the Convention to public authorities in Member States

The access to environmental information in Member States is governed by Directive 2003/4.[77] It transposes the access to information provision of the Aarhus Convention very faithfully and even requires increased transparency from public authorities.

The person entitled to request access to information

Any legal or natural person may request access to environmental information as under the Aarhus Convention without any conditions linked to the nationality or place of residence of the persons (Article 2(5) of Directive 2003/4). Similarly to the Convention, the Directive provides that applicants need not state an interest when making the request.

The information

The definition of environmental information (Article 2(1)) is the same as in Regulation 1367/2006 applying the Convention' s provisions to EU institutions and bodies and thus broader than under the Aarhus Convention (please see above). It includes waste, including radioactive waste, emissions, discharges and other releases into the environment; reports on the implementation of environmental legislation and the contamination of the food chain in addition to what is mentioned in the Aarhus Convention.

Similarly to Regulation 1367/2006, the Directive requires the public authorities to make all efforts to provide the information in a reproducible format (Article 3(4)).

The public authority holding the information

The definition of a public authority is the same as under the Aarhus Convention. However, the information that may be requested is not only that held by a public authority but also that held for a public authority which is defined as information *"which is physically held by a natural or legal person on behalf of a public authority"* (Article 2(4)).

A public authority is defined by Article 2(2) as:

77. Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Directive 90/313/EEC

"(a) government or other public administration, including public advisory bodies, at national, regional or local level;

(b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and

(c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b)."

In Case C-279/12,[78] a UK court referred questions to the ECJ for a preliminary ruling asking whether privatised UK water companies were *"public authorities"* and therefore obliged to disclose environmental information.

The Court examined the structure of Article 2(2) of Directive 2003/4. It held that Article 2(2)(a) covered all administrations which form part of the public administration or executive of the State and which only the State can decide to dissolve. Article 2(2)(b) covers entities which are entrusted with certain functions in the public interest and have been entrusted, for that purpose, with specific powers. UK water companies perform services in the public interest, such as the maintenance and development of water and sewage infrastructure, water supply and sewage treatment. They had been entrusted with certain powers in that regard, namely the possibility of compulsory purchase, of establishing byelaws for waterways and land in their ownership, of discharging waters in certain circumstances, including discharges into private watercourses, of imposing temporary hosepipe bans and of deciding, under certain conditions, to cut off the supply of water. Therefore, the Court held that in order to determine whether such entities can be classified as legal persons which perform 'public administrative functions' under national law within the meaning of Article 2(2)(b) of Directive 2003/4/EC, it should be examined whether those entities were vested with special powers beyond those which result from the normal rules applicable in relations between persons governed by private law.

On whether the companies fell under the scope of Article 2(2)(c), the Court held that it depended on whether they were controlled by a public authority. The Court held that such entities should be classified as 'public authorities' by virtue of Article 2(2)(c) of the Directive, *"if they do not determine in a genuinely autonomous manner the way in which they provide those services since a public authority covered by Article 2(2)(a) or (b) of the directive is in a position to exert decisive influence on their action in the environmental field"*.

Finally, a person falling within the definition in Article 2(2)(b) *"constitutes a public authority in respect of all the environmental information which it holds"*.

78. Case C-279/12, Fish Legal and Shirley, ECLI:EU:C:2013:853.

On the other hand, commercial companies, such as the ones at stake, which are capable of being a public authority by virtue of Article 2(2)(c) of the Directive are public authorities for the purpose of the Directive only in so far as, when they provide public services in the environmental field, they are under the control of a body or person falling within Article 2(2)(a) or (b) of the Directive. An additional condition is that the companies are not required to provide environmental information if it is not disputed that the information does not relate to the provision of such public services.

Authorities acting in a legislative or judicial capacity

The Directive states that Member States may provide that bodies or institutions acting in a judicial or legislative capacity shall not be subject to the provisions of the Directive (Article 2(2)). Where the Directive grants discretion to the Member States to decide to exempt these authorities from the obligation to provide access to information, the Convention excludes these institutions from the definition of a public authority and thus from the scope of the rights provided by the Convention. Article 2(2) of the Convention provides that the definition of a public authority *"does not include bodies or institutions acting in a judicial or legislative capacity"*. The Directive therefore provides the possibility to Member States to decide that the information held by public authorities in the context of legislative and judicial activities may be accessible to the public and provides here again the possibility to broaden the scope of the right of access.

In case C-204/09,[79] in a preliminary ruling initiated by a German court, the Court held that the option to exempt bodies or institutions acting in a legislative capacity could apply to ministries to the extent that they participate in the legislative process, in particular by tabling draft laws or giving opinions. However, that possibility could no longer be exercised when the legislative process in question had ended. In case C-515/2011,[80] the Court of Justice found that the option could not be applied to *"ministries when they prepare and adopt normative regulations which are of a lower rank than a law"*.

The Directive adds that *"if [the Member States'] constitutional provisions at the date of the adoption of this Directive make no provision for a review procedure within the meaning of Article 6, Member States may exclude those bodies or institutions [acting in a legislative or judicial capacity] from..."* the definition of a public authority.[81] Article 6 of the Directive provides the conditions under which access to justice must be provided to challenge refusals to disclose information.

However, the Court found that the option to exclude those institutions from the definition of a public authority was not subject to this condition provided by the Directive.[82] This ruling from the Court therefore ensures greater access to information than that which is provided by the Directive.

79. Case C-204/09, Flachgas Torgau, ECLI:EU:C:2012:71.
80. Case C-515/11, Deutsche Umwelthilfe, ECLI:EU:C:2013:523.
81. Article 2(2) second sentence of second subparagraph.
82. Case C-204/09, Flachglas Torgau GmbH,ECLI:EU:C:2012:71.

Exceptions to the right of access

The exceptions to the right of access are almost identical to the ones provided by the Aarhus Convention. Similarly to the Convention, the Directive only provides for a possibility to public authorities to refuse access to information and does not impose on them to refuse access even when the information falls within the scope of an exception provided by the Directive contrary to what Regulations 1049/2001, as referred by Regulation 1367/2006, require from EU institutions and bodies. Article 4 of the Directive provides that *"Member States may provide for a request for environmental information to be refused if..."*.

The Directive differs in three aspects from the Aarhus Convention. First, the Directive broadens the scope of the exception on *"material in the course of completion"* to *"unfinished documents or data"* (Article 4(1)(d)). However, in practice this added wording neither restricts nor extends the scope of the exception, so the intent behind it is not clear. Unfinished documents or data are necessarily *"in the course of completion"*. The Directive specifies however, that *"where a request is refused on the basis that it concerns material in the course of completion, the public authority shall state the name of the authority preparing the material and the estimated time needed for completion"*. Provided the authorities complete the material at stake within the time limits indicated, knowing when the material will be accessible may help applicants to foresee whether gaining access to the information will be of any use or whether, for example, it would be received too late for them to provide input on the decision being adopted and how the information should be used.

Second, the exception protecting commercial and industrial interests specifies that a legitimate economic interest includes *"the public interest in maintaining statistical confidentiality and tax secrecy"* (Article 4(2)(d)). The application of the exception to these interests will anyway depend on whether a law provides for such confidentiality.

Third, the Directive extensively reduces the scope of the exceptions with regard to information on emissions into the environment. Article 4(2) provides that *"Member States may not, by virtue of paragraph 2(a), (d), (f), (g) and (h), provide for a request to be refused where the request relates to information on emissions into the environment"*. The exceptions on the protection of the confidentiality of the proceedings of public authorities, commercial and industrial information, personal data, the interests of third parties who provided information and the protection of the environment may not be used when the information relates to emissions into the environment. Only the exceptions on the protection of international relations, public security or national defence, the course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature and intellectual property rights may be applied to refuse access to information on emissions.

This provides a much broader access to this type of information than under the Aarhus Convention, which only provides that information on emissions into the environment may not be refused on the grounds that it would adversely affect the protection of commercial and industrial information. For the other grounds for refusal the Convention provides that public authorities shall take *"into account whether the information requested relates to emissions into the environment",* which does not require systematic disclosure.

Regulation 1367/2006 also requires disclosure of information on emissions notwithstanding whether it would undermine commercial interests including intellectual property interests. This differs from the Directive, which excludes intellectual property interests from the list of exceptions that are not applicable with the information relates to emissions. Regulation 1367/2006 also extends the disclosure obligation and prevents the application of the exception which protects inspections and audits but not investigations, *"in particular those concerning possible infringements of Community law"* (Article 6(1)). As mentioned above, the EU and European Commission in particular refuse to provide access to any information relating to infringement proceedings initiated against Member States breaching EU (environmental) law until the whole proceeding is over.

Active dissemination of the information

Article 7 of Directive 2003/4 provides for the dissemination of environmental information and mirrors Regulation 1367/2006 applying to EU institutions, bodies and agencies. Member States must take the necessary measures to ensure the active and systematic dissemination of environmental information. The same type of information is listed and is required to be made available and disseminated as under Article 4 of Regulation 1367/2006 (please see p.33).

Article 7 (4) of the Directive however, mirrors the Convention (Article 5(1)(c) in requiring the Member States to *"take the necessary measures to ensure that, in the event of an imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information held by or for public authorities which could enable the public likely to be affected to take measures to prevent or mitigate harm arising from the threat is disseminated, immediately and without delay"*.

The Directive therefore transposes almost word by word the access to information provisions of the Aarhus Convention, more faithfully than Regulation 1367/2006 through its reference to Regulation 1049/2001 on several aspects. One can question the difference in treatment between the EU institutions and the national governments and the reason why the latter should be subject to more stringent rules with regard to transparency within their decision-making process.

Participation in environmental decision-making

1. The Aarhus Convention

The second pillar of the Aarhus Convention deals with participation of the public in decision-making by public authorities. Article 6 deals with the participation in decisions on projects. This provision applies when public authorities have to decide:

- whether to permit one of the activities of annex I to the Convention (Article 6(1.a));
- whether to permit activities which are not listed in that annex I which may have a significant effect on the environment. However, this provision only applies when the law of the Contracting Parties so provides (Article 6(1.b)).

Article 7 deals with the participation of the public in decisions on plans and programmes. It also provides, though in a non-binding formulation for Contracting Parties, for *"opportunities for public participation in the preparation of policies relating to the environment"*.

Article 8 deals with the public participation in regulatory activities. The term "*regulatory activity*" does not include the legislative parliamentary process. This is due to the fact that Article 2(2) explicitly excludes legislative activities from the field of application of the Convention.

Article 9(2) finally gives access to the EU courts, where the provisions on participation have not been respected.

2. Persons entitled to participate

The Aarhus Convention does not provide that every person shall be entitled to participate in environment-related decision-making. It rather limits this participation to certain persons:

Article 6 of the Convention which refers to administrative decisions on projects explicitly talks of the "*public concerned*". Article 7, which deals with the participation in the decisions on plans programmes and policies, only mentions "*the public*". However, this provision, in practice, reaches the same result, as it provides that the relevant public authority shall identify the public which may participate in the decision-making on plans, projects and policies. Article 8 only mentions "*the public*"; this is due to the fact that executive regulations are of general application and therefore concern everybody.

The "*public concerned*", mentioned in Article 6, is also to be determined on a case-by-case basis. An abstract, general consideration will not be sufficient. This becomes clear when one compares, for example, the construction of a waste incinerator with the construction of a motorway of

500km length. The public who live within a certain distance of the incinerator - perhaps in a circle of three kilometers - might be affected by the waste incinerator, through noise of the trucks which transport the waste, the air or water emissions from the plant etc. In the case of a motorway, a circle of three or more kilometers will not help identifying the people who are concerned. One would rather have to think of persons who live on both sides of the motorway, for example at a distance of less than five thousand meters. Of course, these figures are built from fictitious examples and may vary, when an industrial site is located next to the motorway or the incinerator, according to the geography of the landscape etc.

Where a citizen belongs to the group of the "*public concerned*", he/she has a right to participate in the decision-making process.[83] The disregard of this right entitles that citizen to address the General Court of the EU (see more closely Article 9 of this Convention).

3. Participation and consultation

There is no definition of "*participation*" in the Aarhus Convention. Articles 6 to 9 give, however, some indication of what is meant by participation: it is the possibility to make comments or submit information, analyses or opinions on a specific project, plan or programme, policy or executive regulation. In order to do so, the administration which intends to take a decision that is relevant to the environment shall:

- submit information to the public as early as possible, when all options of the envisaged administrative decision are still open;
- inform the public what environmental information relevant to the proposed activity is available;
- inform on the application for a decision (if any), a description of the foreseeable environmental impacts, the measures to prevent or reduce negative environmental impacts, and an outline of the main alternatives that were studied;
- provide the information in an adequate, timely and effective manner so that the public may comment;
- give reasonable time-frames for the submission of comments or opinions;
- inform of the time and venue of any public hearing which is organised;
- take due account of the submissions, comments and opinions;
- once the decision is taken, give the reasons and considerations for it.

83. See Article 1, Aarhus Convention: *"Each Party shall guarantee the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention."*

For projects, a non-technical summary must also be made available.

All these documents and pieces of information shall enable the public to make comments or submit opinions and observations in an "*effective*" manner; this term is repeated three times in Article 6, which indicates its objective: the public must have sufficient time and sufficient information in order to prepare their comments on the proposal.

The Aarhus Convention does not specify, what a "*sufficient*" time for comments is. This will depend on the circumstances case-by-case. A timespan of less than two full weeks will always be too short and therefore not comply with the requirements of Articles 6 to 8. A reasonable timespan is normally six to eight weeks.

Normally, the timespan for plans, programmes or executive regulation must be at least of the same length, because these activities have effects for a larger group of persons, for a longer timespan, and for a geographically larger area. When citizens want to submit opinions or comments to plans, programmes or executive regulations, they will have to take into account such long-term effects on a large number of persons. This requires a particularly careful preparation of the comments and hence more time to prepare the comments. EU Regulation 1367/2006 therefore provides for plans and programmes a time limit of *"at least eight weeks"* to receive comments.[84]

Overall, "*participation*" under the Aarhus Convention in the decision-making procedure on projects implies and requires a sort of dialogue between citizens and the public authority which intends to take a decision. This is different from a consultation process. Indeed, a consultation process is normally addressed *"to whom it may concern"* and invites comments on a specific draft decision. Under the Aarhus Convention, the public authority has an obligation to identify the public which is affected or likely to be affected by the decision or which has an interest in the matter.[85] Moreover, while the consultation may take place at any moment during the elaboration of a decision on a project or a plan, the participation procedure must start as early as possible, when all options are still open.

Also, during the participation procedure, the application of the developer of the project for the administrative decision must be made available to the public, together with an indication of what environmental information is available, plus detailed documentation on the project.

The Aarhus Convention provides that due account is taken of the outcome of the participation procedure. The public must be informed of the decision which was taken. The text of the decision must be made available to the public, along with the reasons and considerations on which the

84. Regulation 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006, L 264, p.13, Article 9(4).
85. Aarhus Convention, Article 2(5) and Article 6.

decision is based (Article 6(8) of the Convention). No such obligations for public authorities exist, when a consultation of the public is foreseen. The European Commission publishes a résumé of the comments made by the public, but does not give any justification on the way it took these comments into account.

The requirements of the Convention are less detailed, when the participation in plans and programmes is in question, though the obligation to initiate the participation procedure as early as possible, when all options are still open, and to grant reasonable time frames for participation also apply in these cases (Article 7 of the Aarhus Convention).

As the provisions of the Aarhus Convention on the participation in relation to policies on the environment (Article 7, last phrase) and on executive regulations (Article 8) constitute, in legal terms, recommendations, they will not be further discussed here.

4. Projects authorised by EU institutions

Activities listed in Annex I to the Aarhus Convention

Article 6 of the Aarhus Convention contains detailed provisions on the public participation in decisions on specific activities (projects). Neither Regulation 1367/2006 nor any other legal instruments contain provisions that provide for such public participation in decisions on projects or other activities which are authorised by EU institutions or bodies.

As regards the list of activities which are listed in Annex I to the Aarhus Convention, the answer is clearly in the negative: permits for all such projects are granted by the competent authorities of the Member States, not by the EU institutions. There is no exception to that.

In some cases, EU law provides for the financial support from the EU for such projects.[86] However, the decision on whether a specific project may be realised remains that of the Member State in question. This becomes clear when one thinks of a case where the EU refuses to contribute EU funding to the realisation of the project: the Member State would then nevertheless be entitled to realise the project; the consequence of the EU's refusal is only that no EU funds would be made available for it.

86. See for example Regulation 1083/2006, OJ 2006, L 210 p.25, Articles 39 to 41.

Other activities mentioned in Article 6 of the Convention

The Aarhus Convention also provides for public participation in decision-making in activities (projects) that are not listed in Annex I, but which may have *"a significant effect on the environment"* (Article 6(1)(b) of the Convention).

There are permits granted by EU institutions for a number of substances or products which may have a significant effect on the environment. This is for example the case with the authorisation of chemical substances or products,[87] or the authorisation of active substances for pesticide[88] or biocidal products.[89]

However, activities not listed in Annex I to the Convention are required to provide for public participation in decision-making only, where the EU has so decided.[90] As the EU was free to decide whether the described permitting activities were subject to the public participation procedure, it also could decide to provide for some form of public consultation only - as in fact it did in the different regulations. Therefore, it cannot be argued that EU law is not in compliance with regard to Article 6 of the Aarhus Convention.

Another question is whether the EU should have provided, in its legislation on products, some public participation, in order to make its decision-making process more transparent and more democratic. At present, the influence of vested interest groups in such decision-making - for cars, genetically modified organisms, pesticides, chemicals etc - is considerable, and not countervailed by a public participation. This question, though, cannot be discussed further here.

5. Participation in decisions on genetically modified organisms

The Aarhus Convention was amended by the insertion of a new Article 6 bis and an Annex I bis, in order to deal with the deliberate release into the environment of genetically modified organisms. This amendment did not enter into force internationally. The EU adhered to the amendment of the Convention by Decision 2006/957.[91] It decided not to make any amendment to the existing EU legislation on the deliberate release into the environment and placing on the market of genetically

87. Regulation 1907/2006 concerning the registration, evaluation authorisation and restriction of chemicals, OJ 2006, l 396 p.1.
88. Regulation 1107/2009 concerning the placing of plant protection products on the market, OJ 2009, L 309 p.1.
89. Regulation 528/2012 concerning the placing of biocidal producs on the market, OJ 2012, L 167 p.1.
90. See Article 6(1)(b) Aarhus Convention: "[Each Party] shall, in accordance with its national law, also apply the provisions of this Article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions".
91. Decision 2006/957 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, OJ 2006, L 386 p.46.

modified organisms (GMOs), because it considered that the relevant EU legislation on GMOs was consistent with the amendment to the Aarhus Convention.[92]

Deliberate release into the environment is at present regulated by Directive 2001/18[93] and by Regulation 1829/2003.[94] Directive 2001/18 provides for a complex system of permitting such deliberate releases. In general, the permit for such releases is granted by the competent authority of the EU Member States. However, under certain conditions, a decision is taken at EU level; in such cases, the Member State which had received the initial application for permitting the deliberate release is obliged to execute the decision taken at EU level. The decision to permit the deliberate release is valid for all EU Member States.

Regulation 1829/2003 deals with genetically modified food and feed, which includes the cultivation of genetically modified plants. It provides that the decision on the deliberate release of such products is taken by the EU institutions, normally by the European Commission, after receipt of an opinion on the application by the European Food Safety Authority (EFSA). The Member States participate in the application stage and, via a committee, also in the decision-making process. However, the decision to permit or not to permit the deliberate release of genetically modified food or feed is an exclusive EU decision.

As regards public participation in the decision-making, Directive 2001/18 Article 24(1), provides: *"Without prejudice to Article 25 [that Article deals with issues of confidentiality], upon receipt of a notification in accordance with Article 13(1), the Commission shall immediately make available to the public the summary referred to in Article 13(2)(h). The Commission shall also make available to the public assessment reports in the case referred to in Article 14(3)(a). The public may make comments to the Commission within 30 days. The Commission shall immediately forward the comments to the competent authorities."*

Regulation 1829/2003 states in Article 6(7): *"The [EFSA] Authority, in conformity with Article 38(1) of Regulation (EC) No 178/2002, shall make its opinion public, after deletion of any information identified as confidential in accordance with Article 30 of this Regulation. The public may make comments to the Commission within 30 days from such publication."*

These provisions do not provide for *"early and effective information and public participation"*, as required by Article 6 bis (1) of the Aarhus Convention. The first issue is that the participation should take place in the decision-making process. The decision on a GMO application is taken by the Commission. It would thus have to be the Commission which organises, according to the requirements of Article 6 bis, the participation of the public. Neither Regulation 1829/2003 nor

92. Decision 2006/957 (n.9), Recital 4.
93. Directive 2001/18 on the deliberate release into the environment of genetically modified organisms, OJ 2001, L 106, p.1.
94. Regulation 1829/2003 on genetically modified food and feed, OJ 2003, L 268, p.3.

Directive 2001/18 contain the slightest provision in this regard.

The Commission is well aware of applications for the release of GMOs, as under Regulation 1829/2003, Article 5, it is informed of any application. The Commission thus has enough time to organise proper participation of the public. By way of example, a comparison of the dates of application for the release of GMOs and the dates when EFSA gave its opinions on the application, demonstrates the available time:[95]

- Application for the release of genetically modified cotton introduced on 11 April 2007; EFSA final Opinion[96] delivered on 3 July 2013;[97]
- Application for the release of genetically modified maize 3272 introduced on 6 March 2006; EFSA final Opinion delivered on 20 June 2013;[98]
- Application for the release of genetically modified cotton TN304-40 introduced on 7 April 2011; EFSA final Opinion delivered on 29 July 2013;[99]
- Application for the release of genetically modified maize 98140 introduced on 15 April 2008; EFSA final Opinion delivered on 16 April 2013;[100]
- Application for the release of genetically modified maize 59122 introduced on 21 October 2005; EFSA final Opinion delivered on 6 March 2013.[101]

The Commission had thus between two and eight years to organise an "*early*" participation of the public on the different applications.

An early and effective public participation should consist in public participation from the moment when the application for a deliberate release was received by the public authorities. This principle is laid down in Article 6(2) of the Aarhus Convention. While this provision is not directly applicable to the procedure under Article 6 bis, the underlying concept is clear and equally applicable to the procedure under Article 6 bis, the earlier members of the public are informed of an application, the better are they able to collect information on the pros and cons of the deliberate release, consult own experts, look for experience in other regions or countries, talk to other members of the public or groups and submit comments, information, analyses or opinions to the public authorities.

When an application is received by EFSA, this body is to make available to the European Commission the application and any supplementary information supplied by the applicant.

95. This comparison refers to the last five opinions which EFSA issued in summer 2013.
96. The long delays in this and the following examples are also due to the fact that EFSA almost always asked the applicant for supplementary information.
97. Application EFSA-GMO-UK-2007-41; EFSA Opinion in EFSA Journal 2013; 11(7); 3311.
98. Application EFSA-GMO-UK-2006-34; EFSA Opinion in EFSA Journal 2013; 11(6); 3252.
99. Application EFSA-GMO-NL-2011-97; EFSA Opinion in EFSA Journal 2013; 11(6) ; 3251.
100. Application EFSA-GMO-UK-2008-53; EFSA Opinion in EFSA Journal 2013;11(4); 3139.
101. Application EFSA-GMO-NL-2005-23; EFSA Opinion in EFSA Journal 2013; 11(3); 3135.

A summary of the application dossier is, in a standardised form, made available to the public.[102]

Under Article 6(7) of Regulation 1829/2003, quoted above, the public is allowed to comment to the European Commission on the opinion which EFSA issued to the Commission on a specific application. Nothing is said in that provision, how such comments from the public shall be handled by the Commission, that due account is taken of the submission received, and that the Commission shall explain the reasons and considerations upon which the decision is based, including information on the process of the public participation.

The period within which the public may comment is fixed at thirty days after the publication of EFSA's opinion on the application. This period is considerably shorter than the period of eight weeks which is laid down in Regulation 1367/2006, Article 9(4) - though, admittedly that provision refers, as mentioned, to plans and programmes only. The period is also considerably shorter than the period provided for in the Commission's documents on public consultation, which states:[103] *"The Commission should provide sufficient time for planning and responses to invitations and written contributions. The Commission should strive to allow at least 8 weeks for reception of responses to written public consultations."*

It is true that the provision on the 30 days time limit was fixed by the Council and the European Parliament, not by the Commission. However, it has to be underlined that any EU decision under Regulation 1829/2003, which permits the deliberate release into the environment of genetically modified food or feed, is applicable in the whole of the European Union. Thus all citizens in the EU - some 500 million people - are *"affected"* or likely to be affected by such decisions. Moreover, the EFSA opinion on the application - which is highly scientific and goes into considerable technical details, quoting studies and reports from all over the world - is only published in Englis. Under these circumstances, the 30 days period is too short. EU citizens do not have sufficient time available to become familiar with the text of the EFSA opinion, have that opinion translated into their mother tongue, consult with experts, research scientific and other publications on the subject in question and submit their observations.

Annex I bis, no.1 to the Aarhus Convention states that a *reasonable* time frame shall be granted, in order to give the public the opportunity to express an opinion on the proposed decision to permit a deliberate release of genetically modified food or feed. The conclusion of what was said before is that a delay of 30 days is too short for submitting comments on an opinion, all the more as this opinion is, for the vast majority of the EU citizens, drafted in a language which is not their mother language, and which does not even constitute the draft decision on the application for a permit, but only on an opinion of EFSA that prepares the EU decision.

102. Regulation 1928/2003, Article 5 (2)(b) and Article 5(3) (l).
103. Commission, *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission,* COM(2002) 704, p.21.

Article 24 of Directive 2001/18 contains the same delay of 30 days for comments. For the same reasons as mentioned before, this delay is too short. Directive 2001/18 does not contain provisions on the participation of the public in the procedure for authorising a release of GMOs at national level.

In conclusion, the EU is not in compliance with the requirements under Article 6 bis and annex I bis to the Aarhus Convention.

6. Participation in decisions on EU plans and programmes

Definition of *"plan or programme relating to the environment"*

The Aarhus Convention provides in Article 7 that provisions be adopted by the Contracting Parties *"for the public to participate during the preparation of plans and programmes to the environment"*. For that purpose, a *"transparent and fair"* framework shall be established which ensures that the necessary information is conveyed to the public. The time frames for this participation shall be reasonable and shall allow sufficient time for informing the public and *"for the public to prepare and participate effectively during the environmental decision-making"*. This public participation shall take place *"early"*, *"when all options are open and effective participation can take place"*. In the final decision on the plan or programme, *"due account"* shall be taken of the outcome of the public participation.

Regulation 1367/2006 defines in Article 2(1)(e) the term *"plans and programmes relating to the environment"* as:

> *"Plans and programmes*
>
> *(i) which are subject to preparation and, as appropriate, adoption by a Community institution or body;*
>
> *(ii) which are required under legislative, regulatory or administrative provisions; and*
>
> *(iii) which contribute to, or are likely to have significant effects on the achievement of the objectives of Community environmental policy, such as laid down in the sixth Community Environment Action Programme, or in any subsequent general environmental action programme.*
>
> *General environmental action programmes shall also be considered as plans and programmes relating to the environment.*
>
> *This definition shall not include financial or budget plans and programmes, namely those laying down how particular projects or activities should be financed or those related to the proposed annual budgets, internal work programmes of a Community institution or body, or emergency plans and programmes designed for the sole purpose of civil protection."*

This definition does not correspond to the definition of the Aarhus Convention, but deviates from it in several regards. The most significant deviations are discussed hereafter.

Plans and programmes that are *"required"*

The Aarhus Convention does not limit its application to plans or programmes that are *"required under legislative, regulatory or administrative provisions"*. Where an EU institution or body develops a plan or programme relating to the environment without being required to do so by legislative, regulatory or administrative provisions, the effect of such a plan or programme may be equivalent or even worse than in the case of a plan or programme that is *"required"*. There is no reason to limit the application of Regulation 1367/2006 to plans or programmes that are *"required"*.

Examples of plans or programmes of recent months which were launched by the Commission, though not *"required"* by any provision are:

- *"Europe 2020: Flagship initiative innovation"*;[104]
- *"Roadmap to a resource efficient Europe"*;[105]
- *"Our life insurance, our natural capital: an EU biodiversity strategy to 2020"*;[106]
- *"A roadmap for moving to a competitive low carbon economy in 2050"*;[107]
- *"Blueprint to safeguard Europe's water resources"*.[108]

Evidence that these plans or programmes relate to the environment is the fact that the Commission's proposal for a 7th EU environmental action programme (EAP) explicitly refers to the first four of these documents and asks that the environmental action programme must integrate with them.[109]

In all of the five examples and with regard to the 7th EU EAP - which, incidentally, is not *"required"* by any EU provision[110] - there was consultation of the public, but no participation according to the requirements of Article 7 of the Aarhus Convention.

The conclusion is that the restriction of Regulation 1367/2006 to plans or programmes that are *"required"* by EU provisions is not compatible with the Aarhus Convention.

104. Commission, COM (2010) 546.
105. Commission, COM (2011) 571.
106. Commission, COM(2011) 244.
107. Commission, COM (2011) 112.
108. Commission, COM (2012) 673; the term "blueprint" is, in the French version of the document, reproduced as "plan".
109. Commission, COM (2012) 710.
110. See Article 192 (3) TFEU.

Limitation to *"achieve EU environmental policy objectives"*

The Aarhus Convention does not limit its application to plans and programmes that contribute to, or are likely to have significant effects on, *"the achievement of Community environmental policy"*, and neither does it allow such a limitation. In particular, what constitutes a *"significant effect"* may be subject to very different interpretations. For example, a programme to conserve some fish stocks in the Mediterranean Sea certainly relates to the environment.[111] Yet, one might easily imagine that such a programme is considered not to have significant environmental effects, because of the geographical and temporal limitations and the objective of conserving only some fish species.

In the areas of transport, energy, agriculture, fisheries and regional policy there exist numerous EU plans and programmes which relate to the environment, but do not necessarily try to achieve the objectives of EU environmental policy, such as they are laid down in EU environmental action programmes. EU agricultural plans and programmes aim at achieving of EU agricultural policy, as laid down in Article 39 TFEU; EU fisheries plans or programmes aim at achieving the objectives of EU fisheries policy etc.

In recent years, the Commission adopted an Energy Efficiency Plan 2011[112] and a 2050 roadmap for a low-carbon economy,[113] a programme for energy-efficiency labelling of office equipment,[114] an action plan for a competitive and sustainable automotive industry,[115] an annual work programme for European standardisation[116] and a working plan concerning a list of priority product groups under the Directive establishing a framework for the setting of ecodesign requirements for energy-related products.[117] All these plans and programmes are related to the environment. During their preparation, no participation process took place.

Financial plans and programmes

The Aarhus Convention also covers financial plans and programmes relating to the environment. It might be acceptable that Regulation 1367/2006 excludes general budget plans, because of their general character which embraces all policy sectors and are therefore not *"relating to the environment"*. However, there is no reason to exclude, for example, plans and programmes which lay down how the construction of a number of waste incinerators, waste water treatment installations or carbon capture and storage projects shall be financed. In the same way,

111. See also Article 3 TEU which mentions the "conservation of marine biological resources".
112. Commission, COM(2011) 109. That Plan had been preceded by the 2006 Energy Efficiency Action plan, COM(2006) 545.
113. Commission COM (2011) 112.
114. Commission COM(2012) 109
115. Commission, COM (2012 636.
116. Commission, COM (2013) 561. This plan fixed priorities for numerous environmentally relevant issues, such as bio-based products, eco-design and energy related products, waste recycling, clean vehicles and vessels, smart grids, alternative fuels, nuclear safety, chemicals, climate change and resource efficiency.
117. Directive 2009/125, OJ 2009, L 285 p.10. Working plan Commission, COM(2008) 660.

a programme which is intended to give EU financial contributions to the construction of electricity transport lines, or to the construction of oil or gas pipelines in some parts of the EU, clearly relates to the environment.

The exclusion of financial plans and programmes relating to the environment is therefore not compatible with the requirements of the Aarhus Convention.

Emergency plans or programmes

The Aarhus Convention also covers emergency plans for the sole purpose of civil protection. It may be accepted that plans or programmes which are adopted or put into operation in order to protect against incidents or natural catastrophes which are ongoing, or the arrival of which is imminent, are exempted. In such cases, there might be no time for discussions and participation procedures. Examples are measures against floods, landslides, nuclear catastrophes, marine oil pollution etc.

However, also those plans or programmes come under the term *"civil protection"* which, after an incident or a catastrophe has occurred, aim at the reconstruction or restoration of the damaged area. For such plans or programmes, there is no reason to exempt them from the participation procedure of the Aarhus Convention.

A *"transparent and fair framework"*

The Aarhus Convention provides for early publication of the relevant preparatory documents *"when all options are open and effective public participation can take place"*.

The Commission practice regularly deviates from this requirement. Before formally adopting (a proposal for) a plan or programme, such as the ones mentioned on p.57, above, the Commission examines the impact of the proposal on economic, social and environmental issues. Several ways to approach the specific proposal are studied by this impact assessment. However, this impact assessment is published, in English, together with the final proposal as it was adopted by the Commission. There is thus no possibility for the public to give an opinion on the different options open, though the Aarhus Convention explicitly mentions that participation shall take place when all options are open.

An illustrative example is the 7th environmental action programme which the Commission submitted to the other institutions in 2012.[118] The public was consulted on a draft proposal. However, the impact assessment, which contained the different options for EU actions until 2020, was only made public together with the final proposal by the Commission.[119]

118. Commission, COM (2012) 710 of 29 November 2012.
119. Commission, SWD (2012) 398. The document was made public as an attachment to COM (2012) 710

The underlying idea of fairness and transparency in environmental matters is that the public authorities are not the owner of the environment. Decisions that affect the environment are of concern to the citizens who are, positively or negatively, concerned by the plan or programme. For this reason, fairness in "participation" means that the public authorities share with the public concerned the information which they have on the specific area and/or region, so that the public has the same amount of information as the public authorities.

By not publishing the impact assessment of plans or programmes, the Commission tries to reserve the superior knowledge which such impact assessments convey for itself. It does not enter into a dialogue with citizens on the question of how best to shape the plan or programme, but simply proceeds to a consultation, the unilateral form of communication. To this, the fact has to be added that the consultation is based on documents that are drafted in English - at best sometimes in English, French and German - which does not constitute a "fair" possibility for persons who do not understand these languages.

The conclusion is that the Commission's approach with regard to plans and programmes is not based on a *"transparent and fair framework"*. It is not in compliance with Article 7 of the Aarhus Convention.

7. EU legislation on national plans, programmes and projects

Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment

By acceding to the Aarhus Convention, the EU committed itself to ensure that the provisions of the Convention are respected all over the territory of the European Union. The EU is competent to adopt provisions on plans and has made use of this competence by adopting Directive 2001/42.[120] This Directive requires that plans and programmes which come under the Directive are the subject of an environmental assessment before their adoption. The environmental assessment shall consist of an environmental report (Article 5). The public shall be given *"an early and effective opportunity within appropriate time frames"* to express its opinion on the draft plan or programme and the accompanying environmental report (Article 6). Article 7 contains provisions on consultations where a plan or programme is likely to have significant effects on the environment in another Member State.

The provisions of Directive 2001/42 are, in several aspects, not in line with the provisions of the Aarhus Convention, in particular as regards the following aspects.

120. Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment, OJ 2001, L 197 p.30.

Consultation and participation

Directive 2001/42 does not provide for early participation procedures when, in the wording of the Aarhus Convention (Article 7 and Article 6(4)), *"all options are open and effective public participation can take place"*. The Directive only provides for an *"early and effective opportunity"* to express an opinion on the draft plan or programme and the accompanying assessment report (Article 6(2)). It was already mentioned above that a consultation procedure is not the same as a participation procedure. Reference is made to this section.

Plans and programmes covered by Directive 2001/42

The Directive defines plans and programmes as plans and programmes *"which are subject to the preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and which are required by legislative, regulatory or administrative provisions"*. However, according to Article 3(2) of Directive 2001/42, an environmental assessment only has to be made for those plans or programmes *"which set the framework for future development consent of projects, listed in Annexes I and II of Directive 85/337"* or which may have a significant effect on a habitat protected under the Birds or the Habitats Directive.[121] And consequently, only for such plans or programmes need there be public consultation.

This means that where a specific type of project is not listed in the annexes to Directive 2011/92[122] no public consultation - nor public participation - would have to take place. Examples are the installation of a golf course, or the decision to allow fracking activities. The "*error*" of Directive 2001/42 consists in relating the necessity to provide for public consultations only for plans or programmes that lead to projects which are covered by Directive 2011/92. Instead, the Directive should have covered plans or programmes which relate to the environment or - if one wants to be more precise - to plans and programmes which have a significant effect on the environment - be it through the realisation of projects that are based on such plans or programmes.

Exclusion of civil emergency plans

Directive 2001/42, Article 3(8) excludes from its field of application *"plans and programmes the sole purpose of which is to serve... civil emergency"*.

In this regard, reference is made to what was discussed in the section on emergency plans or programmes (p. 59 above). It may be reasonable to exclude plans or programmes which are meant to stop or reduce the effects of natural or man-made catastrophes (inundations, landslides etc).

121. Directive 2009/147, OJ 2010, p.7 (birds); Directive 92/43, OJ 1992) L 206 p.7 (habitats).
122. Directive 2011/92, OJ 2012, L 26 p.1. This Directive replaced Directive 85/337.

However, there is no reason to also exclude recovery or restoration plans or programmes, since they have to be considered "*civil emergencies*".

Exclusion of financial plans or programmes

Directive 2001/42 excludes from its field of application *"financial and budget"* plans and programmes (Article 3(8)). While it might be reasonable to exclude budget plans, as these are very general and cover all activities of a State or a regional entity, there is no reason to also exclude financial plans. Such financial plans may serve to set the framework for urban development projects, tramway or metro projects, shopping centres, transport infrastructure, pipelines, waste treatment or disposal installations etc - all projects that are listed in the annex to Directive 2011/92 and may thus have, according to the very concept of the Directive (see Article 3(2)), a significant effect on the environment. It is not clear why, for example, a plan for the development of a metro system in an agglomeration should be covered by the Directive, when it includes the construction and the financial planning, but that the financial plan should be excluded, where it is developed in a separate planning instrument.

Plans and programmes that are *"required"*

The Directive only covers those plans and programmes that are required by *"legislative, regulatory or administrative"* provisions. This limitation is not found in the Aarhus Convention which refers to all plans and programmes that relate to the environment. In this regard, the Directive is thus not in conformity with the Aarhus Convention.

In case C-567/10, the EU Court of Justice had to decide whether plans which a local authority may elaborate and adopt, where it has no obligation to do so, are also covered by Directive 2001/42. The Court was of the opinion that the practical effect of the Directive would be compromised, as the Directive aims at a high level of protection and intends to cover plans and programmes which have significant effects on the environment.

Therefore, where national legislation regulates plans and programmes and determines the competent authorities as well as the procedures of elaboration and adoption, such plans and programmes must be considered to be *"required"*.[123]

While this judgment clarifies the meaning of *"required"*, it is not capable of giving local, regional or national planning authorities the necessary legal certainty which plans and programmes are covered by the Directive and which are not. An amendment of the Directive appears necessary to ensure legal certainty. At present, the term *"required"* creates legal uncertainty and is thus not compatible with the provisions of the Aarhus Convention.

123. Case C-567/10 Inter-Environnement Bruxelles amd others, ECLI:EU:C:2012:159

Transboundary effects of a plan or programme

Directive 2001/42 provides in Article 7 for an intergovernmental consultation procedure, when a plan or programme may have effects on the environment of another Member State. This procedure is a procedure between the two (or more) affected governments. The Aarhus Convention does not provide for cases, where the individual right to participation, as laid down in Article 6 of the Convention, may be substituted by an intergovernmental procedure.

It is true that Directive 2001/42 does not explicitly state that for plans and programmes which might have transboundary effects, the intergovernmental procedure replaces the normal participation - in the terms of the Directive: consultation - procedure. However, neither is it stated that the ordinary participation procedure, which means the participation of persons and environmental organisations in purely national plans and programmes, should also apply to transboundary plans and programmes. This legal uncertainty about the question which provision applies, is not in compliance with the provisions of the Aarhus Convention.

Directive 2003/35 on public participation in respect of the drawing up of certain plans and programmes

Whereas Directive 2001/42 provides for public participation when national plans or programmes are drawn up which form the basis of projects for which an environmental impact assessment has to be made, Directive 2003/35[124] provides for public participation with regard to national plans which do not require such environmental impact assessment. This Directive also contains provisions regarding the present Directives 2011/92 on environmental impact assessment of projects and 2010/75 on industrial emissions. However, these provisions will be discussed separately.

The provisions on public participation are laid down in Article 2. This Article repeats the provisions of Article 6 of the Aarhus Convention, though in general terms. It does not use the words *"when all options are open"*, but limits itself to require *"early and effective opportunities to participate"*. No explanation is given as to the words *"early and effective"*. The absence of specific delays and of means to make the consultation *"effective"* easily leads to a situation that, whatever the administration provides for, is considered to be effective and early.

The Directive exempts plans or programmes taken in the case of civil emergencies. In this regard, the comments made on p. 59 apply. Furthermore, the Directive contains in Annex I a list of plans and programmes of seven directives[125] to which it applies. In this regard, Recital 10 states: *"Other*

124. Directive 2003/35 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 and 96/61, OJ 2003, L 156 p.17.
125. These are the Directives 75/442 on waste, OJ 1975, L 194 p.39; 91/157 on batteries OJ 1991, L 78 p.38; 91/676 on nitrates in water, OJ 1991, L 375 p.1; 91/689 on hazardous waste, OJ L 377 p.20; 94/62 on packaging waste, OJ 1994, L 365 p.10; and 96/62 on air quality, OJ 1996, L 296 p.55.

relevant Community legislation already provides for public participation in the preparation of plans and programmes and, for the future, public participation requirements in line with the Aarhus Convention will be incorporated into the relevant legislation from the outset."

However, this commitment was not kept, as is evidenced from the following examples:

The Directive on air quality[126] provided that where the Directive's thresholds are exceeded or risk of being exceeded, Member States shall elaborate and put into operation air quality plans (Article 23) or short term action plans (Article 24). Nothing was provided for with regard to public participation.

Article 8 of Directive on environmental noise[127] required the elaboration of action plans designed to manage noise issues and effects. Article 8(7) contained a general provision on participation,[128] however, without any indication as to what documents or other information the public should obtain, which the sources of noise were, and which options were available.

Article 6 of the Directive on national air emission ceilings[129] provided that Member States draw up programmes for the progressive reduction of national emissions of the pollutants covered by the Directive. Article 6(4) provided for clear, comprehensive and easily accessible information to the public on these programmes; however nothing was foreseen on the participation of the public in the drawing up of these programmes.

Under Article 9 of the Directive on the energy performance of buildings,[130] Member States had to draw up national plans for increasing the number of buildings that almost do not consume energy (*"nearly zero-energy buildings"*). Nothing was foreseen for public participation in the elaboration of these plans.

Under Article 4 of the Directive on the sustainable use of pesticides,[131] Member States had to draw up plans to reduce risks and impacts of pesticide use on human health and the environment.

Under Article 4 of the Directive on renewables,[132] Member States had to draw up national renewable energy action plans in order to reach the Directive's targets on renewable energy by 2020. Nothing was provided on public participation in the elaboration of the plans.

Under Article 5 of the Directive on marine waters,[133] Member States had to elaborate a plan of action

126. Directive 2008/50 on ambient air quality and cleaner air for Europe, OJ 2008, L 152 p.1.
127. Directive 2002/49 relating to the assessment and management of environmental noise, OJ 2002, L 189 p.12.
128. Directive 2002/49, Article 8(7): "Member States shall ensure that the public is consulted about proposals for action plans, given early and effective opportunities to participate in the preparation and review of the action plans, that the results of the participation are taken into account and that the public is informed on the decisions taken. Reasonable time-frames shall be provided allowing sufficient time for each stage of public participation".
129. Directive 2001/81 on national emission ceilings for certain atmospheric pollutants, OJ 2001, L 309 p.22.
130. Directive 2010/31 on the energy performance of buildings, OJ 2010, L 153 p.13.
131. Directive 2009/128 establishing a framework for Community action to achieve a sustainable use of pesticides, OJ 2009, L 309 p.71.
132. Directive 2009/28 on the promotion of the use of energy from renewable sources, OJ 2009, L 140, p.16.
133. Directive 2008/56 establishing a framework for Community action in the field of marine environmental policy (Marine Strategy Framework Directive) OJ 2008, L 164 p.19.

in order to improve water quality. Under Article 8, Member States shall establish and implement coordinated monitoring programmes for the assessment of the environmental status of their marine waters. Under Article 13, Member States had to draw up a programme of measures which need to be taken in order to reach good environmental status of the waters. Article 19 provides that the public shall have *"early and effective opportunity to participate in the implementation of this Directive"*. This is too short a formulation to be in compliance with the detailed provisions of the Aarhus Convention.

The preceding examples concern some directives which were elaborated under the auspices of the EU environmental policy. Regulations and directives elaborated under other policies - agriculture, fisheries, transport, energy, regional policy, industry, internal market - were not included. The list of examples, where EU legislation was related to the environment and provided for the elaboration of plans or programmes, without addressing the question of public participation, could thus easily be prolonged. The general conclusion is that EU legislation does not comply with the provisions of the Aarhus Convention as regards public participation in national plans and programmes related to the environment.

Directive 2011/92 on the environmental impact assessment of certain projects

The Aarhus Convention recognises in Annex I (no. 20) that a participation procedure which is provided for in legislation on the environmental impact assessment, shall be considered to substitute a participation procedure in the permitting procedure itself. For this reason, Directive 2011/92 on the environmental impact assessment of certain projects will also have to be examined as regards its conformity with the provisions of the Aarhus Convention.

Directive 2011/92 contains in Article 6 detailed provisions for the involvement of the public in the impact assessment procedure.[134] Overall, these provisions correspond to the requirements laid down in Article 6 of the Aarhus Convention. This applies in particular to the documents which have to be submitted to the public concerned.[135]

The words *"when all options are open"* are not used in Directive 2011/92, and the provision that the public shall be informed *"early in the environmental decision-making procedures... and, at the latest, as soon as information can reasonably be provided"* (Article 6(2)) gives too much discretion to the competent authority and is less precise than the wording *"early public publication, when all options are open and effective public participation can take place"*. Indeed, as the developer himself decides

134. Article 6(1) of Directive 2011/92 uses the term "consultation"; Article 6(4) mentions that the public concerned shall be entitled "to participate in the environmental decision-making procedures".
135. See Directive 2011/92 (n.40), Article 6(2) and (3) which refer back to the information gathered in Article 5.

which alternatives to his proposal he examines - see Article 5(3) of Directive 2011/92 - he is able to reduce the available options. And the Commission proposal for a review of Directive 2011/92[136] will even further narrow down the available options: according to that proposal, in future the administration shall decide, without any public participation, which alternative options shall be examined by the developer. In this way, the term *"when all options are open"* is reduced to "*when, in the opinion of the competent authority, reasonable options are open*".

Article 7 of Directive 2011/92 provides for an intergovernmental consultation procedure in cases, where a project is likely to have significant effects on the environment in another Member State. This provision is not in compliance with the requirements of the Aarhus Convention, for the following reasons:

The Aarhus Convention does not provide for a specific procedure with regard to projects that may have transboundary effects. Its Article 6 also applies to transboundary projects. This means that citizens in another State have the same rights to participation as citizens of the State where the project is to be realised. Directive 2011/92 does not indicate this. Admittedly, courts have, until now, not even discussed this understanding of the Aarhus Convention.

The provision of Directive 2011/92 only refers to a possible impact on the environment in another EU Member State. It does not refer to another State that is not member of the EU. Article 3(9) of the Aarhus Convention gives the right to participate in decision-making *"without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities"*. Article 7 of Directive 2011/92 discriminates between persons in the State of the project and other persons.

Directive 2011/92 leaves the relationship between its Articles 6 and 7 open. It is not clear, whether in the case of a project with transboundary effect, the procedure of Article 7 exclusively applies, or whether the citizens of the affected Member State continue to benefit from the rights given to them in Article 6. This legal uncertainty is not compatible with the Aarhus Convention.

At least some EU Member States only apply Article 7, as the following example shows: the United Kingdom intends to construct a new nuclear installation at Hinkley. It informed the Irish Government according to Article 7 of Directive 2011/92, but did not inform the Irish public under Article 6. And for one reason or the other, the Irish Government did not inform its own citizens and environmental organisations of the impact assessment process.

The Austrian Government asked, according to Article 7 of the Directive, to be informed of the project, and the United Kingdom Government proceeded accordingly. Austrian citizens delivered

136. See Commission COM(2012) 685.

their opinion on the project. The German Government, in contrast, did not formulate a request under Article 7. When later German environmental organisations delivered comments on the project, based on Article 6 of Directive 2011/92, the comments were not accepted by the United Kingdom Government.

The conclusion of all this is that the Aarhus Convention must be interpreted to prohibit the denial of the rights of persons under its Article 6 in cases of a project with transboundary effects. As Directive 2011/92 is unclear in this regard, it is not in compliance with the Aarhus Convention.

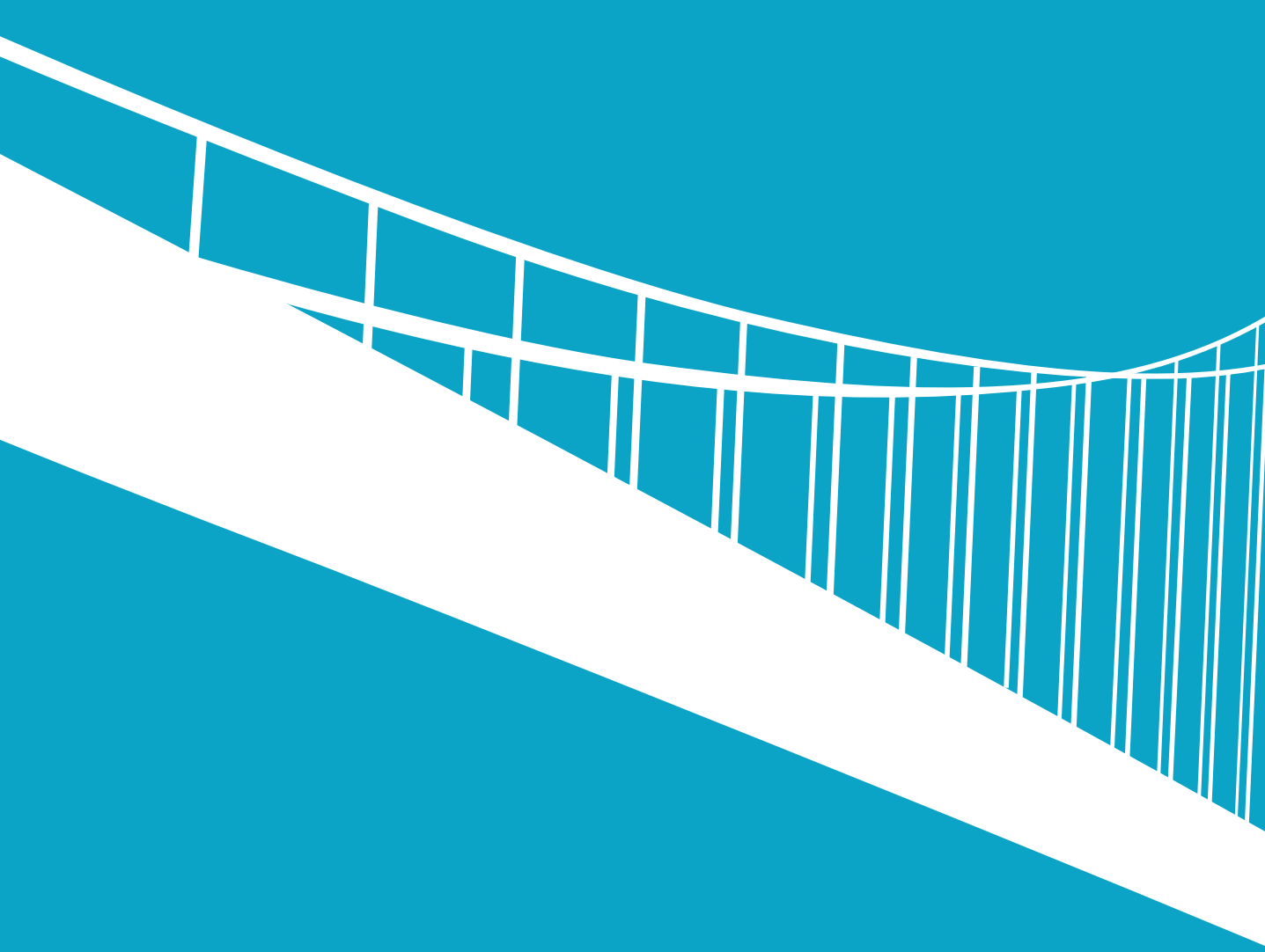
Directive 2010/75 on industrial emissions

Directive 2010/75 provides for the permitting procedures for certain large industrial installations.[137] The list of installations is largely identical, though not completely the same as the list in Annex I to the Aarhus Convention.[138] The one distinction is that the Aarhus Convention requires participation for the permitting of *"installations for gasification and liquefaction"*. Directive 2010/75 requires such a participation for installation for gasification and liquefaction of fuels other than coal in *"installations with a total rated thermal input of 20 MW or more"*.[139]

Article 24 provides that the public shall be given "*early and effective opportunities to participate*" in the procedures for granting a permit for new installations and for providing for substantial changes of a permit. The public shall obtain the necessary information early in the decision adoption procedure or, at the latest, as soon as the information can reasonably be provided (Annex IV, no.1).

Annex IV describes in detail the information which has to be made available to the public, as well as the participation procedure. The wording that participation shall take place "*when all options are open*" is not used in either Article 24 or Annex IV. And the addition that the necessary information shall be made available to the public "*at the latest, as soon as the information can reasonably be provided"* leaves too much discretion to the public authorities and is therefore not compatible with the provisions of the Aarhus Convention.

137. Directive 2010/75, OJ 2010, L 334 p.17. This Directive replaced several older directives, in particular Directive 96/61, OJ 1996, L 257 p.26; Directive 2008/1, OJ 2008, L 24 p.8; Directive 2000/76, OJ 2000, L 332 p.91; Directive 1999/13, OJ 1999, L 85 p.1, and Directive 78/176, OJ 1978, L 54 p.19.
138. The comparison is made difficult, as Annex I no.19 of the Aarhus Convention also includes projects for which participation is provided under an environmental impact assessment procedure. This means that all projects listed in Annex I to Directive 2011/92 (n.40) are also to be deemed to satisfy the participation requirements of the Convention.
139. Directive 2010/75 (n.54), Annex I, no. 1.4(b).



Access to courts in environmental matters

1. Provisions of the Aarhus Convention

The Aarhus Convention provides in Article 9 for access to a review procedure in the areas of access to environmental information (Article 9(1)), participation in decision-making (Article 9(2)) and in general matters, where environmental harm is caused (Article 9(3)).

Article 9(1) stipulates that a person whose request for access to environmental information was ignored, wrongfully refused, or inadequately answered, has *"access to a review procedure before a court of law or another independent or impartial body established by law"*. Where access to a court of law is granted, there shall also be the possibility of an expeditious procedure for reconsideration by a public authority or review by an independent and impartial body other than a court of law.

According to Article 9(2), persons shall have access to a review procedure before a court of law and/or another independent and impartial body established by law, in order *"to challenge the substantive and procedural legality of any decision, act or omission"* of the participation provisions of Article 6 of the Convention.

Article 9(3) provides that members of the public, when they meet the criteria, if any, laid down in the law of the Contracting Parties, shall *"have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions"* of the Party's law relating to the environment.

2. Access to EU courts

Refused access to environmental information

When access to environmental information is refused, Regulation 1367/2006, which refers to Regulation 1049/2001,[140] gives the right to the applicant to ask the EU institution for a confirmatory decision by which it shall re-examine the request and whether the requested document should be disclosed (Regulation 1049/2001, Article 8). This confirmatory decision is taken by the same institution which had decided on the initial application. It constitutes a *"reconsideration"* by a public authority and thus complies with the requirements of Article 9(1) second subparagraph of the Aarhus Convention.

Regulation 1049/2001 only applies to access to documents held by the Commission, the Council and the European Parliament. However, Regulation 1367/2001 stipulates in Article 3 that *"the word 'institution' in Regulation (EC) No 1049/2001 shall be read as 'Community institution or body'"*.

140. Regulation (EC) No. 1049/2001 of the European Parliament and of the Council of 13 May 2001 regarding public acess to European Parliament, Council and Commission documents.

With this formula, it is ensured that a refusal of access to environmental information by one of the some 30 EU agencies or another body of the EU shall also be subject of a confirmatory application and decision.

When a confirmatory decision also refuses, in full or in part, access to environmental information, the applicant has the right of challenging it before the EU Court of Justice (Article 8(3) of Regulation 1049/2001). As the decision is necessarily addressed to the applicant, he is entitled, under Article 263(4) TFEU to appeal to the Court. According to Article 256 TFEU, application to the court must be addressed to the General Court.

The EU provisions concerning access to the courts in the cases of environmental information are thus in compliance with the provisions of the Aarhus Convention.

Refused participation in decision-making

It has already been mentioned above, in Section 4, p.51 and p. 52, that the EU institutions and bodies do not grant themselves permits for the realisation of projects that come under Article 6(1) (a) and Annex I to the Aarhus Convention. Therefore, there is no problem with regard to access to courts in such cases.

As regards participation rights with regard to the elaboration of plans and programmes, the Aarhus Convention does not contain any provisions concerning access to courts in such cases. Indeed, Article 9(2) of the Aarhus Convention refers to Article 6 of the Convention which deals with projects (activities), but does not mention Article 7, which deals with plans and programmes.

It follows from this that there is no legal obligation for the Contracting Parties under the Aarhus Convention to provide for provisions on access to courts, where the participation rights of Article 7 had not been respected.

Cases of environmental harm (Article 9(3) of the Convention)

(a) Internal review procedure

Article 9 (3) of the Convention allows the establishment of administrative procedures to challenge environmental decisions. The question is, whether Regulation 1367/2006 provides for such administrative procedures.

Article 10 of Regulation 1367/2006 grants environmental organisations under certain conditions the

right to ask for an internal review of an EU measure. A decision considering the request inadmissible or a refusal to review the decision may be challenged by bringing *"proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty"* (Regulation 1367/2006, Article 12).

According to Article 10 of Regulation 1367/2006, the request for internal review is to be addressed against the EU institution or body that had adopted the measure. It is thus the same EU institution or body which adopted the original measure that shall decide on the internal review.

Article 9(4) of the Aarhus Convention provides that decisions under Article 9(3) *"shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive"*.

Under EU law, injunctive relief may only be decided by the EU Court of Justice, but not by the EU Commission or another EU institution or body.[141] Moreover, the fairness of procedures suggests that a different institution or body to that which took the original decision should decide on the internal review measure. Otherwise, the same body whose decision is attacked by the request for internal review, decides on it. This is not a *"fair"* procedure.

It follows from this that the internal review procedure under Article 10 of Regulation 1367/2006 is not in compliance with Article 9(3) and (4) Aarhus Convention.

Furthermore, Article 10 specifies that the measure which is requested to be internally reviewed, must be *"an administrative act under environmental law"*. An administrative act is defined in Article 2(1)(g) of Regulation 1367/2006 as *"any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects"*.

Article 9(3) Aarhus Convention refers to *"acts and omissions"*, but does not contain any limitation to an *"individual scope"*. Such acts or omissions do not include legislative acts, as such acts are exempted from the scope of application of the Convention (see Article 2(2)). However, the Convention does not provide for any further limitation.

Finally, Article 10 of Regulation 1367/2006 does not provide for any possibility to challenge acts or omission by private persons which contravene provisions of EU law relating to the environment.

Therefore, the internal review procedure of Article 10 of Regulation 1367/2006 does not fulfil the requirements of Article 9(3) Aarhus Convention.

This understanding of the Convention was confirmed by two decisions of the General Court in

141. See Articles 278 and 279 TFEU.

2012, which held that the Regulation's limitation to administrative acts of individual scope was not compatible with the requirements of the Aarhus Convention.[142]

(b) Access to EU Courts

- Cases of *"individual and direct concern"*

As mentioned, access to the EU Court of Justice against a decision on internal review or against any other decisions by an EU institution or body is allowed under Regulation 1367/2006 in accordance with the relevant provisions of the EU Treaties. These provisions are laid down in Article 263(4) TFEU which grants natural or legal persons access to the court *"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"*.

As most measures related to the environment are not addressed to a specific person, the term *"directly and individually concerned"* becomes particularly relevant.

The Court of Justice interpreted the term in its jurisprudence, practically unchanged since 1962, in rather restrictive terms. In the lead case,[143] it stated: *"Persons other than those to whom a decision is addressed may only claim to be individually concerned, if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually, just as in the case of the person addressed."*

This so-called "*Plaumann jurisprudence*" was maintained by the Court in a continuous line of jurisprudence. It had as a consequence that until 2014, no action by an environmental organisation was ever held admissible by the Court of Justice or the General Court - except, of course, the cases concerning access to environmental information, where the environmental organisation was the addressee of the administrative decision.

The leading environmental case concerned an action by Greenpeace which had attacked a Commission decision to grant financial support to the construction of two power plants in Spain, even though the decision to permit the construction had not been preceded by an environmental impact assessment. Such an assessment was obligatory under EU law, and EU financial support was only to be granted for projects which complied with EU legislation. The General Court, later confirmed by the Court of Justice, was of the opinion that the harm suffered by Greenpeace was not different from the one other persons had suffered or would suffer.[144] Greenpeace was thus not

142. Cases T-338/08 Natuur en Milieu v. Commission, judgment of 14 June 2012; T-396/09 Milieudefensie v. Commission, judgment of 14 June 2012. These judgments are under appeal.
143. Case 25/62, Plaumann, ECR 1963, p.199.
144. Case T-583/93, Greenpeace a.o. v. Commission, ECR 1995, p.II-2205; Court of Justice, case C-321/95P, Greenpeace a.o. v. Commission, ECR 1998, P.I-1651.

individually concerned. And the General Court saw no reason to come to a different result, because the interests in question were general interests.

In case T-219/95R,[145] the applicants, a number of persons who lived in Tahiti, opposed nuclear tests which France planned on the Mururoa islands in the Pacific ocean. The applicants were of their opinion that their health and safety was threatened by the tests and their outfalls, and attacked a Commission decision which gave a green light for the tests. The General Court concluded: *"The decision concerns the applicants only in their objective capacity as residents in Tahiti, in the same way as any other person residing in Polynesia. Even on the assumption that the applicants might suffer personal damage linked to the alleged harmful effects of the nuclear tests in question on the environment or on the health of the general public, that circumstance alone would not be sufficient to distinguish them individually in the same way as a person to whom the contested decision is addressed."*

This means that in the Court's opinion, even the argument that a fundamental human right of the applicant - life or health - is affected, does not make a person "*individually*" concerned.

The Court of Justice defended its restrictive interpretation of the present Article 263(4) TFEU with the argument that the system set up by the Treaty was a complete (exhaustive) system; any change would have to be made through an amendment of the Treaty, but could not be done by the Court. It overlooked, however, that between 1986 and 1988, it had itself interpreted the present Article 263 TFEU against its wording. At that time, according to the wording of Article 173 EEC - now Article 263 TFEU - neither could measures of the European Parliament be tackled in Court nor could the European Parliament itself tackle measures in Court that had been taken by the EU. The Court nevertheless granted standing to the European Parliament, because it held such standing necessary to maintain a balance between the institutions.[146]

This reveals that the Court's interpretation of Article 263(4) TFEU is ideological and not marked by any necessity of interpretation.

- Direct concern by a regulatory act

The Lisbon Treaties, which entered into effect at the end of 2009, added a new phrase to Article 263(4) which allows an application to the Court when the applicant is directly concerned by an EU measure and that measure is a regulatory act and not subject to implementation measures by the EU institutions or by the EU Member States. Thus, the individual concern need no longer exist.

According to the jurisprudence of the Court of Justice, a measure is of direct concern when the measure itself, and not another supplementary measure by an EU institution or a Member State,

145. Case T-219/95R, Danielsson a.o. v. Commission, ECR 1995, p.II-3051.
146. Cases 294/83, Les Verts, ECR 1986, p.1339; 34/86 Council v. European p.2155; European Parliament v. Council, ECR 1990, p.I-2041.

impairs the legal position of the person concerned.[147] When the measure of the EU institution is addressed to the Member States - which is frequently the case - it may not leave any discretion to the Member State, but oblige the Member State to automatically execute the EU measure, in order to be considered to be of direct concern. Where such discretion exists, it is not the EU measure, but the subsequent national measure which is of "*direct*" concern and may be attacked in court.

An illustrative example is the Regulation on trade in seal products which prohibited the import of such products into the EU.[148] The General Court found that only the importers into the EU of seal products were directly concerned by the Regulation. In contrast, the hunters of seals were not directly concerned by it, because the Regulation did not prohibit or restrict the hunting of seals.[149]

However, this new wording does not solve the basic problem in the environmental sector: the environment is a subject of general interest and thus typically not an individual interest. An interfering EU measure is thus a measure which will concern the people living at present or who will live in future, and affect their interest to enjoy a clean and healthy environment. For example, the decisions on the execution and implementation of general EU legislation, the authorising of a chemical substance, the permission to use dangerous active substances in pesticides or biocidal products or the decision to allow the cultivation of a genetically modified plant is in the hands of the European Commission. Sometimes, such decisions are addressed to an applicant, sometimes, they are of general nature and do not have a specific addressee.

May a person or an environmental organisation argue that such decisions are of direct concern to them? It was explained above that Article 10 of Regulation 1367/2006 allowed requests for internal review of EU measures affecting the environment. However, in that provision, there was no requirement that the environmental organisation which requested the internal review was directly concerned by the EU measure in question.

The Court of Justice has not yet decided whether a person or an environmental organisation who tries to protect the general interest "*environment*" is or can be directly concerned by a general EU measure which impairs the environment.

The question is of considerable relevance, as it raises the issue of whether the public authorities - at EU level and/or at EU Member State level - should have the monopoly of preserving the interests of the environment; or whether persons, environmental organisations and other representatives of civil society should have the possibility to submit such a question to the courts and make the courts the arbiter on the diverging economic and ecological interests. In less diplomatic language, one might

147. Cases 113/77 Toyo Bearing v. Council, ECR 1979, p.1185; 132/77 Société pour l'exportation de sucre, ECR 1978, p.1061; C-188/92 TWD, ECR 1994, p.I-833.
148. Regulation 1007/2009, OJ 2009, L 286 p.39.
149. Case T-18/10 Inuit a.o. v. European Parliament and Council, judgment of 6 September 2011. This judgment is under appeal.

formulate the question, who protects the environment against administrative inertia, passivity, mistakes or corruption? In democratic societies it is the role of the courts to balance conflicting interests, and there is no reason why this should be different in environmental matters. However, this implies, as the Aarhus Convention requests, that broad access to the courts be granted.

- Actions against omissions

Article 265 TFEU allows natural or legal persons to appeal to the Court of Justice, when an EU institution, body, office or agency failed to address to that person any legally binding act. However, in environmental matters, EU acts are not addressed to specific persons, but concern the general interest of environmental protection. In parallel to Article 263(4) TFEU, the Court of Justice also held applications admissible which argued that an EU institution or body had failed to address an act to a third person, but which would have concerned the applicant directly and individually.[150] In this regard, all comments which were made above with regard to Article 263(4) TFEU are also applicable to actions under Article 265 TFEU. And no court action by a natural or legal person, based on Article 265 TFEU, was ever held admissible in environmental matters.

- Preliminary rulings

In the Greenpeace decision,[151] the Court of Justice also argued that applicants who had concerns about environmental issues, could bring the matter before a national court. The national court could then make, under the present Article 267 TFEU,[152] a request for a preliminary ruling to the EU Court of Justice; this would ensure sufficient protection in environmental cases. However, in addition to the fact that the decision to appeal to the ECJ is at the discretion of the national court (except for last instance courts), there are considerable differences between direct access to the EU courts and the possibility of a preliminary ruling by the EU Court of Justice. In particular:

The object of litigation before a national court and the EU Court of Justice under Article 267 TFEU is not the same. Under Article 267 TFEU, the EU Court of Justice only has to answer a question on the interpretation of EU law. Whether the action before the national court succeeds, also depends on a number of procedural provisions, such as standing, representation by a lawyer, delays for introducing documents etc. The procedure before a national court might thus be unsuccessful for reasons which have nothing to do with EU law; examples are:

a national court might be reluctant to submit preliminary questions to the EU Court, as this

150. Case C-68/95, T.Port, ECR 1996, p.I-6065.
151. Case C-321/95P (footnote 144).
152. Article 267 TFEU: The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties, (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the court".

means further delays, supplementary attorney costs, and invokes another court as an arbiter;

a national court might err on the question, whether it may or has to submit a case for a preliminary ruling;

the applicant in the national procedure has no possibility to formulate the questions which would be submitted to the EU court; this is the exclusive responsibility of the national court.

National courts are not competent to decide on the validity of an act which was taken by an EU institution. Then it is arguable whether they really should be addressed, when a person contests the validity of that EU act. The principle of *"efficiency of justice"* rather pleads in favour of national measures being attacked before national courts and EU measures being attacked before EU courts.

- Concluding remarks

All these elements led the Aarhus Convention Compliance Committee to conclude that the system set up by Article 267 TFEU *"cannot be a basis for generally denying members of the public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies"*.[153]

The Aarhus Convention Compliance Committee examined the EU practice of access to EU courts in environmental matters (Articles 263, 265 and 267 TFEU) and came to the following conclusion:

> *"With regard to access to justice by members of the public, the Committee is convinced that if the jurisprudence of the EU courts, as evidenced by the cases examined, were to continue, unless fully compensated for by administrative review procedures, the Party concerned [i.e. the European Union] would fail to comply with article 9, paragraphs 3 and 4, of the Convention."* [154]

153. Aarhus Convention Compliance Committee, Findings and recommendations with regard to Communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, adopted on 14 April 2011.
154. Aarhus Convention Compliance Committee (footnote 153).

3. Access to national courts

As was mentioned above, with its adherence to the Aarhus Convention, the EU committed itself to ensure that the provisions of the Aarhus Convention are complied with all over the territory of the EU and its 28 Member States. It is therefore relevant to what extent the EU took measures in order to ensure that access to the national courts in conformity with Article 9 of the Convention is granted everywhere.

Access in cases of environmental information

As regards access to courts in cases of access to environmental information, the EU Directive on access to environmental information[155] provides in Article 6 that Member States shall grant access to courts in cases where the request for access to environmental information was, in full or in part, refused. Article 6 is completely in line with Article 9(1) of the Aarhus Convention.

Access in cases of participation in projects

Access to the national courts in cases of projects (activities) that relate to the environment is granted by Article 11 of the Directive on the environmental impact of certain projects[156] and Article 25 of the Directive on the permitting of industrial installations.[157] Also these two provisions are completely aligned to the requirements of Article 9(2) of the Aarhus Convention.

Access in cases of plans and programmes

The Directives on the environmental impact of certain plans and programmes[158] and on participation in the elaboration of plans that are related to the environment[159] do not contain provisions on access to the courts. This is in conformity with the requirements of the Aarhus Convention which does not contain any provision with regard to plans and programmes under its Article 7.

The EU Court of Justice recently delivered a judgment which might have a considerable impact on the question of whether access to the courts against a plan or programme is possible.[160] In the case in question, a municipality had adopted a plan without an environmental impact assessment,

155. Directive 2003/4, OJ 2003, L 41 p.26.
156. Directive 2011/92, OJ 2012, L 26 p.1.
157. Directive 2010/75, OJ 2010, L 334 p.1.
158. Directive 2001/42, OJ 2001, L 197 p.30.
159. Directive 2003/35, OJ 2003, L 56 p.17.
160. Case C-463/11 L v. M, ECLI:EU:C:2013:247

which was required by Directive 2001/42. The relevant German legislation provided that in such a case, the plan remained valid. However, the Court of Justice declared that this national provision was not in compliance with Directive 2001/42.

It follows from this judgment that any plan or programme which was adopted in a Member State without the necessary environmental impact assessment, as required under Directive 2001/42 - which includes the participation of the public - is not valid. And it remains to be seen whether the Court of Justice will be consistent with this judgment, by declaring plans and programmes which do not fall under Directive 2001/42, but which require public participation, are not validly adopted.

Access in other environmental cases (Article 9(3) Aarhus Convention)

There is no general EU legislation on access to national courts in environmental matters. The Commission made a proposal for a directive in 2003[161] which was, however, not adopted. At present, the Commission is considering making a new proposal.

All empirical studies made on the question of access to national courts in environmental matters show that the provisions are very different from one EU Member State to the other.[162] This diversity obviously has consequences on the compliance of public authorities or private operators with the requirements of environmental legislation, and on the protection of the environment in general. A level playing field within the European Union is probably one of the consequences that flow out of the EU's conclusion of the Aarhus Convention. It remains to be seen whether the EU institutions and the Member States will take measures to align their legislation to the requirements of Article 9(3) and (4) of the Aarhus Convention.

In the area of environmental liability, such measures have already been taken. Under the relevant EU Directive,[163] public authorities, in cases of environmental impairment covered by that Directive, have the obligation either to restore the damaged environment themselves or to ask the responsible person to restore it. Under Article 12 of that Directive a person or an environmental organisation has the possibility to draw the attention of public authorities to the existence of environmental damage and request action from the authorities. The authorities are obliged to take a decision regarding such a request. Against this decision, access to a court or other independent and impartial public body is foreseen, in order *"to review the procedural and substantive legality"* of the decision (Article 13).

161. Commission, Proposal for a directive on access to justice in environmental matters, COM (2003) 624.
162. See in particular J.Ebbesson, Access to justice in environmental matters in the EU, The Hague-London-New York 2002; N.de Sadeleer-G. Roller-M.Dross (eds): Access to justice in environmental matters and the role of NGOs. Empirical findings and legal appraisal. Groningen 2005; M.Eliantonio a.o.: Standing up for your right(s). A comparative study on legal standing (Locus Standi) before the EU and Member States Courts. Study for the European Parliament (PE 462.478) [Bruxelles] 2012; J.Darpö: Effective justice? Synthesis report of the studies on the implementation of articles 9.3 and 9.4 of the Aarhus Convention in seventeen of the Member States of the EU [2012] http://ec.europa.eu/environment/aarhus/accessstudies.htm. Under this last reference, also the studies on access to justice in 17 EU Member States are found.
163. Directive 2004/35 on environmental liability with regard to the prevention and remedying of environmental damage, OJ 2005, L 143 p.56.

Notes

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