

# Contents

Abstract	4
Acknowledgments	5
Abbreviations	6
1. Introduction	7
1.1 General introduction	7
1.2 Objectives	8
1.2.1 Research questions	8
1.2.2 Delimitations	9
1.3 Methodology and materials	9
1.4 Structure	10
2. The Aarhus Convention and its Compliance Committee	11
2.1 Origins of public participation	11
2.2 The rationale behind public participation	12
2.3 The Aarhus Convention	13
2.3.1 Introduction	13
2.3.2 The Three Pillars	14
2.3.2.1 The first pillar	14
2.3.2.2 The second pillar	16
2.3.2.3 The third pillar	17
2.4 The Aarhus Convention's institutions	20
2.5 The ACCC, establishment and functions	22
2.5.1 Introduction	22
2.5.2 The structure of the ACCC	23
2.5.3 The functions of the ACCC	23
2.5.3.1 Submission by a state party	24
2.5.3.2 Referral by the Secretariat	25
2.5.3.3 Communications from the public	25
2.5.4 The nature of ACCC findings	25
3. The EU, MEAs and the Aarhus Convention	28
3.1 EU's accession to the Aarhus Convention	28
3.2 EU accession to MEAs	29
3.3 The division of competences and responsibilities	31
3.3.1 EU rules on the division of external competences	31
3.3.2 EU division of competences in relation to Aarhus	31
3.4 The EU and the ACCC	33
4. The relevant EU legislation	35
4.1 General legislation related to the Aarhus Convention	35
4.2 Access to information	36
4.2.1 Access to information on the Member State level	36
4.2.2 General access to documents in the EU	36

4.3 Participation in decision-making _____	37
4.3.1 Participation in decision-making in the EU Member States _____	37
4.3.2 Participation in decision-making at EU level _____	39
4.4 Access to justice in the EU _____	40
4.4.1 EU legislation on access to justice in Member States _____	40
4.4.1.1 Access to justice after request for environmental information _____	41
4.4.1.2 Access to justice concerning permits and decision-making for specific activities _____	41
4.4.1.3 Access to justice concerning other acts and omissions _____	42
4.4.2 Access to justice at Union level _____	43
4.4.2.1 The internal review procedure _____	44
4.4.2.2 Access to justice and the CJEU _____	45
5. Case backgrounds _____	48
5.1 The <i>Kazokiskes</i> case _____	48
5.2 The <i>Vlora</i> case _____	49
5.3 The <i>ClientEarth</i> case _____	50
5.4 The <i>Irish renewables programme</i> case _____	52
5.5 The <i>Scottish renewables programme</i> case _____	53
6. ACCCs role – competences and responsibilities of the EU _____	55
6.1 The <i>Kazokiskes</i> case _____	55
6.1.1 ACCC’s criteria for attributing responsibility of the EU _____	55
6.1.2 The obligations of the EU _____	55
6.1.3 The responsibility to enforce non-compliance by Member State _____	56
6.1.4 Competences and access to justice _____	56
6.2 The <i>Vlora</i> case _____	57
6.3 The <i>ClientEarth</i> case _____	57
6.4 The <i>Irish renewables programme</i> case _____	58
6.5 The <i>Scottish renewables programme</i> case _____	59
6.6 Concluding observations on competences and responsibilities _____	59
7. Access to justice _____	62
7.1 The EU level _____	62
7.1.1 Article 9(3), a fourth pillar? _____	62
7.1.2 The scope of decisions, acts and omissions _____	63
7.1.2.1 Acting in the capacity of a public authority _____	64
7.1.2.2 Provisions of EU law relating to the environment _____	64
7.1.3 The individual concern criterion _____	65
7.1.3.1 General comments by the ACCC _____	65
7.1.3.2 Comments on EU legislation and jurisprudence _____	66
7.1.3.3 The effects of the Lisbon Treaty _____	67
7.1.4 The interaction between EU and Member State access to justice _____	68
7.1.5 Expenses of a prohibitive nature _____	69
7.1.6 The EU’s response to the <i>ClientEarth</i> report _____	69
7.2 The Member State level _____	70
7.2.1 Effective remedies in the EIA and the IPPC Directives _____	70

7.2.2 The application of Article 9(3) on EU law in EU Member States	71
7.3 Mitigating effects of Article 9(1)	72
7.4 Concluding observations on access to justice	73
8. Access to environmental information	76
8.1 The definition of environmental information	76
8.1.1 The finance contract	77
8.1.2 The framework agreement	77
8.2 Article 4 information requests	78
8.2.1 Grounds for refusing disclosure of environmental information	78
8.2.2 The nature of requests	79
8.3 Article 5 access to information	80
8.4 Concluding observations on access to environmental information	82
9. Participation in decision-making	83
9.1 Decisions on specific activities	83
9.1.1 The scope of decisions	83
9.1.1.1 Financing decisions	83
9.1.1.2 Multiple permits	85
9.1.2 Early participation in decision-making	86
9.1.2.1 The application of Article 6(4)	86
9.1.2.2 The application of Article 6(2)	87
9.1.3 Due account	88
9.1.4 The application of the EIA and IPPC Directives	88
9.2 Plans, programmes and policies	89
9.2.1 The scope of acts constituting plans, programmes and policies	89
9.2.1.1 National renewable energy action plans	89
9.2.1.2 The EU renewable energy strategy	90
9.2.1.3 Financial decisions	91
9.2.2 EU implementation of Article 7 in relation to NREAPs	91
9.2.2.1 The EU legal framework	91
9.2.2.2 Proper monitoring	92
9.2.2.3 Measures taken by the EU after the ACCC recommendations	92
9.3 Concluding observations on participation in decision-making	93
10. Conclusion	95
10.1 Have ACCC recommendations improved EU compliance with Aarhus?	95
10.2 The ACCC's approach to the EU	96
10.3 Final concluding observations	97
Bibliography	99

## **Abstract**

Public participation and access to justice has gained increasing attention in international environmental law during recent years. The Aarhus Convention is the principal international agreement dealing with the matter, and it builds on three main elements; access to information, participation in decision-making and access to justice. In 2002, the Aarhus Convention Compliance Committee (ACCC) was established with the aim to review the compliance by parties to the Aarhus Convention. One of the main tasks of the ACCC is to receive communications regarding non-compliance by the parties to the Convention and recommend measures to be taken in order to improve compliance with the Convention.

The status of reports from the ACCC is not entirely clear. Most parties to the Convention, nevertheless, seem willing to improve public participation in line with recommendations from the ACCC, though there are exceptions, such as the EU's unwillingness to change its practice regarding access to justice. It can also be noted that the Meeting of the Parties (MOP) has so far endorsed most of its reports. Not only are ACCC reports useful in connection to the compliance of specific parties, but they also provide valuable insights into the interpretation of the Convention.

The principal objective of this thesis is to assess if, and how, the compliance reports by the ACCC have affected the EU. The EU has, as a party to the Convention, accepted that the ACCC can review compliance with Aarhus and five reports have been adopted regarding actions by the EU. It is clear from ACCC reports that the division of competences between the EU and its Member States is an important issue in improving the EU's compliance with the Convention. As the division of competences is not in all cases clear, uncertainties have resulted when the ACCC has sought to attribute responsibility for the implementation of the Convention.

Although the EU has adopted extensive legislation to implement the Aarhus Convention it has not taken any legislative measures to improve its compliance as a result of ACCC reports directed towards it. There has, however, been continuous communication between the Committee and the EU, and the EU has in some cases strived to further implement the Convention through other measures. To what extent MOP decisions to endorse the ACCC's findings affect actions by the EU remains to be seen.

## **Acknowledgments**

First of all I would like to thank my supervisor, professor Aðalheiður Jóhannsdóttir, for her insightful remarks and support throughout my work on this thesis. I am also very grateful for the interesting courses I have taken part in during my time at the University of Iceland, as they have provided an excellent basis for my work.

My warmest thanks go to my friend Marie for providing many helpful comments on my draft text and for always managing to cheer me up. Finally, I wish to show my gratitude to my two friends and colleagues, Lena and Britta, for rewarding discussions, endless encouragement and many exciting adventures during our year in Iceland.

## Abbreviations

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

# 1. Introduction

## 1.1 General introduction

Public participation became an issue in environmental law in the US in the early 1970s and gained international attention in the 1990s. Arguments for increasing public participation, including the participation of non-governmental organisations (NGOs), in environmental matters build upon the thesis that public participation increases both the quality and the legitimacy of decisions. Included in public participation is the public's role to, in the name of common interests, act as watchdogs and enforce the environmental legislation.<sup>1</sup> During the twenty years it took for the concept of public participation to gain recognition, it was referred to by the international community on few occasions, such as during the Stockholm Conference on the Human Environment. However, it was only marginally mentioned in environmental agreements.<sup>2</sup> Principle 10 of the 1992 Rio Conference on Environment and Development, is perhaps clearest on the issue, stipulating that

[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.<sup>3</sup>

Although developed in the US, the notion of public participation has definitely influenced the European legal situation.<sup>4</sup> The Aarhus Convention might well be one of the reasons for its spreading in Europe. Public participation has subsequently emerged as an important topic in international environmental law. The principal elements of public participation are, as identified by Jonas Ebbesson in 1998, "participation by the public in decision-making procedures, access to environmental information, and access to a legal review of

---

<sup>1</sup> See further Ebbesson, J., "Comparative Introduction", in *Access to Justice in Environmental Matters in the EU*, Ebbesson, J., ed., 1<sup>st</sup> ed., Kluwer Law International, The Hague, 2002, pp. 1-47, at p. 6 (Ebbesson 2002 a).

<sup>2</sup> Ebbesson, J., "The Notion of Public Participation in International Environmental Law", *Yearbook of International Environmental Law*, 8(1), 1998, pp. 51-97, at p. 51.

<sup>3</sup> 1992 *United Nations Declaration on Environment and Development*, 13, June 1992, UN Doc. A/CONF.151/26/Rev.1 (1992) 31 I.L.M. 876, Principle 10.

<sup>4</sup> See further Ebbesson 2002 a, at pp. 4-5.

administrative decisions”.<sup>5</sup> The same elements later became the cornerstones of the 1998 Aarhus Convention,<sup>6</sup> which is the focus of his thesis.

Public participation can take many different forms. Some of them are included in the Aarhus Convention and represent the three pillars that the Aarhus Convention is typically seen as consisting of. The public’s access to justice and being granted standing in legal processes is an important part of the concept. So are also opportunities to participate in the formulation and implementation of environmental law and policy, participation in related decision-making, and having the necessary access to information, according to Ebbesson.<sup>7</sup>

## **1.2 Objectives**

The objective of this thesis is to analyse in what ways the Compliance Committee of the Aarhus Convention (ACCC) has affected the EU, with a focus on EU environmental legislation. Since the nature of the interaction between the international legal system, the EU *sui generis* system and the EU Member States is still developing, the ACCC’s role in this development will be studied, in addition to changes in EU environmental law. Central to this is how the ACCC has discussed and handled the division of competence and the responsibility for the implementation of the Aarhus Convention in the EU in its findings.

### **1.2.1 Research questions**

The overarching research question of this thesis is “How has the ACCC affected EU law?” In order to examine this broad question, five research questions have been chosen to focus the study:

- What is the status of recommendations from the compliance committee and decisions by the parties?
- What development can be seen in areas of EU law covered by the pillars of the Convention as a result of ACCC reports?
- What role do external compliance mechanisms play in the EU?
- How does the ACCC attribute responsibility between EU Member States and the EU and what is the effect of this?
- Is it possible to see any trends leading to future developments in this area?

---

<sup>5</sup> Ebbesson 1998, p. 53.

<sup>6</sup> *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, UN Doc. ECE/CEP/43 (1998).

<sup>7</sup> Ebbesson 1998, p. 58.



### **1.2.2 Delimitations**

First, it is important to note that the aim of this thesis is not to provide a comprehensive overview of EU's compliance with the Aarhus Convention or if EU's legislation corresponds to the Aarhus Convention. The focus is instead on the ACCC and its findings directed at the EU. The question of EU compliance with the Convention in general has previously been explored in a number of articles and books, some of which are referred to in this thesis.<sup>8</sup> Second, although findings concerning other parties to the Convention are useful for the interpretation of the Convention, they will not be examined to any greater extent. Occasionally, they will be referred to in order to create a more nuanced picture of the interpretation, when the findings relate to those directed towards the EU. Furthermore, this thesis will not go deep into the implementation of the Aarhus Convention in individual EU Member States. The thesis will cover the implementation of the Convention in EU legislation on two different levels; the EU level and the Member State level. The EU level of implementation is meant to represent how the Convention's provisions are implemented into legislation governing the EU institutions. The discussion on implementation on the Member State level covers EU legislation meant to set standards for the EU Member States. The latter is foremost based on secondary EU legislation.

### **1.3 Methodology and materials**

This thesis focuses on the ACCC findings relating to EU legislation. Therefore, the main part of the thesis is based on the five ACCC reports regarding the EU alone, or in some cases the EU and another party to the Convention, that have as of now been adopted. Additional ACCC reports are used when they can provide a deeper interpretation of provisions that are important for the examination of the research questions of this thesis. Other sources of importance are decision by the Meeting of the Parties to the Aarhus Convention, the procedural rules for the ACCC and other documents found on the website of the Convention. EU's legislation, both primary and secondary law, and case law from the EU Courts is also used in the assessment. To some extent the legislation of the individual state parties to the Convention are referred to in order to give examples of how different states have implemented the Convention.

---

<sup>8</sup> See, e.g. *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, Pallemarts, M., ed., 1<sup>st</sup> ed., Europa Law Publishing, Groningen, 2011, and *Access to Justice in Environmental Matters in the EU*, Ebbesson, J., ed., 1<sup>st</sup> ed., Kluwer Law International, The Hague, 2002.

Several general studies on the implementation of and the compliance with the Aarhus Convention are available. These studies have focused both on the EU and the other parties to the Convention. Jonas Ebbesson, in particular, who is also the chairperson of the ACCC, has conveyed many important studies related to public participation in general, the Convention and the ACCC that have been of great importance for this thesis.

Regarding the methodology applied in this thesis, the main focus is on an in-depth analysis of the five cases that have been brought against the EU. In order to facilitate the understanding of the ACCC reports, the study also includes background information on the Aarhus Convention, the ACCC as such and its relation to the EU as well as relevant EU legislation.

## **1.4 Structure**

The first three Chapters of this thesis, Chapter 2, 3 and 4, contain information providing a background on which the case analysis is then built. Chapter 2 concerns the history of public participation, the Aarhus Convention with its pillars and the ACCC. This Chapter is followed by Chapter 3 on the relation between the EU and the Convention. It is important for the understanding of the coming chapters to have discussed EU accession to Multilateral Environmental Agreements (MEAs) and their compliance mechanisms. This Chapter also covers the basics on how competences are divided between the EU and its Member States. Moving on to the implementation of the Aarhus Convention, Chapter 4 introduces the relevant EU legislation implementing or supporting Aarhus objectives. The presentation is divided in accordance with the three pillars that the Aarhus Convention is often seen as consisting of.

Chapter 5 initiates the main part of this thesis and introduces the five reports regarding compliance by the EU that have so far been adopted by the ACCC. The following chapters deal with interesting aspects discussed in the cases starting with Chapter 6 that looks into how the ACCC has discussed competences and responsibilities. Chapters 7 to 9 deal with the three pillars of the Convention: access to justice, access to environmental information and participation in decision-making. Each chapter is concluded by the most significant observations. Lastly Chapter 10 contains conclusions drawn from the above and a discussion of the research questions.

## 2. The Aarhus Convention and its Compliance Committee

### 2.1 Origins of public participation

Public participation was a prominent part of the “environmental justice” movement that originated in the USA in the 1970s. The rationale behind the movement was the realisation of the fact that certain groups were more vulnerable than others to problems related to hazardous activities, and that those often had a limited role in decision-making.<sup>9</sup> Similar considerations have garnered attention in other states. Many domestic legal systems have traditionally relied on what Ebbesson describes as the “standard liberal” notion. With this he means that there has been a strong division between private and public interests where non-governmental actors have been able to take part in decision-making and judicial proceedings only when private interests are concerned, leaving the promotion of public interests for the government and public authorities. In an article written before the Aarhus Convention came into force, Ebbesson described that the standard liberal notion might, in some legal systems, lose its importance as the link between the subject and the type of interest would become weaker and the limit between private and public interests begin to disintegrate. These changes would enable public participation in matters of public interest.<sup>10</sup> Though some states have indeed made changes to their legislation in order to implement the Convention, it seems as though the traditional interest test is still in many cases dominating.<sup>11</sup>

The right to initiate legal proceedings before courts and other bodies is an important part of public participation and deserves some scrutiny. During the 1970s and 1980s when the environmental justice movement developed further, increased focus was placed on the access to courts. Though American environmental law allowed public interest groups to sue the public authorities under environmental law, this right has been under continuous questioning and continues to be so.<sup>12</sup> Many legal systems apply the standard liberal approach and *locus standi* is usually only awarded to non-governmental actors where their private interests are concerned. But just as is the case with other issues of public participation, some states have

---

<sup>9</sup> See, Ebbesson, J., “Introduction: Dimensions of Justice in Environmental Law”, in *Environmental Law and Justice in Context*, J. Ebbesson and P. Okowa, eds., 1<sup>st</sup> ed., Cambridge University Press, Cambridge, 2009, pp. 1-36 at p. 2.

<sup>10</sup> Ebbesson 1998, pp. 56-57.

<sup>11</sup> See, e.g., on the implementation in the Nordic countries in Jóhannsdóttir, A., “Miljødemokrati – Offentlighedens Deltagelse i Beslutningsprocessen”, *Forhandlingerne ved det 38. Nordiske Juristmøde i København 21-23. august 2008*, 1<sup>st</sup> ed., Den danske lokalstyrelse, Copenhagen, 2008, pp. 221-241, at pp. 236-237.

<sup>12</sup> See further, Kubasek, N. and Silverman, G., *Environmental Law*. 4th ed., Prentice Hall, Upper Saddle River, 2001, at pp. 55-56.

made attempts at opening up for non-governmental actors to initiate legal proceedings where public interests are at stake.<sup>13</sup> In a study by Jan Darpö based on questionnaires answered by scholars in the parties to the Aarhus Convention it became obvious that there is a great variation in the extent to which the Aarhus parties grant access to justice. While some states strictly limit the access to a judicial review to those having an interest or an impaired right and some allow anyone to challenge environmental decision, most states are somewhere in between these extremes.<sup>14</sup> This does therefore not necessarily mean that the traditional interest test has been abandoned, and the ACCC has handled many communications alleging non-compliance with the Aarhus provisions on access to justice, see further Chapter 7 of this thesis. For a further discussion on the rules of the Aarhus Convention relating to access to justice, see Chapter 2.3.2.3, which describes the Aarhus Convention's standing rules for individuals and NGOs.

## **2.2 The rationale behind public participation**

The idea that public participation is a necessary component in the struggle to achieve sufficient environmental protection and to promote sustainable development was present long before the Aarhus Convention. As is sometimes mentioned in this context, the environment has indeed no voice of its own in decisions affecting it. In Dette's view, this can lead to problems such as non-transparency of environmental decisions, inadequate environmental legislation and, perhaps most notably, shortcomings in the enforcement of environmental law at all levels. NGOs and other members of the public could therefore be important in representing the interests that may have been overlooked by the traditional actors in domestic as well as international law- and policymaking, also when no private interests are threatened.<sup>15</sup>

There are various reasons for choosing to include the public and NGOs in environmental decision-making. For example it is claimed in Agenda 21 that broad participation in decision-making is a prerequisite for the achievement of sustainable

---

<sup>13</sup> Ebbesson 1998, p. 56.

<sup>14</sup> *Effective Justice? Synthesis Report of the Study on the Implementation of Article 9, paras. 3 and 4, of the Aarhus Convention in Seventeen of the Member States of the European Union*, available on the UNECE website at [http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/2012\\_A2J\\_Synthesis\\_report\\_Final\\_edit.pdf](http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/2012_A2J_Synthesis_report_Final_edit.pdf) [accessed 11 August 2014] (hereafter *Synthesis Report of the Study on the Implementation of Article 9*).

<sup>15</sup> See, Dette, B., "Access to Justice in Environmental Matters; A Fundamental Democratic Right", in *Europe and the Environment – Legal Essays in Honour of Ludwig Krämer*, Onida, M., ed., 1<sup>st</sup> ed., Europa Law Publishing, Groningen 2004, pp. 1-21, at pp. 4-5.

development.<sup>16</sup> If this is actually the case is debatable, however, Ebbesson suggests some other possible rationales for increasing the influence of the public and NGOs. There is a belief that individuals and NGOs, in aiming to further their own interests, could also promote public interests. Though it is not certain if the public will offer suggestions that will better benefit the environment, participation can increase the number of options and alternative solutions.<sup>17</sup> Moreover, through involving the public and perhaps first and foremost NGOs, they can act as watchdogs and oversee implementation and compliance.<sup>18</sup> Furthermore, both can contribute with valuable knowledge and scientific expertise.<sup>19</sup> Ebbesson also points out that public participation increases legitimacy and achieves a higher degree of acceptance of decisions and rules.<sup>20</sup>

It is furthermore important to note that there are also arguments against public participation. They often focus on participation being costly, inefficient and time-consuming. Ebbesson counters these arguments by claiming that public participation can also make a procedure more efficient by for example resolving conflicts early on in the process.<sup>21</sup>

## 2.3 The Aarhus Convention

### 2.3.1 Introduction

The Aarhus Convention, which was established within the United Nations Economic Commission for Europe (ECE) framework, was signed in June 1998 and entered into force in 2001. One protocol, the Kiev protocol on Pollutant Release and Transfer Registers (PRTR Protocol) has been added under the auspices of the Convention.<sup>22</sup> As of January 2014, in addition to the European Union (EU), 46 states have become parties to the Aarhus Convention, and 33 to the PRTR Protocol.<sup>23</sup> Aarhus has, according to Marshall, emerged as a leading instrument in the area of public participation.<sup>24</sup> Ebbesson, in 1998, described Aarhus as “the most far-reaching and detailed environmental treaty on public participation.”<sup>25</sup> The

---

<sup>16</sup> Agenda 21, *Report of the United Nations Conference on Environment and Development*, 13 June 1992, UN Doc. A/CONF.151/26/

<sup>17</sup> Ebbesson 1998, p. 58.

<sup>18</sup> *Ibid.* at p. 60.

<sup>19</sup> *Ibid.* at p. 68.

<sup>20</sup> *Ibid.* at p. 75.

<sup>21</sup> *Ibid.* at p. 62.

<sup>22</sup> Marshall, F., “Two Years in the Life: The Pioneering Aarhus Convention Compliance Committee 2004-2006”, *International Community Law Review*, 8, 2006, pp. 123-154, at p. 126.

<sup>23</sup> Unece.org, *Status of ratification - UNECE* available at: <http://www.unece.org/env/pp/ratification.html> [Accessed 27 May, 2014].

<sup>24</sup> See further Marshall 2006, p. 123.

<sup>25</sup> Ebbesson 1998, p. 53.

Aarhus Convention is usually considered to be a ground breaking environmental instrument mainly because it awards extensive rights to individual members of the public and NGOs, without discrimination as to citizenship, nationality or domicile, see Aarhus Article 3(9), to take action on behalf of public interests.<sup>26</sup> The basic corresponding obligations of the Convention fall on public authorities in the parties to the Convention.

Paragraph 7 of the preamble of Aarhus furthermore states that “every person has the right to live in an environment adequate to his or her health and well-being” and that this right can only be asserted through enhancing public participation with a right to obtain environmental information and access to justice, see further Paragraph 8. The Convention is a procedural instrument and does not stipulate any substantial environmental standards that NGOs and individuals, and of course the environment, could benefit from. Hence, Aarhus has sometimes been compared with human rights instruments.<sup>27</sup> Ebbesson makes a difference between two levels of public participation; it takes place either on a domestic level within the public authorities and the courts, or on an international level such as within intergovernmental institutions (IGOs).<sup>28</sup> The Aarhus Convention is primarily focusing on public participation on the domestic level, see further Chapter 2.3.2 on the three pillars and Chapter 4 on the implementation of Aarhus in the EU and its Member States. However, also the Convention’s institutions apply rules enabling public participation, see further Chapters 2.4 and 2.5 of this thesis.

### **2.3.2 The Three Pillars**

Many would say that the core of the Aarhus Convention is public participation or the participation of non-governmental actors in environmental decision-making. The Convention is however built on three interacting pillars representing different forms of participation ultimately depending on each other for the full functionality of the Convention.<sup>29</sup>

#### **2.3.2.1 The first pillar**

The first pillar of the Convention is covered by Articles 4 and 5 and concerns access to information. According to Ebbesson, international rules obliging states to make information available for the public was a quite recent development at the time when the Aarhus was concluded.<sup>30</sup>

---

<sup>26</sup> Marshall 2006, p. 125.

<sup>27</sup> Beyerlin, U. and Marauhn, T., *International Environmental Law*, 1<sup>st</sup> ed., Hart, Oxford, 2011, at p. 239.

<sup>28</sup> Ebbesson 1998, p. 54.

<sup>29</sup> Beyerlin and Marauhn 2011, p. 237.

<sup>30</sup> Ebbesson 1998, p. 90.

Article 5 of the Aarhus Convention aims at creating durable arrangements for the collection and spreading of information through the establishment of transparent and effective information systems, both to ensure a flow of information under normal circumstances and in situations of emergency. Article 5(1)(a) is the central provision that has been assessed by the ACCC in a several cases including the *Scottish renewables programme* case discussed in Chapter 8.3 below. The provision stipulates that the parties shall ensure that public authorities possess and update environmental information which is relevant to their function. There is also an obligation to regularly publish national reports on the state of the environment in accordance with Article 5(4). Recognising that efforts beyond those made by public authorities is necessary to ensure environmental protection, Articles 5(6) and 5(8) stipulate that private operators are to be encouraged to inform the public of significant environmental impact and consumers are to be given sufficient information to be able to make informed environmental choices”.

Article 4 establishes a right to access environmental information, and a complementary duty for public authorities to make such information available when so requested by a member of the public. As a main rule, this has to be complied with in accordance with national law, without the application of a traditional interest test, and the information requested must be given as soon as it is possible. Though the Convention contains a general right to environmental information as described above, Ebbesson asserts that it does not ensure a firm right to access information. This is mostly due to the many possible grounds that can be used to deny disclosure of information.<sup>31</sup>

Refusals to disclose information after requests by individuals can be motivated with grounds found in Article 4(3)-(4). Article 4(3) includes situations where the authority in question does not hold the information, where the request is unreasonable or too general and when the material requested is in the course of completion or concerns the internal communication of the public authorities when this is provided for in national law or customary practice. Regarding the latter ground, it is stipulated that the public interest served by the disclosure must be taken into account. Article 4(4) concerns grounds for refusing disclosure where it would adversely affect important interests such as the confidentiality of proceedings of public authorities, international relations, the course of justice and a fair trial or the confidentiality of commercial and industrial information protected by law and in order to protect a legitimate economic interest.

---

<sup>31</sup> *Ibid.* at p. 92.

In line with Article 4(4)(2) of Aarhus, a restrictive approach should be taken with regards to refusals to disclose environmental information. This provision is strengthened by the fact that public authorities shall be obliged to keep and update relevant environmental information, making sure that authorities gather information necessary for their functions in accordance with Article 5(1)(a). Article 4(7) stipulates that a refusal has to be in writing if the request made was, or the applicant requests this. The refusal, moreover, has to be reasoned and give information on access to a review procedure provided for in accordance with Article 9. Accordingly, if an individual or NGO considers that his or her information request has not been dealt with in accordance with Article 4, they shall have access to a review procedure before a court of law or another independent and impartial body established by law.

As will be seen in Chapter 8.3 below, communicants have not been successful in alleging non-compliance with Article 5 partly due to the general nature of the provision and the fact that the ACCC does not comment on correctness of the information provided. Though it is clear that also EU institutions have to respond to information requests made in accordance with Article 4, there have not been many cases regarding EU non-compliance. The issue will be explored in Chapter 8.2 of this thesis.

### **2.3.2.2 The second pillar**

The second pillar, regulated in Articles 6 to 8 of Aarhus, establishes rights relating to public participation in different forms of decision-making. Article 6 shall be applied with respect to decisions on specific activities, including decisions permitting activities in Annex I to the Convention, and, in accordance with national law, decisions permitting other activities that may have a significant impact on the environment. Annex 1 to the Aarhus Convention contains a list of activities divided into different sectors and industries such as the energy sector, the mineral industry and waste management. The activities listed are of such a nature that they could have an environmental impact and therefore should be made subject to a public participation procedure in accordance with Article 6 before receiving a permit. Projects listed include for example mineral oil and gas refineries, nuclear power stations and chemical installations producing certain chemicals.

There are, however, exceptions under which a party to the Convention can decide not to apply the provisions of Article 6. An exception exists in Article 6(1)(c) for situations where the participation would adversely affect an activity serving national defence purposes. The public must be notified early on in the procedure so that they can partake in a decision-making procedure in line with Article 6(2) and then get access to the relevant information in



accordance with Article 6(6), without prejudice to the right of parties to refuse the disclosure of information in Article 4. Practical arrangements can, accordance to Article 6(7) consist of holding a public hearing or inquiry or accepting written comments and opinions and it is up to the applicant to resolve which information it deems appropriate to submit. The party in question must then, in accordance with Article 6(8) of Aarhus, ensure that the outcome of the public participation is taken into “due account” in the decision-making. Chapter 9.1.3 will explore how the ACCC has argued around the duty to take due account of public participation in relation to the EU. A central provision, Article 6(4) stipulating that each party shall provide for early participation when all options are open and effective public participation can take place, has garnered attention from the ACCC. The application of this provision will be elaborated on in Chapter 9.1.2 below.

Article 7 concerns public participation with regards to plans, programmes and policies relating to the environment. The obligations of the parties are the strongest when decision on plans and programmes are concerned. With regards to those, the relevant authority shall, after having identified the public that may participate in the process, in accordance with Article 6(3), 6(4) and 6(8) allow for effective participation through reasonable time-frames and early participation. When environmental policy is concerned, public participation should be endeavoured “to the extent appropriate”, as provided for by the party itself. Hence, the obligation is not as strong in this case. Chapter 9.2.1 of this thesis contains a discussion on how the ACCC has assessed some EU decisions, if they constituted plans, programmes or policies and if the EU was complying with its requirements under the Convention.

Finally, Article 8 stipulates that public participation should be promoted during the preparation of executive regulations and legally binding rules that may have a significant effect on the environment. Also here efficient participation with sufficient time frames at an appropriate stage of decision-making is accentuated. The results shall be taken into account as far as possible. Since there has not yet been a communication alleging non-compliance by the EU with this provision, it will not be further discussed in this thesis.

### **2.3.2.3 The third pillar**

The third and final pillar of Aarhus is found in Article 9 and concerns access to justice in environmental matters. Article 9(1) and (2) have direct ties to the first two pillars of the Convention, while Article 9(3) concerns access to justice with the aim of enforcing national environmental legislation.

According to Article 9(1), any person who alleges that their request for information under Article 4 has not been respected, is entitled to access a review procedure before a court or other similar body of law, and shall be given a chance of reconsideration by a public authority or other independent and impartial body. In accordance with Article 4, the person seeking a review does not have to show interest or the impairment of a right. Ebbesson states that it is implied that both procedural and substantial failures can be invoked by the applicant.<sup>32</sup> Article 9(1)(3) moreover stipulates that any final decision taken shall be binding and reasoned, at the very least when the request for information is refused.

Article 9(2) covers access to justice for challenges to the procedural and substantive legality of decisions, acts and omissions, corresponding to Article 6 of the Convention on public participation in decisions on specific activities as well as other decisions, acts and omissions governed by relevant provisions of the Convention where so provided for in national law. Thus, also acts and omissions under Articles 7 and 8 of Aarhus could be subject to a judicial procedure in accordance with this provision. The *locus standi* is more closely defined in this paragraph as the parties are allowed to limit access to justice to those member of the public and NGOs concerned either having a sufficient interest, in accordance with Article 9(2)(a), or maintaining impairment of a right, where the administrative procedural law of a party requires this as a precondition, in accordance with Article 9(2)(b). The conditions should be defined more closely in and interpreted in accordance with the requirements of national law. However, the requirements used to establish legal standing must be consistent with the objective to grant wide access to justice, which has been emphasised by the ACCC.<sup>33</sup> In for example Sweden an individual to be granted standing has to show that they are “concerned”. In relation to environmental decisions, an individual could be seen as concerned if the activity in question entailed some kind of disturbance to the surroundings of the

---

<sup>32</sup> Ebbesson, J., “Access to Justice at the National Level: Impact of the Aarhus Convention and European Union Law”, in *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, Pallemmaerts, M., ed., 1<sup>st</sup> ed., Europa Law Publishing, Groningen, 2011, pp. 245-270, at p. 255.

<sup>33</sup> United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Twelfth Meeting, Geneva, 14–16 June 2006, ECE/MP.PP/C.1/2006/4/Add.2, *Report of the Meeting, Findings and Recommendations*, Communication ACCC/C/2005/11 (Belgium) 28 July 2006, para. 27.

individual.<sup>34</sup> Darpö moreover emphasises that definition of who is “concerned” or similar differs between national legal orders.<sup>35</sup>

The provision in Article 9(2)(3) also expressively establishes that the interest of NGOs should be regarded as sufficient in accordance with the above and that they shall likewise be able to have rights that can be impaired so that they can be granted *locus standi*. Ebbesson also points out that it is not only the wording of the law that should be assessed, but foremost its application.<sup>36</sup> The implementation of this provision has taken many different forms. Only in the Nordic countries there have been several different approaches to what is required and how the requirements can be fulfilled.<sup>37</sup> Again using Sweden as an example, NGOs are only allowed to appeal certain decisions and then only as long as they fulfil specific requirements. The NGO has to be a non-profit organisation having operated in Sweden for at least three years and is devoted to nature conservation or environment protection. The NGO also has to have at least 100 members, or be able to show in some other way that they are supported by the public.<sup>38</sup> The Swedish legislation is, by Darpö among others, considered restrictive in giving NGOs access to justice. Examples of other approaches providing wider access to justice for NGOs is to only require the NGO to defend an environmental interest such as in the UK, or to register NGOs that can challenge environmental decisions such as in Finland.<sup>39</sup>

Article 9(3) covers other kinds of acts and omissions than those regulated in Articles 4 and 6 that contravene national environmental law. Here actions by both private persons and public authorities are included. Examples of acts are planning decisions and the approval of chemicals by public authorities and non-compliance by private actors with requirements to take precautionary measures for hazardous activities and safety requirements.<sup>40</sup> According to Ebbesson, it is sometimes hard to differ between this provision and Article 9(2) in practice, as it is not always clear if an act concerns permits for specific activities or if it should be categorised under other acts and omissions. It is also important to note that it is not how a state labels an act that is decisive, but rather “the legal functions and effects of the decision”.<sup>41</sup> Although it might in practice be hard to differ between the paragraphs, it is clear that they aim

---

<sup>34</sup> For further reference see decisions from by the Environmental Court of Appeal, MÖD 2002:92, MÖD 2003:98, MÖD 2003:99.

<sup>35</sup> Darpö, J., “Environmental Justice through Environmental Courts? Lessons Learned from the Swedish Experience”, in *Environmental Law and Justice in Context*, Ebbesson, J., and Okowa, P., eds., 1<sup>st</sup> ed., Cambridge University Press, Cambridge, 2009, pp. 211-227, at p. 188.

<sup>36</sup> Ebbesson 2011, p. 258.

<sup>37</sup> See further Jóhannsdóttir 2008, pp. 232-234.

<sup>38</sup> The Swedish Environmental Code (SFS 1998:808) chapter 16, section 13.

<sup>39</sup> Darpö 2009, pp. 190-191.

<sup>40</sup> Ebbesson 2011, p. 263.

<sup>41</sup> *Ibid.* at p. 253.

at enforcing distinctive actions. While Articles 9(1) and 9(2) are used to enforce the two previous pillars, Article 9(3) is of a different nature. Jóhannsdóttir points out that it is independent from the other pillars of the Convention as it is instead used to provide the public with a means to enforce national legislation connected to the environment.<sup>42</sup>

The access to a review procedure under Article 9(3) is restricted to members of the public "where they meet the criteria, if any, laid down in its national law". It is not entirely clear to what extent states can delimit access to justice with reference to Article 9(3) and there seems to be a great variation in implementation among the parties to the Convention.<sup>43</sup> However, the ACCC has to some extent developed this further in its recommendations. For example, access to justice should be seen as a presumption, and not as an exception.<sup>44</sup> Article 9(3) is the main provision on access to justice that has been assessed by the ACCC in relation to the EU. Issues related to the provision will therefore be revisited in Chapter 7 on recommendations affecting the access to justice in the EU.

Furthermore, Article 9(4) states that the procedure given to challenge decisions and acts shall provide adequate and effective remedies and be fair, equitable, timely and not prohibitively expensive. These are general requirements, applicable to the procedures in 9(1) to 9(3) as described above. The Article also reinforces the goal to strengthen transparency through prescribing that decisions shall be recorded in writing and, whenever possible, be publicly accessible.

Finally, in accordance with Article 9(5), states shall aim to establish mechanisms removing other barriers to access to justice. The example given in the provision is that financial barriers should be removed or reduced, but parties should also aspire to remove other barriers. The provision also stresses the importance of informing the public about the access to different review procedures.

## **2.4 The Aarhus Convention's institutions**

In order to better understand the full effectiveness of the Aarhus Convention, its institutional arrangements and institutions need scrutiny. The Convention's three main institutions are: (1) the Compliance Committee of the Aarhus Convention (ACCC); (2) the Meeting of the Parties (MOP) and (3) the Convention's Secretariat. Since the focus of Chapter 2.5 is the ACCC, the main emphasis of this Chapter is the MOP, and to some extent the Secretariat.

---

<sup>42</sup> Jóhannsdóttir 2008, pp. 232-234.

<sup>43</sup> *Synthesis Report of the Study on the Implementation of Article 9.*

<sup>44</sup> ACCC/C/2005/11 (*Belgium*), para 36.

The MOP is the main governing body of the Aarhus Convention where each party to the Convention is represented. Since the entry into force of the Convention five ordinary meetings have been held with an interval of three years. In addition two extraordinary meetings have been held.<sup>45</sup> The main function of the MOP is to continuously review the implementation of the Aarhus Convention and to promote the three pillars of public participation, through implementation as well as through other required action, see further Article 10(2) of Aarhus. In addition, it may in order to further the objectives of the Convention establish necessary subsidiary bodies and prepare protocols to the Convention, in line with Article 10(1)-(2) Aarhus.

Central to this thesis is that the MOP has an imperative role in relation to the Compliance mechanism of the Convention. Not only does the MOP in accordance with Paragraph 7 of the Annex to decision I/7<sup>46</sup> elect the members of the ACCC, but it can also request reports from the ACCC and subsequently adopt recommendations, altering their status from a document merely reflecting the views of the Compliance Committee members. This will be further explained in Chapter 2.5.4 of this thesis.

At its first meeting, in 2002, the MOP adopted a document containing the Procedural Rules to guide its work in accordance with what is stipulated in Article 10(2)(h) of the Convention.<sup>47</sup> As one of the objectives of the Convention is to enhance the access to information and transparency in environmental matters, it seems only natural that the procedural rules state that the MOP is open to a large number of observers. According to Article 10(4)-(5) of the Aarhus Convention, not only UN agencies, states and IGOs are allowed to observe meetings, but also NGOs qualified in fields relating to the Convention, unless there are objections by at least one third of the present parties. The Procedural Rules also simplify the participation by NGOs and the public. For example they have the right to receive a notification of any meeting if so requested, and also members of the public not belonging to an NGO have the right to attend meetings unless there are exceptional circumstances requiring closed meetings to protect confidential information, see further

---

<sup>45</sup> See the UNECE website for information on the meetings and the related documents at <http://www.unece.org/env/pp/mop.html> [accessed 23 June 2014].

<sup>46</sup> United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, First Meeting, Lucca, 21–23 October 2002, ECE/MP.PP/2/Add.8, *Report of the First Meeting of the Parties, Decision I/7, Review of Compliance* (hereafter Decision I/7).

<sup>47</sup> United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, First Meeting, Lucca, 21–23 October 2002, ECE/MP.PP/2/Add.2, *Report of the First Meeting of the Parties, Decision I/1, Rules of Procedure* (hereafter the Procedural Rules).

Paragraphs 6 and 7 of the Procedural Rules. Furthermore, Paragraph 11 of the Procedural Rules stipulates that all meeting documents must be made available on the ECE website, and that the MOP shall in most respects follow the terms of article 4 of the Convention on access to information.

All parties to the Convention are, as explained above, represented at the MOP and can vote at the meetings. When voting, each party to the Convention has one vote. Regional economic integration organisations, in reality only the European Union, votes for its Member States in the areas where it has competence. It then has a number of votes equal to its number of member states, in accordance with Article 11 of Aarhus. When an issue is within EU competence, the EU Member States do not have a right to vote. In areas where the EU does not have competence the Member States can vote independently. This is also related to the competence and responsibility for the implementation of the Convention. A background on this can be found in Chapter 3.3 below. The question of how the ACCC has assessed competences is further explored in Chapter 6.

In principle, the MOP strives to reach agreements and adopt decisions by consensus, a goal that is stated expressively in several provisions, see for example Articles 10(3) and 14(3) of the Convention. Rules 26 to 34 of the Procedural Rules go into greater detail on how the meeting itself is conducted.

Finally, regarding the practical work related to the Aarhus Convention, it is in accordance with Article 12 of Aarhus, for the Executive Secretary of the ECE to carry out tasks related to preparing meetings and transmitting reports and information.

## **2.5 The ACCC, establishment and functions**

### **2.5.1 Introduction**

At its first meeting, the MOP adopted Decision I/7, establishing a compliance committee determined to promote and improve compliance with the Aarhus Convention in line with Paragraph 1 of the Decision. Marshall describes the ACCC as exceptionally innovative due to its original approach to achieving compliance, especially because individuals and NGOs are allowed such a high degree of influence.<sup>48</sup> The decision establishing the ACCC was based on Article 15 of the Aarhus Convention, which stipulates that the MOP shall establish arrangements for reviewing compliance of a non-confrontational, non-judicial and

---

<sup>48</sup> Marshall 2006, p. 123.

consultative nature. Rules governing the functions and structure of the ACCC can be found in the annex to Decision I/7.

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

### **2.5.2 The structure of the ACCC**

According to Paragraphs 1 and 2 of the Annex to Decision I/7, the ACCC consists of eight members serving in their personal capacity, not representing their respective states. Also, there cannot be more than one member of the same state. The aspiration is of course to include experts in the field who are able to make decisions independently from the political agendas of their respective home states.<sup>49</sup> Moreover, Article 8 of the Decision stresses the importance of geographical distribution of membership as well as diversity of experience. Reinforcing the objective of the Convention to include non-governmental actors in environmental governance, candidates can be nominated not only by state parties and signatories of the Convention, but also by NGOs as defined in Article 10(5) of the Aarhus Convention, see further Paragraph 4 of the Annex to Decision I/7. Similarly, Article 15 of Aarhus states that the compliance mechanism shall allow for appropriate public involvement. The MOP then elects the ACCC by consensus or by secret ballot in line with the normal voting procedure of the Convention.

### **2.5.3 The functions of the ACCC**

The ACCC has several functions, which are defined by Article 13 of Decision I/7. Most importantly for this thesis, they ACCC's tasks includes considering of submissions, referrals and communications by various actors. However the ACCC's functions also comprise

---

<sup>49</sup> *Ibid.* at p. 128.

preparing compliance and implementation reports, monitoring, assessing and facilitating reporting requirements and examining compliance issues resulting in recommendations where appropriate. A case can be brought before the ACCC by: (1) one or more of the parties to the Convention in accordance with Paragraphs 15 and 16 of the Annex to Decision I/7; (2) the Secretariat, in line with Paragraph 17 of the Annex to Decision I/7 or (3) of and a member of the public as stipulated in Paragraph 18 of the Annex to Decision I/7. To date, there has not yet been a referral by the Secretariat and only one submission by a state party.<sup>50</sup> Individuals and NGOs on the other hand, have been more active in submitting communications and during the ten years that the ACCC has accepted cases there have been 98 communications from the public.<sup>51</sup>

As pointed out by Fitzmaurice, the ACCC was established with the objective to improve compliance with the Aarhus Convention rather than to help individuals enforce their rights.<sup>52</sup> The ACCC in its report to the second MOP expressed the view that ACCC was not to be seen as a redress procedure for individuals, it does not provide any remedies or injunctive relief but solely aims at increasing compliance and a correct implementation of the Convention. Thus the ACCC also considers that it has discretion in delimiting and extending the scope of considerations of submissions, referrals and communications.<sup>53</sup>

### **2.5.3.1 Submission by a state party**

Paragraphs 15 and 16 of the Annex to Decision I/7 govern submissions by state parties to the ACCC. One or more of the parties to Aarhus can bring a submission before the ACCC if they consider that another party is not honouring its obligations under the Convention. A party may also bring a submission before the ACCC regarding its own compliance if it concludes that it is or will be unable to comply with its obligations despite its best endeavours. It must then explain the specific circumstances that hinder its compliance.

---

<sup>50</sup> See ACCC/S/2004/1, submission by Romania regarding compliance by Ukraine.

<sup>51</sup> For a list of communications from the public, see the ECE website at <http://www.unece.org/env/pp/pubcom.html> [accessed 29 June 2014].

<sup>52</sup> Fitzmaurice, M., “Environmental Justice through International Complaint Procedures? Comparing the Aarhus Convention and the North American Agreement on Environmental Cooperation”, in *Environmental Law and Justice in Context*, Ebbesson, J., and Okowa, P., eds., 1<sup>st</sup> ed., Cambridge University Press, Cambridge, 2009, pp. 211-227, at p. 215.

<sup>53</sup> United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Second Meeting, Geneva, 25–27 May 2005, ECE/MP.PP/2005/13, *Report of the Compliance Committee*, para.13.



### **2.5.3.2 Referral by the Secretariat**

In line with Paragraph 17 of the Annex to Decision I/7, the Secretariat may refer a matter to the ACCC, but this is more of a procedural duty as if the Secretariat becomes aware of possible non-compliance, it may request that the party in questions provides further information about the matter within a given time frame. In the event that this request is not respected it can refer the matter to the ACCC.

### **2.5.3.3 Communications from the public**

To allow for appropriate public involvement, which constitutes the truly innovative feature of the compliance mechanism, the public can submit communications to the ACCC in accordance with Article 18 of Decision I/7. The submitting party can be one or more members of the public, including both individuals and NGOs. The ACCC must consider all communications in written form, with few exceptions. According to Paragraph 20 of the Annex to Decision I/7, the ACCC does not have to consider communications that are anonymous, an abuse of the right to make such communications, manifestly unreasonable or incompatible with the provisions of the Decision or the Convention. Moreover, Paragraph 21 of the Annex stipulates that the ACCC should take into account expeditious, effective and sufficient domestic remedies available to the applicant.

In its work with a communication, the ACCC should consider all relevant written material made available and may hold hearings to obtain further information. In addition, Paragraphs 24 and 25 govern the information available to the ACCC that it can take into account in its proceedings. Accordingly, the ACCC may for example request more information, gather information on the territory of the party or seek the services of experts and advisers, as appropriate. This gives the ACCC the means to properly exercise its purpose of surveying compliance. Paragraph 26 of the Annex establishes that throughout the process before the ACCC, no information may be kept confidential except for when provided in the Decision I/7. This is of course in conformity with the obligation to give the public a fair chance of exercising its right to access information and to some extent take part in the process. In a case where it is necessary to ensure the confidentiality of information, the ACCC can, in accordance with Paragraphs 30 and 31 of the Annex to Decision I/7, hold closed meetings and exclude the particular information from ACCC reports.

### **2.5.4 The nature of ACCC findings**

The ACCC does not have judicial powers; instead, the ACCC issues draft findings, measures and recommendation. In the adoption of those, the ACCC takes into account comments by the

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

The term measures means actions that can be taken pending consideration by the MOP, intended to be used by the ACCC when they are urgently needed before the next MOP takes place.<sup>54</sup> In consultation with the party concerned, the ACCC may “provide advice and facilitate assistance” in the party’s implementation of the Convention. Moreover, where the party agrees to it, the ACCC can in accordance with Paragraphs 36 to the Annex to Decision I/7 adopt certain measures present in Article 37 of the Annex to Decision I/7. The ACCC can then request that the party submits a strategy on how to achieve compliance with the Convention and subsequently report of its development, and make recommendations to the party concerning specific measures to address a matter raised by a member of the public if relevant. Fitzmaurice stresses the fact that the findings of the ACCC are to be regarded as a dialogue with parties aiming to ensure compliance with the Convention, describing the process as consultative.<sup>55</sup> In many cases parties to the Convention are willing to cooperate with the ACCC in order to improve compliance, there are however exceptions. One such case where the party did not accept the application of Paragraphs 36 and 37 of Decision I/7 concerned non-compliance by the EU. This case is briefly discussed in Chapter 7.1.6 of this thesis.

Recommendations are, according to the guidance document of the ACCC<sup>56</sup> to be understood as recommendations to the MOP to adopt further measures. Whereas no specific legal consequences arise from a draft recommendation itself it is clear that the recommendation carries more weight when endorsed by the MOP. The MOP also has the competence to adopt a wider range of measures. Before every ordinary meeting, the ACCC is to finalize its reports so that the MOP can consider and endeavour to adopt them by

---

<sup>54</sup> Marshall 2006, p. 132.

<sup>55</sup> Fitzmaurice 2009, p. 216.

<sup>56</sup> *Guidance Document on the Aarhus Convention Compliance Mechanism*, available on the UNECE website at [http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC\\_GuidanceDocument.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf) [accessed 12 August 2014].

consensus. In attempting to ensure full compliance with the Convention, the MOP can resolve to take any of the measures recommended including those mentioned above, but also the measures in Article 37(e)-(h) of Decision I/7. These include issuing declarations of non-compliance, issuing cautions, suspending the party's rights and privileges under the convention in accordance with applicable international law and taking other appropriate non-confrontational, non-judicial and consultative measures.

Regarding the efficiency of the compliance mechanisms, it can be noted that the MOP has so far followed the recommendations of the ACCC, strengthening its authenticity and dependability.<sup>57</sup> How recommendations have actually influenced parties to the Convention receiving them, and the EU in particular, is less clear and will be further elaborated on in Chapters 6 to 9. During the first years of the ACCC's existence response by parties was poor, though the development does seem encouraging and some parties have made changes to better comply with their obligations.<sup>58</sup>

---

<sup>57</sup> Marshall 2006, p. 153.

<sup>58</sup> *Ibid.* p. 153-154.

### 3. The EU, MEAs and the Aarhus Convention

#### 3.1 EU's accession to the Aarhus Convention

The European Community signed the Aarhus Convention on 25 June 1998 and approved the Convention on 17 May 2005.<sup>59</sup> The Aarhus Convention is a mixed agreement, meaning that both the EU itself and its Member States are parties to the Convention and thus under an international obligation to comply with it.<sup>60</sup> Which party is responsible for implementation of the Convention depends how the competence has been attributed in the given case, this will be discussed in Chapter 3.3 below. The question on how the ACCC handles issues connected to competence will be further developed in Chapter 6 of this thesis. Upon signing the Convention, the EU made a declaration in which the importance of covering both EU institutions and national public authorities was stressed.<sup>61</sup> When approving the Convention the EU further declared its competence to enter into an international agreement and to implement it through legislation furthering the objectives of:

- preserving, protecting and improving the quality of the environment;
- protecting human health;
- prudent and rational utilisation of natural resources;
- promoting measures at international level to deal with regional or worldwide environmental problems.<sup>62</sup>

The EU did not include any specific reservations in the declaration. In the view of Pallemmaerts, this could be understood as an intention to adopt the legislation necessary for the full implementation of the Convention.<sup>63</sup>

---

<sup>59</sup> Council Decision 2005/370 of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L124 p. 1-3.

<sup>60</sup> See Articles 216 and 218 TFEU, which provide a legal basis for accessions to MEAs.

<sup>61</sup> The declaration that was made upon signature can be found on the UNECE website at: <http://www.unece.org/env/pp/ratification.html> [Accessed 22 June 2014].

<sup>62</sup> The declaration that was made upon approval can be found on the UNECE website at: <http://www.unece.org/env/pp/ratification.html> [Accessed 22 June 2014] (Hereafter the Declaration upon approval).

<sup>63</sup> Pallemmaerts, M., "Access to Environmental Justice at EU Level: Has the 'Aarhus Regulation' Improved the Situation?", in *The Aarhus Convention at Ten: Interactions and Tensions Between Conventional International Law and EU Environmental Law*, Pallemmaerts, M., ed., 1<sup>st</sup> ed., Europa Law Publishing, Groningen, 2011, pp. 273-312, at p. 274.

### 3.2 EU accession to MEAs

According to Article 47 TEU, the EU has a legal personality, which is seen a precondition for it to enter into international agreements such as the Aarhus Convention.<sup>64</sup> This does however, not mean that the EU can act beyond the competences granted to it by the Member States. The legal basis for the EU to accede to multilateral environmental agreements (MEAs) is found in Articles 216 and 218 TFEU. Accordingly, the EU has the competence to conclude international agreements with third states as well as international organisations when the Treaties so provide, and when the measure is necessary, to attain one of the objectives of the Treaties or when it is provided for in another legally binding Union Act. Article 216(2) TFEU, moreover, stipulates that international agreements concluded by the Union are binding on the institutions of the Union as well as on the Member States.

The EU's competence to conclude agreements is based on its internal competence.<sup>65</sup> With regards to the environment the internal competence is as a rule based on Article 4(2)(e) TFEU, which states that the EU and the Member States share competence, and Article 191 TFEU. Especially important in connection to the accession to international agreements in the environmental field is Article 191(4), stating that:

Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may be the subject of agreements between the Union and the third parties concerned.

The procedure that is used when international treaties are concluded basically has three steps: First, negotiations are opened after an authorisation given by the Council of Ministers. In the second stage the negotiations are then carried out. If it is a mixed agreement, such as in the case of the Aarhus Convention, the EU Member States are also involved in the negotiation process. Finally, the Council takes a decision to sign the agreement, sometimes after acquiring consent from, or consulting the Parliament. In the case of a mixed agreement individual Member States will also sign the treaty.<sup>66</sup>

In the implementation report that was provided by the EU at the first MOP after acceding to the Aarhus Convention, the EU in addition to reporting on the implementation of

---

<sup>64</sup> Chalmers, D., Davies, G. and Monti, G., *European Union Law*, 2<sup>nd</sup> ed., Cambridge University Press, Cambridge, 2010, p. 632-633.

<sup>65</sup> See further on the competence, e.g. Craig, P. and de Búrca, G., *EU Law – Text, Cases and Materials*, 5<sup>th</sup> ed., Oxford University Press, Oxford, 2011, pp. 307-318.

<sup>66</sup> See further Chalmers, Davies and Monti 2010, p. 633.

specific Aarhus rules described the role of MEAs in the EU system.<sup>67</sup> In Paragraph 2 of the report, the EU recalls the binding nature of international agreements, as stipulated by Article 395 TFEU. Article 216(2) furthermore establishes that agreements that have been concluded by the EU are binding both on the EU Member States and the EU institutions. MEAs concluded by the EU are therefore an integral part of EU law. This means that all secondary legislation shall, so far it is possible, be interpreted in line with applicable international agreements. This was also expressed in *Etang de Berre*, where the CJEU stated that mixed agreements have the same status in the EU legal order as pure EU agreements when they fall within the scope of EU competence. Furthermore, the CJEU acknowledged that the Member States have an obligation towards the EU to ensure compliance with the agreement.<sup>68</sup> Conversely, when an international agreement is not compatible with the Treaties, that is primary legislation of the EU, it may not enter into force in the EU in line with Article 118(11) TFEU. Accordingly, an EU Member State, the European Parliament, the Council or the Commission can, when envisaging that an agreement is incompatible with the Treaties, request that the CJEU determines whether or not this is the case. For an international agreement to then come into force, there must be an amendment of either the agreement or the Treaties.

Moreover, as a part of EU law, a provision of an international agreement is also, in many cases, directly applicable. Account must nevertheless be taken of the nature of the agreement and to the provision in question. The obligation has to be clear and precise and not subject to the adoption of any subsequent measure. The result of this direct application is that individuals can rely on the provision of the international agreement against public authorities as a rule of the internal legal order of the Member State.<sup>69</sup> When the implementation report was submitted by the EU, there had not been any cases on the direct applicability of the Aarhus rules. Now the matter has been tried in relation to Article 9(3) of the Convention. An account of this can be found in Chapter 4.4.1.3 of this thesis.

---

<sup>67</sup> See the implementation report submitted by the European Community, United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Third Meeting, Riga, 11–13 June 2008, ECE/MP.PP/IR/2008/EC, *Implementation Report Submitted by the European Community* (hereafter the implementation report).

<sup>68</sup> Case C-213/03, [2004] ECR I-7357 (*Etang de Berre I*), para. 24.

<sup>69</sup> See further on direct effect of international agreements e.g. Craig and de Búrca 2011, pp. 344-351; Paragraph 3 of the implementation report.

### **3.3 The division of competences and responsibilities**

#### **3.3.1 EU rules on the division of external competences**

Separate from the competence to accede to international agreements, is the competence of the EU and the Member States respectively in the implementation of an agreement. The powers of the EU in relation to the implementation of international agreements are related to the attribution of competence in internal situations.<sup>70</sup> Central to the division of powers is the principle of conferred powers set out in Article 5 TEU, which stipulates that EU acts are limited to those within the competence granted by its Member States in the Treaties. Competence that is not clearly conferred to the EU consequently remains with the Member States.<sup>71</sup>

If the EU adopts legislation in an area of shared competence, the Member States no longer have competence to legislate freely in that area. This applies also in situations where international agreements have been concluded. Thus, the Member State can implement the treaty in question in what manner it considers most appropriate, until the Union has adopted implementations of the agreements limiting Member State competence. This can also have consequences for the issue of whether or not a treaty provision has direct effect. According to theory, it is up to national courts to decide if a provision of an MEA has direct effect if it has not been implemented in EU law.<sup>72</sup> Though the CJEU has not been entirely consistent, there are cases where international agreements have been given direct effect even when the EU has adopted implementing legislation.<sup>73</sup> The only case where a provision of Aarhus has been tested is tackled in Chapter 4.4.1.3 below.

#### **3.3.2 EU division of competences in relation to Aarhus**

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

---

<sup>70</sup> See further Chalmers, Davies and Monti 2010, p. 648.

<sup>71</sup> See further on the EU's attributed competence in Craig and de Búrca 2011, pp. 73-75.

<sup>72</sup> See further Chalmers, Davies, and Monti, p. 649.

<sup>73</sup> See e.g. Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641.

competence in the given case.<sup>74</sup> Article 19(4)-(5) of the Aarhus Convention further stipulate that:

3. Any organization referred to in article 17 which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under this Convention. If one or more of such an organization's member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under this Convention concurrently.
4. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 shall declare the extent of their competence with respect to the matters governed by this Convention. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence.

Even though there is an obligation to clarify the extent of an organisation's competence, problems can occur. The ACCC has come across issues relating to competence in assessing the compliance of the EU and its Member States, and in deciding which party bears the responsibility for implementing and assuring the application with which parts of the Convention.<sup>75</sup> How the ACCC has handled this matter will be discussed further in Chapter 6, but a short introduction to the division of competences will be presented below.

As stated above in Chapter 3.1, the EU has stated in which areas it had competence in the declaration of the approval of the Aarhus Convention. The declaration ends by stating that the EU will apply the Convention on the basis of existing and future legislation on access to documents and other rules of EU law covered by the Convention. Furthermore, the EU declared its responsibility for the performance of Aarhus obligation covered by the Union law in force at the time of approval. Lastly, the EU pointed out that EU competence is subject to development and that changes may occur to the division of responsibilities.

Not only EU legislation applicable to the Union institutions and bodies is subject to the rules of the Aarhus Convention. Also EU legislation conducting the actions of Member

---

<sup>74</sup> Ali, A., "The EU and the Compliance Mechanisms of Multilateral Environmental Agreements: the Case of the Aarhus Convention", in *The External Environmental Policy of the European Union: EU and International Law Perspectives*, Morgera, E., ed., 1<sup>st</sup> ed., Cambridge University Press, Cambridge, 2012, pp. 287-303 at p. 288.

<sup>75</sup> See e.g. the ACCCs argumentation in United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Third Meeting, Riga, 11–13 June 2008, ECE/MP.PP/2008/5/Add.10, *Report by the Compliance Committee, Compliance by the European Community with its Obligations Under the Convention, ACCC/2006/17 (European Community)*, (hereafter *The EU Kazokiskes report*).



States is governed by the Convention and, of course, within Union competence.<sup>76</sup> The EU has adopted several directives as to ensure compliance with the Convention by its Member States, some of which will be presented in Chapter 4. The ACCC has remarked that when Member States draft national legislation to implement an international agreement, such as Aarhus, that the EU is also a party to, they often primarily rely on the EU law rather than the Convention text itself.<sup>77</sup>

### 3.4 The EU and the ACCC

With EU's accession to the Aarhus Convention, the Union has accepted that the ACCC has the competence to work to improve compliance with the Convention as an integral part of the Aarhus regime. The ACCC can, and has, in several cases commented on the compliance by the EU and in some cases the ACCC has suggested improvements to EU legislation implementing the Convention. These will be presented in Chapters 6 to 9 of this thesis. In the case of the EU, the ACCC, in addition to assessing substantive issues of compliance with Aarhus, has to tackle the issue of assigning responsibility for a case of non-compliance. As stated above, the question is first and foremost handled by the EU itself and based on EU's internal competences. This issue raises a number of interesting questions such as how the ACCC sees shared responsibility, what responsibility the EU has for implementation at the national level, and what responsibility the CJEU has in relation to MEAs. The ACCC has also handled a communication regarding compliance by the EU and Ireland, before Ireland was a party to the Convention.<sup>78</sup> Even though all EU Member States are now parties to the Aarhus Convention, the case is important as it raises the question of how much responsibility the EU has for non-compliance by a state that is not party to an MEA. Chapter 6 below is dedicated to a discussion on how the ACCC handles these issues.

An important aspect to mention in this context, is that since the EU became a member to the Aarhus Convention, the compliance with Aarhus objectives has been made subject to two review systems for EU Member States: First, the Aarhus system with its reporting system and the review by the ACCC, and second, the EU system with a duty to report

---

<sup>76</sup> Ali 2012, p. 290.

<sup>77</sup> The *EU Kazokiskes* report, para. 49.

<sup>78</sup> See United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation and Decision-making and Access to Justice In environmental Matters, Compliance Committee, Thirty-ninth Meeting, Geneva, 11–14 December 2012, ECE /MP.PP/C.1/2012/12, *Findings and Recommendations with Regard to Communication ACCC/C/2010/54 Concerning Compliance by the European Union*.

implementation, Member State courts and the CJEU.<sup>79</sup> As the EU has adopted legislation to implement the Convention, some of which will be briefly described in Chapter 4, the Member States must follow both sets of legislation, which will hopefully conform to each other and be interpreted similarly by the ACCC and the CJEU. Also, the EU institutions have to comply with the Convention. This leaves the CJEU with both the competence to review compliance with the Convention and an obligation to ensure compliance in its judgments.<sup>80</sup>

---

<sup>79</sup> Ebbesson 2011, p. 250.

<sup>80</sup> *Ibid.* at p. 249.

## 4. The relevant EU legislation

### 4.1 General legislation related to the Aarhus Convention

EU's primary legislation reflects provisions that are corresponding to the Aarhus objectives. Accordingly, Article 10(3) of the Treaty of the European Union (TEU) states that every citizen shall have the right to participate in the democratic life of the Union and that decisions shall be taken as openly and as closely as possible to the citizen.<sup>81</sup> Both these principles relate to the right to access information and participation in decision-making. Furthermore, the Seventh Environmental Action Programme, which came into force in January 2014 and will guide European environmental policy until 2020, recalls in several paragraphs the commitments that were made when approving the Convention. The Action Programme especially highlights access to justice, effective legal protection and public participation as a means to improve implementation and sustainability and investments in qualitative data collection.<sup>82</sup>

On 6 September 2006, the European Parliament and the Council adopted Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies<sup>83</sup> (the Aarhus Regulation).<sup>84</sup> The Aarhus Regulation touches upon all three pillars of the Aarhus Convention, this was a conscious choice aimed at increasing the transparency of the implementation of the Convention.<sup>85</sup> This Chapter will briefly go through the most important EU legislation adopted in order to implement the Convention or that is otherwise related to the Aarhus Convention. The purpose of this is to give a background to the following Chapters discussing the role of

---

<sup>81</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01.

<sup>82</sup> See paragraphs 62, 65, 69 and 95 of the Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' [2013] OJ L 354, p. 171–200.

<sup>83</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, [2006] OJ L 264 p. 13-19.

<sup>84</sup> The Commission has also adopted two decisions to further implement the Aarhus Regulation: Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts [2008] OJ L 13, p. 24–26 and Commission Decision 2008/401/EC, Euratom of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institution and bodies, [2008] OJ L 140 p. 22-25.

<sup>85</sup> Paragraph 5 of the Preamble to the Aarhus Regulation.

the ACCC for the development of EU law. The presentation is divided in accordance with the three pillars and comprised of both legislation aimed at Member States and the EU institutions.

## **4.2 Access to information**

### **4.2.1 Access to information on the Member State level**

There has been EU legislation on the access to information already before the accession to the Aarhus Convention, having adopted directive 90/313/EEC on the freedom of access to information on the environment in 1990.<sup>86</sup> Ralph Hallo asserts that the EU Member States in comparison with other states participating in the negotiations had a relatively strong tradition of transparency and, in fact, even inspired the development of the first pillar of the Convention.<sup>87</sup> Directive 90/313/EEC has replaced by Directive 2003/4/EC on public access to environmental information,<sup>88</sup> which according to Hallo, in return, is strongly influenced by the Aarhus Convention. The Directive is in large parts very similar to the Aarhus Convention in granting access to environmental information and the cases where access to documents can be denied are almost identical; see further Article 4(4) of the Aarhus Convention and Article 4(1)-(2) of Directive 2003/4.

### **4.2.2 General access to documents in the EU**

It is possible to exclude bodies acting in a judicial or legislative capacity from the obligations of public authorities in accordance with Article 2(2) of the Aarhus Convention. Nonetheless, the EU has chosen to let the documents by the European Parliament, Council and Commission be subject to public access also when they are acting in a legislative capacity. This is stated in Paragraph 7 of the Preamble to the Aarhus Regulation. Article 2(d) of the Aarhus Regulation defines environmental information as any information in written, visual, aural, electronic or other material form on for example the state of the environment, factors and measures affecting or that are likely to affect the environment. While requests for access

---

<sup>86</sup> Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, [1990] OJ L 158 p. 56-58.

<sup>87</sup> See further Hallo, R. "Access to Environmental Information. The Reciprocal Influences of EU Law and the Aarhus Convention", in *The Aarhus Convention at Ten: Interactions and Tensions Between Conventional International Law and EU Environmental Law*, Pallemarts, M., ed., 1<sup>st</sup> ed., Europa Law Publishing, Groningen, 2011, pp. 55-65, at p. 57 and 62.

<sup>88</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EE [2003] OJ L 41 p. 26-32, (Hereafter the Environmental Information Directive).

to EU documents are mainly regulated in Regulation 1049/2001<sup>89</sup> the Aarhus Regulation contains some important rules relating to environmental information. According to Hallo, the Aarhus Regulation is a significant improvement to the scope of Regulation 1049/2001, as it includes all EU bodies except the CJEU in its application and because it lets all natural or legal persons request documents containing environmental information. The scope is no longer limited to EU citizens.<sup>90</sup>

Article 4 of the Aarhus Regulation regulates the collection and dissemination of environmental information, making the institutions and bodies of the Union responsible for organising the information relevant to their functions. Paragraph 2 stipulates that they shall also make this information available in electronic databases and facilitate access to the information and update it as appropriate. Also ensuring the quality and accuracy of the environmental information available is, according to Article 5 of the Aarhus Regulation, the responsibility of the EU institutions. Exceptions from the duty to disclose environmental information can be found in Regulation 1049/2001 and according to Hallo it is still unsure if the Regulation reaches the Aarhus standards for access to environmental information. The Regulation is also currently under review and proposals have been made for revising it.<sup>91</sup>

## **4.3 Participation in decision-making**

### **4.3.1 Participation in decision-making in the EU Member States**

In the EU, public participation has been developed closely with the procedure for environmental assessment. Some NGOs, for example, mean that proper public participation cannot take place outside an EIA procedure, as this will ensure the public access to environmental studies and enable the public to express their opinions based on a science-based background.<sup>92</sup> The EU legislation implementing the Convention's rules on participation in decision-making can be found in a number of Directives. The directive adopted with the aim of transposing Aarhus rules on public participation into EU rules applicable to Member

---

<sup>89</sup> 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, [2001] OJ L 145, p. 43-48.

<sup>90</sup> Hallo 2011, p. 64.

<sup>91</sup> *Ibid.* at p. 64.

<sup>92</sup> Jendroška, J., "Public Participation in Environmental Decision-Making: Interactions Between the Convention and EU Law and Other Key Legal Issues in its Implementation in the Light of the Opinions of the Aarhus Convention Compliance Committee", in *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, Pallemarts, M., ed., 1<sup>st</sup> ed., Europa Law Publishing, Groningen, 2011, pp. 245-270, at p. 99.

States is Directive 2003/35/EC on public participation.<sup>93</sup> It amends the EIA Directive<sup>94</sup> and the IPPC Directive<sup>95</sup>, which will be briefly described below.

Perhaps the most important directive in the field of public participation is the EIA Directive, which in accordance with Article 1, applies to the assessment of the environmental effects of those public and private projects that are likely to have significant effects on the environment. According to Article 4(1), projects listed in Annex 1 to the Directive are to be subject to the assessment provided for by the directive. This contains a variety of activities in several sectors such as agriculture, extractive and energy industry, the production and processing of metals and infrastructure projects. Also, other activities found in Annex 2 can be made subject to assessment if so determined by a Member State as stipulated in Article 4(2). Article 6(2) of the EIA Directive contains the provision on participation by the public and it emphasises the importance of providing information early on in the decision-making procedure. In accordance with Article 6(4), the public shall be entitled to express opinions and comments early in the procedure when all options are open, before the decision is taken. The Directive does in Article 6(6), similarly to the Aarhus Convention, establish that time frames for the different phases of the procedure must be reasonable.

The purpose of the IPPC Directive is to achieve integrated prevention and control of pollution arising from the activities listed in Annex I of the Directive as stipulated in Article 1. The provisions on public participation are provided in Annex V to the Directive and in large reflect the rules of the EIA Directive. It is furthermore the intention of the EU to include provisions on public participation in other relevant EU legislation.<sup>96</sup> This has been done in for example the SEA Directive<sup>97</sup>, the Water Framework Directive<sup>98</sup> and several additional

---

<sup>93</sup> Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156 p. 17-25.

<sup>94</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, [2012] OJ L 26 p. 1-21 as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, [2014] OJ L 124 p. 1-18.

<sup>95</sup> Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control [2008] OJ L 24 p. 8-29.

<sup>96</sup> Jendroška 2011, p. 203.

<sup>97</sup> Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197 p. 30-37.

<sup>98</sup> Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L 327 p. 1-73.

directives where national authorities have to consult interest groups before they adopt certain plans and programmes.<sup>99</sup>

According to Jendroška, a weakness in the transposal of the Aarhus rules on public participation in decision-making, is that the EU seems to have focused on Article 6 on specific activities, plans and programmes as can be seen in the directives described above. The provisions of Articles 7 and 8 on policy making, rulemaking and legislative drafting have not been implemented in the same way which Jendroška means is due to a view that these articles do not provide clear obligations that need to be implemented in the same way in EU law.<sup>100</sup> Also, the ACCC has commented on EU legislation on public participation in its reports. This will be further discussed in Chapter 9 below.

### **4.3.2 Participation in decision-making at EU level**

At the EU level, different interest groups have been involved in decision-making since the creation of the European Communities, though the participation in the beginning was not very structured and the process not formalised.<sup>101</sup> Public participation in decision-making is regulated in Article 9 of the Aarhus Regulation, which states that institutions and bodies shall provide for early and effective public participation during the preparation, modification or review of plans and programmes relating to the environment. Moreover, the provision states that the public affected or likely to be affected by, or having an interest in the matter shall be identified and informed of the plan or programme, relevant environmental information connected to it and practical information on how to participate. Paragraph 4 stipulates that there is a possibility to organise meetings and hearings as well as letting the public submit comments, for which there should, in general, be given a time frame of eight weeks. Furthermore, Article 9(5) of the Aarhus Regulation states that the institutions and bodies of the EU shall take due account of the outcome of the public participation, and there is also an obligation to inform the public of the reasoning behind the decision taken.

In order to implement public participation into the work of the EU institutions there are additional documents specifying how to incorporate participatory processes. The

---

<sup>99</sup> See for example Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC [2001] OJ L 106 p. 1-39, s 9 and 24 and Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206 p. 7-50, Article 6(3).

<sup>100</sup> Jendroška 2011, p. 102.

<sup>101</sup> Obradovic, D., "EU Rules on Public Participation in Environmental Decision-Making Operating at the European and National Levels", in *The Aarhus Convention at Ten: Interactions and Tensions Between Conventional International Law and EU Environmental Law*, Pallemarts, M., ed., 1<sup>st</sup> ed., Europa Law Publishing, Groningen, 2011, pp. 149-187, at p. 152.

Commission, for example, has an impact assessment mechanism applied when drafting proposals and major initiatives for example in questions relating to the environment.<sup>102</sup>

#### **4.4 Access to justice in the EU**

According to Ebbesson, access to justice in environmental matters has not been a priority question in the EU, and general principles on judicial remedies have been the basis in the area.<sup>103</sup> Legal standing in the EU has according to Ebbesson long rested on what he describes as the “standard liberal” approach that was briefly described in Chapter 2. The criterion has been especially hard for NGOs to reach. This is because with legal standing and access to justice for a private individual or organisation is so strongly connected to having a private interest in the matter.<sup>104</sup> After the Aarhus Convention, some exceptions have been made as to enable access to justice without having to fulfil this traditional interest test. The change can foremost be seen in the domestic legal systems in the EU. It is, however, important to note that EU legislation has also affected how the EU Member States have regulated access to justice, and, consequently, how the Member States have implemented the Aarhus Convention. Chapter 4.4.1 will focus on these issues. Also, the EU institutions have to comply with the Convention’s rules on access to justice. How this has been implemented into EU law will be discussed in Chapter 4.4.2.

##### **4.4.1 EU legislation on access to justice in Member States**

According to Article 9 of Aarhus, states have to provide access to justice in three main situations described above in Chapter 2.3.2.3, as to increase the effect of national environmental legislation. The obligations of EU Member States are not limited to the enforcement of national legislation. In accordance with Article 19(1) TEU, they are also under the obligation to provide effective legal protection in fields covered by EU law. EU law upholding obligations derived from the Aarhus Convention is therefore also enforceable before domestic courts through (a) EU law having direct effect; (b) the requirement to interpret national legislation in conformity with EU law or (c) the doctrine of state liability for

---

<sup>102</sup> See European Commission, ‘Impact Assessment Guidelines’ 15 January 2009, SEC(2009) 92 at [http://ec.europa.eu/smart-regulation/impact/commission\\_guidelines/docs/iag\\_2009\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf) [accessed 27 June 2014].

<sup>103</sup> Ebbesson, J., “European Community”, in *Access to Justice in Environmental Matters in the EU*, Ebbesson, J., ed., 1<sup>st</sup> ed., Kluwer Law International, The Hague, 2002, pp. 49-100, at pp. 49-50 (Ebbesson 2002 b).

<sup>104</sup> Bogojevic, S., “CJEU, can you hear me? Access to Justice in Environmental Matters”, *Europarättslig Tidskrift*, 16, 2013, pp. 728-740, at p. 732.



infringements of EU law.<sup>105</sup> This Chapter aims at describing the EU legislation influencing access to justice in the EU Member States and is divided in accordance with the three situations where Aarhus stipulates that parties to the Convention must allow access to justice. Since the EU Member States have adopted their own more detailed legislation in this field, meant to fulfil the obligations of the Aarhus Convention, EU law is not generally applied in practice.<sup>106</sup> However, as this thesis is limited to the influence of the ACCC on EU law, the focus will nevertheless be on EU legislation, with a few cases from the CJEU used to demonstrate how the EU influences national legislation.

#### **4.4.1.1 Access to justice after request for environmental information**

The Environmental Information Directive does not only provide rules on the right to access to information, but also contains an Article on access to justice when this right is not respected. The Directive establishes that Member States must give access to a review procedure, before a court or another independent body established by law, as well as a procedure for reconsideration. The right is given to any applicant who considers that his or her request for information has been ignored, wrongfully refused, inadequately answered or otherwise not dealt with in accordance with Article 6 of the Directive. In observance of Article 9(1) of the Convention, the Directive states that the decisions of the review procedure shall be binding. Lastly, even though the requirement regarding the cost of the procedure is not identical to the one in the Convention, EU legislation states that the review procedure must at least be inexpensive for the person seeking access to justice. According to Ebbesson, the Convention and the Environmental Information Directive set similar minimum standards on the review procedure and access to justice relating to the access to environmental information.<sup>107</sup>

#### **4.4.1.2 Access to justice concerning permits and decision-making for specific activities**

The EIA Directive and the IPPC Directive contain rules on access to justice in connection to permits and decision-making for specific activities. Both Directives oblige the Member States to provide access to a review procedure before a court, or another independent and impartial body of law, much like the Aarhus Convention. Both also allow states to first use a preliminary review procedure before access is given to a judicial review procedure.<sup>108</sup> In accordance with Article 16(3) of the IPPC Directive and Article 11(3) of the EIA Directive, it

---

<sup>105</sup> See Jans, J. and Vedder, H., *European Environmental Law After Lisbon*, 4<sup>th</sup> ed., Europa Law Publishing, Groningen, 2012, p. 228-229.

<sup>106</sup> *Ibid.* at p. 229.

<sup>107</sup> Ebbesson 2011, p. 256.

<sup>108</sup> See further Article 11 of the EIA Directive; Article 16 of the IPPC Directive; Article 9(2) of the Aarhus Convention.

is possible for Member States to limit standing criteria by stating that applicants must have a sufficient interest or maintain the impairment of a right as defined in the state's own legislation. Member States apply and interpret these criteria in different ways, and the access to justice can therefore differ depending on the Member State in question.<sup>109</sup> Before the adoption of the Aarhus Convention, the EU had started developing its rules on access to justice in relation to specific activities in its jurisprudence. It was stated that persons concerned should, where appropriate, be able to rely on the enforceability of rights given in environmental legislation before national courts.<sup>110</sup>

Both the EIA Directive and the IPPC Directive were amended to further implement the Aarhus Convention. These amendments ensured enhanced access to justice and Ebbesson means that they are now very similar in wording to the Convention and follow it closely.<sup>111</sup> He also, however, mentions that access to justice is more complex in relation to permits and decision-making for specific activities and that for example the rules regarding remedies and costs might differ.<sup>112</sup> Therefore, these issues will be discussed further in Chapter 7 in relation to how the ACCC has made recommendations regarding access to justice.

#### **4.4.1.3 Access to justice concerning other acts and omissions**

There is no specific EU legislation adopted with the purpose of implementing Article 9(3) on access to justice concerning acts and omissions not related to specific activities. At the ratification of the Convention, the EU stated in its declaration that Article 9(3) was in fact not fully covered by Union legislation, and that the Member States were responsible for its implementation. The reason given for this was that the provision relates to procedures challenging acts by actors other than the EU institutions. It would therefore remain the responsibility of Member States unless the EU adopted legislation in the area.<sup>113</sup> Though the Commission later proposed legislation, the Member States did not agree that it would be within the competence of the Union.<sup>114</sup> Directive 2004/35/EC on environmental liability<sup>115</sup> to some extent still covers the Article, but not in full. As described above in Chapter 3.3, this

---

<sup>109</sup> See further Ebbesson 2011, p. 257.

<sup>110</sup> *Ibid.* at p. 258.

<sup>111</sup> *Ibid.* at pp. 258-259.

<sup>112</sup> *Ibid.* at p. 262.

<sup>113</sup> EU's declaration upon approval can be found on the UNECE website at: <http://www.unece.org/env/pp/ratification.html> [Accessed 22 June 2014].

<sup>114</sup> Ebbesson 2011, p. 263.

<sup>115</sup> See Articles 12 and 13 of Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, [2004] OJ L 143 p. 56-75.

means that the Member States are responsible for the implementation of the Aarhus Convention and ensuring a sufficient access to justice in their legislation in this regard.

With very little Union legislation as guidance on access to justice, a Slovak court referred a case to the CJEU for a preliminary reference procedure regarding whether or not Article 9(3) of the Aarhus Convention itself could have direct effect. The CJEU established that Article 9(3) of the Aarhus Convention, although a part of EU law and falling within the scope of both Member State law and EU law, could not be directly applicable. The reason given was that Article 9(3) does not contain a clear and precise enough obligation and is also in need of adoption of subsequent measures to be effective. Article 9(3) only gives access to justice to those members of the public meeting the criteria established in national law.<sup>116</sup> The CJEU however still put pressure on Slovakia to give broad access to justice in stating that:

It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation, such as the *zokupenie*, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.<sup>117</sup>

Ebbesson also finds it likely that the duty to interpret national legislation to the fullest extent possible, in accordance with the Aarhus Convention, applies also to the remedies found in Article 9(4) of the Convention, when rights derived from Article 9(3) are concerned.<sup>118</sup>

#### **4.4.2 Access to justice at Union level**

It is clear that Article 9 of the Aarhus Convention on access to justice applies not only to acts by national public authorities, but also to acts by EU institutions in accordance with Article 2(d) of the Aarhus Convention. Judicial procedures on the EU level can be initiated in a number of ways. For instance, a case before a national court, as described in Chapter 4.4.1 above, can be referred to the CJEU for a preliminary ruling in accordance with Article 267 TFEU. An NGO also has the possibility of bringing a breach of EU law to the attention of the Commission, in the hope that the Commission chooses to take it forth to the CJEU, as stated in Article 258 TFEU. These two possibilities, however, do not make the NGO in question a

---

<sup>116</sup> Case C-240/09 *Lesoochránárske zokupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR nyr., paras. 42-45.

<sup>117</sup> *Ibid.* at para. 52.

<sup>118</sup> Ebbesson 2011, p. 268.

party to the proceedings.<sup>119</sup> When an individual objects to acts and legislation by the EU itself, a remedy before a national court is not usually sufficient, as the national court does not have competence to judge on, for example, the validity of a directive.<sup>120</sup> There are, however, two main ways available for the public to start a review procedure at Union level: the internal review procedure available in Article 10 of the Aarhus Regulation and a procedure before the CJEU. This will be presented below.

#### **4.4.2.1 The internal review procedure**

Rules regarding the internal review procedure of the EU can be found in Article 10 of the Aarhus Regulation. Article 10(1) gives the right for certain Environmental NGOs to request an internal review by an institution or body that has either adopted an administrative act or not adopted such an act when they should have under environmental law. The NGOs entitled to make requests have to fulfil the criteria in Article 11 of the Aarhus Regulation of being:

- (a) an independent non-profit-making legal person;
- (b) having a primary stated objective of promoting environmental protection;
- (c) having existed with this objective for more than two years and
- (d) the request must be made regarding a subject matter covered by its objective.

Articles 10(1)-(2), moreover, stipulate that the request must be made within six weeks of the adoption of the act and submitted in writing. The institution or body receiving a request for an internal review should then, as soon as possible or at least within 12 weeks, state its reasons unless the request was clearly unsubstantiated. Article 10(3) contains an exception to the rule above, which allows the institution or body more time, up to 18 weeks, when it is unable to perform its duty, but must then inform the NGO of why it was unable to act.<sup>121</sup> A judicial review before the CJEU is possible following a request for internal review. As stipulated in Article 12 of the Aarhus Regulation, an NGO can also institute proceedings before the CJEU when an institution or body fails to comply with Articles 10(2) and 10(3).

---

<sup>119</sup> Bogojevic 2013, p. 730.

<sup>120</sup> Jans and Vedder 2012, p. 237.

<sup>121</sup> Requests and answers made under the internal review procedure can be found on the European Commission's website at <http://ec.europa.eu/environment/aarhus/requests.htm> [accessed 23 June 2014].

There is not yet a recommendation by the ACCC endorsed by the MOP on the internal review procedure. However, the NGO *ClientEarth* and some other NGOs have initiated a procedure before the ACCC<sup>122</sup> that will be discussed in Chapter 7.

#### 4.4.2.2 Access to justice and the CJEU

As stated above, a procedure before the CJEU can be initiated by an NGO following an internal review procedure, but it could also be initiated by members of the public in other cases regarding acts and omissions of EU's institutions. In accordance with Article 12 of the Aarhus Regulation, the same rules apply regardless of if an internal review procedure has been attempted or not. The provisions in question are Article 263 TFEU on action for annulment and Article 265 TFEU on action for failure to act.

Article 263(1) TFEU states that the CJEU shall review the legality of legislative acts by the EU institutions if intended to produce legal effects vis-à-vis third parties. Paragraphs 2-4 enable actions for annulment by some different actors subject to varying requirements. The Article's first paragraph covers actions brought by a Member State, the European Parliament, the Council or the Commission on a number of grounds including lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. The Court of Auditors, the European Central Bank and the Committee of the Regions can bring actions on the same grounds, provided that they are doing it for the purpose of protecting their prerogatives in accordance with Article 263(2) TFEU.

Article 263(4) TFEU concerns actions brought by individuals and NGOs, the so-called unprivileged applicants, and includes a further restriction of the standing criteria. It provides three possible ways to gain standing to challenge an act of the EU:

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act **addressed to that person** or which is of **direct and individual concern** to them, and **against a regulatory act which is of direct concern to them and does not entail implementing measures**<sup>123</sup>

First, an unprivileged applicant can challenge acts addressed to them. This can, of course, sometimes be useful for private individuals, but it is rare that NGOs receive such acts

---

<sup>122</sup> See *Communication ACCC/C/2008/32 submitted on 1 December 2008 by ClientEarth and others*, available at <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Communication.pdf> [accessed 23 June 2014].

<sup>123</sup> Emphasis added.

addressed to them, as their role is generally that of representing broad environmental interests and are not in other ways affected by decisions.<sup>124</sup> This was also claimed in a well-known case from the CJEU on the access to justice of NGOs, the *Greenpeace case*<sup>125</sup>, where the court stated that environmental interests are “...by their very nature, common and shared”.<sup>126</sup>

Second, an act can be challenged by an unprivileged applicant if the act is of direct and individual concern to them. Individual concern has been defined in case law from the CJEU and a test usually referred to as the *Plaumann test*, is applied in order to establish if the applicant is individually concerned. In accordance with the *Plaumann* doctrine

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.<sup>127</sup>

The test is strongly connected to standard interest test, where it is necessary to show some kind of personal interest. The effect, which was confirmed in the *Greenpeace case*, is that an NGO cannot in practice have standing when it protects a collective interest.<sup>128</sup> This criterion has, by for example *Bogojevic*, been considered too strict and a barrier to effective access to justice at the EU level. However, she means that this could perhaps be abated by the stronger access to justice at the Member State level.<sup>129</sup> Measures of direct concern have been defined in the case law of the CJEU as measures that “directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it”.<sup>130</sup>

The third and final way in which an act can be challenged by an individual before the CJEU was added with the adoption of the Lisbon Treaty and contains three criteria: (1) the act in question is a regulatory act, (2) the act is of direct concern to the applicant and (3) the act must not entail any implementing measures. The main difference from the above is thus that an applicant must not show that they are individually concerned as long as the contested act is a regulatory measure, not followed by an implementing measure. The definition of a regulatory act is debatable, but the term is generally seen as excluding acts of a legislative

---

<sup>124</sup> *Bogojevic* 2013, p. 728.

<sup>125</sup> Case C-321/95 *Greenpeace v Commission* [1998] ECR I-1651 (Hereafter the *Greenpeace case*).

<sup>126</sup> *Ibid.* at para. 17.

<sup>127</sup> See further Case 25/62 *Plaumann v Commission* [1963] ECR 95, (Hereafter the *Plaumann case*) at para. 107.

<sup>128</sup> The *Greenpeace case*, para 14.

<sup>129</sup> See further *Bogojevic* 2013, p. 739.

<sup>130</sup> Case C-386/96 *Soci t  Louis Dreyfuss & Cie v Commission* [1998] ECR I-2309, para. 43.

nature.<sup>131</sup> The legislative acts of Article 288 TFEU; regulations, directives and decisions, can therefore not be contested under this paragraph. Also this criterion has been criticised, Bogojevic claims that the vast majority of environmental law is unchallengeable as they are legislative acts and that whether access to justice can be claimed by unprivileged applicants is dependent on the form chosen for the act.<sup>132</sup> Furthermore, directives will never be considered under this provision, as they are, in accordance with Article 288(3), always dependent on further implementation measures.

It is clear from this presentation that the standard liberal notion, or the traditional interest test, is still the norm in EU legislation on access to justice. The ACCC has criticised the standing criteria and the EU legislation on access to justice. This will be discussed in greater detail in Chapter 7.1.

---

<sup>131</sup> Bogojevic 2013, p. 734.

<sup>132</sup> *Ibid.* at p. 734.

## 5. Case backgrounds

At the time of writing, seven communications have been brought before the ACCC regarding the compliance with the Aarhus Convention by the EU, or, in earlier cases, the EC. Five of those have been assessed in reports by the ACCC and some cases include recommendations on changes of EU legislation or the interpretation of EU legislation. Currently two communications await assessment by the ACCC.<sup>133</sup> The aim of this Chapter is to provide brief backgrounds on the cases alleging non-compliance by the EU, in order to move on to specific issues explored by the ACCC in connection to EU compliance with the Convention in Chapters 6 to 9. Chapter 6 scrutinises the division of competences between the EU, Member States and third states. This will be followed by Chapter 7 that concerns issues relating to access to justice. Chapter 8 examines access to information. Finally, Chapter 9 takes up issues relating to participation in decision-making. Each Chapter ends with a short discussion on the main findings and their impact on EU law. In relation to some of the issues, reports by the ACCC on compliance by parties other than the EU are also discussed in order to clarify the issue. It is not the purpose of this thesis to give a complete account of EU compliance with the Aarhus Convention, but rather to highlight issues of compliance as discussed by the ACCC and to evaluate how these have affected EU legislation. Therefore, it is possible that the coming Chapters leave out important aspects of EU compliance that have not, yet, been subject to an assessment by the ACCC.

### 5.1 The *Kazokiskes* case

The *Kazokiskes* case is especially interesting in relation to the question of the division of competences between the EU and the Member States. On the one hand, because the case was the first one reviewing compliance by the EU and on the other hand, because there were in fact two communications: one alleging non-compliance by Lithuania and a corresponding one alleging non-compliance by the EU.<sup>134</sup> The two cases are connected as they concern the same event. Both were initiated by the Lithuanian NGO Association *Kazokiskes* Community and the alleged breach was the authorisation for and financing of a landfill in the territory of the

---

<sup>133</sup> See *Communications From the Public - UNECE* available at: <http://www.unece.org/env/pp/pubcom.html> [Accessed 29 June 2014].

<sup>134</sup> United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Third Meeting, Riga, 11–13 June 2008, ECE/MP.PP/2008/5/Add.6, *Report by the Compliance Committee, Compliance by Lithuania with its Obligations Under the Convention*, ACCC/2006/16 (*Lithuania*) and the *EU Kazokiskes* case.



Kazokiskes village. An important question in the case was which of the parties, that is Lithuania or the EU, was responsible of ensuring compliance with the Aarhus Convention.

In the communication alleging the non-compliance by the EU, the communicant described the plans for a landfill project near the Kazokiskes village that had been authorised by the Lithuanian authorities. The planned project was of such a nature that it fell under Annex I to both the EIA Directive and the IPPC Directive.<sup>135</sup> The role of the EU was that of signing a financial memorandum to finance the landfill with up to 50% of the establishment cost. The communicant argued that the landfill project was not to follow the environmental legislation of neither Lithuania nor the EU. The communicant also maintained that the authorisation procedure in Lithuania had not been carried out in consistency with Articles 6(2), 6(4) and 9(2) of the Aarhus Convention. They had not been allowed to take part in the decision-making procedure and had no possibility to challenge the decision to establish the landfill. Moreover, the communicant claimed that the EU decision to co-finance the landfill had not been subject to a decision-making procedure in accordance with the above Articles of the Aarhus Convention either. They furthermore pointed out that the IPPC Directive did not fulfil Aarhus standards for this type of project.<sup>136</sup>

In Chapter 6.1 below, the focus will be on how the ACCC approached the question of competences in the *Kazokiskes* case while other substantial issues will be discussed in Chapters 7.2 on access to justice and Chapter 9.1 on the participation in decision-making regarding decisions on specific activities.

## 5.2 The *Vlora* case

The *Vlora* case<sup>137</sup> differs from the case above as it concerns compliance by the EU and a non EU Member State, namely Albania. Thus it does not define how to attribute responsibilities and competences between the EU and its Member States, but touches on the problem whether the EU as such can be found to be in non-compliance with the Aarhus for actions in a third state. Just as in the *Kazokiskes* case above, a NGO had also submitted a communication regarding the compliance by the state, Albania, which resulted in a separate report.<sup>138</sup>

---

<sup>135</sup> The *EU Kazokiskes* report, para. 15.

<sup>136</sup> The *EU Kazokiskes* report, para. 2.

<sup>137</sup> United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Twenty-ninth Meeting, Geneva, 31 March–3 April 2009, ECE/MP.PP/C.1/2009/2/Add.1, *Findings and Recommendations with Regard to Communication ACCC/C/2007/21 Concerning Compliance by the European Community* [Hereafter the *Vlora* report].

<sup>138</sup> See further United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters,

The case was initiated by an Albanian NGO, the Civic Alliance for the Protection of the Bay Vlora. The issue at hand concerned the plans of Albanian authorities to construct a thermal power plant in the bay Vlora in Albania. The involvement of the EU concerned the financing the project through the European Investment Bank (EIB) together with the World Bank and the European Bank for Reconstruction and Development (EBRD).<sup>139</sup> The communicant maintained that the EU had taken the decision to finance the project without ensuring proper public participation.<sup>140</sup> The EIB had furthermore refused to disclose the investment agreement and the applicant meant that the refusal was contrary to their right to access environmental information upon request in accordance with Article 4 of Aarhus. Hence, the allegations concerned Articles 4, 5 and 6 of the Convention. These issues will be explored in Chapters 8 and 9. It is also worth mentioning that the ACCC had previously in its report on Albania found the state to be in non-compliance with regard to some requirements for public participation in the decision-making process. The findings of non-compliance to some extent overlap the allegations against the EU.<sup>141</sup>

### **5.3 The *ClientEarth* case**

The *ClientEarth* case was initiated by the NGO ClientEarth and supported by a number of other organisations and an individual. In contrast to the two cases above no Member State of the EU was involved. The communication was also limited to the issue of access to justice. The basis for the allegations concerned Article 3(1) and Article 9(2)-(5) of Aarhus.<sup>142</sup> The communication was not sent as a response to a certain event or decision by the EU, but was more of a general nature questioning the strict criteria for access to justice in the EU, see further Chapter 4.4 above.

There were three main allegations: (1) that the EU through applying the individual concern criterion for granting legal standing to NGOs and individuals before EU courts (CJEU and the Court of First Instance (CFI)) did not comply with the Aarhus rules on access to justice; (2) that the Aarhus Regulation did not fulfil the requirements of the Convention as

---

Compliance Committee, Sixteenth Meeting, Geneva, 13-15 June 2007, ECE /MP.PP/C.1/2007/4/Add.1, *Findings and Recommendations with Regard to Compliance by Albania*, ACCC/C/2005/12 (*Albania*), (Hereafter the *Albania* report).

<sup>139</sup> The *Vlora* report, para. 15.

<sup>140</sup> *Ibid.* at para. 2.

<sup>141</sup> The *Albania* report, paras. 92-94.

<sup>142</sup> United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Thirty-second Meeting, Geneva, 11-14 April 2011, ECE /MP.PP/C.1/2011/4/Add1, *Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union*, at para. 1, [Hereafter the *ClientEarth* report].

it did not grant individuals other than NGOs access to the internal review procedure and as the scope of the procedure was limited to administrative acts of an individual nature, and (3) that the costs of a procedure before the EU Courts were too uncertain and possibly prohibitive in the event of a lost case.<sup>143</sup>

The allegations were mainly based on a number of decisions by the EU Courts as the communicant meant that the EU legislation regarding legal standing for individuals and NGOs had been misinterpreted by the EU Courts.<sup>144</sup> In all of the cases that were referred to, the individual or the NGO requesting a judicial review was denied standing. It must be noted that several of the cases were concluded before the entry into force of the Convention for the EU and all but two initiated before this time. While the *WWF-UK* case was initiated after the entry into force of the Convention, see further below, the Aarhus Regulation was not yet effective. Thus, the *Stichting Milieu* case is the only case that was initiated after the EU had implemented the Aarhus Convention through the Aarhus Regulation. This case had however not yet been concluded at the time of the ACCC report, so possible breaches of the Convention in relation to *Stichting Milieu* case could not lead to findings of non-compliance by the ACCC.<sup>145</sup>

It is also important to mention that at the time of the communication, the Lisbon Treaty had not yet come into force. However, as the Lisbon Treaty entered into force on the 1 December 2009, during the consideration of the communication, the ACCC invited the parties to submit their views on how this would affect the allegations made by the communicant. A brief description of this can be found in Chapter 7.1.3.3 of this thesis.

It must also be noted that the case is not yet completely settled. The ACCC decided to stay the procedure awaiting a ruling from the CJEU. The second part of the report regarding compliance by the EU will cover issues related to the internal review procedure described in Chapter 4.4.2.1 above and the review procedure of the Aarhus Regulation. The

---

<sup>143</sup> *Ibid.* at para. 2.

<sup>144</sup> *Ibid.* at para. 2. The decisions included: *WWF-UK Ltd v. Council of the European Union*, T-91/07, 2 June 2008; and *WWF-UK Ltd v. Council of the European Union and the Commission of the European Communities*, C-355/08, 5 May 2009 [Hereafter the *WWF* case], *European Environmental Bureau (EEB) and Stichting Natuur en Milieu v. Commission*, joined cases T-236/04 and T-241/04, 28 November 2005 [Hereafter the *EEB* cases], *Região autónoma dos Açores v Council*, T-37/04, 1 July 2008 and C-444/08, 26 November 2009 [Hereafter the *Azores* case] and *Stichting Natuur en Milieu and Pesticides Action Network Europe v. Commission*, T-338/08, 14 June 2012 [Hereafter the *Stichting Milieu* case].

<sup>145</sup> *Ibid.* at para. 59.

communicant has requested that the ACCC also adopt findings on the second part of the communication as soon as possible.<sup>146</sup>

#### **5.4 The *Irish renewables programme* case**

The *Irish renewables programme* case concerned alleged non-compliance by the EU for having approved and funded a renewable energy programme in Ireland. The case was initiated in 2010, when an individual claimed that the EU had failed to disseminate information in accordance with Article 5 of Aarhus and failed to provide an opportunity for public participation in accordance with Article 7 of Aarhus.<sup>147</sup> When the case came before the ACCC, Ireland had not yet ratified the Convention, which is why only the compliance by the EU was scrutinised.

As stated above, the main allegation concerned the issue if the EU had failed to disseminate information on the Renewable Energy Feed-In Tariff 1 (REFIT 1) programme in Ireland. The EU was involved in the programme through financing and by approving state aid. According to Article 108 TFEU, state aid is in general prohibited in the EU, but it can sometimes be allowed by the Commission. The communicant also alleged that information had not been disseminated concerning the SEA that was made, and it was argued that the EU was wrong in financing and approving state aid, as the SEA did not comply with the EU legislation that was meant to implement the Aarhus Convention.<sup>148</sup>

Of importance was also the EU Directive on the promotion of the use of energy from renewable sources,<sup>149</sup> the purpose of which is to increase the use of energy from renewable sources and containing targets for the Member States and the EU as a whole. Article 4 of the renewable energy directive moreover requires the Member States to submit national renewable action plans (NREAPs) on how they will reach their respective targets. The communicant alleged that the EU had failed to respect Article 6 and 7 of Aarhus when approving the NREAP of Ireland.<sup>150</sup> At its fifth meeting in 2014, the MOP adopted some of the findings by the ACCC, which strengthened their importance.<sup>151</sup>

---

<sup>146</sup> Letter from the communicant of 20 May 2014 in case ACCC/C/2008/32 (*European Community*), available on the UNECE website at [http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/correspondence/frCommC32\\_20.05.2014.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/correspondence/frCommC32_20.05.2014.pdf) [accessed 8 August 2014].

<sup>147</sup> The *Irish renewables programme* report, para. 1.

<sup>148</sup> *Ibid.* at para. 2.

<sup>149</sup> Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140 p. 16-62 [hereafter the renewable energy directive].

<sup>150</sup> The *Irish renewables programme* report, para. 44.

<sup>151</sup> United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to

Issues related to the access to information will be further discussed in Chapter 8 below, while those related to participation in decision-making will be tackled in Chapter 9. The question on competences and the consequences of Ireland not being a party to the Convention at the time of the communication will be analysed in Chapter 6.

### **5.5 The *Scottish renewables programme* case**

The *Scottish renewables programme* case was initiated by an individual alleging non-compliance by both the EU and the UK. The allegations related to the renewable energy policy of the EU,<sup>152</sup> the UK's implementation of the policy and two particular projects, a wind farm and an access route to the wind farm.<sup>153</sup> The communicant had three main allegations touching upon all pillars of the Convention. They can be summarised as follows: (1) The authorities of the EU and UK had failed to provide information on the renewable energy programme and some individual energy projects as required by Articles 4 and 5 of the Convention. (2) The same authorities had not allowed for effective public participation in accordance with Articles 6 and 7, the main problem, they meant was the lack of transparency throughout the process. Finally, (3) the authorities did not provide adequate review procedures and were therefore in non-compliance with Article 9(1)-(2) and in addition the costs for such procedures were also prohibitively high.<sup>154</sup> The communication also contained concerns on the process that was used when the EU's renewable energy policy was adopted.<sup>155</sup>

UK's renewable energy program was based on the Renewable Energy Directive, which, as mentioned above, requires EU's Member States to provide NREAPs, the drafting of which was also questioned in the case.<sup>156</sup> In addition, most of the EU legislation described in Chapter 4 is relevant in the case, including the Aarhus Regulation, the Environmental

---

Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Fifth Session, Maastricht, 30 June and 1 July 2014, ECE/MP.PP/2014/L.16, *Draft Decision V/9g Concerning Compliance by the European Union With its Obligations Under the Convention*.

<sup>152</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions "Renewable Energy: a major player in the European energy market" (COM(2012) 271).

<sup>153</sup> United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Forty-fourth Meeting, Geneva, 25–28 March 2014, ECE/MP.PP/C.1/2014/5, *Findings and recommendations with regard to communication ACCC/C/2012/68 concerning compliance by the European Union and the United Kingdom of Great Britain and Northern Ireland [hereafter the *Scottish renewables programme* report]*, at para. 1.

<sup>154</sup> *Ibid.* at para. 2.

<sup>155</sup> *Ibid.* at para. 3.

<sup>156</sup> *Ibid.* at para. 57.

Information Directive, the EIA Directive and the SEA Directive.<sup>157</sup> In the UK, the main legislation governing these issues was, at the time of the case, the Electricity Act 1989. Accordingly, the construction of power stations, like the one in this case, is subject to an EIA procedure. Consequently, EIA procedures with possibilities for public participation had taken place both in relation to the wind farm and the access route projects, though the communicant meant that these were inadequate and based on figures that were not sufficiently established.<sup>158</sup> The issues related to public participation will be further explored in Chapter 9. How requests for information were handled by the EU Commission will be discussed in Chapter 8. Chapter 7 of this thesis will handle the issues of remedies, while Chapter 6 covers competences.

---

<sup>157</sup> *Ibid.* at paras. 17-19.

<sup>158</sup> *Ibid.* at paras. 31-33.

## **6. ACCCs role – competences and responsibilities of the EU**

### **6.1 The *Kazokiskes* case**

#### **6.1.1 ACCC's criteria for attributing responsibility of the EU**

The ACCC pointed out that the EU had a special structure, which separated it from the other parties to the Convention as the function of EU legislation was dependent on the implementation by the Member States and because of the distribution of powers, which was a unique phenomenon. Hence, the ACCC came to the conclusion that the assessment of the case needed a slightly different approach to reflect these differences.<sup>159</sup> In relation to public participation in decision-making, a certain test of significance is normally used by the ACCC.<sup>160</sup> The test that was instead applied by the ACCC in order to assess if the EU was complying with the Convention, was the question whether the EIA and IPPC Directives allowed the Member States to make decisions on landfills without a proper notification and opportunities for public participation.<sup>161</sup> EU's responsibility could then be said to be based on whether or not it allows for non-compliance by its Member States.

#### **6.1.2 The obligations of the EU**

The ACCC also stressed that the EU Member States had a responsibility to implement the EU legislation transposing the Convention and it seems like the ACCC meant that the EU's responsibility ended when it had legislated in accordance with the Convention.<sup>162</sup> According to Àli the ACCC decided not to adopt a “classic search for responsibility”, but instead focused on a more pragmatic approach by assigning responsibility to the party that was best suited to achieve compliance in a concrete manner.<sup>163</sup> In this particular case, that party was Lithuania.<sup>164</sup>

Moreover, the ACCC stressed that international agreements are indeed superior in rank to the secondary legislation of the EU and that they can sometimes be applied even though they have not been implemented. This does, however, not allow the EU to abstain from transposing the Convention “through a clear, transparent and consistent framework” of EU law. This apparently applies even though the Convention in certain cases could have

---

<sup>159</sup> The *EU Kazokiskes* report, para. 44.

<sup>160</sup> See further Chapter 8.2.2 of this thesis.

<sup>161</sup> The *EU Kazokiskes* report, para. 45.

<sup>162</sup> *Ibid.*

<sup>163</sup> See further Àli 2012, p. 292.

<sup>164</sup> The *EU Kazokiskes* report, para. 89.

direct effect and though secondary law shall be interpreted in line with the Aarhus Convention.<sup>165</sup> Thus, the ACCC conclusion strengthened the view that the EU cannot rely on the Member States to transpose the Convention correctly. This also has to be done in EU legislation.

### **6.1.3 The responsibility to enforce non-compliance by Member State**

It is noteworthy that the Commission had, prior to the second communication regarding the compliance of the EU was sent, stated that the Lithuanian legislation was in line with the EU law implementing the Aarhus.<sup>166</sup> The applicant therefore in the submitted Communication, argued that the EU had confirmed its own failure to implement the Convention, as the EU did not enforce the breach by Lithuania.<sup>167</sup> Nevertheless, the ACCC came to the conclusion that the EU had not failed to comply with the Aarhus Convention but did not enter into a discussion of this particular issue.<sup>168</sup>

What ACCC did in the *Lithuanian Kazokiskes* case was that it attributed the responsibility to Lithuania for the failure to provide for a proper participation in the decision-making procedure.<sup>169</sup> Yet, the ACCC did not discuss the fact that the Commission considered Lithuanian legislation to fulfil the obligations of the directives in question. Neither did the ACCC discuss the possibility of the Commission to initiate an infringement procedure against Lithuania for non-compliance or mention a potential obligation to enforce compliance with international agreements. Àli interprets this as an intention to focus on how to best encourage conduct that will eventually achieve the greatest compliance with the Convention and to accommodate the EU's internal division of competences.<sup>170</sup>

### **6.1.4 Competences and access to justice**

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

---

<sup>165</sup> *Ibid.* at para. 58.

<sup>166</sup> See further Àli 2012, p. 292.

<sup>167</sup> The *EU Kazokiskes* Communication, p. 6.

<sup>168</sup> The *EU Kazokiskes* report, para. 61.

<sup>169</sup> *Ibid.* at para. 89.

<sup>170</sup> See further Àli, p. 293.



question for the EU and the Member States to determine among themselves if the implementation should be done in national law or in EU legislation.<sup>171</sup>

## 6.2 The *Vlora* case

In the *Vlora* case, the ACCC did not cover the question of competence in any great detail but began by stating that the provisions of the Aarhus Convention were applicable on EIB actions.<sup>172</sup> It is clear that decisions by all EU institutions acting as public authorities have to comply with the Convention and can be considered by the ACCC if there is a communication alleging non-compliance. Moreover, the ACCC stated that the decision to permit the activity was taken by Albanian authorities and recalled that it had already found that Albania was not in compliance with the Convention when it permitted the construction of the power plant.

In Paragraph 36 of the report, the ACCC stated that the EIB did not have the legal authority to conduct an EIA procedure in Albania and that the EIB had to rely on the state itself to ensure the proper public participation during the decision-making procedure. Undertaking an EIA procedure is clearly within the competence of the Member States and responsibility for completing these procedures could consequently not be attributed to the EU. The ACCC moreover stated that the decision to provide a loan or other financial support by a financial institution was not comparable with a decision to permit an activity.<sup>173</sup> Since the decision to provide financial means is not an activity that should in general be regarded as giving a permit it is difficult to see what actions could potentially be considered non-compliance by the EU for actions in third states.

## 6.3 The *ClientEarth* case

The *ClientEarth* case, in contrast to the other cases presented in this Chapter, did not contain any allegations directed at a state but only at the EU as an organisation. This means that the ACCC did not really discuss the issue of competences. However, the ACCC did mention the declaration that was made by the EU upon approval of the Aarhus Convention stating that the Member States of the EU were responsible for the full implementation of Article 9(3) due to the fact that the EU had not yet legislated in this area.<sup>174</sup>

---

<sup>171</sup> The *EU Kazokiskes* report, para. 57.

<sup>172</sup> The *Vlora* report, para. 26.

<sup>173</sup> *Ibid.* at para. 36.

<sup>174</sup> The *ClientEarth* report, para. 58.

The ACCC furthermore discussed in some greater length whether the preliminary reference procedure and procedures for access to justice in the Member States could meet the requirements for access to justice in the EU or not. The ACCC, again, based this on the fact that the EU, as a regional integration organisation, was of a special nature. The actions of EU and its Member States therefore and to some extent have to be considered together.<sup>175</sup> This will be further developed in Chapter 7.1.4.

#### **6.4 The *Irish renewables programme* case**

In the case, the EU argued that its liability had to be based on its competence as spelled out in the declaration that was made upon approval of the Convention. The EU then maintained that the applicant had not proved that the acts in question fell under EU competence.<sup>176</sup> Interestingly, even though the ACCC had not previously required the EU to monitor compliance by its Member States, the EU argued that it had done its utmost to pursue the alleged breaches by Ireland in relation to EU law implementing the Convention. This has been done through infringement proceedings in accordance with Articles 258 and 260 TFEU. However, Ireland was found not to be in non-compliance.<sup>177</sup> This suggests that the obligation of the EU could go beyond legislating in accordance with the Convention and could also include the enforcement of the legislation, where possible. This approach was also adopted by the ACCC when it stated that the question of on which party the obligations fell needed to be divided into two parts. The ACCC stressed that the following questions needed to be addressed:

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

The ACCC specifically pointed out that this test was to be made for EU responsibility regarding all Member States, including Ireland. Thus, it does not seem to matter whether or not the Member State in question is also a party to the Aarhus Convention.<sup>178</sup> The ACCC continued by assessing how the EU had monitored implementation by Ireland and observed that the EU had not provided evidence on how it has evaluated the acts of Ireland in the light

---

<sup>175</sup> The *ClientEarth* report, para. 65.

<sup>176</sup> The *Irish renewables programme* report, paras. 52-53.

<sup>177</sup> *Ibid.* at paras. 53-54.

<sup>178</sup> *Ibid.* at para. 76.

of Article 7 of the Convention. Instead, the EU simply submitted that Ireland had complied with the requirements of Article 7.<sup>179</sup> The ACCC found that the EU had failed to comply with Article 7 of the Convention on both points, which was also endorsed by the MOP in its decision.<sup>180</sup> The substantial issues relating to access to environmental information and participation in decision-making will however be discussed in Chapters 8 and 9 below.

### **6.5 The *Scottish renewables programme* case**

In the *Scottish renewables programme* case, the ACCC did not discuss the competences and responsibilities of the EU specifically as they had done in the previous cases. The communicant in the case had several allegations regarding participation in decision-making covering the actions of both the EU and the UK. Most of the allegations were fully refuted by both parties.<sup>181</sup> In relation to some parts of the allegations, the EU maintained that the communication concerned compliance by the UK rather than compliance by the EU. The issues, EU maintained, had to do with the implementation of the Convention by the UK.

The EU also recalled the special structure of the EU and argued that due to this, it had no responsibility for potential breaches. In support of this view, the EU referred to the *EU Kazokiskes* case.<sup>182</sup> The EU moreover argued that the UK and the Scottish authorities had conducted adequate consultations in relation to the requirements of the relevant EU law.<sup>183</sup> It is hard to draw conclusions regarding why the ACCC decided not to discuss the division of competences in this case. The ACCC neither mentioned the issue of Member State compliance with EU law implementing the Convention, nor did it discuss the responsibility of the EU to monitor Member State compliance with EU law.

### **6.6 Concluding observations on competences and responsibilities**

First, it is important to note that the ACCC recognises that the EU is a *sui generis* legal system and that it must take this into consideration when assessing allegations of non-compliance. One might conclude from the *EU Kazokiskes* case that the EU is responsible for making sure that its legislation does not allow the Member States to make environmental decisions in such a way that the Aarhus Convention is not respected. In the case, the ACCC pointed out that EU legislation must not allow for Member States' decision-making

---

<sup>179</sup> *Ibid.* at para. 81.

<sup>180</sup> MOP Decision in the *Irish renewables programme* case, para. 1.

<sup>181</sup> The *Scottish renewables programme* report, para. 59.

<sup>182</sup> *Ibid.* at para. 49.

<sup>183</sup> *Ibid.* at para. 60.

procedures neglecting proper notification and opportunities for participation. The EU cannot simply depend on the Member States to individually fulfil the obligations of the Aarhus Convention. However, it is also important to note that the Member States have an obligation to implement the EU legislation transposing the Convention. Furthermore, the ACCC seems to have adopted a pragmatic approach in assigning responsibilities, focusing on which party can best ensure compliance with the Convention.

A similar approach was taken in the *Irish renewables programme case*, where it is clearly established that the EU can be held responsible for a violation by its Member States that are not parties to the Convention. In this case, however, the ACCC extended the assessment to also include an obligation to monitor implementation of EU legislation derived from the Convention. It is not certain what caused this different approach. It could be a development of how the ACCC sees the responsibility of the EU or perhaps a result of a greater responsibility of the EU when the Member State has not ratified the Convention. The latter suggestion is in line with the ACCC having a pragmatic approach to liability finding the party most likely to best ensure compliance as proposed by Àli.<sup>184</sup>

The responsibility of the EU for actions in third states seems to be limited. Pure agreements on loans or financial support are not generally regarded as decisions requiring a proper procedure for public participation and it is hard to imagine a hypothetical situation other than financing agreements that could be covered by the Convention. A non EU Member State is naturally not bound by EU legislation. Consequently, the EU cannot violate the Convention through non-implementation of the Convention in relation to an action in a third state.

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

---

<sup>184</sup> See further Àli, p. 292.

be that it enables the EU to find a good solution working for the EU as the special system that it is.

Àli raises several questions connected to the special nature of the EU system and the effect of the accession to the Convention through the adoption of a mixed agreement in the EU. For example, there has not yet been a case brought by an EU Member State against another Member State or the EU. It is not sure whether this would be allowed within the EU with reference to the judgment by the CJEU in the *Mox Plant* case.<sup>185</sup> Moreover, Àli maintains that external compliance mechanisms such as the ACCC are increasingly intruding into the internal matters of the EU with competences being a good example. This could, according to Àli, harden the position taken by the EU in relation to external compliance mechanisms.<sup>186</sup>

---

<sup>185</sup> Case C-459/03, [2006] ECR I-4635 [*Mox Plant*].

<sup>186</sup> Àli, p. 303.

## 7. Access to justice

### 7.1 The EU level

Regarding access to justice on the EU level, including the EU Courts, the ACCC has only discussed the application of Article 9(3) of the Aarhus Convention in some depth. In the *Irish renewables programme* case, the communicant alleged that the EU did not provide access to justice in relation to information requests in accordance with Article 9(1). However, the ACCC found that this allegation was not substantiated and that a possible deficiency was rather to be attributed to the Member State, Ireland, than the EU.<sup>187</sup> This does not mean that the EU necessarily fulfils the requirements of Article 9(1)-(2), but as of now, the ACCC has not indicated otherwise. Thus, this Chapter will focus on whether or not EU legislation on access to the EU Courts fills the requirements of Article 9(3) Aarhus.

#### 7.1.1 Article 9(3), a fourth pillar?

The ACCC summarised Article 9(3) in a very comprehensive way in the *ClientEarth* case and distinguished it from Article 9(1)-(2) of Aarhus. The latter two paragraphs are used to enforce acts related to the first two pillars of the Convention, regarding information requests and public participation in decision-making and in some cases other acts and omissions contrary to relevant provisions of the Convention. Article 9(3), however, is not tied to the other pillars of Aarhus. The ACCC describes the application and purpose of the provision as follows:

Article 9, paragraph 3, of the Convention refers to review procedures relating to acts or omissions of public authorities which contravene national law relating to the environment. This provision is intended to provide members of the public access to remedies against such acts and omissions, and with the means to have existing environmental laws enforced and made effective. In this context, when applied to the EU, the reference to “national law” should be interpreted as referring to the domestic law of the EU.<sup>188</sup>

As briefly described above, in Chapter 2.3.2.3, this separates Article 9(3) from the first two paragraphs to such an extent that some consider it to be an independent part of the Convention, and possibly even its own pillar.

---

<sup>187</sup> The *Irish renewables programme* report, paras. 92-95.

<sup>188</sup> The *ClientEarth* report, para. 76.

### 7.1.2 The scope of decisions, acts and omissions

As described in Chapter 2.3.2.3 above, Article 9 of the Convention covers access to justice in different situations in relation to decisions made by public authorities. Which provisions on access to a review procedure are applicable depends on which type of decision the individual or NGO wants to challenge. In the *ClientEarth* case, the ACCC recalled this and stressed that it was not possible to assess the different cases referred to by the communicant in a general manner. In order to conclude whether or not the EU was in violation of the Convention, the ACCC stated that it needed to scrutinise the type of decision-making in a specific case that had been dismissed due to lack of standing before the EU Courts.<sup>189</sup> Although the ACCC was of the opinion that it could not in general comment on whether the EU in its decision-making had to provide access to justice in accordance with Article 9 of Aarhus, it did not give specific examples of decisions that could be covered by the provision.<sup>190</sup> The ACCC concluded that in order to examine the standing criteria of the EU, which was seen as the most important allegation, it was only necessary to establish that Article 9 could in some cases be applied.

In the *ClientEarth* case, the ACCC furthermore stated that it was not ruled out that decisions, acts and omissions by EU institutions could be seen as decision-making under Articles 6-8 under the Convention and therefore challengeable under Article 9. The ACCC specified that even acts labelled as “regulations” could perhaps constitute such decisions, but it did not focus on this issue.<sup>191</sup> The main issue was instead whether or not Article 9 could at all be applicable to any EU acts, and in establishing this, the ACCC chose to focus only on the application of Article 9(3).

Two criteria were established by the ACCC in order to determine whether or not an act or omission by the EU institution could be covered by Article 9(3), so that access to justice had to be provided. The criteria were: could the act or omission be:

- (a) attributed to the institution in its capacity as a public authority, and
- (b) linked to provisions of EU law relating to the environment.<sup>192</sup>

These two criteria will be discussed in the subchapters below.

---

<sup>189</sup> *Ibid.* at para. 60.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Ibid.* at para. 72.

<sup>192</sup> *Ibid.*

### 7.1.2.1 Acting in the capacity of a public authority

The first criterion of course includes that the institution acts as a public authority and not in a legislative capacity. The ACCC came to the conclusion that some acts and omissions by EU institutions could indeed be considered to be of such a nature that they were not made in a legislative capacity and thus fulfilled the criteria above.<sup>193</sup> The example used was the *Greenpeace* case where the EU institution, the Commission, had taken the decision to provide financial assistance to two power stations through the European Regional Development Fund without requiring that an EIA be conducted.<sup>194</sup>

The ACCC furthermore recalled that the EU institutions are not covered by Article 9 of the Convention when they act in a legislative capacity according to Article 2(2) Aarhus.<sup>195</sup> As stated above, Article 9 of the Convention does not apply to decisions made in a legislative capacity. It is clear from the ACCC reports that it is not the domestic label of an act that determines if it is to be regarded as an act made in a legislative capacity, or not. Instead the ACCC in a report on compliance by Belgium stated that this has to be assessed in every case based on “the legal functions and effects of a decision, *i.e.* on whether it amounts to a permit to actually carry out the activity”.<sup>196</sup>

### 7.1.2.2 Provisions of EU law relating to the environment

Regarding the second criterion it is obvious that the act challenged has to relate to the environment for the Aarhus Convention to be applicable. It was stated already in a case regarding non-compliance by Denmark, the *Birds Directive* case, that “national law” in the meaning of Article 9(3), would in relation to the EU refer to the domestic law of the EU.<sup>197</sup> In the *ClientEarth* case the ACCC did not elaborate on the question of whether the legislation applicable to the cases from the EU Courts was of such a nature that it would fall under Article 9(3). When, in the *ClientEarth* case, the ACCC had concluded that Article 9 could in certain cases be applied to decisions by EU institutions it simply went on to examine the standing criteria before the EU Courts to see if the EU was in compliance with the Convention.<sup>198</sup>

---

<sup>193</sup> The *ClientEarth* report, para. 74.

<sup>194</sup> *Ibid.* at para. 73.

<sup>195</sup> *Ibid.* at para. 61.

<sup>196</sup> ACCC/C/2005/11 (*Belgium*), para. 29.

<sup>197</sup> United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation and Decision-making and Access to Justice in environmental Matters, Third Meeting, Riga, 11–13 June 2008, ECE/MP.PP/2008/5/Add.4, *Report by the Compliance Committee, Compliance by Denmark with its Obligations Under the Convention*, ACCC/C/2006/18 (*Denmark*), (Hereafter the *Birds Directive* report), at para. 27 and the *ClientEarth* report, para. 76.

<sup>198</sup> The *ClientEarth* case, paras. 74-75.



### 7.1.3 The individual concern criterion

The most central allegation of the *ClientEarth* case was that the EU through applying the individual concern criterion for granting legal standing to NGOs and individuals to the EU courts did not comply with the Aarhus rules on access to justice. Article 9(3) allows the parties to the Convention to limit access to justice as the provision stipulates that members of the public shall be ensured access to administrative or judicial procedures “where they meet the criteria, if any, laid down in its national law”. This subchapter will first focus on how the ACCC has argued the criteria used to limit access to justice in earlier cases. This will be followed by a discussion on the individual concern criteria of the so-called Plaumann test that is applied in EU law. Lastly, the effects of the entry into force of the Lisbon Treaty will be briefly discussed.

#### 7.1.3.1 General comments by the ACCC

It is clear from previous ACCC reports that parties to the Convention are allowed some flexibility in providing access to justice in accordance with Article 9(3). In some of the cases the ACCC has discussed the wording of the provisions and that state should provide access to administrative or judicial procedures for members of the public fulfilling the criteria, if any, laid down in national law. The ACCC has repeated that it is not the Convention that sets these criteria, nor does it establish any criteria on what should be avoided. The parties to the Convention do not have the obligation to apply an *actio popularis* principle and are thus perfectly free to set the criteria within certain limits.<sup>199</sup>

The ACCC has also pointed out that general criteria of a legal interest or of demonstrating a substantial individual interest are acceptable, as long as they do not “lead to effectively barring all or almost all members of the public from challenging acts and omissions” relating to the environment.<sup>200</sup> Moreover, the access to a review procedure should be seen as the presumption and not the exception.<sup>201</sup> In assessing the compliance by a party to the Convention the ACCC in the *ClientEarth* case looked at the general picture, *i.e.* if the domestic law of the party generally prevented the public and environmental NGOs from having access to justice, or if there were in general some remedies to challenge acts and omissions. The ACCC also recalled that the provision should be read in conjunction with the preamble of Aarhus that stipulates that “effective judicial mechanisms should be accessible to

---

<sup>199</sup> See *Ibid.* at para. 77; the *Birds Directive* report, paras. 29-31; ACCC/C/2005/11 (*Belgium*), paras. 29-37.

<sup>200</sup> The *Birds Directive* report, para. 31.

<sup>201</sup> The *ClientEarth* report, para. 78.

the public, including organisations, so that its legitimate interests are protected and the law is enforced”.<sup>202</sup>

### 7.1.3.2 Comments on EU legislation and jurisprudence

In the *ClientEarth* case, the ACCC did not discuss the case where an individual or NGO wanted to challenge an act addressed to them. Instead, it was predominantly the second part of Article 263(4) TFEU (then Article 230(4) TEC), which was discussed, namely that

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act ... of **direct and individual concern** to them.<sup>203</sup>

The final part of the provision, establishing special conditions for regulatory acts not requiring implementation measures, had not yet been added, and therefore it had not been tried before a court, at the time of the communication.

The ACCC view was that the test developed in the *Plaumann* case had been established as a consistent jurisprudence on standing and access to justice before the EU Courts. The individual seeking a review before an EU Court had to show that the decisions that they wanted to challenge affected them in a way distinguishing them from all other persons. In several of the cases referred to by the communicant, standing before the courts was denied because the measures and acts would affect a too wide range of individuals, for example that many persons lived in the same area that was affected.<sup>204</sup> Even though personal damage and risks to the health of the general public has been demonstrated, that has not been considered as sufficient interests.<sup>205</sup> The result has been that the EU Courts have not accepted standing to any individual or NGO, which the ACCC commented on by stating:

The consequences of applying the *Plaumann* test to environmental and health issues is that in effect no member of the public is ever able to challenge a decision or a regulation in such case before the ECJ.<sup>206</sup>

The ACCC moreover stated that the provision in question could be interpreted in another way, leading to a less strict application of the individual concern criterion. While the jurisprudence of the EU Courts that was investigated by the ACCC was considered too strict to comply with Article 9(3) of the Convention, the ACCC maintained that the wording of the

---

<sup>202</sup> *Ibid.* at para. 79.

<sup>203</sup> Emphasis added.

<sup>204</sup> See e.g. the Greenpeace case, para. 54.

<sup>205</sup> The *ClientEarth* report, para. 85, and the *Danielsson* case, para. 71.

<sup>206</sup> The *ClientEarth* report, paras. 82-83.

provision did not necessarily require such a strict interpretation. Most notably, the ACCC argued that direct and individual concern did not have to be interpreted as a factual situation differentiating an individual from all other persons.<sup>207</sup> Most of the cases, however, concerned the legal situation before the Convention came into force in the EU. However, the ACCC did not find that the jurisprudence and the interpretation of the standing criteria looked any different after the Convention came into force.<sup>208</sup>

Consequently, the ACCC was of the view that the ECJ jurisprudence was too strict in allowing access to justice and that it did not meet the criteria set up in Article 9(3) Aarhus.<sup>209</sup> The ACCC, however, did not arrive at the conclusion that the EU was in non-compliance because the cases were all initiated before the entry into force of the Convention and the Aarhus Regulation. The ACCC however stipulated that

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 adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraphs 3 and 4, of the Convention.<sup>210</sup>

The ACCC also recommended that a new direction should be established for the jurisprudence of the EU Courts.<sup>211</sup> The ACCC, moreover, stated that the lack of access to the CJEU could perhaps be compensated by other internal review procedures, such as before national courts.<sup>212</sup> This issue will be further discussed in Chapter 7.1.4.

### **7.1.3.3 The effects of the Lisbon Treaty**

In the *ClientEarth* case, the ACCC noted that the jurisprudence that the ACCC had built its report on was based on the old text of Article 230(4) TEC, that differs from the new Article 263(4) TFEU. The new wording, in addition to the old criteria, allows for access to justice without the individual having to show individual concern if the challenged act is a regulatory one that requires no implementing measures. The ACCC noted that it was possible that this new wording would change the interpretation and the application of the provision and that it would open up the access to justice for individuals and NGOs.

---

<sup>207</sup> *Ibid.* at para, 86.

<sup>208</sup> *Ibid.* at para, 87.

<sup>209</sup> *Ibid.* at para, 87.

<sup>210</sup> *Ibid.* at para, 94.

<sup>211</sup> *Ibid.* at para, 97.

<sup>212</sup> *Ibid.* at para, 88.

The EU submitted a letter to the Secretary of the Aarhus Convention explaining the view by the Commission and the Parliament on how the change in current Article 263(4) would affect the legal standing of individuals and NGOs.<sup>213</sup> It was the view of the Commission that the change would greatly improve the situation and that the standing criteria would be widened. However, the Commission also pointed out that since there had not yet been any cases before the EU Courts after the entry into force of the Lisbon Treaty, it was too early to draw conclusions on the exact effects. In any case, the Commission chose to submit its opinion on the terms “regulatory act” and “implementing measures” in order to clarify the new provision. Regarding the former, the Commission defined a regulatory act as “acts of general application which are not legislative acts within the meaning of Article 289(3)”. Regarding the latter expression, implementing measures, the Commission stated that such measures could be taken by the EU or the Member States and that it was for this reason extremely unlikely that Directives could ever be challenged under this provision. This is because Directives are always to be subject to implementing measures by the EU Member States.

Nevertheless, the ACCC refrained from commenting on how the new wording of the provision on access to the EU Courts would comply with Article 9(3) of the Convention. It is clear from the report that the assessment of how the EU fulfils its obligations under Article 9(3) largely depends on how the provision is interpreted by the EU Courts. Since there was at the time no jurisprudence on access to justice in environmental matters based on this provision, the ACCC refrained from speculating on the matter.<sup>214</sup>

#### **7.1.4 The interaction between EU and Member State access to justice**

A question discussed by the ACCC was if a broader access to justice in the EU Member States, that is, before national courts, could compensate for a more limited access to review procedures on the EU level. In the *ClientEarth* case, the EU argued that members of the public in the EU could request national courts to ask for preliminary rulings according to Article 267 TFEU (then Article 234 TEC). It is not possible to challenge EU acts before the national courts, but implementation measures can be challenged. Many Member States also have standing rules that to some extent limit access to justice for NGOs.<sup>215</sup>

---

<sup>213</sup> Message outlining changes in the relations between the Aarhus Convention and the European Union (European Community) from the Party concerned on the 26 February 2010 available on the UNECE website at [http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/correspondence/FrEC\\_ReplyQuestion\\_26Feb2010.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/correspondence/FrEC_ReplyQuestion_26Feb2010.pdf) [accessed 4 August 2014].

<sup>214</sup> The *ClientEarth* report, para, 91.

<sup>215</sup> *Ibid.* at para, 89.

The conclusion made by the ACCC was that although the national courts fill an important function in ensuring a proper and consistent application and interpretation of EU law in the Member States, the EU Courts should not be able to use this possibility as a reason to deny access to a review procedure before the EU Courts. The ACCC was therefore of the opinion that the system of preliminary review could neither be seen as an appellate system in itself fulfilling the requirement of Article 9(3) Aarhus, nor as a system compensating for the lack of proper access to the EU Courts.<sup>216</sup>

### **7.1.5 Expenses of a prohibitive nature**

According to Article 9(4) Aarhus, the costs associated with the review procedures according to Article 9 must not be prohibitively expensive. In the *ClientEarth* case, the communicant argued that the costs of a procedure before the EU Courts were too uncertain and possibly prohibitive in the event of a lost case.<sup>217</sup>

The ACCC referred to the rules of procedure of the Court of Justice<sup>218</sup> and noted that the costs of a procedure before the EU Courts could not be prohibitively expensive as that could interfere with effective access to justice. Through the ACCC's examination of the procedural rules that are applicable to costs and legal aid available in procedures before the EU Courts, it did not find that the EU had violated the Convention. The ACCC also found that since the communicant had not substantiated its allegations through showing a case where the costs had been of a prohibitive nature, the rules were applied in such a manner that the EU was complying with its obligations.

As the communicant argued in the *Scottish renewables programme* case, the costs involved in pursuing a judicial review were too high and therefore in breach of Article 9(1)-(3) of Aarhus.<sup>219</sup> The ACCC however did not address these issues and referred to the communicant's failure to further elaborate on the matter.<sup>220</sup>

### **7.1.6 The EU's response to the *ClientEarth* report**

Although the ACCC did not arrive at the conclusion that the EU was in non-compliance with the Aarhus Convention in the *ClientEarth* case, as explained above, the ACCC strongly criticised the jurisprudence of the EU Courts. In a letter to the Secretary to the Aarhus Convention after the report of the ACCC had been finalised, the Commission expressed its

---

<sup>216</sup> *Ibid.* at para. 90.

<sup>217</sup> *Ibid.* at para. 2.

<sup>218</sup> See OJ C 177/21 of 2.7.2010, p. 20–21.

<sup>219</sup> The *Scottish renewables programme* report, para. 70.

<sup>220</sup> *Ibid.* at para. 74.

discontent with the findings of the ACCC.<sup>221</sup> Not only did the Commission again restate its opinion that the EU was complying with its obligations under the Convention, but it also considered that the ACCC had failed to comply with its procedural obligations in accordance with Decision I/7 and questioned whether the ACCC could find a party to be in non-compliance while at the same time recommending steps to be taken to ensure compliance. Consequently the EU disagreed with the findings and did not take measures to improve compliance.

The EU's disagreement with the ACCC findings also had procedural effects. In the letter to the Secretary of the Aarhus Convention, the Commission expressed its view that paragraph 36(b) of Decision I/7, as described in Chapter 2.5.4 of this thesis, could not be applied in the case. The implications of this was that the EU would not accept the ACCC taking the measures provided for in Paragraph 37(b)-(d) of the same Decision such as making recommendations and requiring that the party submit a strategy on how to achieve compliance with the Convention. Thus, the case still awaits both the adoption of findings on the second part of the communication and, perhaps, a decision to adopt measures by the MOP.

## **7.2 The Member State level**

Though there are several ACCC reports on access to justice on the national level, only a few cases on the application of EU legislation on access to justice in EU Member States are available. Therefore, the main issues that the ACCC has commented on are limited to the question of effective remedies in the EIA and IPPC Directives and whether the Member States are required to apply Article 9(3) Aarhus when an individual intends to challenge EU legislation before national courts. These two issues will be discussed in the subchapters below.

### **7.2.1 Effective remedies in the EIA and the IPPC Directives**

The communicant in the *EU Kazokiskes* case first stated that access to justice after a failure to respect the duty to provide for means of public participation is useless when provided first after a construction has already started.<sup>222</sup> The communicant furthermore argued that neither the EIA Directive nor the IPPC Directive provided effective remedies, including injunctive

---

<sup>221</sup> See *Letter from the Party concerned of 20 July 2011*, available on the UNECE website at <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/correspondence/frParty20.07.11.pdf> [accessed 4 August 2014].

<sup>222</sup> The *EU Kazokiskes* report, para. 31.

relief to the public concerned.<sup>223</sup> Both allegations were refuted by the EU with the motivation that the Directives were in line with the Convention, and fulfilling the requirements on the EU bearing in mind the scope of its competence.<sup>224</sup> While the ACCC did not agree that access to justice was meaningless after the start of a construction, they agreed that “access to justice must indeed be provided when it is effectively possible to challenge the decision permitting the activity in question”.<sup>225</sup>

The ACCC in the *EU Kazokiskes* case, to some extent, agreed with the communicant that neither the EIA Directive nor the IPPC Directive contained provisions requiring effective remedies for the public concerned. The ACCC considered the existence of remedies essential for effective access to justice but could still not find any non-compliance on the EU’s side. This, however, was due to the difficulty in deciding on whether the EU or its Member States were responsible for the implementation of this provision, as described in Chapter 6.1 above. The ACCC nevertheless decided to express its concern for the lack of an obligation to provide effective remedies and injunctive relief to the public concerned in the EIA Directive as well as the IPPC Directive, at least with regards to decisions on permits for landfills.<sup>226</sup> If there had been a clearer division of competences, establishing the EU as responsible for the full implementation of access to justice including remedies, the EU might perhaps have been found to be in non-compliance.

### **7.2.2 The application of Article 9(3) on EU law in EU Member States**

When the EU acceded to the Aarhus Convention, the Union submitted a declaration explaining that the Member States were responsible for the implementation of Article 9(3) on access to justice in relation to acts and omissions other than the ones covered by Articles 9(1)-(2). As was described above in Chapter 4.4.1.3, the EU was then of the opinion that the provisions concerned an area that was still within the Member States’ competence and acts by authorities other than the EU institutions. The EU seemed to be of the opinion that Article 9(3) would not have an impact on the application of EU law. It is also clear from the provision itself that it is to be applied to violations of national law relating to the environment.

However, in 2006 the ACCC received a communication from a Danish individual wanting to gain access to justice in Denmark under Article 9(3) for an alleged violation of EU

---

<sup>223</sup> *Ibid.* at para. 32.

<sup>224</sup> *Ibid.* at para. 33.

<sup>225</sup> *Ibid.* at para. 56.

<sup>226</sup> *Ibid.* at para. 59(b).

law. The communicant meant that Denmark was in breach of the Birds Directive<sup>227</sup> and that he had no recourse to a judicial procedure to challenge the failure to correctly implement the Directive in general, or to apply the provisions of the Directive to the specific act by a Danish public authority of culling rooks.<sup>228</sup> The question before the ACCC was whether or not EU legislation could be considered to be part of national legislation in the meaning of Article 9(3). The ACCC answered this in its report:

The Committee notes that, in different ways, European Community legislation does constitute a part of national law of the EU member states. It also notes that article 9, paragraph 3, applies to the European Community as a Party, and that the reference to “national law” therefore should be understood as the domestic law of the Party concerned. While the impact of European Community law in the national laws of the EU member states depends on the form and scope of the legislation in question, in some cases national courts and authorities are obliged to consider EC directives relating to the environment even when they have not been fully transposed by a member state. For these reasons, in the context of article 9, paragraph 3, applicable European Community law relating to the environment should also be considered to be part of the domestic, national law of a member state.<sup>229</sup>

From the above it can be concluded that although the EU was of the opinion that the implementation of Article 9(3) Aarhus was only an obligation for the Member States of the EU, the provision can still be applicable to decisions made by national public authorities while applying EU legislation. This case only covered the obligations of a Member State, and the findings were adopted before the *ClientEarth* report. As described in the chapter above it is also unclear if the EU as such should provide access to justice under Article 9(3).

### **7.3 Mitigating effects of Article 9(1)**

Though the ACCC did not examine the EU’s implementation of Article 9(1) independently in the *Vlora* case, it commented on how providing sufficient access to an effective review procedure could affect its findings in connection to small erroneous decisions in the implementation of, in this case, Article 4 on requests for environmental information. In the *Vlora* case, the ACCC did not find the EU to be in non-compliance with the Convention although it meant that there were deficiencies in the handling of the information requests. Accordingly, the ACCC wrote:

---

<sup>227</sup> European Community Directive 79/409/EEC on the Conservation of Wild Birds, now replaced by Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L 20, p. 7–25.

<sup>228</sup> The *Birds Directive* report, paras. 2-5.

<sup>229</sup> *Ibid.* at para. 27.



However, it does not consider that in every instance where a public authority of a Party to the Convention makes an erroneous decision when implementing the requirements of article 4, this should lead the Committee to adopt a finding of non-compliance by the Party, provided that there are adequate review procedures. The review procedures that each Party is required to establish in accordance with article 9, paragraph 1, are intended to correct any such failures in the processing of information requests at the domestic level, and as a general rule, it is only when the Party has failed to do so within a reasonable period of time that the Committee would consider reaching a finding of non-compliance in such a case.<sup>230</sup>

It seems to be the aim of the ACCC to encourage the parties to the Convention to enable enforcement of breaches within their own legal systems, instead of letting the ACCC adopt findings in every such case. Individuals and NGOs should use national courts and other procedures to enforce minor cases of non-compliance. Thus, when a party has a adequate system for reviewing the compliance with the Convention, the ACCC will consequently not adopt findings of non-compliance in relation to smaller breaches. Instead issues of compliance can be corrected by the state itself. Connected to this, is also the fact that the purpose of the ACCC is not to provide a redress procedure for individuals, or necessarily get involved in all minor breaches. The aim is instead to report on and improve the compliance of the parties to the Convention as described in Chapter 2.5.3 above. The opinion of the ACCC seems to be that individuals should instead have a redress procedure to use in their home country or, in some cases when the issue is connected to acts and omissions by the EU, through the EU courts.

#### **7.4 Concluding observations on access to justice**

The *ClientEarth case* is the only case where the ACCC has adopted significant findings with regard to access to justice at the EU level. The focus of the assessment of the ACCC was Article 9(3), and it is this paragraph that has earned recommendations by the ACCC. This does not necessarily mean that the EU is complying with Articles 9(1)-(2). The assessment by the ACCC in a clear way shows that Article 9(3) is different from the two first paragraphs, perhaps even to such an extent that it can be considered a forth pillar as it stands independent from the other pillars of the Convention in a way that Articles 9(1)-(2) do not.

Although the ACCC to some extent commented on the scope of EU decisions, acts and omissions that could be subject to a judicial or administrative review on the initiative of

---

<sup>230</sup> The *Vlora* report, para. 33.

an individual or NGO under Article 9(3), this was not the main issue of the report. Instead, the main concern regarding access to the EU Courts has been the individual concern criterion applied to distinguish those individuals having legal standing. As pointed out by Bogojevic, there is of course a reason to limit access to justice to some degree. She mentions regulating the extent of interventions in the regulatory processes as an example.<sup>231</sup> Nevertheless, the criterion has been criticised for too strictly limiting access to justice, especially in relation to NGOs, but also other individuals.<sup>232</sup> Though some discretion is given to limit legal standing, the ACCC in the *ClientEarth* case considered the EU criteria based on the Plaumann test to limit the access to justice too much.

As emphasised by Bogojevic, a prominent change after the entry into force of the Aarhus Convention in the EU is that measures have been taken to increase access to justice for NGOs before national courts.<sup>233</sup> Most notably, access to judicial and administrative procedures in the EU Member States have been strengthened in judgments from the EU Courts.<sup>234</sup> Also the Aarhus Regulation contains provisions ensuring access to justice for NGOs through the internal review procedure. However, the ACCC has come to the conclusion that the measures before national courts cannot fully compensate for the lack of access to justice on the EU level. Regarding the internal review procedure, the ACCC has still has not adopted any findings. There are also problems with relying on the preliminary reference procedure such as having to entrust the procedure to national courts as well as the potential cost of such a procedure. As established by the ACCC in previous cases, a relatively inexpensive procedure is necessary in order to achieve full effectiveness of the access to justice provisions.<sup>235</sup>

Though the ACCC did not find that the EU was in non-compliance with the requirements of Article 9, it directed strong criticism at the application of the strict standing criteria applied by the EU Courts, and recommended a change in direction of the interpretation of the EU legislation in this respect. Since the EU has not responded well to the criticism received, and is not willing to comply with any measures by the ACCC, it is unclear how the report will eventually affect EU legislation. The communicant has written to the

---

<sup>231</sup> Bogojevic 2013, p. 737.

<sup>232</sup> See e.g. Bogojevic 2013.

<sup>233</sup> See Bogojevic, p. 739.

<sup>234</sup> See e.g. Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening* [2009] ECR I-9967.

<sup>235</sup> See United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Twenty-ninth Meeting, Geneva, 21–24 September 2010, ECE/MP.PP/C.1/2010/6/Add.3, Findings and recommendations with regard to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland.

ACCC requesting that the ACCC adopts findings concerning the second part of the communication, and it is also possible that the MOP takes further action at its next meeting.

Regarding access to justice on the Member State level, the ACCC has not found any cases of non-compliance by the EU. Worth to note, however, is that the ACCC has recommended that the EU should clarify the obligation for Member States to provide effective remedies and injunctive relief through the EIA and IPPC Directives. This issue is however complicated by the fact that it is unclear which party has the responsibility for the implementation of this provision.

## 8. Access to environmental information

The ACCC has handled a few communications on information requests and dissemination of environmental information related to the EU. Central to all of them is that it is important that the concept of environmental information is well defined. Thus, this chapter will commence with an overview of how the ACCC has described environmental information, and how the criteria for establishing if information is of such a kind has been applied to EU acts. This will be followed by a Chapter on Article 4 information requests, the possible grounds for denying information requests and the requirements on the requests. Lastly, the duty of the EU to disseminate information in accordance with Article 5 Aarhus will be studied.

### 8.1 The definition of environmental information

A basic criterion for creating a duty to disclose information to members of the public is that the information sought can be defined as “environmental information”. This is obvious from Article 4 of the Aarhus Convention. Environmental information is defined in Article 2(3) of the Convention, which states that it must be of such a character that it provides information on:

(a) The state of elements of the environment... and the interaction among these elements

(b) **Factors**, such as substances, energy, noise and radiation, **and activities or measures**, including administrative measures, environmental agreements, policies, legislation, plans and programmes, **affecting or likely to affect the elements of the environment** within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

(c) The state of human health and safety, conditions of human life, cultural sites and built structures, **inasmuch as they are or may be affected by the state of the elements of the environment** or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above;<sup>236</sup>

It can, nevertheless, be difficult to see what type of information falls under this classification, but some information can be found in ACCC reports.

The communicant in the *Vlora* case, the NGO Civic Alliance, argued that it had along with individuals acting on its behalf, sent requests for many different kinds of environmental

---

<sup>236</sup> Emphasis added.

information to the EIB on three different occasions. Some information such as an EIA made by the party, the translation of a framework agreement and copies of the EIB statute was disclosed in full at the request. However, the EIB refused to disclose: (1) the loan agreement concluded by EIB and Albania, and (2) a copy of the framework agreement between EIB and Albania.<sup>237</sup>

The ACCC did not consider whether the documents that were disclosed without problems could be considered as environmental information, but focused on the two documents that were not disclosed. In its report, the ACCC particularly considered whether the two denied requests were actually environmental information and discussed these two types of information separately.<sup>238</sup> ACCC's assessment will be described below.

### **8.1.1 The finance contract**

Regarding the request for a copy of the finance contract (referred to as loan agreement by the communicant) the ACCC began by pointing out that the document did contain environmental information. Documents could be of such a nature that some parts of them contain information that relate to the environment while the main part are not environment related.<sup>239</sup> Although the EIB argued that the finance contract almost did not contain any environmental information and should therefore not have been regarded as environmental information, the ACCC did not agree with this narrow interpretation of the term. Whereas the Convention's definition of environmental information proposes that information contained in, for example administrative measures, environmental agreements, policies, legislation and plans and programmes, the list was non-exhaustive. Financing agreements are consequently not necessarily excluded. The ACCC suggests that financing agreements could be "measures ... that affect or are likely to affect the elements of the environment" if they deal with certain environmental issues. The conclusion was that the assessment needed to be done on a case-by-case basis.<sup>240</sup> Finally, the ACCC concluded by stating that the financing agreement could potentially be considered environmental information.

### **8.1.2 The framework agreement**

With regard to the request for a copy of the framework agreement, the ACCC did not go into a discussion on whether or not, and to what extent, the framework could be considered environmental information. However, the ACCC did not give any more information on how

---

<sup>237</sup> The *Vlora* report, paras. 18-21.

<sup>238</sup> *Ibid.* at para. 29.

<sup>239</sup> *Ibid.* at para. 30(a).

<sup>240</sup> *Ibid.* at para. 30(b).

this type of document would or should be examined. The ACCC recalled the conclusions reached above regarding the finance contract, but did not take a stand on whether the agreement in itself would be environmental information. The reasons, according to the ACCC, was that the documents that had been requested were eventually provided to the communicant so making such a decision was not considered necessary.<sup>241</sup> This is in line with the function of the ACCC, that is to review and improve the compliance with the Convention, without necessarily, in all cases, taking a stand on which party was right in its allegations or providing a redress for the communicant.

## **8.2 Article 4 information requests**

### **8.2.1 Grounds for refusing disclosure of environmental information**

As described in Chapter 2.3.2.1 above, several grounds can be used to justify refusals of requests for environmental information. In the *Vlora* case, some of these grounds were tried by the ACCC, providing valuable interpretations of their application. A legitimate ground for a refusal of providing information could of course be that the document that has been requested does not at all contain any environmental information as defined above in Chapter 8.1.<sup>242</sup>

First, the EIB refused to disclose the loan agreement concluded by the EIA and Albania on grounds of confidentiality. This is possible in accordance with Article 4(4)(a) of Aarhus where it is stated that a request for environmental information can be refused if the disclosure of the information would adversely affect the confidentiality of the proceedings of public authorities where such confidentiality is provided for under national law. However, the Albanian translation of the loan agreement was already in the public domain at this time and thus not confidential.<sup>243</sup> The ACCC pointed out that a document that is already in the public domain could not be considered confidential. Hence, using confidentiality as a reason for refusing disclosure of environmental information already in the public domain was not in accordance with the Convention.

Moreover, in the same case the EU relied on Article 4(4)(d), which is an exception from the duty to disclose environmental information. Accordingly, disclosure can be refused if it would adversely affect “the confidentiality of commercial and industrial information,

---

<sup>241</sup> *Ibid.* at para. 31(d).

<sup>242</sup> *Ibid.* at para. 31(c).

<sup>243</sup> *Ibid.* at para. 20.

where such confidentiality is protected by law in order to protect a legitimate economic interest”. The ACCC pointed out that this exception should not be interpreted too widely, but also stressed that a restrictive interpretation should be applied. The exception however does not mean that the duty to disclose information only exists “when no harm to the interests concerned is identified”. The ACCC suggested that the public interest in the disclosure of environmental information was to be weighed against the harm to the interest that could be harmed by the disclosure.<sup>244</sup>

Regarding the framework agreement in the same case, the EIB first replied that the document was already accessible in the public domain. This was however not the case, as only the decision for the approval of the agreement was possible to access. After obtaining an authorisation from the Albanian authorities the EIB provided the actual text of the framework agreement on 15 January 2008 three months after the initial request.<sup>245</sup> The ACCC very clearly stated that when a document is already in the public domain there is no legitimate ground for refusing to provide the environmental information exists.<sup>246</sup> Furthermore, the ACCC concluded that when a third party (in this case Albania) had not authorised the disclosure of the information could be considered a valid ground for refusal.<sup>247</sup>

### **8.2.2 The nature of requests**

In the *Vlora* case, the requests that were submitted to the EIB did not mention that the legal basis for the request was the Aarhus, but were broadly formulated requests for the documents specified above.<sup>248</sup> The ACCC asserted that a request for a whole document without specifying what environmental information in the document was requested could complicate the process of disclosure for the authority handling the information.<sup>249</sup> Furthermore, it seems as though there was an opening for not treating the request that were not formulated as request for environmental information specifically. In the *Vlora* case, the ACCC stated that EIB had not provided information on an access to a review procedure, which is required after requests for environmental information in accordance with Article 4(7), but did not attribute any responsibility for this act.<sup>250</sup> The ACCC did also in its report acknowledge that a request for environmental information might not always be recognised as such by the public authority receiving the request. This could happen if the information was not of an obvious

---

<sup>244</sup> *Ibid.* at para. 30(c).

<sup>245</sup> *Ibid.* at para. 21.

<sup>246</sup> *Ibid.* at para. 31(a).

<sup>247</sup> *Ibid.* at para. 31(b).

<sup>248</sup> *Ibid.* at para. 19.

<sup>249</sup> *Ibid.* at para. 31(c).

<sup>250</sup> *Ibid.* at para. 31(d).

environmental character and if it was not indicated in the request that environmental information was being requested.<sup>251</sup>

The ACCC took a pragmatic approach to the problem. Though a party requesting environmental information is not required to “explicitly refer to (a) the Convention itself, (b) the implementing national legislation or (c) even the fact that the request is for environmental information”, they are encouraged to do so in order to facilitate the immediate disclosure.<sup>252</sup> The ACCC did not find the EIB to be in a non-compliance with the Convention but stated that there had been deficiencies in how the requests for environmental information were handled, regardless of that the requests were of a general nature.<sup>253</sup>

The EU, although pleased to acknowledge that the ACCC had not found the Union to be in non-compliance with the Convention, sent a letter to the secretary of the Aarhus Convention in order to clarify some issues during the finalisation of the findings.<sup>254</sup> First, the EU wanted to make sure that it was clear that the Aarhus Convention’s provisions on access to information would only apply to environmental information and did not concern the financial and banking activities of the EIB. Second, the EU drew attention to the fact that the EIB was about to launch public consultations on its Public Disclosure Policy and its Transparency Policy. It was the view of the EU that the issues discussed in the ACCC’s findings could be further addressed at these opportunities.

### **8.3 Article 5 access to information**

As described above in Chapter 2.3.2.1, Article 5 differs from Article 4 in that it does not cover requests for specific environmental information, but the collection and dissemination of environmental information in a more progressive and general manner. The application of this provision has been discussed in two cases regarding compliance by the EU; the *Irish renewables programme* case and the *Scottish renewables programme* case.

In the *Irish renewables programme* case, the ACCC was careful in commenting on whether or not the information disseminated by the EU was sufficient. It noted that the information available to the party seems to be available also to the public, but also stated that

---

<sup>251</sup> *Ibid.* at para. 34.

<sup>252</sup> *Ibid.* at para. 35.

<sup>253</sup> *Ibid.* at para. 33.

<sup>254</sup> See Comments from the European Community on the draft findings of the Compliance Committee, letter from the European Community of the 24 February, available on the UNECE website at <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2007-21/DRFcomments/ECcomments.2009.02.24.pdf> [accessed 4 August 2014].



it was in no position to assess the correctness of technical information provided.<sup>255</sup> Though the ACCC considered that the EU might have failed to possess and disseminate all relevant environmental information, the allegation was insufficiently substantiated by the communicant.<sup>256</sup>

In the *Scottish renewables programme case*, the communicant argued that both the EU and the UK had failed to collect and disseminate information related to both the renewable energy policy and in relation to the decision-making for the wind farm.<sup>257</sup> The communicant meant that the parties had failed to make sure that the information was “transparent, up to date, accurate and comparable”.<sup>258</sup> Although the ACCC chose not to develop its standpoint with regards to the renewable energy policy<sup>259</sup> it made some clarifications regarding the application of Article 5. Once again they strengthened the view that the ACCC cannot assess whether technical information provided by the parties is correct, adequate or accurate.<sup>260</sup>

Thus, even though public authorities of the parties to the Convention are under an obligation to possess and update environmental information relevant to their functions in accordance with Article 5(1)(a), it can be difficult to establish when the requirements are fulfilled in an adequate manner. The ACCC has in general avoided commenting on whether or not the requirements of the provision are satisfied and there are no general criteria to be applied. In *Scottish renewables programme case*, the ACCC specified what kind of information had to be provided by the authorities in this particular case:

For public authorities engaged in decision-making regarding wind energy, this includes data arising from the application of different methods for calculating the CO2 reductions generated by wind energy projects, including data from actual measurements.<sup>261</sup>

Conclusively, it does seem like the ACCC in both cases was of the opinion that an individual assessment has to be made in every case and that technical issues will not be a part of the evaluation before the ACCC. It thus seems unlikely that the ACCC would find a party to be in non-compliance since the ACCC has been sparse in defining what information an authority has to possess.

---

<sup>255</sup> The *Irish renewables programme* report, para. 89.

<sup>256</sup> *Ibid.* at para. 90.

<sup>257</sup> The *Scottish renewables programme* report, para. 50.

<sup>258</sup> *Ibid.* at para. 51.

<sup>259</sup> *Ibid.* at para. 60.

<sup>260</sup> *Ibid.* at para. 86.

<sup>261</sup> *Ibid.* at para. 88.

## **8.4 Concluding observations on access to environmental information**

There have been no findings of non-compliance by the EU in relation to the dissemination of information or information requests. The ACCC has, nevertheless, had noteworthy comments on for example the definition of environmental information in cases that have specific importance for the EU. The ACCC did in the *Vlora case* discuss the status of a finance contract and a framework agreement governing the financing of the construction of a power plant. Since these kinds of measures are commonly taken by EU institutions, in particular EIB, the conclusion that documents in question can, in some cases, be subject to the provisions on access to information could be important for individuals seeking to access them.

Though the ACCC did not find the EU to be in non-compliance with the Convention in the *Vlora case*, it meant that the EIB could have handled the information requests in a more efficient way. The ACCC also pointed out that the individuals requesting information could have done this in a clearer manner, which could have led to a better handling of the request by EIB. As the ACCC did not find any problems with EU legislation in the case, the report has not had any effects in changes of EU law. However, the EU to some extent responded to the ACCC findings through stressing that the EIB was aiming to improve its policies relating to the disclosure of information. This is a good example of the ACCC working on a consultative basis, with the ACCC and the parties cooperating to improve the implementation of the Convention. This does not always have to be done through amendments of legislation. In this area, cooperation between the ACCC and the EU, and the EU and individuals seeking access to environmental information, seems to be of importance.

Regarding the collection and dissemination of information in line with Article 5, the ACCC has, in general, been careful in defining what is needed to comply with the requirements. It is clear that the correctness of information will not be assessed by the ACCC and the ACCC only provided an example of what information must be kept and disseminated by a public authority. It is, therefore, hard to examine whether or not the EU is fully complying with its obligations under Article 5.

## **9. Participation in decision-making**

In order to make this Chapter more comprehensive, it will be divided in accordance with the different types of remarks that the ACCC has made in relation to decision-making relevant to the EU. Chapter 9.1 concerns decisions on specific activities according to Article 6 of the Convention and the scope of decisions, the definition of early participation as well as the meaning of “due account”. Chapter 9.2 is focused on issues connected to plans, programmes and policies as governed by Article 7 of Aarhus. The Chapter focuses on issues related to the scope of the decisions and then concentrates on the EU implementation of Article 7, in relation to NREAPs, as that has been the main issue tackled by the ACCC. This is not a full account on EU’s implementation of the provisions on public participation as it is focused on the issues that have been discussed by the ACCC.

As described in Chapter 4.3 of this thesis, public participation in decision-making regarding the actions of Member States has been implemented in EU law through the EIA Directive and the IPPC Directive. Thus, the focus of this Chapter will be the ACCC’s view on whether these two Directives fulfil the requirements of the Convention.

### **9.1 Decisions on specific activities**

#### **9.1.1 The scope of decisions**

Not all decisions resulting in a permit for an activity are subject to the procedure set out in Article 6, paragraphs 2 to 10 of the Aarhus Convention. According to Article 6(1) of Aarhus, the provisions are to be applied to decisions on permits for the activities that are listed in Annex I to the Aarhus Convention. The fact that a decision, in order to be covered by the Article, has to be a permitting decision, has been emphasised in several ACCC reports.<sup>262</sup> The following subchapters will discuss two kinds of EU decisions that have been assessed by the ACCC and are especially important in relation to EU compliance with Aarhus. The purpose is to see how the ACCC has argued in these cases and if EU legislation fulfils the requirements of the Aarhus Convention.

##### **9.1.1.1 Financing decisions**

It is likely that permits for most projects requiring a decision-making process in line with Article 6 of the Aarhus Convention are taken on a national basis and not at the EU level.

---

<sup>262</sup> See *e.g.* the *EU Kazokiskes* case and the *Vlora* case.

However, the EU sometimes makes complementary decisions such as financing decisions, which was done in the *EU Kazokiskes case*. In this case, the communicant lifted the question on whether financing decisions were to be subject to the rules of Article 6 on public participation in decision-making. They pointed out that such a decision, as a rule, would not permit an activity. However, the Commission when making such a decision should be under an obligation to refuse the financing of a project if it had not been subject to a proper decision-making procedure.<sup>263</sup> The EU maintained that all requirements in this respect had been fully implemented.<sup>264</sup> In the *EU Kazokiskes case*, the issue of the financing decision of the EU was unfortunately not considered by the ACCC due to the fact that the decision was taken well before the EU ratified the Convention.<sup>265</sup> The ACCC, nonetheless, declared that they welcomed the initiative taken by the EU to apply the Convention's provisions also to financing decisions.<sup>266</sup>

When the ACCC stated that they would not further assess the issue of financing decision in the *EU Kazokiskes case*, they also referred to its work on the *Vlora case*. At that time no report had been completed in the case, but it was under preparation. Here, the issue was discussed more extensively as the communicant was of the opinion that in making a financing decision, an independent EIA should be conducted.<sup>267</sup> The ACCC began its assessment by stating that EIB, which was the EU institution that had taken the decision, did not have authority to conduct its own EIA, such a procedure fell within the territorial sovereignty of a state. The ACCC then considered that a financing decision could not, generally, be considered a permitting act in the meaning of Article 6 of the Convention. The decision to permit an activity usually lies with the state in which the activity is undertaken.<sup>268</sup>

Also, in the *Irish renewables programme case*, the ACCC discussed decisions of a financial character. The two acts that the communicant meant should be subject to procedures under Article 6 of the Convention were (1) a decision by the Commission to approve state aid for the REFIT 1 programme, and (2) a decision to approve financial assistance. The ACCC did, unfortunately, not motivate its standpoint, but meant that the two decisions did not amount to decisions under Article 6 of Aarhus.<sup>269</sup>

---

<sup>263</sup> The *EU Kazokiskes* report, para. 17.

<sup>264</sup> *Ibid.* at para. 19.

<sup>265</sup> *Ibid.* at, para. 39.

<sup>266</sup> *Ibid.* at para. 40.

<sup>267</sup> The *Vlora* report, para. 17.

<sup>268</sup> *Ibid.* at 36.

<sup>269</sup> The *Irish renewables programme* report, para. 74.

### 9.1.1.2 Multiple permits

The communicant in the *EU Kazokiskes case* also mentioned the application of Article 6 to multiple permits, which in the report were defined as “a number of decisions/permits covering different topics ‘which are relevant in respect of environmental pollution and danger to the public concerned’”. These decisions are special as it is not always clear when the permitting decision or decisions are made and by what authority.

The communicant alleged that Article 6 should be applicable to every such partial decision or permit.<sup>270</sup> Many decisions are subject to public participation procedures at two stages throughout the decision-making, both through EIA and IPPC permits. However, the communicant, supported by the EU, maintained that not all projects are subject to both procedures. The annexes determining what categories of projects are subject to the procedures differ from each other and from the Convention.<sup>271</sup> In contrast to the view held by the communicant, the EU nevertheless maintained that the two directives in combination cover the Annex to the Aarhus Convention comprehensively.<sup>272</sup>

The ACCC started by stressing that it only examined Article 6 with regard to multiple permits in the specific case of the plans to construct a landfill and that the assessment was not of a general nature. Of relevance is also that the ACCC means that “neither the EIA Directive nor the IPPC Directive seems to prevent multiple permit decisions in the Member States”.<sup>273</sup> Then the ACCC went on to describe how all requirements of the Article 6 that is paragraphs 2 to 10, does not have to be applied for every decision in a procedure including multiple permits. The motivation was that all requirements do not have significance or environmental relevance in all cases.<sup>274</sup> The main points seems to be that all significant environmental aspects must be subject to a public participation at some point whether it is possible to gather them in one such process, or if different aspects are assessed in different procedures. The ACCC concluded that an assessment of whether public participation has been applied to all relevant decisions in a permit procedure has to be made on a contextual basis.<sup>275</sup>

The ACCC moreover formulated a significance test to be applied on a national level to ensure that the public participation procedure fulfils the requirements of the Convention when there are multiple permit decisions. It reads as follows:

---

<sup>270</sup> The *EU Kazokiskes* report, para. 20.

<sup>271</sup> *Ibid.* at para. 22.

<sup>272</sup> *Ibid.* at para. 23.

<sup>273</sup> *Ibid.* at para. 45.

<sup>274</sup> *Ibid.* at para. 41.

<sup>275</sup> *Ibid.* at para. 42.

does the **permitting decision**, or **range of permitting decisions**, to which **all the elements of the public participation procedure** set out in article 6, paragraphs 2 to 10, apply embrace **all the basic parameters and main environmental implications** of the proposed activity in question?<sup>276</sup>

Thus, if some significant environment-related aspects of the permitting decisions have not been subject to a full-fledged public participation process the requirements of the Convention are not met.

## 9.1.2 Early participation in decision-making

### 9.1.2.1 The application of Article 6(4)

According to Article 6(4) of the Aarhus Convention, “each Party shall provide for early public participation, when all options are open and effective public participation can take place”. The question on whether public participation is provided for early enough in the procedure has been scrutinised in several cases before the ACCC, one of which will be discussed here.<sup>277</sup>

In the *EU Kazokiskes case*, the communicant stated that the criterion on early public participation had not been correctly implemented in the IPPC Directive, because it allows for a permit to be sought after an installation has already been constructed.<sup>278</sup> Similarly, the communicant claimed that neither the EIA Directive makes it clear that public participation must be carried out before the construction of a project commences.<sup>279</sup> The ACCC was of another view and pointed out that the EIA Directive indeed does require public participation to be carried out before the construction, if an activity involved construction.<sup>280</sup> Furthermore, the ACCC was of the opinion that a Directive allowing the start of a permit procedure first after a construction is finalised is not necessarily in violation of the Convention.<sup>281</sup> In the words of the ACCC:

A key issue is whether the public has had the opportunity to participate in the decision-making on those technological choices at one or other stage in the overall process, and before the “events on the ground” have effectively eliminated alternative options.<sup>282</sup>

---

<sup>276</sup> *Ibid.* at para. 43, emphasis added.

<sup>277</sup> See the *EU Kazokiskes case*.

<sup>278</sup> The *EU Kazokiskes* report, para. 24.

<sup>279</sup> *Ibid.* at para. 26.

<sup>280</sup> *Ibid.* at para. 53.

<sup>281</sup> *Ibid.* at para. 54.

<sup>282</sup> *Ibid.* at para. 55.

There must in other words be a realistic possibility to comment on the choices made in the decision-making process and for these comments to be accepted. This is most probably a less likely scenario after a construction has already been finalised.<sup>283</sup> The ACCC, in this case, found that the Directives were in line with Aarhus, though the ACCC did not comment on other scenarios than the construction of a landfill.<sup>284</sup>

### 9.1.2.2 The application of Article 6(2)

This issue of early participation on decision-making is clearly also connected to Article 6(2) of the Convention, which states that members of the public must be informed “early in an environmental decision-making procedure, and in an adequate, timely and effective manner”. It is safe to say that this duty to inform is necessary for the functioning of public participation. The communicant in the *EU Kazokiskes* pointed out that the opposite is also very true, the provision on early information is to some extent also rendered useless unless also public participation is enabled at this point.<sup>285</sup>

Neither the EIA Directive nor the IPPC Directive use the exact wording of the Aarhus Convention, but according to the ACCC provide for “early and effective notification”.<sup>286</sup> Contrary to the view of the communicant, the ACCC came to the conclusion that the Directives indeed do provide for early information in the decision-making process. This conclusion was derived from the provision of the IPPC Directive stating that Member States shall ensure early and effective public participation and the provision in the EIA Directive obliging Member States to ensure that the public is informed early in environmental decision-making procedures. Using the exact wording of the Convention is not required, though encouraged. The EU was throughout the procedure leading up to the findings by the ACCC critical to this statement and meant that a similar wording would not be necessary to ensure full compliance.<sup>287</sup> Hence, the ACCC established that the EIA and IPPC Directives fulfilled the requirements of Article 6(2) Aarhus.<sup>288</sup> Nonetheless, the ACCC, at the end of its report, noted with concern that the wordings of the provisions of the Directives do not follow that of the Convention more closely and recommended a change of the Directives to better fulfil the criteria.

---

<sup>283</sup> *Ibid.* at para. 55.

<sup>284</sup> *Ibid.* at para. 56.

<sup>285</sup> *Ibid.* at para. 25.

<sup>286</sup> *Ibid.* at para. 47-48.

<sup>287</sup> See e.g. *Comments of the Party concerned on the Committee's draft findings and recommendations of 7 April 2008*, available at the UNECE website at <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2006-17/ECresponseDraftFR2008.04.07.pdf> [Accessed 4 August 2014].

<sup>288</sup> The *EU Kazokiskes* report, para. 50.

### 9.1.3 Due account

An issue which was briefly mentioned in Chapter 2.3.2.2 of this thesis, is what is entailed in the requirement for public authorities to take due account to the outcome of public participation procedures. The requirement is included in both Article 6(8) of the Convention and in Article 8 of the EIA Directive in accordance with which the results of consultations with the public shall be duly taken into account throughout the development consent procedure.

The issue is briefly discussed in the *Scottish renewables programme* case, where the communicant argued that the authorities had not properly taken the comments by the public into account when taking decisions in the case.<sup>289</sup> The ACCC in its report pointed out that the obligation to take due account does not give the public a right to veto decisions of projects subject to a public participation procedure, neither does the final say about the details of a project lie with the local community their acceptance of the project is not a requirement.

The ACCC then provided another interpretation for the requirement, formulating that “the obligation to take due account of the outcome of the public participation should be interpreted as the obligation that the written reasoned decision includes a discussion of how the public participation was taken into account”.<sup>290</sup> This view has also been presented by the ACCC in previous reports.<sup>291</sup> In the *Scottish renewables programme* case, the ACCC considered the UK to be in compliance with Article 6 of the Convention, and did not even discuss compliance by the EU.<sup>292</sup> It is likely that the EIA Directive, with its similar wording on the obligation to take the outcome of public participation into due account, is seen as fully implementing the Convention in this regard.

### 9.1.4 The application of the EIA and IPPC Directives

As stated above, the EU has in for example the *EU Kazokiskas case* defended the view that the EIA Directive in conjunction with the IPPC Directive fully covers the duty of providing for public participation. When a permitting decision is of such a nature that both Directives are applicable, the decision will be subject to two procedures that the EU means together fulfil the requirements of the Convention. The ACCC in the same case seemed to maintain a similar

---

<sup>289</sup> The *Scottish renewables programme* report, para. 90.

<sup>290</sup> *Ibid.* at para. 93.

<sup>291</sup> See e.g. United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Twenty-sixth Meeting, Geneva, 15-18 December 2009, ECE/MP.PP/C.1/2009/8/Add.1, *Findings and Recommendations with Regard to Communication ACCC/C/2008/24 Concerning Compliance by Spain*, at para. 98.

<sup>292</sup> The *Scottish renewables programme* report, para. 94.



view when they stated that “the Community legal framework in principle properly assures achievement of the respective goals of the Convention”. Nevertheless, the ACCC underlined that its assessment applied specifically to multiple permit decisions for landfill projects, that are subject to both procedure, and so left open the question on whether the public participation procedure of only one of the Directives in question would on its own fulfil the criteria. The ACCC wrote: “the Committee does not rule out the possibility that with respect to activities in annex I other than landfills, the Party concerned fails to comply with the Convention.”<sup>293</sup>

## **9.2 Plans, programmes and policies**

### **9.2.1 The scope of acts constituting plans, programmes and policies**

Public participation in relation to plans, programmes and policies is regulated in Article 7 Aarhus and is divided into two parts. The first part is about plans and programmes, while the last sentence concerns policies. As described in Chapter 2.3.2.2 above, the requirements on the public participation procedure are different for these types of acts. As it is not entirely clear what types of actions fall within what category, it is useful to look at how the ACCC has argued in the few cases related to Article 7.

#### **9.2.1.1 National renewable energy action plans**

In the *Irish renewables programme* case, the ACCC found that Ireland’s NREAP constituted a plan or programme relating to the environment in the meaning of Article 7 of Aarhus. The ACCC underpinned this by explaining that the NREAP “sets the framework for activities by which Ireland aims to enhance the use of renewable energy in order to reduce greenhouse gas emissions, based on Directive 2009/28/EC”.<sup>294</sup> Consequently, the requirements of Articles 6(3), 6(4) and 6(8) of Aarhus have to be followed with regards to NREAPs in accordance with Article 7 of Aarhus.

In the *Scottish renewables programme* case, the communicant had two allegations concerning Article 7 of Aarhus. The first one concerned the application of Article 7 to the NREAPs that had previously been discussed in the *Irish renewables programme* case. The ACCC referred to its report in this case and recalled that NREAPs are plans or programmes in the meaning of Article 7 of Aarhus and thus subject to public participation.<sup>295</sup> The EU argued

---

<sup>293</sup> The *EU Kazokiskas* report, para. 45.

<sup>294</sup> The *Irish renewables programme report*, para. 75.

<sup>295</sup> The *Scottish renewables programme report*, para. 100.

that as a consequence of the report in this case, the EU was already endeavouring to improve the implementation of Article 7 of the Convention in relation to the preparation of NREAPs.<sup>296</sup> As in the *Irish renewables programme* case, the UK's NREAP had not been made subject to a public participation procedure and thus the ACCC found the UK to be in non-compliance with the Convention. The ACCC, however, did not specifically comment on the role played by the EU.<sup>297</sup> Instead in its conclusion, the ACCC again stated that findings regarding compliance by the EU were presented in the *Irish renewables programme* case.<sup>298</sup>

#### **9.2.1.2 The EU renewable energy strategy**

The second allegation in the *Scottish renewables programme* case concerned the renewable energy strategy of the European Commission as adopted through the communication "Renewable Energy: a major player in the European Energy market".<sup>299</sup> While the communicant meant that this strategy was to be considered a plan or programme in the meaning of Article 7 of Aarhus,<sup>300</sup> the EU was of the opinion that it was not. The EU argued its standpoint as follows:

... the Communication on "Renewable Energy: a major player in the European energy market" (COM(2012)271) is not a plan or programme within the purview of article 7 of the Convention, but a political document of a non-legally binding nature, announcing the view of one EU institution as expressed to the other institutions (in particular the Parliament and the Council as co-legislators). The EU, however, notes that because Commission "communications" have the nature of a preparatory step, they could fall under the last sentence of article 7 of the Convention.<sup>301</sup>

The last sentence of Article 7 of Aarhus concerns policies related to the environment and as previously discussed, but it does not contain as strict criteria for public participation as the first part of the Article, when plans and programmes are concerned. Unfortunately, the ACCC used its discretion to avoid answering this question and referred to an, at the time, pending case before the General Court regarding the annulment of the communication.<sup>302</sup>

---

<sup>296</sup> *Ibid.* at para. 61.

<sup>297</sup> *Ibid.* at para. 101.

<sup>298</sup> *Ibid.* at para. 107.

<sup>299</sup> "Renewable Energy: a major player in the European Energy market" (COM(2012) 271).

<sup>300</sup> The *Scottish renewables programme* report, para. 62.

<sup>301</sup> *Ibid.* at para. 63.

<sup>302</sup> *Ibid.* at para. 75.

### 9.2.1.3 Financial decisions

Even if this was not further motivated by the ACCC, it should be noted that the ACCC, in the *Irish renewables programme* case, established that neither the decision by the Commission to approve state aid for the REFIT 1 programme or a decision to approve financial assistance was to be regarded as a plan, programme or policy under Article 7 of the Convention.<sup>303</sup> This does however, not necessarily mean that no financial decisions could be considered under this Article, but at least in relation to the financing of the Irish REFIT 1 programme, the acts did not amount to decisions under Article 7.

## 9.2.2 EU implementation of Article 7 in relation to NREAPs

### 9.2.2.1 The EU legal framework

In the *Irish renewables programme* case, the ACCC concluded that the adoption of NREAPs in EU Member States should be subject to a procedure for public participation in line with Article 7 of the Aarhus Convention, and then used this as a basis for a review of whether or not the EU had correctly implemented this provision.<sup>304</sup>

The EU has, when the NREAPs are concerned, implemented Article 7 through the Renewable energy Directive. There is also, through the Directive a system for monitoring implementation of the provision in the Member States when they develop their NREAPs.<sup>305</sup> The ACCC, however, meant that the Directive was too general in its implementation of Article 7 of Aarhus, and that a proper implementation should include provisions requiring Member States to:

- 1) Have in place proper participatory procedures in accordance with the Convention
- 2) Report on how public participation is arranged as to make sure it is transparent, and fair
- 3) Report on how necessary information is provided to the public.

The ACCC also stated that proper implementation should refer to the requirements of Article 6(3), 6(4) and 6(8) of the Convention.<sup>306</sup>

The ACCC furthermore pointed out several deficits in the handling of the procedure in Ireland. This included having insufficient time frames<sup>307</sup> and only allowing targeted consultations with selected stakeholders, not open to the general public. The ACCC was of

---

<sup>303</sup> The *Irish renewables programme* report, para. 74.

<sup>304</sup> *Ibid.* at para. 77.

<sup>305</sup> *Ibid.* at para. 78.

<sup>306</sup> *Ibid.* at, para. 80.

<sup>307</sup> For further information on acceptable time frames see ACCC/C/2006/16 (*Lithuania*), at para. 69.

the opinion that these types of public participation procedures can complement but not substitute a proper procedure.<sup>308</sup> The responsibility for providing a proper public participation procedure lies with the relevant public authorities, and the ACCC recalled the fact that in this case, that would often be the public authorities of Ireland, and not the EU. Nevertheless, having a proper legal framework corresponding to the points above is the responsibility of the EU along with some level of monitoring implementation on the national level.<sup>309</sup>

### 9.2.2.2 Proper monitoring

An interesting question is what “proper monitoring” entails for the EU when concerning compliance by a Member State. This was briefly discussed in the *Irish renewables programme* case where the ACCC came to the conclusion that the EU should have evaluated the elements mentioned above in Chapter 9.2.2.1 and ascertained whether or not the procedure used by the public authorities in Ireland fulfilled the requirements of the Aarhus Convention. The ACCC also pointed out that it is not enough to rely on complaints from the public.<sup>310</sup> This suggests that the EU has to be more active in order to fulfil its monitoring requirements.

The ACCC found in the *Irish renewables programme* case, that the EU was in non-compliance with Article 3(1) Aarhus. Accordingly, a party to the Convention has to

... take the necessary legislative, regulatory or other measures, including measures to achieve compatibility between the provisions implementing the . . . public participation . . . provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention ...

As the EU had not implemented Article 7 Aarhus through a clear legislative framework or enforced and monitored the implementation, the EU could not be considered to be in compliance with this provision.

### 9.2.2.3 Measures taken by the EU after the ACCC recommendations

On the 17 October 2013 the EU sent an email to the secretariat of the Aarhus Convention with the purpose of informing on the progress made by the EU in implementing the recommendations by the ACCC.<sup>311</sup> The EU acknowledged that Article 7 Aarhus required

---

<sup>308</sup> The *Irish renewables programme report*, para. 83.

<sup>309</sup> *Ibid.* at para. 76.

<sup>310</sup> *Ibid.* at para. 84.

<sup>311</sup> Email informing about following up with the CC recommendations from the party concerned of the 17 October 2013, available on the UNECE website at

“clear instructions” for the EU Member States as recommended by the ACCC. The action taken by the Commission in order to improve Compliance with the Convention was to send letters to the EU Member States informing them of the recommendations by the ACCC and reminding them to follow the requirements of the Aarhus Convention in the event that they would be required to submit an amended NREAP.<sup>312</sup> There has, as of now, been no change of the regulatory framework governing public participation during the development of NREAPs.

At its fifth meeting, the MOP to the Convention endorsed the findings of the ACCC that Article 7 had not been properly implemented in relation to the adoption of NREAPs. Although welcoming the EU’s intention to improve compliance with Article 7, the MOP was concerned that the EU had only taken the measure of sending letters to the Member States of the EU and therefore suggested that the EU should continue its work to sufficiently implement the provision.<sup>313</sup>

### **9.3 Concluding observations on participation in decision-making**

The process of issuing a permit for an activity can be complex and consist of many decisions. Although it is hard to give a general overview on the ACCC’s approach to how public participation is to be organised in these procedures, two main points can be concluded from the *EU Kazokiskes case*: (1) Only the decisions that can be seen as “permitting” the activity in question have to apply the rules in Article 6, and (2) all decisions that permit activities with significant environmental implications have to be made subject to public participation. The ACCC thus concluded that financing decisions could not in general be regarded as decisions requiring the application of Article 6 procedures. When applied in relation to the EU, this approach seems logical, as the EU Member States, which are all parties to Aarhus, are all obliged to subject their permitting decisions to the procedure of Article 6.

As has been maintained by Ebbesson among others, the EIA and IPPC Directives are, with regards to participation in decision-making, closely corresponding to the Aarhus Convention.<sup>314</sup> Though the ACCC has not found the EU to be in non-compliance in its

---

[http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20Party%20concerned/frEUC54\\_1Aug2013\\_forMOP5.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20Party%20concerned/frEUC54_1Aug2013_forMOP5.pdf) [accessed 4 August 2014].

<sup>312</sup> The letter sent to the permanent representations of the EU Member States can be found on the UNECE website at [http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20Party%20concerned/Annex\\_Letters\\_to\\_EU\\_member\\_states.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20Party%20concerned/Annex_Letters_to_EU_member_states.pdf) [accessed 4 August 2014].

<sup>313</sup> See further Draft decision V/9g concerning compliance by the European Union with its obligations under the Convention.

<sup>314</sup> See further Ebbesson, 2011, pp. 258-259.

implementation through these directives, the ACCC in the *EU Kazokiskes* case noted that the Directives could benefit from a clearer obligation to notify members of the public earlier on in the decision-making process. The ACCC has furthermore only tried cases where both the EIA and the IPPC Directives were applicable. It is possible that the application of only one of the EU Directives would not fulfil the requirements of the Convention.

The most important remark by the ACCC in relation to participation in decision-making in the EU concerned the NREAPs and how they were regulated in the Renewable Energy Directive. NREAPs are, according to the ACCC, to be considered as plans or programmes in the meaning of Article 7 of Aarhus. Moreover, the ACCC meant that the requirements of the Renewable Energy Directive did not fulfil those of the Aarhus Convention and suggested several means of improvement. Unfortunately, these suggestions have not been adopted by the EU, and the ACCC, as well as the MOP, are still concerned about the insufficient implementation of Article 7 in relation to NREAPs.

## 10. Conclusion

### 10.1 Have ACCC recommendations improved EU compliance with Aarhus?

The overarching research question of this thesis is “how has the ACCC affected EU law?” There is no question that the EU, since it became a party to the Aarhus Convention in 2005, has changed its legislation in order to implement its obligations. The Aarhus Regulation, the Environmental Information Directive and the EIA and IPPC Directives, to name but a few examples, have all introduced important changes. Most authors agree that these acts have increased public participation in environmental matters within the EU. Naturally, most of these legislative changes were a direct result of the coming into force of the Convention, and had little to do with findings by the ACCC.

The ACCC has not often found the EU to be in non-compliance with the Convention, but has nevertheless suggested improvements and encouraged measures to improve the implementation. Examples of this can be found in the *Vlora case* regarding routines for handling information requests by EIB and the *EU Kazokiskes case* concerning effective remedies in the EIA and IPPC Directives. In some reports, the ACCC has expressed that it appreciates that the EU itself has taken measures to ensure better compliance with the Convention. The reports, moreover, often concentrate on how provisions of the Convention are meant to be interpreted, and although not suggesting changes of EU legislation, the ACCC has submitted views on how EU legislation should be interpreted in order to be in line with Aarhus. The ACCC has, in some cases, arrived to the conclusion that the legislation of the party concerned did not have to be changed in order to comply with the Convention, as long as the existing legislation would be interpreted in a way that is compatible with Aarhus. The *ClientEarth* case is of course the obvious example here.

The case where the ACCC has been most sceptical towards the EU’s implementation of Aarhus is the *ClientEarth* case. There, the ACCC suggested that the practice of the EU to narrow down the access to justice for individuals, and especially NGOs, to the degree that it was close to impossible for these actors to challenge EU acts, was not in line with the Convention. The ACCC was however, not of the opinion that the legislation necessarily had to be revised, but stressed that the access to justice of individuals and NGOs had to be widened, either through a revision of the legislation or through a new interpretation of the current legislation by the CJEU. The EU did not receive the recommendations in a positive way and still seems unwilling to adapt its legislation, while maintaining that the CJEU’s

interpretation of the standing requirements is complying with the requirements of the Convention.

Also in the *Irish renewables programme case*, the ACCC had recommendations for the MOP to adopt measures against the EU that were later endorsed by the MOP. Although the ACCC clearly had legislative amendments in mind, when suggesting improvements of EU compliance, the EU has not yet taken any such measures. Instead, the only action taken by the EU in response to the recommendations received was to send a letter to the Member States, recalling their obligation to follow the requirements of the Aarhus Convention in relation to the adoption of NREAPs. Although the MOP has expressed concern about this measure not entirely fulfilling the requirements of Article 7, the EU has, as of now, not showed any tendencies to improve its compliance.

These two cases, one of them endorsed by the MOP, containing clear recommendations from the ACCC, have not led to any thorough actions by the EU to improve compliance with Aarhus. However, the communication between the EU, the communicants, the MOP and the ACCC in these cases is certainly continuing and it is possible that the ACCC reports will, eventually, have a greater influence on EU legislation. At the very least, it is possible to conclude that the EU has in some cases taken note of the recommendations and remarks by the ACCC.

## **10.2 The ACCC's approach to the EU**

It is clear from the cases examined in this thesis that the ACCC is stepping lightly in relation to the EU. In most, if not all, cases regarding the EU, the ACCC has recalled the special nature of the EU and how it, being the only regional economic integration organisation party to the Convention, must in certain cases be treated in a different way than the other parties. This view has been especially apparent in relation to the ACCC's comments on the division of competences and responsibilities between the EU and its Member States and between the EU and third states. The ACCC seems to focus on cooperating with the European Union as to achieve maximum effect of the three pillars. It appears to be a fragile balance between demanding a high level of compliance to strengthen the objective of increasing public participation, while at the same time not interfering too much with the internal structure of the Union.

When functioning at its best, the EU's own review procedures, the Member State judiciary, the internal review mechanism and the CJEU, can enhance the effect of the Aarhus Convention. The CJEU and the ACCC do not yet seem to have interpreted the Convention



significantly different, and have therefore avoided creating ambiguous interpretations of the Convention. The interpretation of Article 9(3) of the Aarhus Convention and, specifically, the application of the Plaumann test on legal standing for individuals before the EU Courts is of course an obvious exception. It is, however, not yet clear how the *ClientEarth* case will affect the situation, and this will perhaps not be clarified before the next MOP, if clarified at all.

It is clear that issue of attributing competence and responsibility between the EU and its Member States has been problematic for the ACCC. Several ACCC reports bear witness to the unsettled nature of EU competences and demonstrate the difficulties that an external compliance mechanism can encounter in finding the party responsible for a compliance issue. One example of this is the ACCC's inability to establish whether the EU or its Member States should ensure certain procedural requirements connected to access to justice. At the very least, the reports by the ACCC show that EU legislation must enable proper implementation of the Aarhus Convention in its Member States. In some cases, the responsibility of the EU also goes further. Some cases have established a duty to monitor compliance by EU Member States and other a duty to have in place legislation requiring full implementation by the Member States. It is not, yet, clear when the different kinds of acts are required. Perhaps coming reports by the ACCC will clarify this issue.

### **10.3 Final concluding observations**

Findings by the ACCC have without doubt provided valuable insights into the interpretation and application of the Aarhus Convention. It is also likely that they will continue to do so in the future considering the number of new communications awaiting consideration by the ACCC. The fact that the MOP has endorsed most of the ACCC's recommendations so far also adds to the weight of its findings. The issue of competences is one of the more interesting problems arising when a regional economic integration organisation such as the EU becomes a party to an international convention. Although primarily an internal issue, external compliance mechanisms, such as the ACCC, have to take a stand as to be able to attribute responsibility. In order to improve compliance with the Aarhus Convention, the ACCC seems to have been careful in making assumptions on the division of competences and instead adopted a pragmatic approach. Perhaps this issue will in the future be further clarified by the ACCC or the EU itself. It will also be interesting to see how the EU will respond to the recommendations regarding the application of Article 9(3) to the standing criteria of the EU Courts, as well as the application of Article 7 to NREAPs. Hopefully the EU will take note of

the ACCC recommendations, enabling it to be the effective compliance mechanism envisaged by the MOP of the Aarhus Convention.

# Bibliography

## Literature

### Books

Beyerlin, U. and Marauhn, T., *International Environmental Law*, 1<sup>st</sup> ed., Hart, Oxford, 2011

Chalmers, D., Davies, G. and Monti, G., *European Union Law*, 2<sup>nd</sup> ed., Cambridge University Press, Cambridge, 2010

Craig, P. and de Búrca, G., *EU Law – Text, Cases and Materials*, 5<sup>th</sup> ed., Oxford University Press, Oxford, 2011

See Jans, J. and Vedder, H., *European Environmental Law After Lisbon*, 4<sup>th</sup> ed., Europa Law Publishing, Groningen, 2012

Kubasek, N. and Silverman, G., *Environmental Law*. 4<sup>th</sup> ed., Prentice Hall, Upper Saddle River, 2001

### Chapters of edited books

Ali, A., “The EU and the Compliance Mechanisms of Multilateral Environmental Agreements: the Case of the Aarhus Convention”, in *The External Environmental Policy of the European Union : EU and International Law Perspectives*, Morgera, E., ed., 1<sup>st</sup> ed. Cambridge University Press, Cambridge, 2012, pp. 287-303

Darpö, J., “Environmental Justice through Environmental Courts? Lessons Learned from the Swedish Experience”, in *Environmental Law and Justice in Context*, Ebbesson, J., and Okowa, P., eds., 1<sup>st</sup> ed., Cambridge University Press, Cambridge, 2009, pp. 211-227

Dette, B., “Access to Justice in Environmental Matters; A Fundamental Democratic Right”, in *Europe and the Environment – Legal Essays in Honour of Ludwig Krämer*, Onida, M., ed., 1<sup>st</sup> ed., Europa Law Publishing, Groningen 2004, pp. 1-21

Ebbesson, J., ”Comparative Introduction”, in *Access to Justice in Environmental Matters in the EU*, Ebbesson, J., ed., 1<sup>st</sup> ed., Kluwer Law International, The Hague, 2002, pp. 1-47

Ebbesson, J., ”European Community”, in *Access to Justice in Environmental Matters in the EU*, Ebbesson, J., ed., 1<sup>st</sup> ed., Kluwer Law International, The Hague, 2002, pp. 49-100

Ebbesson, J., “Introduction: Dimensions of Justice in Environmental Law”, in *Environmental Law and Justice in Context*, J. Ebbesson and P. Okowa, eds., 1<sup>st</sup> ed., Cambridge University Press, Cambridge, 2009, pp. 1-36

Ebbesson, J., “Access to Justice at the National Level: Impact of the Aarhus Convention and European Union Law”, in *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, Pallemarts, M., ed., 1<sup>st</sup> ed., Europa Law Publishing, Groningen, 2011, pp. 245-270

Fitzmaurice, M., “Environmental Justice through International Complaint Procedures? Comparing the Aarhus Convention and the North American Agreement on Environmental Cooperation”, in *Environmental Law and Justice in Context*, Ebbesson, J., and Okowa, P., eds., 1<sup>st</sup> ed., Cambridge University Press, Cambridge, 2009, pp. 211-227

Hallo, R. “Access to Environmental Information. The Reciprocal Influences of EU Law and the Aarhus Convention”, in *The Aarhus Convention at Ten: Interactions and Tensions Between Conventional International Law and EU Environmental Law*, Pallemmaerts, M., ed., 1<sup>st</sup> ed., Europa Law Publishing, Groningen, 2011, pp. 55-65

Jendroška, J., “Public Participation in Environmental Decision-Making: Interactions Between the Convention and EU Law and Other Key Legal Issues in its Implementation in the Light of the Opinions of the Aarhus Convention Compliance Committee”, in *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, Pallemmaerts, M., ed., 1<sup>st</sup> ed., Europa Law Publishing, Groningen, 2011, pp. 245-270

Obradovic, D., “EU Rules on Public Participation in Environmental Decision-Making Operating at the European and National Levels”, in *The Aarhus Convention at Ten: Interactions and Tensions Between Conventional International Law and EU Environmental Law*, Pallemmaerts, M., ed., 1<sup>st</sup> ed., Europa Law Publishing, Groningen, 2011, pp. 149-187

Pallemmaerts, M., “Access to Environmental Justice at EU Level: Has the ‘Aarhus Regulation’ Improved the Situation?”, in *The Aarhus Convention at Ten: Interactions and Tensions Between Conventional International Law and EU Environmental Law*, Pallemmaerts, M., ed., 1<sup>st</sup> ed., Europa Law Publishing, Groningen, 2011, pp. 273-312

## Articles

Bogojevic, S., “CJEU, can you hear me? Access to Justice in Environmental Matters”, *Europarättslig Tidskrift*, 16, 2013, pp. 728-240

Ebbesson, J., “The Notion of Public Participation in International Environmental Law”, *Yearbook of International Environmental Law*, 8(1), 1998, pp. 51-97

Jóhannsdóttir, A., “Miljødemokrati – Offentlighedens Deltagelse i Beslutningsprocessen”, *Forhandlingerne ved det 38. Nordiske Juristmøde i København 21-23. august 2008*, 1<sup>st</sup> ed., Den danske lokalstyrelse, Copenhagen, 2008, pp. 221-241

Marshall, F., “Two Years in the Life: The Pioneering Aarhus Convention Compliance Committee 2004-2006”, *International Community Law Review*, 8, 2006, pp. 123-154

## International agreements

*United Nations Declaration on Environment and Development*, 13 June 1992, UN Doc. A/CONF.151/26/Rev.1 (1992) 31 I.L.M. 876

*Agenda 21, Report of the United Nations Conference on Environment and Development*, 13 June 1992, UN Doc. A/CONF.151/26 (Vol. 1)

*Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* UN Doc. ECE/CEP/43 (1998)

## **EU documents**

Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/01

Consolidated Version of the Treaty on European Union [2010] OJ C 83/01

Consolidated Version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47

Consolidated Version of the Treaty Establishing the European Community [2006] OJ C 321 E/37

Rules of Procedure of the Court of Justice OJ C 177/21 of 2.7.2010, p. 20–21

## **Regulations**

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, [2001] OJ L 145, p. 43-48

Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, [2006] OJ L 264 p. 13-19

## **Directives**

Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, [1990] OJ L 158 p. 56-58

Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora [1992] OJ L 206 p. 7-50

Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L 327 p. 1-73

Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC [2001] OJ L 106 p. 1-39

Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment [2001] OJ L 197 p. 30-37

Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EE [2003] OJ L 41 p. 26-32

Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L 156 p. 17-25

Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, [2004] OJ L 143 p. 56-75

Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control [2008] OJ L 24 p. 8-29

Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L 140 p. 16-62

Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds [2010] OJ L 20, p. 7–25

Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, [2012] OJ L 26 p. 1-21 as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment, [2014] OJ L 124 p. 1-18

## **Decisions**

Council Decision 2005/370 of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L124 p. 1-3.

Commission Decision 2008/401/EC, Euratom of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institution and bodies, [2008] OJ L 140 p. 22-25

Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts [2008] OJ L 13, p. 24–26

Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 ‘Living well, within the limits of our planet’ [2013] OJ L 354, p. 171–200

### **Communications**

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions “Renewable Energy: a major player in the European energy market” (COM(2012) 271)

### **Other legislation**

The Swedish Environmental Code (SFS 1998:808)

### **Aarhus documents**

#### **MOP reports**

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, First Meeting, Lucca, 21–23 October 2002, ECE/MP.PP/2/Add.2, *Report of the First Meeting of the Parties, Decision I/1, Rules of Procedure*

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, First Meeting, Lucca, 21–23 October 2002, ECE/MP.PP/2/Add.8, *Report of the First Meeting of the Parties, Decision I/7, Review of Compliance*

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Second Meeting, Geneva, 25–27 May 2005, ECE/MP.PP/2005/13, *Report of the Compliance Committee*

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Third Meeting, Riga, 11–13 June 2008, ECE/MP.PP/IR/2008/EC, *Implementation Report Submitted by the European Community*

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Fifth Session, Maastricht, 30 June and 1 July 2014, ECE/MP.PP/2014/L.16, *Draft Decision V/9g Concerning Compliance by the European Union With its Obligations Under the Convention*

## ACCC reports

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Twelfth Meeting, Geneva, 14–16 June 2006, ECE/MP.PP/C.1/2006/4/Add.2, *Report of the Meeting, Findings and Recommendations*, Communication ACCC/C/2005/11 (Belgium)

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Sixteenth Meeting, Geneva, 13-15 June 2007, ECE /MP.PP/C.1/2007/4/Add.1, *Findings and Recommendations with Regard to Compliance by Albania*, ACCC/C/2005/12 (Albania)

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Third Meeting, Riga, 11–13 June 2008, ECE/MP.PP/2008/5/Add.10, *Report by the Compliance Committee, Compliance by the European Community with its Obligations Under the Convention*, ACCC/2006/17 (European Community)

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Third Meeting, Riga, 11–13 June 2008, ECE/MP.PP/2008/5/Add.6, *Report by the Compliance Committee, Compliance by Lithuania with its Obligations Under the Convention*, ACCC/2006/16 (Lithuania)

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Third Meeting, Riga, 11–13 June 2008, ECE/MP.PP/2008/5/Add.4, *Report by the Compliance Committee, Compliance by Denmark with its Obligations Under the Convention*, ACCC/C/2006/18 (Denmark)

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Twenty-third Meeting, Geneva, 31 March–3 April 2009, ECE /MP.PP/C.1/2009/2/Add.1, *Findings and Recommendations with Regard to Communication ACCC/C/2007/21 Concerning Compliance by the European Community*

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Twenty-sixth Meeting, Geneva, 15-18 December 2009, ECE/MP.PP/C.1/2009/8/Add.1, *Findings and Recommendations with Regard to Communication ACCC/C/2008/24 Concerning Compliance by Spain*

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Twenty-ninth Meeting, Geneva, 21–24 September 2010, ECE /MP.PP/C.1/2010/6/Add.3, *Findings and recommendations with regard*



to communication ACCC/C/2008/33 concerning compliance by the United Kingdom of Great Britain and Northern Ireland

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Thirty-second Meeting, Geneva, 11–14 April 2011, ECE /MP.PP/C.1/2011/4/Add.1, *Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union*

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Thirty-ninth Meeting, Geneva, 11–14 December 2012, ECE /MP.PP/C.1/2012/12, *Findings and Recommendations with Regard to Communication ACCC/C/2010/54 Concerning Compliance by the European Union*

United Nations Economic and Social Council, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice In environmental Matters, Compliance Committee, Forty-fourth Meeting, Geneva, 25–28 March 2014, ECE/MP.PP/C.1/2014/5, *Findings and recommendations with regard to communication ACCC/C/2012/68 concerning compliance by the European Union and the United Kingdom of Great Britain and Northern Ireland*

## **Cases**

### **EU cases**

Case 25/62 *Plaumann v Commission* [1963] ECR 95

Case 104/81 *Hauptzollamt Mainz v Kupferberg* [1982] ECR 3641

Case C-321/95 *Greenpeace v Commission* [1998] ECR I-1651

Case C-386/96 *Société Louis Dreyfuss & Cie v Commission* [1998] ECR I-2309

Case C-213/03 [2004] ECR I-7357 (*Etang de Berre I*)

Joined cases T-236/04 and T-241/04 *European Environmental Bureau (EEB) and Stichting Natuur en Milieu v. Commission* [2005] ECR II-4945

Case C-459/03 [2006] ECR I-4635 (*Mox Plant*)

Case T-91/07 *WWF-UK Ltd v. Council of the European Union* [2008] ECR II-81

Case C-444/08 *Região autónoma dos Açores v Council* [2009] ECR I-200 (appeal of case T-37/04 *Região autónoma dos Açores v Council* [2008] ECR II-103)

Case C-263/08 [2009] ECR I-9967 (*Djurgården-Lilla Värtans Miljöskyddsförening*)

Case C-355/08 *WWF-UK Ltd v. Council of the European Union and the Commission of the European Communities* [2009] ECR I-73

Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR nyr.

Case T-338/08 *Stichting Natuur en Milieu and Pesticides Action Network Europe v. Commission* [2012] ECR II-0000

### **Cases from the Swedish Environmental Court of Appeal**

MÖD 2002:92

MÖD 2003:98

MÖD 2003:99

### **Internet sources**

Unece.org, *Status of ratification – UNECE*, available at:  
<http://www.unece.org/env/pp/ratification.html> [accessed 27 May. 2014]

Unece.org, *Meeting of the Parties – UNECE*, available at:  
<http://www.unece.org/env/pp/mop.htm> [accessed 23 June 2014]

Unece.org, *Communications From the Public - UNECE*. available at:  
<http://www.unece.org/env/pp/pubcom.html> [accessed 29 June 2014]

*Guidance Document on the Aarhus Convention Compliance Mechanism*, available at:  
[http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC\\_GuidanceDocument.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_GuidanceDocument.pdf)  
[accessed 12 August 2014]

*European Commission, Impact Assessment Guidelines*, 15 January 2009, SEC(2009) 92,  
available at:  
[http://ec.europa.eu/smart-regulation/impact/commission\\_guidelines/docs/iag\\_2009\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf)  
[accessed 27 June 2014]

*European Commission – Requests Under the Internal Review Procedure*, available at:  
<http://ec.europa.eu/environment/aarhus/requests.htm> [accessed 23 June 2014]

*Communication ACCC/C/2008/32 submitted on 1 December 2008 by ClientEarth and others*,  
available at: <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/communication/Communication.pdf> [accessed 23 June 2014]

*Letter from the communicant of 20 May 2014 in case ACCC/C/2008/32 (European Community)*, available at: [http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/correspondence/frCommC32\\_20.05.2014.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/correspondence/frCommC32_20.05.2014.pdf) [accessed 8 August 2014]

*Message outlining changes in the relations between the Aarhus Convention and the European Union (European Community) from the Party concerned on the 26 February 2010*, available at: [http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/correspondence/FrEC\\_ReplyQuestion\\_26Feb2010.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/correspondence/FrEC_ReplyQuestion_26Feb2010.pdf) [accessed 4 August 2014]

*Effective Justice? Synthesis Report of the Study on the Implementation of Article 9, paras. 3 and 4, of the Aarhus Convention in Seventeen of the Member States of the European Union*, available at: [http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/2012\\_A2J\\_Synthesis\\_report\\_Final\\_edit.pdf](http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/AnalyticalStudies/2012_A2J_Synthesis_report_Final_edit.pdf) [accessed 11 August 2014]

*Letter from the Party concerned of 20 July 2011*, available at: <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/correspondence/frParty20.07.11.pdf> [accessed 4 August 2014]

*Comments from the European Community on the draft findings of the Compliance Committee, letter from the European Community of the 24 February*, available at: <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2007-21/DRFcomments/ECcomments.2009.02.24.pdf> [accessed 4 August 2014]

*Comments of the Party concerned on the Committee's draft findings and recommendations of 7 April 2008*, available at: <http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2006-17/ECresponseDraftFR2008.04.07.pdf> [accessed 4 August 2014]

*Email informing about following up with the CC recommendations from the party concerned of the 17 October 2013*, available at: [http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20Party%20concerned/frEUC54\\_1Aug2013\\_forMOP5.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20Party%20concerned/frEUC54_1Aug2013_forMOP5.pdf) [accessed 4 August 2014]

*Letter sent to the permanent representations of the EU Member States*, available at: [http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20Party%20concerned/Annex\\_Letters\\_to\\_EU\\_member\\_states.pdf](http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2010-54/Correspondence%20with%20Party%20concerned/Annex_Letters_to_EU_member_states.pdf) [accessed 4 August 2014]