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Abstract

Participation rights, or the rights to public participation in preparing decisions regarding environmental matters, have acquired a place in international environmental law and international principles thereof are elaborated in the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters or the Aarhus Convention.

The Aarhus Convention is commonly said to rest on so-called *three pillars*. The third pillar, or access to justice, is the main focus of this thesis, particularly the direct and indirect enforcement by members of the public entailed in Article 9(3) of the Convention, also known as public or citizen enforcement. The main objective is to analyse and interpret the material scope of Article 9(3) of the Aarhus Convention, inter alia, by using the Convention’s preparatory documents and the relevant decisions of its Compliance Committee (ACCC). Subsequently, the outcome of the analysis is compared to (a) EU law and practice, (b) EEA law and practice, and finally (c) the relevant Icelandic law.

International development in the recent years has been towards officially recognizing the importance of public participation in environmental decision-making. Nevertheless, the study of this thesis gives cause to conclude that there is considerable reluctance towards the enforcement of this concept.

Article 9(3) of the Aarhus Convention takes citizen enforcement one step further than has been done before. The vague wording of the provision is, however, a disadvantage and has led to divergent interpretations.
Acknowledgments

First of all I would like to thank my supervisor, Professor Aðalheiður Jóhannsdóttir, for all her assistance. Her advice and remarks were essential for this study and our progress meetings were particularly pleasant. I would also like to thank my parents, Einar S. Hálfdánarson and Regína G. Pálsdóttir, for proofreading and for invaluable support and my husband, Róbert B. Róbertsson, for all his love and help and for holding down the fort. My children, Jökull and Susie Rut, receive a special acknowledgment for their patience.

Last, but not the least, I would like to thank my best friend, Íris Ísberg, District Court Attorney, for her endless help and patience throughout my LL.M. study, the thesis being no exception.
1. Introduction
1.1 Generally on the subject

Environmental law cannot be classified as belonging to either private or public law and environmental issues can neither be limited to private nor public interests. Environmental law simply cuts across separations of ordinary classification of legal systems and the issues contain both private and public interests and they do create individual’s rights.\textsuperscript{1} For this reason, the development of the laws of the European states has been towards making it possible for more people and parties to participate in and to launch both administrative and judicial procedures in environmental matters, to access justice.\textsuperscript{2} This increased locus standi (standing rights) in environmental matters is, as Jonas Ebbesson argues, based on both general democracy theories and the advancement of human rights and the furtherance of the legitimacy of law. Elementary environmental reasons for public participation in decision-making and an increased locus standi might thus improve the protection of public environmental interests.\textsuperscript{3}

Although traditionally non-state actors are not considered international legal persons according to public international law, they have become international actors in the field of international environmental law. In practice, they even play an important part in developing and applying international environmental law.\textsuperscript{4}

The origins of so-called participatory rights, or the right to public participation in preparing decisions regarding environmental matters, can be traced to the United States of America (US).\textsuperscript{5} Public participation in preparing decisions regarding environmental matters has been justified by referring to three factors. Firstly, it is believed that the implementation of environmental legislation will become more effective with public participation and thereby increasing environmental protection. Secondly, public participation has been justified by reference to a series of human rights norms. Finally, there have been references to legitimacy, whereas public participation seems to promote reconciliation, inter alia regarding decisions, which result it a significant environmental impact.\textsuperscript{6} Participation rights have acquired a place in international environmental law, and international principles thereof are elaborated in the

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{1} Ebbesson, J., Access to Justice in Environmental Matters in the EU (Kluwer Law International 2002) 4.
  \item \textsuperscript{2} ibid 5.
  \item \textsuperscript{3} ibid 6.
  \item \textsuperscript{4} Sands, P. and Peel, J., Principles of International Environmental Law (3\textsuperscript{rd} edn, Cambridge University Press 2012) 155.
  \item \textsuperscript{5} Jóhannsdóttir, A. and Tómasson, E., Endurskoðun ákvarðana sem áhrif hafa á umhverfið (Lagastofnun Háskóla Íslands 2008) 38.
  \item \textsuperscript{6} Jóhannsdóttir, A., „Samrýmast íslensk lög 6. gr. Árósasamningsins“, in Úlfhjötur (2nd issue 2003) 206.
\end{itemize}
\end{footnotesize}
Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters\(^7\) or the Aarhus Convention.

Access to justice was discussed in relation to environmental matters as early as in the 1970’s and public participation in environmental decision-making was mentioned in the 1972 Action Plan for the Human Environment.\(^8\) This notion was strengthened by the 1992 United Nations Conference on Environment and Development\(^9\) as embodied in Principle 10 of the Rio Declaration\(^10\):

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

As an international political programme, an increased attention was paid to public participation. Earlier than that, though, the UN Economic Commission for Europe (UNECE) had discussed these issues, but that gained less public attention.\(^11\) These explorations later turned out to become the road towards the Aarhus Convention.

As discussed below in chapter 2.1, the Aarhus Convention is commonly said to rest on so-called \textit{three pillars}. The third pillar, or access to justice, is the main focus of this thesis, particularly the direct and indirect enforcement by members of the public entailed in Article 9(3) of the Convention, also known as public or citizen enforcement. Throughout my LL.M. study I have taken part in many intriguing classes. The subject of environmental protection, which particularly raised my interest, has been addressed in all of them to a greater or lesser extent. Therefore, it was an interesting task to study the Aarhus Convention, in which improving environmental protection is a clear objective.\(^12\)

\(^9\) Ebbesson (n 1) 9.
\(^11\) Ebbesson (n 1) 10.
\(^12\) In the recitals to the Aarhus Convention the parties recognize that “adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights” and “the importance of the respective roles that individual citizens, non-governmental organizations and the private sector can play in environmental protection.” The objective in Article 1 of the Convention states that each party shall guarantee the rights entailed in the three pillars of the Convention “in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.”
1.2 Objective and method

The overall objective of the thesis is to investigate international obligations, which are aimed at enhancing the possibilities of the public to enforce environmental law with an emphasis on the relevant obligations of the Aarhus Convention.

The thesis objective is operationalized, firstly, by analysing and interpreting the material scope of Article 9(3) of the Aarhus Convention, inter alia, by using the Convention’s preparatory documents and the relevant decisions of its Compliance Committee (ACCC). Secondly, by comparing the outcome of the analysis to the relevant (a) EU law and practice, (b) EEA law and practice, and finally (c) the relevant Icelandic law.

1.3 Layout

The essay starts with an introduction of the Aarhus Convention, covering its background and development in addition to an overview of its content. Following the introduction is a brief coverage of the establishment of the Aarhus Convention Compliance Committee (ACCC) and its operation as well as an introduction of Article 9 of the Convention and the concept of access to justice, focusing on Article 9(3).

In chapter 3, I take a closer look at Article 9(3) of the Convention, studying the wording of the provision, pointing out that its language is open regarding forums and forms of measures for citizen enforcement. The chapter contains coverage of preparatory documents regarding the provision and referral to case law of the ACCC to shed some light on the matter. Finally, there is a short comparison of Articles 9(2) and 9(3) of the Convention.

For the sake of context, I will discuss Article 9(4) of the Convention in chapter 4. I will review its wording together with ACCC case law for clarification and refer to a 2012-2013 study the implementation of Articles 9(3) and 9(4) of the Aarhus Convention in the Member States of the EU for explanation. A couple of Icelandic examples are mentioned as well.

Chapter 5 focuses on the interactions between Article 9(3) and the European Union (EU) law. Firstly, I discuss the approval of the Convention on behalf of the EU and review how responsibility for compliance is divided between the EU and its Member States. Subsequently I cover issues regarding access to EU review procedures in environmental matters, both through administrative procedures and EU Courts. Next, I discuss the EU proposal for a Directive on access to justice in environmental matters and the current situation on the matter. The chapter ends with a review on the CJEU case law regarding Article 9(3) of the Convention, discussing three landmark cases, in addition to a brief coverage of the European Economic Area (EEA).
In chapter 6, I discuss a study conducted on the implementation by all 28 EU Member States of Articles 9(3) and 9(4) of the Aarhus Convention. A number of widely known national experts prepared the study and a synthesis report was made, of which I give an account. I summarize the main content of the report and present its recommendations on how to construct suitable provisions of EU law in order to implement Article 9(3) of the Convention in the EU Member States.

Chapter 7, Iceland and Article 9(3) of the Aarhus Convention, covers the process of Iceland’s ratification and implementation of the Aarhus Convention, focusing on Article 9(3) in that relation. I discuss the Committee on the Aarhus Convention, appointed by Iceland’s Minister for the Environment in 2005, evaluating whether any legislative amendments were necessary in relation to Iceland’s ratification of the Convention. I also present the Committee’s conclusions. I furthermore cover the preparation in Iceland for the ratification of the Convention and related law amendments proposed.

An independent research of Icelandic law and Article 9(3) is presented in chapter 8. The essay ends with conclusions in chapter 9, summarizing the main results of the thesis’ subject.
2. The Aarhus Convention – an introduction

2.1 The Aarhus Convention in general

The Aarhus Convention originates in the so-called *Environment for Europe* process; the cooperation of the Member States of the UNECE region. It was developed over a period of two years, negotiating contributions from states and non-governmental organisations (NGOs) from the area.13 The Convention is open for signatures by Member States of the UN ECE according to its Article 17, in addition to states that enjoy consultative status with the Commission. Additionally, any other state not mentioned in Article 17, i.e. a United Nations member state, may also accede to the Convention if approved by the Meeting of the Parties to the Convention, according to Article 19.

The Aarhus Convention contains provisions on access to information, access to justice and public participation, commonly known as the three pillars found in Articles 4-9 of the Convention. The Convention furthermore connects environmental protection to a human rights aspect, emphasizing people’s right to live in a healthy environment.14 The Convention primarily contains rules of procedure, although it aims to ensure that the public enjoys some basic human rights.15 It covers obligations of its parties to the public, requiring the implementation of its provisions into the parties’ national law.16

A few general features of the Convention worth especially mentioning are, firstly the rights that underlie various procedural conditions throughout the Convention, making it a *right-based*17 Convention. Secondly, the Convention creates minimum standards for the parties to fulfil but does not hinder them in going further regarding the public’s rights. Thirdly, the Convention bans discrimination as to nationality, citizenship or domicile according to Article 3(9) of the Convention.18

2.2 Sofia Guidelines

In October 1995, the ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decision-making (Sofia Guidelines) were introduced at the

15 Jóhannsdóttir and Tómasson (n 5) 53.
17 See further on the difference between a right-based and an interest-based system in chapter 6.2.2.2.1.
Third Environment for Europe (EfE) Ministerial Conference in Sofia, Bulgaria in October 1995. As the Aarhus Convention builds upon the guidelines, they are viewed as one of its corner stones. The guidelines refer to principle 10 of the Rio Declaration on Environment and Development, which states that Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. In the preamble to the guidelines, environmental authorities are encouraged to raise public awareness so that the public is better equipped for enforcement of environmental policies.

2.3 Aarhus Convention Compliance Committee

Based on Article 15 of the Aarhus Convention, the Meeting of the Parties established a Working Group to prepare a system intended to review compliance with the Convention’s provisions. Article 15 requires the establishment of “optional arrangements of a non-confrontational, non-judicial and consultative nature” for reviewing compliance with the provisions of the Convention. At the first meeting of the Group, in October 2002, the Meeting of the Parties elected the first Compliance Committee (ACCC) by decision 1/7 on review of compliance.

The parties adopt decisions at the ACCC’s recommendation on general compliance issues as well as on decisions concerning individual parties’ compliance. The compliance instrument can be activated by a party’s submission about another party’s compliance, a party’s submission on its own compliance, by a referral from the secretariat, or by members of the public regarding compliance with the Convention. The ACCC can also initiate examination on compliance matters. On the basis of each of these triggers, the ACCC has the authority to examine the merits of a case. However according to decision 1/7, it cannot issue binding decisions. In line with its competence, the Committee rather makes recommendations, either to the Meeting of the Parties (MoP) or to individual parties.

23 ibid.
The meetings of the ACCC are generally open to the public. The only exception is when the ACCC is deliberating prior to reaching a conclusion. Furthermore, members of the public who attend meetings may engage in interventions, offer opinions and make observations. The participatory feature of the Convention is therefore believed to be a significantly developed example of how the public has gained more rights to participate in compliance mechanisms of multilateral environmental agreements (MEAs). This development has also been named emergence of participatory democracy. In fact, it took several drafting and negotiation session before communications from the public were included in the Aarhus compliance mechanism, but several delegates demonstrated strong reservations about this particular matter. At the end, a compromise was made and the public complaints was agreed upon together with an optional opt-out period of 90 days. No country has however opted-out to this day.

The ACCC has reached a number of findings regarding the compliance by individual parties and regarding Article 9(3). In chapter 3, a couple of those findings relating to the appropriate part of the provision will be reviewed.

2.4 Article 9(3) of the Aarhus Convention

2.4.1 In general

Article 9 of the Aarhus Convention entails provisions on access to justice, or the third pillar of the Convention. The concept of access to justice for the public is designed under the Convention, in some instances members of the public, to have access to a formal review mechanism as part of enforcing the Convention. This applies both to public participation and access to information and to domestic environmental law. The Implementation Guide to the Aarhus Convention, cited before, notes that Article 9 “requires adequate review procedures that safeguard the rights afforded in the other pillars of the Convention and under national environmental law.” The Guide also states that Article 9 of the Convention fortifies the right to a fair trial, as drawn from international human rights mechanisms such as the European Convention on Human Rights.

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26 Wates (n 18) 393.
27 Kravchenko (n 25) 89.
29 ibid 190.
30 ibid 188.
Article 9(3) reads as follows:

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

The paragraph provides additional rights to the previous two paragraphs, creating more instances where members of the public can access judicial or administrative mechanisms. Compared to paragraphs 1 and 2, paragraph 3 covers a significantly broader collection of acts and omissions as well as being more flexible regarding implementation. The ACCC has emphasized the difference between members of the public, Article 9(3), and members of the public concerned, Article 9(2), but the difference between Article 9(2) and Article 9(3) is further discussed in chapter 3.4.2.

Article 9(3) anticipates both direct and indirect enforcement by the members of the public; direct as they cannot have law enforced by bringing a case to judicial bodies and indirect as they can set off and take part in administrative processes to have law enforced. The Implementation Guide to the Convention refers to this both as public enforcement and citizen enforcement of environmental law.

The advantage of the remedy of paragraph 3 is that effective monitoring role of the public supports environmental authorities, thus ensuring greater public interest. The provision has been claimed to empower citizens and NGOs in assisting in enforcing environmental law.

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32 In the United States of America (US) for example, some acts provide for citizen enforcement.
33 The Aarhus Convention: An Implementation Guide (n 14) 197.
34 As discussed in chapter 4.2, means for direct citizen enforcement can for example be found in US civil suit provisions in various environmental protection laws.
35 ibid 198.
36 Jóhannsdóttir and Tómasson (n 5) 75.
37 Wates (n 18) 401.
A closer look at Article 9(3) of the Aarhus Convention

3.1 Ensuring access to administrative or judicial procedures

3.1.1 Wording of the provision

Article 9(3) of the Aarhus Convention stipulates that each party should ensure members of the public access to administrative or judicial procedures. According to the Implementation Guide to the Convention, the provision possibly entails a broad range of measures for citizen enforcement, both directly and indirectly as introduced in chapter 2.4.1. Whereas the wording of the provision is open regarding forums and forms of these measures, parties may choose their preference, keeping in mind the requirement of Article 3(1), to establish a “clear, transparent and consistent framework” when implementing the content of the Convention. This means that the access can be granted both through courts or administrative bodies and through, inter alia, civil, administrative or criminal law.38

Jonas Ebbesson points out that judicial review does not rule out the alternative of a preliminary review mechanism before a government authority. He states that the focus on access to justice is on courts and judicial procedures regarding environmental matters, but that other review mechanisms are accepted.39

The term judicial procedures equals courts and court-like institutions, meaning that they act beside and without a commitment to the administration.40 Article 9(4) of the Convention contains additional requirements to the procedures of paragraph 3 to “provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.” Article 9(4) is separately reviewed in chapter 4 below.

The Implementation Guide furthermore states that parties may not limit the review of applicable acts to either procedural or substantive legality; both should be within the scope of review.”41 This matter will be further discussed below in chapter 3.4.

During the preparation of the Aarhus Convention, an Ad Hoc Working Group was established to prepare a draft convention on access to environmental information and public participation in environmental decision-making. The Group had ten sessions over the period of two years. 42 At its ninth session, which took place on 27 January 1998, the issue of the meaning of the term having access to was brought up by the delegations of Denmark, Finland, Norway

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39 Ebbesson (n 1) 9.
40 The Aarhus Convention: An Implementation Guide (n 14) 188.
41 ibid 199.
and Sweden. They clarified that a decision by their Ombudsman institution was not binding on public authorities. They furthermore stated that the institution was no equivalent to a legal right to a review procedure, but emphasized that they believed the institution would meet the requirements of Article 9(4) of the Convention. The report on the session did not explain these statements any further.\textsuperscript{43}

\textbf{3.1.2 An Ombudsman institution}

As stated before, Article 9(3) entails that access to justice according to the provision can be granted through both courts and administrative bodies. Many countries provide citizens with the impartial review mechanism of an Ombudsman concerning breach of administrative law. Whether a national Ombudsman institution meets the requirements of Article 9(3) of the Aarhus Convention, depends on how that institution is structured and what its role is within the national review system.\textsuperscript{44}

In the ACCC’s findings regarding the Ombudsman institution in Austria for example, ACCC noted that the authority of the Ombudsman might be limited and that the Ombudsman could decide whether a case was brought to court, notwithstanding the available request of a member of the public.\textsuperscript{45}

\textbf{3.1.3 More ACCC case law}

The ACCC has held that if communicants’ standing has not been disputed in national courts, that in itself adequately demonstrates that they meet the requirements under national law for accessing review procedures, referred to in Article 9(3) of the Aarhus Convention.\textsuperscript{46} It has also held that even though it was not within the ACCC’s authority to assess violations claimed in a case or confirm the information presented, it could consider the judicial mechanism of the case and whether it complied with Article 9(3).\textsuperscript{47} The ACCC has furthermore found that if negligence of a public authority, which contravenes provisions of a party’s national law were

\textsuperscript{43} Report on the ninth session of the AD Hoc Working Group for the preparation of a draft convention on access to environmental information and public participation in environmental decision-making, CEP/AC.3/18, 27 January 1998, 3.

\textsuperscript{44} The Aarhus Convention: An Implementation Guide (n 14), 189.


\textsuperscript{47} ibid, para. 25.
established, the failure of courts to address a claim requiring the authority to take action would be equivalent to a denial of access to judicial review, cf. Article 9(3). 48 It has also held that it can review compliance by a party concerning Article 9 as regards acts and omissions, even if made before the Convention entered into force for the party. 49 Finally, the ACCC has stated that even though communicants have access to review procedures, parties may be considered to be in non-compliance with Article 9(3) if the procedures fail to provide adequate and effective remedies as required in Article 9(4). 50

The ACCC has held that if the conclusion is that a party has failed to provide a remedy according to Article 9(3), it also suggests a party’s failure to comply with Article 9(4). 51

The ACCC has found that a state’s failure to provide effective review procedure in relation to an omission by a public authority to enforce environmental law in addition to failure to see to that parties are properly notified by courts of the time and place of court hearings, equals a breach of Article 9(3) of the Aarhus Convention. 52 The Committee has also stated that members of the public should have access to a review mechanism to challenge decrees, which handle subject matters regulated in national environmental law, especially when the law requires that the public is consulted during the decision-making process. 53 Access to justice, according to Article 9(3), furthermore requires more than a right to access an administrative body about the issue in question. The provision is also intended to afford members of the public ways to enforce and put into effect existing environmental law. 54

Finally, following the judgment of the CJEU in the Slovak Brown Bear case 55 thoroughly discussed below in chapter 5.5.3.1, the ACCC responded to the communication ACCC/C/2008/31 (Germany), covered below. 56 The ACCC discussed how the German Federal

48 ibid, para. 26.
50 ibid, para. 31.
51 Communication ACCC/C/2011/63 (Austria) (n 45), para. 48.
52 Communication ACCC/C/2004/6 (Kazakhstan) (n 46), para. 35.
55 Case C-240/09 Lesoschrmárske Zoskupenie VLK, Judgment of 8 March 2011 (Slovak Brown Bear).
56 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
Administrative Court had widened the interpretation of the criteria of *impairment of a right*. The ACCC pointed out that the Administrative Court itself has specified that legislative amendments were necessary in order for Germany to comply in all respects with the requirements of Article 9(3) of the Aarhus Convention.

### 3.2 Members of the public

#### 3.2.1 The Convention

According to the wording of Article 9(3) of the Aarhus Convention, parties are to ensure that members of the public have a standing based on the provision. Article 2(4) of the Convention defines the public as “one or more natural or legal persons, and in accordance with national legislation or practice, their associations, organizations or groups”. On enquiry, the term members of the public seems to be somewhat vague and preparation documents and scholarly work do not bring much to the table. The previously mentioned Sofia Guidelines, do not mention the term. Additionally, a reference to the members of the public is to be found a couple of times in the Convention outside Article 9(3). Firstly, Article 5 mentions members of the public “who may be affected”. Secondly, Article 15 refers to “considering communications from members of the public”.

#### 3.2.2 The Ad Hoc Working Group sessions

During the third session of the Ad Hoc Working Group that prepared the Aarhus Convention, distinction between members of the public and members of the public with an appropriate interest was discussed. It was suggested that provisions relating to specific decisions would e.g. cover “provisions to the effect that members of the public could participate without having to show an interest.”

During the next sessions of the Working Group, the participating delegations introduced different views and it became clear that not everyone agreed that the Convention should include provisions on general access to justice in environmental matters. The delegations also

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Committee, Fifth session, Maastricht, 30 June and 1 July 2014, ECE/MP.PP/C.1/2014/8, Report of the Meeting, Findings and Recommendations, Communication ACCC/C/2008/31 (Germany) 4 June 2014, para. 98. See also chapter 3.4.

57 Report on the third session of the AD Hoc Working Group for the preparation of a draft convention on access to environmental information and public participation in environmental decision-making, CEP/AC.3/6, 13 January 1997, 12.

58 Ibid.

59 Report on the fifth session of the AD Hoc Working Group for the preparation of a draft convention on access to environmental information and public participation in environmental decision-making, CEP/AC.3/10, 7 July 1997, 10.
proclaimed different perspectives on the scope of such provisions. Some even expressed reservations concerning Article 9 of the Convention, but these differing views were reconciled before the Group completed its sessions.

3.2.3 The Aarhus Convention: Key guidance material

The draft elements for the Aarhus Convention, from 11 April 1996, made a distinction between individual members of the public versus groups of the public, without a further explanation. Article 1 of the draft elements said the public to mean “one or more natural or legal persons.”

The Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums, 20 June 2005, mention that members of the public can have distinguished resources, circumstances and capacity and accordingly suggest special measures to be taken to provide for a “balanced and equitable process”.

A summary of the Maastricht Recommendations on Promoting Effective Public Participation in Decision-making in Environmental Matters, published December 2015, says members of the public include non-governmental organisations as well as private parties involved in environmental decision-making. A special reference is made to the younger members of the public and another to members of the public with disabilities. When identifying the public, which may participate under Article 7 of the Convention, a reference is made to members of the public generally and to ordinary members of the public.

3.2.4 The Aarhus Convention Implementation Guide

A few conclusions can be drawn regarding the term members of the public from the aforementioned Implementation Guide. Firstly, the term is to cover non-governmental organisations attempting to exercise their rights and private parties involved in activities subject

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60 ibid.
61 Report on the eight session of the AD Hoc Working Group for the preparation of a draft convention on access to environmental information and public participation in environmental decision-making, CEP/AC.3/16, 17 December 1997, 5.
to the Convention. Secondly, ENGOs do not seem to fall within the scope of the definition. Thirdly, associations, organisations and groups of persons without legal personality are, under some conditions, also regarded as members of the public under the Convention, although a requirement adherence to national legislation or practice must be met as well. Fourthly, the Guide makes special reference to particular members of the public such as e.g. the elderly, poor and illiterate on one hand, and the public on the other. The Guide’s coverage of Article 9(3) explicitly says that the provision provides standing to certain members of the public so that they can enforce environmental legislation. Thus, the Convention makes a distinction between the public and members of the public.

The Guide states, with reference to e.g. Articles 4, 5, 6 (paragraphs 7 and 9) and Article 8, that when the term public is used in the Convention without any further requirements, respective provisions apply to the public in general regardless of whether the public has an interest in the matter. Article 3(9) furthermore requires that the definition is not discriminatory with regards to nationality etc., meaning that non-citizens also have interests and rights under the Convention. It is noted or clarification that “one or more natural or legal persons” does not mean any random person, but that each person enjoys all rights included in the Convention.

3.3 Further on the issue of standing: National criteria

3.3.1 In general

The Convention furthermore grants the parties permission to set criteria for standing under Article 9(3). If parties choose to set requirements on this basis, they must be in accordance with the aim of the Convention, which is to secure broad access to its rights. The requirements also have to be laid down in national law.

Item 26 of the aforementioned Sofia Guidelines, states that it is “desirable that standing should be given a wide interpretation in proceedings involving environmental issues.”

The fifth session of the Ad Hoc Working Group, that took place on 7 July 1997, discussed general access to justice in environmental matters. When discussing the predecessor

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67 Ibid 55-56.
68 Ibid 63.
69 Ibid 197.
70 Ibid 55-56.
71 Ibid 55.
72 Ibid 190.
73 *Draft Guidelines* (n 21) 6.
to Article 9(3), reference was made to particular criteria of individuals regarding standing under the provision.74

As pointed out in the previously cited Aarhus Implementation Guide, the flexibility allowed for the parties in providing access to justice in conformity with the Convention, such as the one in Article 9(3), does not equal a slack for them to drift away from the Convention’s objective. The notion is rather that it indicates that the parties are able to reach the objective in many ways and consistent with national legislation.75

3.3.2 Case law of the ACCC

The ACCC has held that the Convention should be interpreted in light of its objectives when assessing access to justice criteria in relation to Article 9(3).76 The ACCC has pointed out that the Aarhus Convention does not define the criteria referred to in Article 9(3) and that it intends to allow significant flexibility when determining who has access to justice.77 The ACCC has suggested that the parties decide, based on some kind of criteria, which members of the public have to meet in order to be able to contest a decision without barring effective remedies for the same group. This could help the parties avoiding actio popularis in these cases.78 The ACCC has paid attention to all aspects of a matter when evaluating compliance with Article 9(3), especially if national law has blocking consequences for environmental associations and if they actually can challenge acts and omissions in question.79

Although the ACCC has concluded that national criteria in question do not imply a lack of compliance with Article 9(3), it has found in same instances that the jurisprudence of the national courts can indicate too restrictive access to justice for certain members of the public.80 The ACCC has also held that Article 9(3) does not require that there is a single set of national criteria for different types of procedure for seeking review of decisions.81

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75 The Aarhus Convention: An Implementation Guide (n 14) 188.
76 Communication ACCC/C/2005/11 (Belgium) (n 31), para. 36.
77 Communication ACCC/C/2006/18 (Denmark) (n 54), para. 35.
78 ibid, para. 36.
79 ibid, para. 37.
80 ibid, para. 40.
81 ibid, para. 44.
3.4 Acts and omissions

3.4.1 General comments
According to Article 9(3) of the Aarhus Convention, what can be reviewed are “acts and omissions by private persons and public authorities” that breach the parties’ law relating to the environment.

The Convention makes a distinction between three classifications of decisions, acts and omissions with regard to access to justice. Those are: 1) Refusals and insufficient process of requests of environmental information (Article 4), 2) decisions, acts and omissions regarding permits and decision-making related to specific activities (Article 9.2 and 9.3) and 3) other types of acts and omissions by public authorities and private persons, contravening national law relating to the environment (Article 9.3). Additionally, the flexibility for the parties to the Convention to provide access to justice varies, depending on the criteria. Thus, in accordance with the first two categories, a review procedure before a court or a court-like body must be provided for, whereas for the third category, access to justice must be guaranteed by administrative or judicial procedures.  

3.4.2 The difference between Articles 9(2) and 9(3) of the Aarhus Convention
The difference between the categories of Article 9(2) and 9(3) of the Convention is particularly noteworthy in this relation, but the former includes decisions, acts and omissions, whereas the latter only refers to acts and omissions. Although there is a possibility that Articles 9(2) and 9(3) could both be invoked in situations regarding public participation and decision-making, it is apparent that the rationale behind the two paragraphs is not identical, as previously mentioned in chapter 2.4.1. Even though Article 9(2) lists decisions in addition to acts and omissions, it is evident that Article 9(3) is meant to apply to a broader range of acts and omissions than Articles 9(1) and 9(2). It may therefore be concluded that decisions by public authorities can also be challenged on the basis of Article 9(3) of the Aarhus Convention. The additional listing of decisions in Article 9(2) can simply be explained by its connection to Article 6, which precisely covers decisions on specific activities.

The ACCC has discussed the difference between Articles 9(2) and 9(3) of the Convention. It has emphasized that the Convention makes a distinction between a) acts and omissions concerning permits from a public authority for specific activities for which public
participation is required, based on Article 6 and b) all other acts and omissions both by private persons and public authorities contravening provisions of national law relating to the environment.\textsuperscript{85}

Finally, Article 9(2) of the Aarhus Convention requires an access to a review procedure for challenging both the substantive and procedural legality of decisions, acts or omissions, whereas Article 9(3) does not specify the subject of its review. Even so, the ACCC’s conclusions on communication ACCC/C/2008/33 (United Kingdom) found that the party in question had allowed challenging of certain side of the substantive legality of decisions, acts or omissions and referred to Articles 9(2) and 9(3) in that relation.\textsuperscript{86}

3.5 Private persons and public authorities

3.5.1 Public authorities

Public authority is defined in Article 2(2) of the Convention;

2. “Public authority” means:
(a) Government at national, regional and other level;
(b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
(c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
(d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity;

The Implementation Guide to the Convention defines the term public authority as covering a wide span of governmental activities.\textsuperscript{87} This has been confirmed many times by the ACCC.\textsuperscript{88}

And whereas Article 9(3) also applies to actions and negligence by private persons, it is not considered necessary to scrutinize the definition of the term other than to emphasize that it does apply to activities related to legislative actions.\textsuperscript{89}

The Guide divides the provisions of the Convention on access to justice into three categories. The first one being public authorities’ refusal or mishandling of environmental

\textsuperscript{85} Report (n 55) para. 26.
\textsuperscript{87} Ibid 46.
\textsuperscript{89} Ibid.
information requests, the second concerning permits and the third about acts and omissions as defined in Article 9(3) of the Convention. The categories apply essentially to all environmental issues. Based on this, it can be concluded that Article 9(3) was intended to be a so-called catch-all provision, or a provision that would cover all situations (acts and omissions) not covered by Article 9(1) or Article 9(2). This conclusion is supported by the report of an informal meeting of the aforementioned Working Group about access to justice. The report states that the Group generally had to address access to justice in environmental matters.

The ACCC has stated that even though a decision is made by a public authority such as a municipality in its capacity as a landowner, Article 9(3) is applicable to the act to the extent that it contravenes national law relating to the environment.

The Implementation Guide furthermore states that the wording omissions covers the negligence of a public authority in implementing or enforcing environmental law. The wording acts and omissions thus covers both failure to take action according to law and actions which infringe the law.

A synthesized version of the draft article on access to justice was presented at an informal meeting of the aforementioned Ad Hoc Working Group in July 1997. The majority of delegations agreed on a provision on a general access to justice regarding environmental matters.

3.5.2 Private persons

The Aarhus Implementation Guide does not provide any additional information explaining the meaning of private persons in the context of Article 9(3) of the Convention. Neither do the reports from the aforementioned meetings of the Ad Hoc Working Group. The Guide’s section on the provision does state though that individuals and ENGOs, meeting the national criteria, could challenge an installation’s breach of the wastewater discharge limitations in its license, by taking the owner to court. The individual or ENGO would thus claim a breach of the relevant law and could receive a court order to stop the unlawful discharges. This is a good example of the distinction between Articles 9(2) and 9(3). The installation’s licence issue would have
been subject to Article 9(2), but in a case where the license has already been issued, Article 9(3) applies.

Another example further clarifying this term in this relation would be where a farmer conducts activities on his privately owned land, affecting a protected area located on that same land. Members of the public should, in that case, have access to a review procedure to challenge this act, according to Article 9(3).

### 3.6 National law relating to the environment

#### 3.6.1 Wording

Finally Article 9(3) of the Aarhus Convention ends by saying what can be challenged according to the provision, are actions and omissions that fail to comply with the parties’ *national law relating to the environment*.

According to the Implementation Guide to the Convention, the wording *national law relating to the environment* does not entail limitation so that it solely involves the rights to information or public participation, ensured by the Convention. Furthermore, the wording is not limited to law, which specifically refers to the *environment* in its title or heading. What matters is if the provision at issue affects the environment by some means. This means that the law in question may be of all sorts, even taxation or maritime law.\(^97\) This was emphasized in ACCC’s conclusions in communication ACCC/C/2011/58 (Bulgaria), reviewed below in chapter 3.6.3.\(^98\)

According to the Implementation Guide, the provision does not require that a violation of national law has to be established in advance, i.e. before the assessment. Accusation from a member of the public suffices.\(^99\)

Studying other provisions of the Aarhus Convention reveals that Article 5, on environmental information, also uses the term *relating to the environment*. The Implementation Guide notes that the explicit wording is meant to include a broad range of information in provisions of the Convention specifically relating to environmental information.\(^100\) This is also the case e.g. with Article 6, which refers to plans and programmes *relating to the environment*

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\(^97\) *The Aarhus Convention: An Implementation Guide* (n 14) 197.


\(^100\) ibid 109.
rather than likely to have significant environmental effects, resulting in a much wider concept.\textsuperscript{101} Even though not directly linked to Article 9(3), these provisions indicate that the wording was intended to extend the scope of the provisions in question.

3.6.2 The negotiations on the Aarhus Convention

As mentioned above in chapter 3.5.1, Article 9(3) was intended to cover access to justice in environmental matters in general. The report from the fifth session of the aforementioned Working Group, states that some delegations suggested that such provision would include a right to challenge acts or omissions “which contravened specific provisions of national environmental law.”\textsuperscript{102} The session prepared a few alternative articles on access to justice. Two options were put forward regarding the predecessor of Article 9(3). One alternative included an access to procedures to challenge acts or omissions “which contravene[d] provisions of [the party’s] national environmental law.”\textsuperscript{103} The other referred to acts or omissions “which contravene[d] the provisions of this Convention.”\textsuperscript{104}

The eight session of the Working Group introduced the current version of Article 9(3).\textsuperscript{105} The reports from the sixth and seventh sessions of the Group did not discuss the transformation of the conclusion of the provision from the options put forward in the fifth session. The report from the sixth session did, however, disclose that a small drafting group would meet before the seventh session to prepare a consolidated draft version of the convention, taking into account the work from all sessions of the Working Group.\textsuperscript{106} The seventh session, however, only discussed proposals for Articles 4-7 of the Convention.\textsuperscript{107} Thus, the reports from the negotiations of the Aarhus Convention do not explain how this transformation of the ending of Article 9(3) came about. Nevertheless, it is possible to draw the conclusion that the drafting group, referred to in the report from the sixth session, was responsible for the change.

\textsuperscript{101} ibid 122.
\textsuperscript{102} Report on the fifth session of the AD Hoc Working Group (n 59) 11.
\textsuperscript{103} ibid 16.
\textsuperscript{104} ibid.
\textsuperscript{105} Report on the eight session of the AD Hoc Working Group for the preparation of a draft convention on access to environmental information and public participation in environmental decision-making, CEP/AC.3/16, 17 December 1997, 8.
\textsuperscript{106} Report on the sixth session of the AD Hoc Working Group for the preparation of a draft convention on access to environmental information and public participation in environmental decision-making, CEP/AC.3/12, 22 July 1997, 2.
\textsuperscript{107} Report on the seventh session of the AD Hoc Working Group for the preparation of a draft convention on access to environmental information and public participation in environmental decision-making, CEP/AC.3/14, 21 October 1997.
3.6.3 Case law of the ACCC

The ACCC has noted that the opportunity to challenge acts and omissions based on Article 9(3) must refer to an act or omission contravening national law relating to the environment. An act prohibited by applicable EU law relating to the environment is also regarded as a part of the national law of a party. The Committee has also found that the reference to national law in this context should be interpreted as also referring to domestic EU law.

The ACCC has also emphasized the importance of the text of the Aarhus Convention specifically referring to laws relating to the environment instead of environmental laws. Article 9(3) is therefore not limited to environmental laws, but it rather covers any law relating in general to the environment, helping to protect or in other ways impacting the environment.

The ACCC has reviewed the United Kingdom’s law of private nuisance and whether it constitutes as national law relating to the environment. The ACCC pointed out that private nuisance was defined as an act or omission normally related to land occupation causing damage to a person and some right the person had in connection with the land. Its findings were that the law on private nuisance could be considered a part of the United Kingdom’s law relating to the environment and thus falling under Article 9(3).

The ACCC has also held that laws on the protection of wildlife species and trade in endangered species also constitute laws relating to the environment since they do not exclusively regulate trade.

The ACCC has examined the refusal of access to review procedures to challenge decrees concerning land designation. Such refusal does not comply with Article 9(3) whereas land designation is regulated by environmental laws and laws regulating urban planning.

Finally, the ACCC has found that it can review access to justice in relation to General Spatial Plans in view of Article 9(3). The plans are binding administrative acts, determining the future development of an area and subject to obligatory SEA. They can influence the environment and are, thus, related to it. The ACCC considers the plans as acts of administrative authority.

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108 Communication ACCC/C/2005/11 (Belgium) (n 31), para. 28.
110 Communication ACCC/C/2011/63 (Austria) (n 45), para. 52.
111 Communication ACCC/C/2008/23 (United Kingdom) (n 49), para. 45.
112 Communication ACCC/C/2011/63 (Austria) (n 45), para. 55.
113 Communication ACCC/C/2004/8 (Armenia) (n 53), para. 36.
114 Communication ACCC/C/2011/58 (Bulgaria) (n 97), para. 64.
3.6.4 Conclusions

Defining what constitutes *national law relating to the environment*, is a significant part of determining the scope of Article 9(3) of the Aarhus Convention. The choice of the term *law relating to the environment* instead of *environmental law* is clearly an important indicator. According to the Implementation Guide, what matters is if the concerned provision affects the environment by some means. Accordingly, national law relating to the environment can thus be all sorts of laws, even taxation or maritime laws. The ACCC has emphasized this conclusion.

The preparatory documents of the Aarhus Convention reveal that this part of the provision was greatly transformed throughout the negotiations of the Convention. In addition, the documents do not reveal details of the formation of the final outcome. It is, nonetheless, safe to conclude that the wording was intended to include a broad range of laws, affecting the environment in some ways. The findings of the ACCC support that conclusion.
4. Article 9(4) of the Aarhus Convention

4.1 In general

For the sake of context, it seems appropriate to discuss Article 9(4) of the Aarhus Convention briefly, before proceeding with the coverage of Article 9(3). Article 9(4) reads as follows:

> 4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

Thus, the provision sets wide minimum standards, applicable to all decisions, review procedures, and remedies named in paragraphs 1, 2 and 3 of Article 9.115

The ACCC has found that even though individual provisions of national law are not in conflict with Article 9(4) of the Convention themselves, the cumulative effect of the provisions might nevertheless lead to non-compliance.116

4.2 Adequate and effective remedies

According to paragraph 4, parties shall provide *adequate and effective* remedies, as well as injunctive relief as relevant. Adequacy, in this context, has been interpreted as requiring the relief to ensure proposed effect of a review procedure. *Effective* has been interpreted as meaning that remedies should be capable of efficient enforcement.117

What is considered an adequate and effective remedy is subject to evaluation, but Article 9(4) of the Aarhus Convention underlines that the public should have a genuine potential of preventing permanent impairment of the environment and that laws, intended to prevent impairment, should be applied.118

Injunctive relief is a means to intercept or repair damage by requesting a halt to an activity or a violation, or requesting some measures to be taken. It permits persons to secure orders against other persons, instructing them to do something, e.g. to access a scene or provide access to information.119 Using injunctive relief can be essential in environmental cases since

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118 Jóhannsdóttir and Tómasson (n 5) 75.
they often involve actions that can result in permanent damage to health or the environment. In such cases compensation may be not be enough. In others, compensatory measures might be the most adequate procedure, e.g. to improve the environment in other places. Fiscal compensation may furthermore provide some satisfaction for harmed persons.120

Finally, in some states, members of the public can file civil proceedings to challenge acts and omissions related to environmental matters.121 In the US, for example, some acts provide for citizen enforcement122 procedures through which citizens may collect fiscal penalties.123

The ACCC has reviewed Article 9(4) of the Aarhus Convention on a few occasions. Communication ACCC/C/2005/11 (Belgium)124 concerned access to justice for ENGOs in Belgium. The ACCC found that Belgium would fail to provide an effective remedy according to Article 9(4) if the state kept up its jurisprudence on access to justice regarding town planning permits. Thus, the interest concept as a criterion for standing rights before Belgian courts was thought to be too narrowly interpreted.

The ACCC’s findings in communication ACCC/C/2006/17 (European Community) held that granting access to a review procedure regarding a permit only after construction work had begun, was equivalent to lacking *an adequate and effective remedy* as required by Article 9(4) of the Aarhus Convention.125

The aforementioned communication ACCC/C/2006/18 (Denmark) concerned the appeal of decision in relation to nature conservation. The ACCC had stated that although access to courts was an essential element, it would seem to be a more effective way to provide an administrative appeal to the Nature Protection Board of Appeal, in addition to the court procedure.126

**4.3 Fair, equitable and timely procedures**

Article 9(4) also specifies that parties to the Aarhus Convention are to ensure *fair, equitable, timely and not prohibitively expensive* procedures. *Fair* has been interpreted as to mean

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120 ibid.
121 ibid.
122 Enforcement by the public is also known as public or citizen enforcement, see chapter 1.1.
123 For example the US Clean Water Act and Clean Air Act.
124 Communication ACCC/C/2005/11 (Belgium) (n 31), para 40.
126 Communication ACCC/C/2006/18 (Denmark) (n 54), para. 28.
unbiased and without discrimination, preconception, partiality and self-interest. Fairness also requires the public be informed about review procedures and about the conclusion of the review.

Equitable remedies are remedies that avoid applying the law in an unnecessarily strict and technical manner.\textsuperscript{127} The requirement of timely remedies entails that parties must comply with this standard in relation to all review processes, whether administrative or judicial. The requirement also strengthens the requirement of Article 9(1), regarding ensuring an expeditious review procedure.\textsuperscript{128} This requirement has already been met by many parties to the Convention, e.g. by Belarus, where complaints and appeals concerning decisions in environmental matters must be dealt with within one month. In Ireland, courts have the option to pull particular cases from the list of pending cases and consider them immediately.\textsuperscript{129} An example in addition is the Icelandic Act on right to information on environmental matters No. 23/2006. According to Article 12 of the Act, administrative authorities shall notify about the reason for a delay if a request for access to information has not been processed within 15 days of its receipt. If the request has not been processed 60 days after its receipt by an administrative authority, the process may be appealed to the Appeal Committee on Information Matters.

The aforementioned\textsuperscript{130} conclusion of the ACCC, communication ACCC/C/2004/6 (Kazakhstan),\textsuperscript{131} found that the fact that a court hearing had started without actual notification, meant that the requirement of a fair procedure under Article 9(4) had not been met.\textsuperscript{132} In the aforementioned ACCC’s findings regarding communication ACCC/C/2008/23 (United Kingdom),\textsuperscript{133} the ACCC concluded that a court order instructing communicants to pay the whole of the legal cost of the public authorities was inequitable and unfair and did not comply with Article 9(4) of the Aarhus Convention.\textsuperscript{134}

\textbf{4.4 Not prohibitively expensive}

Finally, Article 9(4) of the Aarhus Convention requires its parties to ensure review procedures that are \textit{not prohibitively expensive}. The cost of challenging decisions and enforcing national environmental law cannot be so expensive that it hinders the public from doing so. High costs have proven to be one of the main hindrances to access to justice, but various means are

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{127} The Aarhus Convention: An Implementation Guide (n 14) 201.
\item\textsuperscript{128} ibid.
\item\textsuperscript{129} ibid.
\item\textsuperscript{130} See chapter 3.1.3.
\item\textsuperscript{131} See chapter 2.5.1.3.
\item\textsuperscript{132} Communication ACCC/C/2004/6 (Kazakhstan) (n 46), para. 28-29.
\item\textsuperscript{133} See chapter 2.5.1.3.
\item\textsuperscript{134} Communication ACCC/C/2008/23 (United Kingdom) (n 49), para. 52.
\end{enumerate}
\end{footnotesize}
available for the parties to fulfil this requirement.\textsuperscript{135} The Convention does not contain instructions on how to keep the costs at a minimum level, so the parties are allowed great discretion in how to advance. While the wording \textit{not prohibitively expensive} is not very thorough, the obligation imposed on the parties is certainly easy to understand.\textsuperscript{136}

To mention a few examples of costs that can be associated with access to justice, costs relating to judicial procedures may include attorney’s fees, court fees, expert fees and witness transport costs.\textsuperscript{137} Other environmental procedures’ costs may include administrative or participation appeal fees and securities for obtaining injunctive relief.\textsuperscript{138}

A 2012-2013 study on the implementation of Articles 9(3) and 9(4) of the Aarhus Convention in the EU Member States, discussed in details in chapter 6, revealed that there were generally no fees for participating in environmental decision-making or for administrative appeals. In most cases, however, there were court fees.\textsuperscript{139} The study also disclosed that in many of the EU Member States, court appeals required assistance by a lawyer, especially before the supreme courts.\textsuperscript{140} It furthermore revealed that at an administrative level, each party usually bore their own costs in environmental cases in the EU Member States. The \textit{loser pays principle}, which is self-explanatory, was the basic principle for distribution of costs in court, although at the discretion of the presiding judge.\textsuperscript{141} According to the report on the study, costs of judicial procedures were considered a hindrance to access justice in environmental matters or had discouraging effect at least.\textsuperscript{142}

Proceedings before the Appeal Committee for Environmental and Resource matters, discussed below in chapter 7.5.1, is free of charge. The Appeal Committee ruled on complaint costs in matter no. 13/2014. The Committee found that there was no legal basis for determining complaint costs in matters before the Committee and thus it did not consider a claim thereof.\textsuperscript{143}

The ACCC has considered this part of Article 9(4) quite often and its findings provide guidance on the matter. In the ACCC’s findings regarding communication ACCC/C/2008/27 (United Kingdom), the ACCC found that the costs awarded in the case amounted to non-compliance with Article 9(4) since they were considered to be prohibitively expensive. The

\textsuperscript{135} The Aarhus Convention: An Implementation Guide (n 14) 203.
\textsuperscript{136} ibid.
\textsuperscript{137} ibid 204.
\textsuperscript{139} ibid 17-18.
\textsuperscript{140} ibid 18.
\textsuperscript{141} ibid 19.
\textsuperscript{142} ibid 21.
\textsuperscript{143} Ruling of the Appeal Committee for Environmental and Resource matters in case no. 13/2014.
communication concerned the United Kingdom’s decision to expand the operations of an airport through a so-called *private planning agreement*, which did not allow the public to appeal except through judicial review.\(^{144}\) The ACCC furthermore found that in such cases, in which a member of the public loses a case involving public environmental interest, fairness should be taken into consideration when allocating costs.\(^{145}\)

In the conclusion of the ACCC concerning communication ACCC/C/2011/57 (Denmark), the fee for NGOs to appeal decisions to the Nature and Environmental Appeal Board was DKK 3,000. The ACCC took into account that the fee for appealing decisions to other comparable review mechanisms in Denmark was either free or at least significantly less than DKK 3,000 and found that the fee did not comply with the requirement in Article 9(4) concerning costs.\(^{146}\)

What can be added to this discussion is the fact that the Aarhus Convention does not give any instructions about the division of costs from review proceedings between those who succeed and those who do not.

### 4.4 More ACCC case law

In the findings of the ACCC regarding communication ACCC/C/2008/24 (Spain), the ACCC held that even though injunctive relief was available in theory, it was not available in practice. Citizens could therefore not actually obtain injunctive relief, neither early nor late. This was in non-compliance with Article 9(4) of the Aarhus Convention since adequate and effective remedies were not provided.\(^{147}\) Spanish legislation furthermore did not fully take into account the requirements of Article 9(4) in full, since it did not prevent decisions regarding the cost of appeal.\(^{148}\)

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\(^{145}\) ibid, para 45.


\(^{148}\) ibid, para 110.
The ACCC has held that a restrictive legal aid system, as it applied to NGOs, constitutes a failure to provide fair and equitable procedures in accordance with Article 9(4) of the Convention. Costly financial requirements, preventing entities from receiving free legal aid, was contradictory and in contrast to the innate meaning of free legal aid since it excluded small NGOs from receiving the aid.  

In the aforementioned conclusions of the ACCC, regarding communication ACCC/C/2008/33 (United Kingdom), the ACCC assessed the cost system as a whole in a systematic way. There the ACCC furthermore concluded that parties could not rely on judicial discretion of courts to ensure that time duration of judicial review applications complied with the requirements of Article 9(4).

150 See also chapter 3.4.
151 Communication ACCC/C/2008/33 (United Kingdom) (n 86), para. 128.
152 ibid, para 139.
5. Interactions between Article 9(3) and EU law

5.1 The Aarhus Convention and the European Union

The EU was an entrepreneur regarding the engagement of members of the public in environmental matters. Before the 1990’s, the EU had already adopted some pieces of legislation, e.g. Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment and Directive 90/313/EEC on the freedom of access to information on the environment. The European Court of Justice had also emphasized parts of individual rights to depend on environmental law in courts.

The Aarhus Convention was approved by the EU with a decision of the Council from 17 February 2005. The decision referred to the fact that the European Community and most of its Member States had already signed the Convention in 1998. It stated that the objective of the Convention was in accordance with the objectives of the European Community’s environmental policy, as listed in Article 174 of the Treaty establishing the Community. The Community therefore approved the Convention and the text of the Convention was attached to the decision. Since 2012, all EU Member States and the EU are parties to the Convention.

The EU does not have exclusive competence in matters of external environmental relations. Thus, both the EU and its Member States have competence when it comes to MEAs and that is precisely the case with the Aarhus Convention. It is furthermore essential to determine how the division of responsibility for compliance between the EU and its Member States.

Upon the approval and signing of the Aarhus Convention, the EU made a declaration, announcing, inter alia, that:

the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention. The European Community is responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force. The exercise of Community competence is, by its nature, subject to continuous development.

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153 Now Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment.
157 Now Article 191 of the Treaty on the Functioning of the European Union.
158 Ebbesson (n 155) 3.
160 ibid.
161 Ebbesson (n 155) 9.
The EU furthermore declared the implementation of the commitment following Article 9(3) not completely covered by the legal instruments, which the Union had already put into practice. Therefore, the Member States were responsible for these obligations unless and until the EU adopted EU law to cover these obligations.\(^{163}\)

Subsequently the EU thought it was necessary to improve access to justice concerning the acts of its institutions.\(^{164}\) The EU therefore adopted Regulation 1367/2006\(^ {165}\), further discussed below in chapter 5.2, in order to apply the Aarhus Convention to EU’s institutions, bodies and agencies.\(^ {166}\)

Jonas Ebbesson points out the special relationship between EU and the Aarhus Convention, due to the EU’s legal structure and the fact that it is a party aligned with its Member States. He argues that sufficient EU legislation is critical for ensuring compliance and implementation of the Convention for both the EU and its Member States.\(^ {167}\) The EU’s obligation based on the Convention is in fact two-fold. On one hand, the EU is obligated to implement acts addressed to its Member States and on the other towards its institutions.

Ebbesson furthermore states that the jurisprudence of the Court of Justice of the European Union (CJEU) has had a positive effect on compliance by the Member States. He notes that all three pillars of the Convention apply to the EU courts and institutions and that the ACCC has examined whether the EU has met its requirements.\(^ {168}\) The responsibility division between the EU and its Member States is further discussed in chapter 5.5.3 below on CJEU case law.

### 5.2 Regulation 1367/2006

The aforementioned Regulation 1367/2006 grants environmental organisations the right to request an internal review of an EU procedure under certain conditions. According to Article 10 of the Regulation, the EU institution, which is responsible for a procedure, also decides on

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\(^{164}\) Jans, J. and Vedder, H. (n 159) 246.


\(^{166}\) According to Article 1(d) of the Regulation, among its objectives is to contribute to the implementation of the obligations of the Aarhus Convention by “granting access to justice in environmental matters at Community level under the conditions laid down by this Regulation.”

\(^{167}\) Ebbesson (n 1) 8.

\(^{168}\) Ebbesson (n 1) 4.
the review. Article 10 is, furthermore, limited to *administrative acts under environmental law* and it does not provide remedies to challenge acts and omissions by private persons as required by Article 9(3) of the Aarhus Convention.\(^\text{169}\)

Furthermore, internal reviews are limited to administrative acts *under environmental law*, defined in Article 2(1)(f)\(^\text{170}\) of the Regulation. The definition is very restrictive and as a result, many areas of EU policy may fall outside the scope of the internal review procedure. Another matter worth mentioning is the criteria listed in Article 11 of the Regulation. According to the criteria, only certain NGOs can request an internal review and natural persons do not have access to the procedure.\(^\text{171}\)

In view of the abovementioned remarks, one can conclude that the internal review procedure of the Regulation does not meet the requirements of Article 9(3) of the Aarhus Convention.\(^\text{172}\)

Two recent cases have been brought before the CJEU on the basis of the Regulation, more specifically on the basis of the rejection of requests for internal views according to Article 10(1) of the Regulation. The cases will be discussed further in chapters 5.5.3.2 and 5.5.3.3.

### 5.3 Proposal for a Directive on access to justice in environmental matters

#### 5.3.1 In general

Two directives, which concerned the first two pillars of the Aarhus Convention, were adopted by the EU in 2003. On October 24\(^\text{th}\) 2003, the Commission presented a proposal for a Directive of the European Parliament and the Council on access to justice in environmental matters. The proposal was part of a so-called *Aarhus package*, which consisted of a proposal for a decision


\(^{170}\) Article 2(1)(f) of Regulation 1367/2006 reads: ‘environmental law’ means Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems;

\(^{171}\) Jans, J. and Vedder, H. (n 159) 247-248.

\(^{172}\) Berthier, A. and Krämer, L. (n 169) 72.
to ratify the Convention\textsuperscript{173} and a proposal for Regulation no. 1367/2006\textsuperscript{174}, discussed above in chapters 5.1 and 5.2.\textsuperscript{175}

The proposal focused on access to justice regarding acts and omissions by public authorities, but left it to the EU Member States to set up suitable criteria for access to justice related to acts and omissions by private persons. The proposal created minimum conditions for access to administrative or judicial review procedures regarding environmental matters, setting up the criteria able to ensure improved implementation of environmental law\textsuperscript{176}, taking due consideration of the proportionality principle.\textsuperscript{177}

The proposal’s general requirement on access to justice simply mirrored the wording of Article 9(3) of the Aarhus Convention. Moreover, the proposal made no difference between access to a court or an administrative review procedure, although requiring independence and impartiality and that the decisions of the reviewing body were legally binding.\textsuperscript{178}

When preparing the proposal, two meetings took place with national experts from the EU Member States. Member States made several comments on the proposal at the meetings and afterwards in writing.\textsuperscript{179} Two meetings were also held with NGOs, in addition to collection of observations from industrial operators and local authorities of the Member States.\textsuperscript{180}

According to the proposal, EU Member States were to report periodically to the Commission on the application of the directive. The Commission would then publish reports on the matter and in that way monitor the application.\textsuperscript{181}

\textbf{5.3.2 Justification for the proposal}

The dual objective of the proposal was to firstly to play a part in the implementation of the Aarhus Convention and secondly to make up for some deficiencies in managing the application of environmental law. General considerations of the proposal pointed out that environmental law was primarily enforced by public authorities since there was a lack of financial interest for

\textsuperscript{173} Commission, Proposal for a Council Decision 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 regarding environmental matters, COM (2003) 625.


\textsuperscript{176} Commission, Proposal for a directive on access to justice in environmental matters, COM (2003) 624.

\textsuperscript{177} ibid, chapter 3.6.

\textsuperscript{178} Synthesis report (n 138) 25.

\textsuperscript{179} Proposal for a directive (n 176), chapter 5.1.

\textsuperscript{180} ibid, chapter 5.2.

\textsuperscript{181} ibid, chapter 6.
private actors to enforce it. The enforcement is, thus, dependent on factors, such as political will and the authorities’ resources. And in addition, limited legal standing too often resulted in deficiency in enforcement of environmental law. Ensuring wider access to administrative and judicial procedures in environmental matters was, accordingly, considered a step towards improving enforcement.\textsuperscript{182}

The proposal, founded on Article 175(1) of the Treaty, declared that its purpose was, furthermore, to strengthen environmental protection. It referred to Articles 2 and 174 of the EC Treaty, stating that EU was to implement an \emph{environmental legal policy} that contributed to the objectives underlined in Article 174 of the EC Treaty.\textsuperscript{183}

A common framework containing procedural provisions to be applied in the same way in all Member States, was believed to be a necessary EU legal instrument. Firstly, in the light of the Aarhus Convention, which imposes on the EU the obligation to ensure access to justice in environmental matters. Secondly, because of the unequal circumstances in the EU Member States regarding compliance with and enforcement of environmental law. And thirdly, due to the transboundary aspect of environmental problems.\textsuperscript{184}

\subsection*{5.3.3 Review proceedings}

The proposal granted review proceedings regarding acts and omissions by public authorities, which were to be subject to both procedural and substantive review. The review was to be based on a \textit{two tiered approach}. Those who had legal standing had to notify the public authority in question, giving it the opportunity to reconsider prior to starting environmental review proceedings. The proposal granted standing rights to certain members of the public and to \textit{qualified entities}.\textsuperscript{185}

\subsection*{5.3.4 The content of the proposal}

The access to justice granted by the proposal, was based on administrative and judicial proceedings, already existing in the EU Member States. The proposal contained several definitions, including definition of \textit{administrative acts and omissions} ("Administrative act shall mean any measure taken under environmental law by a public authority having a legally binding and external effect. Administrative omission means a failure to act by a public authority, if there was an obligation under environmental law for the public authority to act")\textsuperscript{186} and a definition

\begin{itemize}
  \item \textsuperscript{182} ibid, chapter 1.1.
  \item \textsuperscript{183} ibid, chapter 1.2.
  \item \textsuperscript{184} ibid, chapter 3.3.
  \item \textsuperscript{185} ibid, chapter 3.6.
  \item \textsuperscript{186} ibid, chapter 6.
\end{itemize}
of members of the public ("one or more natural or legal persons, and their associations, organisations or groups")\textsuperscript{187}. As regards environmental law, the definition was in general terms so that the relevant environmental legislation could later be included since it was constantly developing.\textsuperscript{188}

Members of the public, which met the criteria laid down in the proposal, were given access to review proceedings, challenging administrative acts and omissions breaching environmental law. According to the proposal, members of the public had to have “a sufficient interest in the related administrative act or omission or maintain the impairment of a right, where the administrative procedural law of the Member State concerned require[d] this as a precondition to have access to review procedures.”\textsuperscript{189} The proposal thus rejected the possibility of an actio popularis requirement\textsuperscript{190}, concept is explained further in chapter 8.2.1.2.

Qualified entities were granted legal standing, conferring legal standing to certain groups that did not have to have sufficient interest or maintained the impairment of their rights, such as required of members of the public. This type of legal standing required a precise definition of certain characteristics, e.g. regarding the activity of the entities and regarding geographic area of activity. The proclaimed objective of such entities should also be to protect the environment.\textsuperscript{191}

5.3.5 Current situation

The proposal for a Directive of the European Parliament and the Council on access to justice in environmental matters ended up being withdrawn in 2014 since it did not gather enough support from the EU Member States.\textsuperscript{192} During my work on this thesis, I sent an enquiry to the EU Directorate-General (DG) for Environment\textsuperscript{193} on the current situation regarding the proposal and whether a new proposal was being prepared.\textsuperscript{194} According to the DG for Environment’s response, the Commission decided to prepare an interpretative guidance document based on the case law of the CJEU, instead of proposing a legislative instrument. The document’s publication was expected in the spring 2017.

\textsuperscript{187} ibid, chapter 6.
\textsuperscript{188} ibid, chapter 6.
\textsuperscript{189} ibid, chapter 6.
\textsuperscript{190} ibid, chapter 6.
\textsuperscript{191} ibid, chapter 6.
\textsuperscript{192} 2003/0246/COD.
\textsuperscript{193} The EU DG for Environment is the European Commission department that is responsible for EU’s policy on the environment.
Attached to the response was a roadmap with an outline and further details, published in July 2016. It stated that the non-implementation of EU environmental laws caused great damage to the health of both humans and animals and to the quality of water, soil and air. The importance of improving the implementation of EU environmental law in the Member States was underlined and this was stated the reason for creating the roadmap. The political context of the initiative was the importance that bot EU Member States and EU institutions focus on improving its implementation.

The roadmap furthermore pointed out that several of the EU Member States had been found in breach of their obligations under the Aarhus Convention by the ACCC, even though compliance could be ensured under the current system based on the Treaty. The roadmap made referred to studies, e.g. the 2012-2013 study conducted on EU implementation of Articles 9(3) and 9(4), further discussed in chapter 6. Studies had revealed different situations in the Member States regarding access to justice in environmental matters as well as the existence of several issues and hindrances.

Citizens and NGOs were also negatively affected by some hindrances in acceding the courts. The roadmap pointed out that the CJEU had received several preliminary references from various national courts, seeking clarification on access for those groups. Furthermore, public administration and national courts faced growing workload and costs relating to uncertainty in cases concerning access to justice.

The roadmap concluded that more or less all EU Member States had failed to comply with requirements of effective access to justice regarding environmental matters. Therefore, it outlined four options for ensuring adequate access to justice, one of which was an interpretative Communication. Its conclusion was that issuing an interpretative Communication in relation to existing EU rules on access to justice in environmental matters, would have advantages over other options, provide clarity and improve efficiency. The Communication would be less of a nuisance for the Member States compared to a new legal instrument and less invasive as well. Matters of non-compliance should still be dealt with by infringement procedures.

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196 ibid 1.
197 ibid 1-2.
198 ibid 2.
199 ibid 2-3.
200 ibid.
201 ibid 5.
5.3.6 Conclusions
Even though it was claimed that a proposal for a Directive of the European Parliament and the Council on access to justice in environmental matters was vital to make up for some deficiencies in managing the application of environmental law, Article 9(3) of the Aarhus Convention has not yet been transposed by EU secondary legislation. According to the information from the EU DG for Environment, it has been decided not to submit a new proposal on the matter, at least for now.

5.4 Access to national courts
Provisions on access to national courts in environmental matters in the EU Member States are considerably different. Comparative studies have been made, such as Jonas Ebbesson’s study Access to Justice in Environmental Matters in the EU from 2002 which concluded that in addition to different conditions and requirements, there was also great difference to which degree institutions were entrusted with reviewing environmental decisions. This conclusion was confirmed in Jan Darpô’s 2012-2013 synthesis report, discussed in details in chapter 6.2. The consequence of this divergence is that members of the public do not necessarily have the same opportunities to access justice generally in environmental matters when comparing the EU Member States.

EU’s compliance to the Aarhus Convention entails that it is committed to ensure adherence to the Convention all over the EU territory and all of its Member States. Even so, there is to date no general EU legislation on access to national courts in environmental matters. The Commission did however present a proposal for a directive which was at the end withdrawn as previously discussed in chapter 5.3. It therefore remains to be seen which measures the EU will take to harmonize the EU legislation and the Member States’ legislation so that it complies with Article 9(3).

202 Ebbesson (n 1) 20.
203 ibid.
204 Berthier, A. and Krämer, L. (n 169) 78.
205 Proposal for a directive (n 176).
206 Berthier, A. and Krämer, L. (n 169) 79.
207 ibid.
5.5 Access to EU courts

5.5.1 In general

The CJEU is the main judicial authority of the EU, interpreting EU law to ensure uniform application in all Member States. The Court also settles legal disputes between governments and EU institutions. The most common cases before the Court are preliminary rulings (interpreting the law for national courts), infringement proceedings (cases against a national government failing to comply with EU law), actions for annulment (to annul EU legal acts believed to violate EU treaties or principles), actions for failure to act (to ensure that the EU takes action after a complaint) and actions for damages (to sanction EU institutions as a result of harmed interest due to acts or omission of the EU).208

In case of external environmental relations209 both the EU and its Member States have competence, as previously mentioned in chapter 5.1. In that case, the EU and its Member States all become parties to a convention (a mixed agreement) and it has to be implemented in “close association between the institutions of the Union and the Member States.”210 This is in accordance with the so-called principle of sincere cooperation, mentioned in Article 4(3) Treaty on European Union (TEU). The principle entails that the EU institutions and the institutions of the Member States work closely together in fulfilling the obligations, which they have entered into through the convention in question.211

Many recent multilateral environmental agreements (MEAs) contain specific provisions addressing the problem concerning how the EU and its Member States are bound by the agreements as regards other contracting parties.212 The Council of Europe made a special declaration on competence with respect to the Aarhus Convention, as mentioned above in chapter 5.1.

The CJEU has recently rendered three landmark judgments concerning the interpretation and scope of Article 9(3) of the Aarhus Convention. I intend to outline these cases briefly and analyse their conclusions. The first one, so-called Slovak Brown Bear case213, was brought to the CJEU in the form of preliminary questions from the Slovak Supreme Court, as further discussed in chapter 5.5.3.1. The referral from the Slovak Supreme Court was thus made in accordance with the principle of sincere cooperation since both the EU and Slovakia had

209 Jans, J. and Vedder, H. (n 159) 70.
210 ibid.
211 ibid.
212 ibid 71.
213 Slovak Brown Bear (n 55).
become parties to the Convention, although the case concerned Slovakia’s obligations according to the Convention. The other two judgments, the joined case of Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht and the joined case of Stichting Natuur en Milieu and Pesticide Action Network Europe concerned access to justice in environmental matters at the EU level on the basis of Regulation 1367/2006, as further discussed in chapters 5.5.3.2 and 5.5.3.3. The two latter cases thus related to the EU’s obligations according to the Convention.

5.5.2 The ACCC and the CJEU

The ACCC examined access to EU courts in environmental matters in its findings of 14 April 2011. The NGO ClientEarth submitted a communication to the Committee, claiming the failure by the EU to comply with its obligation, inter alia under Article 9(3). The failure mainly concerned the application of the individual concern standing criterion for private individuals and NGOs that challenged decisions of EU institutions before General Court and the CJEU. The allegations were supported by references to several decisions by the CJEU and the General Court, including WWF-UK v Council of European Union (WWF Case) and Regiao autónoma dos Açores v Council (Açores Case).

In the WWF Case, WWF-UK, an environmental organisation and a member of the Executive Committee of the North Sea Regional Advisory Committee (RAC), sought to challenge a regulation fixing the Total Allowable Catches (TACs) for cod for 2007 before the General Court. WWF had held a minority viewpoint regarding a report from RAC on a proposal for a Council regulation fixing the fishing opportunities for certain fish stocks. The action was dismissed by the Court as inadmissible on the grounds that the regulation was not of individual concern to WWF-UK. WWF appealed to the CJEU, which confirmed the decision and held that WWF-UK was not individually concerned.

The Açores Case concerned the autonomous region of the Azores, which sought to partly annul a regulation on the management of the fishing effort relating to community fishing areas and resources. The General Court dismissed the action, stating that the autonomous region was not individually concerned by the act in question. The case was appealed to the CJEU, but

214 Cases C-401/12, C-402/12 and C-403/12, Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht, Judgment of 13 January 2015 (Vereniging Milieudefensie).
215 Cases C-404/12, C-405/12 P, Stichting Natuur en Milieu and Pesticide Action Network Europe, Judgment of 13 January 2015 (Stichting Natuur en Milieu).
216 Aarhus Convention Compliance Committee, Findings and recommendations with regard to Communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, adopted on 14 April 2011.
218 Case C-444/08 Regiao autónoma dos Açores v Council, Judgment of 26 November 2009 (Açores Case).
the Court dismissed the appeal without discussing Article 9 of the Aarhus Convention in that context.

The ACCC reviewed Articles 263, 265 and 267 of the TFEU and jurisprudence on access to EU Courts. It concluded that if the jurisprudence of the Courts would continue on the same path, the EU would fail to comply with Article 9(3) and 9(4) of the Convention. The Committee thus recommended that “a new direction of the jurisprudence of the EU Courts should be established in order to ensure compliance with the Convention.”

### 5.5.3 The CJEU and Article 9(3)

#### 5.5.3.1 The Slovak Brown Bear case

#### 5.5.3.1.1 Facts of the case

The so-called *Slovak Brown Bear case* was brought to the CJEU in the form of preliminary questions from the Slovak Supreme Court on the interpretation of the Aarhus Convention. In April 2008 the Slovak Environment Ministry granted a hunting organisation permission to derogate from protective conditions that had been accorded to brown bears in Slovakia, authorising a construction project. The Slovak NGO Lesoochranárske zoskupenie VLK (LZV), whose objective is the protection of the environment, demanded to participate in these administrative proceedings, arguing that the Slovakian Administrative Procedure Code recognized its status as a party. LZV specifically referred to its rights and legally protected interests arising from the Aarhus Convention. The Ministry rejected LZV’s arguments, claiming that it only had the status of a participant or interested party, and as a result, LZV was precluded from directly initiating proceedings itself to review the legality of ministry decisions. LZV then brought a contentious appeal against the rejection of the ministry, building its case inter alia on the direct effect of Article 9(3) of the Aarhus Convention.

The case ended up in the Slovak Supreme Court, which referred preliminary questions to the CJEU on the interpretation of Article 9(3) of the Aarhus Convention, in particular on the direct effect of the provision.

#### 5.5.3.1.2 Judgment

CJEU argued that since the Aarhus Convention was signed and approved by the Community, the provisions of the Convention now formed an “integral part of the legal order of the European

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219 ibid 21.
220 *Slovak Brown Bear* (n 55).
Union” according to settled case law. The Court also argued that both EU and its Member States concluded the Convention and accordingly the Court had jurisdiction to distinguish between obligations of the EU and obligations, which remained the responsibility of the Member States.

The Court pointed out that it was essential to examine whether the EU had exercised its power and adopted legislation to implement the obligations deriving from Article 9(3) of the Aarhus Convention. If that was the case, the EU legislation would be applicable and the Court would determine if Article 9(3) had direct effect. If not, obligations stemming from Article 9(3) would be covered by national law of the Member States and their national courts’ task to decide whether individuals and NGOs could rely directly on rights deriving from international agreement in question. On that note, the Court stated that the EU had “explicit external competence pursuant to Article 175 EC” in the field of environmental protection.

The Court observed that the species in the present case was mentioned in Annex IV(a) to the Habitats Directive. The species was subject to strict protection under Article 12 of the Directive and derogations could only be granted under conditions laid down in Article 16 of the Directive. Therefore, the dispute in the case fell within the scope of EU law.

The Court specifically referred to the Council’s declaration mentioned in chapters 5.1 and 5.5.1. It also noted that previously mentioned Regulation No 1367/2006 only concerned the institutions of the EU an could therefore not be regarded as implementing the obligations deriving from Article 9(3) of the Aarhus Convention.

Furthermore, the Court argued that where both national law and EU law are applicable in a situation, it is in the interest of the EU that the provision in question be interpreted uniformly in order to prevent different interpretation. As a result, the Court had jurisdiction to interpret Article 9(3) of the Aarhus Convention and rule on whether or not the provision had direct effect.

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221 ibid, para 30.
222 ibid, para 31.
223 ibid, para 32.
224 ibid, para 35.
226 Slovak Brown Bear (n 55), para 37-38.
227 ibid, para 39.
228 See discussion in chapters 3.1 and 5.2.1.
229 ibid, para 41.
230 ibid, para 42-43.
The Court held that Article 9(3) of the Convention did not contain “any clear and precise obligation capable of directly regulating the legal position of individuals”\textsuperscript{231}, noting that the provision was subject to the adoption of a measure for its implementation.\textsuperscript{232} However, the Court emphasized that the Article was intended to “ensure effective environmental protection.”\textsuperscript{233} Therefore, the Court concluded that Article 9(3) did not have direct effect in EU law.\textsuperscript{234}

In that connection the Court found that in the absence of EU law on the matter, domestic legal system of each member states should provide procedural rules for safeguarding rights that individuals attain from EU law, in this case the Habitats Directive.\textsuperscript{235} Accordingly it was a task for the national courts of the member states to interpret national law so that it was consistent with the objectives laid down in Article 9(3) of the Aarhus Convention. On that basis, the Court ruled that it was for the Slovak Supreme Court to interpret the rules in question in accordance with Article 9(3) “so as to enable an environmental protection organisation, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.”\textsuperscript{236}

In light of the Court’s respond to questions one and two, it stated that it was not necessary to reply to question three.\textsuperscript{237} The verdict of the Court read as follows:

Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 does not have direct effect in European Union law. 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 European Union law, in order to enable an environmental protection organisation, such as the Lesoochranárské zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.\textsuperscript{238}

5.5.3.1.3 Reflection on the Slovak Brown Bear case

Jan H. Jans and Hans H.B. Vedder argue that the above findings of the CJEU make the Council’s declaration of competence as to the Aarhus Convention almost pointless.\textsuperscript{239} I would

\textsuperscript{231} ibid, para 45.
\textsuperscript{232} ibid, para 45.
\textsuperscript{233} ibid, para 45.
\textsuperscript{234} ibid, para 46.
\textsuperscript{235} ibid, para 47.
\textsuperscript{236} ibid, para 51.
\textsuperscript{237} ibid, para 53.
\textsuperscript{238} ibid, para 54.
\textsuperscript{239} Jans, J. and Vedder, H. (n 159) 74.
have to agree with them. In the declaration, the Council specifically states that the European Community is competent in implementing the obligations deriving from international agreements in accordance with TEU, i.p. Article 175(1)\textsuperscript{240}. The declaration especially listed the objectives of preserving, protecting and improving the quality of the environment.\textsuperscript{241}

An interesting fact about the \textit{Slovak Brown Bear} case is that the Court has previously held that even though a specific issue had not yet been subject of EU legislation, it was part of EU law where that issue was regulated by agreements concluded by the EU and its Member States and concerned a field covered by it in large measure. This was emphasized by the Court in the \textit{Slovak Brown Bear} case.\textsuperscript{242} Another interesting part of the \textit{Slovak Brown Bear} judgment is the Court’s reference to the principle of effectiveness of EU law\textsuperscript{243} and the following assumption that national courts of the member states should interpret national law in conformity with the objectives of the Aarhus Convention.

The findings of the court mean that if members of the public cannot rely on direct effect of Article 9(3), the parties to the Convention must make sufficient changes in their national legislation to comply with the requirements of the provision. They must guarantee access for members of the public to review procedures to challenge acts and omissions and public authorities, contravening provisions of national law relating to the environment.

### 5.5.3.2 Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht

#### 5.5.3.2.1 Facts of the case

The joined case of Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht was an appeal brought by the EU Council, the European Parliament and the European Commission against a judgment from June 2012 of the General Court, concerning access to justice in environmental matters at the EU level.\textsuperscript{244}

In 2009, the Netherlands got a postponement of the deadlines deriving from the Ambient Air Quality Directive\textsuperscript{245}, and thereby a temporary exemption from the obligations arising from the Directive. The Dutch NGOs Vereniging Milieudefensie (VM), an association fighting for

\textsuperscript{240} Currently Article 192 TFEU.
\textsuperscript{241} Council Decision 2005/370/EC (n 86).
\textsuperscript{242} \textit{Slovak Brown Bear} (n 55), para 36.
\textsuperscript{243} The principle of effectiveness is recognized as a general principle of EU law by the CJEU. The principle i.a. requires the effective protection of EU rights and of EU law in national courts. With regard to treaties, according to the principle a judge has to choose the interpretation most likely to guarantee the effectiveness of a treaty.\textsuperscript{244} UTC.org, \textit{Case Summary posted by the Task Force on Access to Justice} available at: https://www.utec.org/fileadmin/DAM/env/pp/a.to.jurisprudence_prj/EUROPEAN_UNION/CJEU/C401-405_2012_InternalReview/CJEU_C401-405_2012_Internal_review_2015.pdf (Accessed 3 March, 2017).
protection of the environment, and Stichting Stop Luchtverontreiniging Utrecht (SSLU), a foundation campaigning against air pollution, submitted a request to the Commission for internal review of its decision according to Article 10(1) of Regulation 1367/2006. The provision reads as follows:

Any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act.

The Commission rejected the request as inadmissible on the grounds that the decision was not a measure of individual scope and therefore not an administrative act according to Article 2(1)(g) of the Regulation.

VM and SSLU sought to annul the decision before the General Court. In its judgment of 14 June 2012 the Court held that the limitation in Regulation 1367/2006, stating only acts of individual scope were open to review, was too restrictive and incompatible with Article 9(3) of the Aarhus Convention. It was thus contrary to EU law and could not be applied and, accordingly, the Court annulled the Commission’s decision at issue.

5.5.3.2.2 Judgment
The Council, the Parliament and the Commission asked the CJEU to set aside the aforementioned judgment of the General Court of the EU. Their appeals were joint for the purpose of the judicial procedure and judgment.

The CJEU noted that international agreements concluded by the EU bind the Union’s institutions and prevailed over acts laid down by the institutions. However, EU institutions were free to agree with non-member states concerning the effects of the provisions of agreements concluded by the EU. If not specifically addressed in the agreement in question, it was for the courts having jurisdiction in the matter to decide.

The Court referred to its decision in the Slovak Brown Bear case and that Article 9(3) did not regulate the legal position of individuals directly; did not have direct effect. It furthermore held that it could not be concluded that the EU intended to implement the

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246 See discussion in chapters 3.1 and 5.2.1.
248 Article 9(3) of the Aarhus Convention refers to “acts and omissions by private persons and public authorities“.
249 Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht (n 214), para 52.
250 ibid, para 53.
251 ibid, para 55.
obligations deriving from Article 9(3) of the Aarhus Convention regarding review procedures, and that Regulation 1367/2006 only concerned EU institutions and only one of the remedies that were available to individuals for assuring compliance with EU environmental legislation.\textsuperscript{252} The Court therefore found that the General Court had made an error of law when it held that Article 9(3) could be the basis of assessment of the legality of Article 10(1) of the Regulation and thus set aside its judgment.\textsuperscript{253}

\textit{5.5.3.3 Stichting Natuur en Milieu and Pesticide Action Network Europe}

\textbf{5.5.3.3.1 Facts of the case}

The joined case of \textit{Stichting Natuur en Milieu} and \textit{Pesticide Action Network Europe} was an appeal brought by the Council of the European Union and the European Commission against a judgment from June 2012 of the General Court, concerning access to justice in environmental matters at EU level.

Stichting Natuur en Milieu, a foundation established to protect the environment, and Pesticide Action Network Europe, a foundation campaigning against the use of chemical pesticides, requested that the Commission carried out a review of Regulation No 149/2008\textsuperscript{254} consistent with Article 10(1) of Regulation 1367/2006.\textsuperscript{255} The request was rejected as inadmissible on the basis that Regulation 149/2008 was not a measure of individual scope and therefore not an administrative act according to Article 2(1)(g) of Regulation 1367/2006.\textsuperscript{256}

The foundations sought the annulment of the decisions of the Commission by an application to the General Court in 2008.\textsuperscript{257} The Court annulled the decisions at issue and the Council and the Commission appealed to request the CJEU to set aside the judgment of the General Court and to dismiss the action of the foundations.\textsuperscript{258}

\textbf{5.5.3.3.2 Judgment}

The findings of the Court were identical to the findings in the joined case of \textit{Vereniging Milieudefensie} and \textit{Stichting Stop Luchtverontreiniging Utrecht}\textsuperscript{259} reviewed above in chapter 5.5.3.2.

\textsuperscript{252} ibid, para 58.
\textsuperscript{253} ibid, para 61-62.
\textsuperscript{255} \textit{Stichting Natuur en Milieu} (n 215), para. 10.
\textsuperscript{256} ibid, para. 11.
\textsuperscript{257} ibid, para. 12.
\textsuperscript{258} ibid, para. 22.
\textsuperscript{259} \textit{Vereniging Milieudefensie} and \textit{Stichting Stop Luchtverontreiniging Utrecht} (n 214).
5.5.3.4 Reflection on Vereniging Milieudefensie and Stichting Natuur en Milieu

In the two CJEU’s judgments as of 13 January 2015, the Court found that individuals could not rely on Article 9(3) of the Aarhus Convention in order to challenge the legitimacy of EU acts. The Court’s decisions was supported by case law and it furthermore stated that the nature of the obligation arising from Article 9(3) was not sufficiently precise to have direct effect. This is the same conclusion the Court reached in the Slovak Brown Bear case. The judgments are interesting, both regarding access to justice in environmental matters and the interaction between EU law and international agreements.

The judgments indicate that Article 9(3) requires adopting measures to implement it and thus the Court did not review the EU law in question on the grounds of the provision. The Court, in a number of cases, had previously found that agreements between the EU and other states regarding free trade could have direct effect to some extent. This was e.g. the case in the Biotech case, in which the Court reviewed EU secondary law against the Biotech Directive. It seems that the Court has made exceptions by admitting the direct effect of some provisions of WTO law, perhaps emphasizing case-by-case examination on the matter.

In Vereniging Milieudefensie and Stichting Natuur en Milieu, on the other hand, the Court seems to rely on a strict version of the so-called two-tier test regarding direct effect, looking at the nature and objective of the Aarhus Convention and if the provision in question is sufficiently clear, precise and unconditional. The Court thus rejects an open approach regarding adopting subsequent measures, as required by Article 9(3).

The wording of the judgments regarding the General Court’s error of law also raises questions about what it is exactly the Court means. Was the General Court perhaps supposed to dismiss the cases? Or is the CJEU simply old fashioned and its interpretation of standing rights too narrow?

The situation after the judgments from 13 January 2015 is that the possibility for members of the public to enforce environmental law is still limited in EU law and their standing before the EU courts also restricted. These circumstances are contrary to one of the fundamental objectives of the Aarhus Convention: To guarantee access to justice in environmental matters, an obligation the EU has committed itself to by ratifying the Convention. Some scholars have gone as far as stating that with the judgments, CJEU avoided challenging the disappointing level of judicial protection in environmental matters at the EU level, missing the opportunity of

260 Case C-428/08, Monsanto Technology LLC v. Cefetra BV and others, Judgment of 6 July 2010 (Biotech case).
enhancing environmental democracy. \(^{262}\) Even so, the rulings of the General Court in *Vereniging Milieudefensie* and *Stichting Natuur en Milieu* are a stepping-stone towards reviewing EU law in the light of the third pillar of the Aarhus Convention whereas it is the first time in which EU judges were willing to do precisely that. The rulings are thus “a small spark of hope for environmental justice”. \(^{263}\)

### 5.6 The Aarhus Convention and the EEA

#### 5.6.1 General comments on the EEA

The European Economic Area (EEA) links together the EU Member States and the three states of the European Free Trade Association (EFTA states) Iceland, Liechtenstein and Norway in an internal market governed by the same basic rules. \(^{264}\) The EEA is based on the Agreement on the European Economic Area, the EEA Agreement, which entered into force on 1 January 1994. The Agreement states that all Member States of the EU must also become party to the Agreement according to its Article 128. \(^{265}\)

The EEA Agreement contains incorporating EU legislation regarding the so-called four freedoms: The free movement of goods, services, persons and capital all through the EEA states. The Agreement also includes cooperation in important areas such as education, consumer protection and the environment. \(^{266}\) According to the Agreement, all citizens and economic operators in the EEA enjoy equal rights and obligations within the internal market. \(^{267}\)

#### 5.6.2 The EEA States and Article 9(3) of the Aarhus Convention

In order to reach the objective of the EEA Agreement, free movement within the internal market, EU acts that are relevant for the EEA are constantly incorporated into the EEA Agreement. \(^{268}\) This way, the applicability of an EU act is extended to the EEA EFTA states by decisions of the EEA Joint Committee. The Committee decides to which annex or protocol to incorporate the relevant EU act. \(^{269}\)

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\(^{263}\) ibid, 53.


\(^{266}\) ibid.

\(^{267}\) Agreement on the European Economic Area, 6.

\(^{268}\) Subcommittee to the Standing Committee of the EFTA States on Legal and Institutional Questions, *How EU acts become EEA acts and the need for adaptions* (23 May 2013) 1.

\(^{269}\) ibid, 2.
The aforementioned proposal for a Directive of the European Parliament and the Council on access to justice in environmental matters was withdrawn in 2014 as discussed above in chapter 5.3. There are, furthermore, no plans to propose a new legislative EU instrument in relation to Article 9(3) of the Aarhus Convention. The commitment of the provision has, therefore, not been incorporated into the EEA Agreement and the obligation of the EEA States, which are parties to the Convention are, accordingly, not based on the EEA Agreement.
6 The implementation of Article 9(3) of the Aarhus Convention

6.1 General remarks
As previously discussed, it has been of significance for the assessment of the implementation of Article 9(3) of the Aarhus Convention in Iceland that the other Scandinavian states did not make any legislative amendments in this relation.\(^\text{270}\)

Comparative law is useful when interpreting international law as well as in academic research and objective-oriented studies are both common and current in the field of environmental law. Professor Jan Darpö, chair of the Aarhus Convention Access to Justice Task Force, has phrased it so that there is “constant presence of comparative elements in modern environmental legal thinking and argumentation.”\(^\text{271}\)

In 2012, Darpö was hired by the European Commission to conduct a study on the implementation of all 28 EU Member States of Articles 9(3) and 9(4) of the Aarhus Convention. The study was to be a legal study as well as a study on the economic impact of the Convention. A number of widely known national experts prepared the study and a synthesis report was made.\(^\text{272}\)

6.2 The synthesis report

6.2.1 In general
The objective of the aforementioned study was to analyse the implementation of Article 9(3) of the Aarhus Convention in EU’s Member States. The study also focused on the implementation of Article 9(4), insofar as it related to situations in which Article 9(3) was applicable. Acclaimed judges, scholars or experienced environmental lawyers from each country wrote national reports for the purpose of the study.\(^\text{273}\)

The aim of the synthesis report was to summarize the main results of the study and draw conclusions from the national reports. Furthermore, several fundamental issues regarding the implementation of Articles 9(3) and 9(4) of the Convention in the EU were addressed.\(^\text{274}\) The report focused on the judicial review of administrative decisions regarding the environment.


\(^{273}\) Synthesis report (n 138).

\(^{274}\) ibid 7.
Judicial measures are available in other contexts, such as civil measures, and they must be kept in mind while studying the report for “a full picture of access to justice.”

6.2.2 The results of the national reports

6.2.2.1 General comments
The possibility for members of the public to challenge decisions in environmental matters had been improved in some Member States, inter alia by modifying the standing criteria for individuals or environmental NGOs (ENGOs), or by increasing their possibility to go to court (e.g. in Belgium). To some degree, this had been done due to pressure from the ACCC or even from the European Commission.

By contrast, tendency was also found towards large scale projects, considered to be of significant public interest, being decided at a high administrative level. These were projects such as offshore activities and nuclear power stations. The possibility for members of the public to challenge such decisions in court were generally weak or they were non-existent. Additionally, the standing criteria had in some places been made stricter for individuals in environmental cases. This was e.g. the case in the Netherlands and Romania. Furthermore, some Member States had introduced appeal fees or raised court fees (e.g. Denmark and the United Kingdom). The report therefore described the overall picture of the implementation of Articles 9(3) and 9(4) of the Aarhus Convention as “diverging, random and inconsistent.”

A clear distinction between public participation procedures and other types of decision-making procedures regarding environmental matters, were rather common among the Member States. It was noteworthy that access to justice was considered easier in public participation procedures than in other types. This was largely explained by the implementation of the requirements in the Environmental Impact Assessment Directive (EIA), Environmental Impact Assessment Directive (EIA) of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment [1985] OJ L 175.
Liability Directive (ELD)\textsuperscript{283}, Directives on Integrated Pollution Prevention and Control\textsuperscript{284} and Industrial Emissions (ICCP/IED)\textsuperscript{285}, in addition to the Habitats Directive.\textsuperscript{286}

The means available for accessing justice on the basis of Article 9(3) of the Aarhus Convention varied considerably between Member States. For example, most Member States allowed administrative acts to be challenged through both administrative procedures, e.g. to a superior administrative body, and courts. Other Member States established special tribunals for administrative appeals.\textsuperscript{287}

6.2.2.2 Standing for individuals, groups and Environmental NGO’s

6.2.2.2.1 Right-based or interest-based

Before proceeding, it is perhaps appropriate to discuss briefly the difference between right-based and interest-based legal systems. The majority of legal systems within the EU are interest-based, generally requiring a direct, actual and certain interest for obtaining standing rights concerning the judicial review of administrative action. Standing is thus granted to those who demonstrate a sufficient interest.\textsuperscript{288} In contrast, according to a right-based approach the claimant must depend on subjective public rights. This is e.g. the case in Germany and Austria, which have a strict individual right-based legal system.\textsuperscript{289}

As mentioned briefly before in chapter 2.1, the rights that underlie various procedural conditions throughout the Aarhus Convention make it a right-based Convention. Those rights are namely the right to environmental information, the opportunity to participate in the preparation of decisions affecting the environment and the right to a fair process in environmental issues proceedings.\textsuperscript{290} Nevertheless, the Convention as such does not constitute an independent right to claim that the environment and natural resources are of certain standard. On the other hand, the provisions of the Convention aim to ensure that the public can enjoy specific and generally recognized fundamental human rights, some of which are guaranteed by the European Convention on Human Rights (ECHR).\textsuperscript{291}

\textsuperscript{287} ibid 11.
\textsuperscript{288} A Comparative study on Legal Standing (Locus Standi) before the EU and Member States’ Courts, Standing up for your right(s) in Europe (2012), 15.
\textsuperscript{289} ibid 22.
\textsuperscript{290} Jóhannsdóttir and Tómasson (n 5) 55.
\textsuperscript{291} ibid.
6.2.2.2.2 Individuals and groups

The study revealed a great diversity relating to standing rights in administrative appeals and judicial review in the Member States. The systems varied from anyone being allowed to challenge administrative acts and omissions\textsuperscript{292} on environmental matters (actio popularis, e.g. in Portugal\textsuperscript{293}) to systems, which restricted the possibility for judicial review so that it was only for members of the public that could prove that their rights had been affected. In Sweden, for example, any resident of a municipality had the possibility of challenging certain local decisions in court.\textsuperscript{294}

Contrary to the above, a so-called \textit{protective norm theory}\textsuperscript{295} was applied in many Member States, which in its strictest form entails that one can only submit a case to a court if able to prove that an act or an omission concerned his individual right. This was e.g. the case in Germany and Austria.\textsuperscript{296}

However, most of the Member States belonged somewhere in the middle, being mostly interest-based regarding standing rights. The report noted that the difference between a right-based and an interest-based system was not always clear, although the latter had more liberal approach to standing rights.\textsuperscript{297}

The report explained that even though standing for individuals was mainly a matter for the courts to decide, only a few of the national reports referred to case law on the matter. Even so, the national experts were able to draw some conclusions. Two examples were compared. One was from the United Kingdom (UK), but there a bird-watcher was refused standing for judicial review regarding planning of development in an area he used for bird-watching, 6 km from his home. Nevertheless, the UK report concluded that the bird-watcher would probably have been permitted standing later on, in light of more recent case law.\textsuperscript{298} The other example was from the Italian report, regarding a person living 2 km away from a beach, who was granted standing regarding the issue of a permit allowing a building on the beach. The report noted that those two individuals would have never had standing rights before, e.g. Swedish courts, even

\textsuperscript{292} The term \textit{acts and omissions} has been thoroughly discussed above in chapter 2.5.4 and a conclusion was made that Article 9(3) of the Aarhus Convention covered decisions as well.

\textsuperscript{293} Synthesis report (n 138) 12.

\textsuperscript{294} ibid.

\textsuperscript{295} The protective norm theory (Schutznorm theory) is a German rule, widely accepted by administrative courts. According to the theory, the relevant statutory provision has to be interpreted to determine established rights in order to see whether the provision aims at the protection of individual interest; whether it is a protective norm (Scott, S.D., \textit{Constitutional law of the European Union}, 331).

\textsuperscript{296} ibid.

\textsuperscript{297} ibid.

\textsuperscript{298} The report did not specify the case law, only referred to UK’s national report in a footnote.
though the Swedish system was considered to be “quite generous to individual members of the
public in allowing access to justice.”

6.2.2.2.3 Environmental NGO’s

The report noted that standing rights for ENGOs were often based on tradition or express
legislation. In actio popularis systems, explained below in chapter 8.2.1.2, access to courts
were evidently wide both for individuals and ENGOs, as embodied in actio popularis. Other
Member States commonly upheld basic requirements that the statutes of the organisations had
to meet, e.g. regarding environmental protection. Some Member States had geographic criterion
for ENGO’s standing rights. In Slovenia, for example, an ENGO had to have been active
everywhere in the country in order to be recognized.

Other general standing requirements for ENGOs in the Member States were, inter alia,
registration of the organisation and a criterion regarding the length of existence. Slovenia and
Sweden had a requirement regarding a specific number of members of ENGOs (30 in Slovenia
and 100 in Sweden) and a non-profit criterion was used in few of the Member States.

It is noteworthy that according to the national reports, some Member States granted
standing rights to ENGOs so they were able to challenge any decisions in relation to
environmental law in a broad sense, thus including, inter alia, cultural heritage and nature
protection. Other Member States limited standing to specific legislation and/or certain kinds of
decisions.

Another matter also worth mentioning is that some Member States had a system in
which participation in an environmental decision-making procedure was a precondition for
access to justice. This meant that only those who had “raised their voices” when the decision
was prepared, had standing rights in courts regarding the final outcome.

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299 Synthesis report (n 138) 13-14.
300 ibid 14.
301 ibid.
302 In a landmark case of the CJEU, C-263/08, October 15 2009, Djurgården-Lilla Vartans Miljöskyddsforening v
Stockholms kommun (DLV case), the Court clarified the condition for public participation in environmental
decision-making procedures. A local association for environmental protection, the Miljöskyddsforening, was not
considered to fulfill the conditions laid down in the Swedish Environmental Act and was thus denied legal
standing regarding a decision of a local Stockholm court on a project likely to have significant effects on the
environment. According to the Act, such associations should have at least 2,000 members. The CJEU concluded
that this requirement was not in conformity with Directive 85/337/EEC, which was i.a. based on Article 9(2) and
9(4) of the Aarhus Convention. As a result, changes were made to Swedish law and the requirement for certain
number of members of ENGOs is now 100 in Sweden.
303 Synthesis report (n 138) 15.
304 ibid.
305 ibid.
6.2.2.3 Access to justice

The report noted that the wording *access to justice* was unclear and that it was crucial to determine what it was exactly one had the right to challenge and what were the consequences. The report made general conclusions regarding the relationship between standing rights and the scope of a trial in court, stating that “the wider the entrance, the smaller the room”. It was explained that Member States’ systems with generous standing rights tended to provide a narrow scope of judicial review. The report mentioned an example of this from the Czech courts, which had developed a doctrine entailing that ENGO’s only had standing to protect their procedural rights. Substantive results of EIAs were, e.g., off limits and the same applied to the subsequent permit decisions.

An example of the opposite was the German system, in which standing requirements were more restrictive but a substantive outcome could be reviewed if standing was allowed. Property owners, for example, allowed standing to challenge a decision in an administrative court, were given wide protection against the acts and omissions of the authorities.

6.2.3 The report’s proposals

6.2.3.1 General comments

The second half of the synthesis report contained thoughts on some critical matters regarding the EU Member States’ implementation of Article 9(3) of the Aarhus Convention. In addition, some recommendations were made on how to construct suitable provisions of EU legislation to advance this cause.

The report referred to communications from the European Commission, lining up options for EU approach to the Member States’ implementation of Article 9(3). The first option was to continue on the same path as the Commission’s proposal for a directive for access to justice, possibly with insignificant changes. The second option was to propose a new directive, more focused on standing rights. The third option was a soft-law approach, cooperating with judges and stakeholders in addition to, e.g., guidelines developed by the Commission. The

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306 Synthesis report (n 138) 16.
307 ibid.
308 In this context, the decision of the CJEU in Case C-237/07, July 25 2008, Dieter Janecek v Freistaat Bayern, is worth mentioning. There Mr Janecek, a Munich resident living on Landshuter Allee, brought an action for an order requiring the Freistaat Bayern to draw up an air quality action plan in Landshuter Allee district according to the EU Directive on ambient air quality assessment and management. The German Federal Administrative Court held that Mr Janecek could not, under German law, simply rely on any entitlement to have an action plan drawn up. The CJEU concluded that it was incompatible with the binding effect of the Directive, that persons could not in principle rely on the obligation imposed by it.
309 Synthesis report (n 138) 16.
310 ibid 24.
fourth and the last option was to make sure that Member State provisions on access to justice were in line with recent CJEU case law, especially the aforementioned *Slovak Brown Bear* case. This would be done by using infringement proceedings according to Article 258 TFEU.

6.2.3.2 A common EU legal framework
The report proposed a common EU legal framework to bring all the Member States in conformity with Articles 9(3) and 9(4) of the Aarhus Convention. It was pointed out that there was considerable uncertainty and conflicting opinions regarding the requirements of Article 9(3). Thus, the only way to create a *level playing field* was to propose an EU directive on access to justice in environmental matters, promoting unity and legal certainty.

The report suggested that the EU legislative framework would be rather basic, only handling in general the core elements of judicial review of administrative decisions. That being said, the report did not suggest whether to build upon the already proposed directive or to propose a new directive.

6.2.3.3 Generally on judicial review
The report noted that Article 47 of the European Charter of Fundamental Rights and Article 19 TEU could be viewed as starting points in relation to access to justice regarding environmental matters at EU level. Article 47 contains the right to an effective remedy and to a fair trial, whereas Article 19(1) TEU states that Member States should “provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.”

According to the report, an EU directive on access to justice should use a broad definition of environmental law, given the wide scope of the Aarhus Convention itself. In that context, attention was drawn to the wording of Article 9(3) of the Convention, covering national law relating to the environment. The report concluded that it was necessary that some directions were provided on access to justice in an EU directive and that they had to be applicable for all EU law on the environment in general.

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311 *Slovak Brown Bear* (n 55).
312 Synthesis report (n 138).
313 ibid 25.
314 ibid.
315 ibid.
316 ibid 26-27.
Furthermore, the report proposed that the terms *acts and omissions*\(^{318}\) would be made an independent EU legal term by defining them in an access to justice directive. This could prevent deficiencies that would result from various understanding of the terms among the Member States.\(^{319}\)

Finally the report commented on the possibility for members of the public to make use of civil action to challenge operators of unlawful activity as the national reports indicated that this remedy was widespread. It was pointed out that civil actions were rarely used in this context, which accordingly raised questions about whether this remedy did in fact provide possibilities of access to justice for the public. At least there were concerns that this could not be regarded as an effective remedy within the meaning of Articles 9(3) and 9(4) of the Aarhus Convention.\(^{320}\)

6.2.3.4 Standing rights for members of the public

Regarding the definition of the group of individuals with standing rights in environmental cases, the report emphasized the importance of a connection between those who challenge an administrative act or omission and the matter in question. A similar definition to the one used in Article 1.1(e) of the Environmental Impact Assessment (EIA) Directive\(^{321}\) was proposed, namely “the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures (…). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”.\(^{322}\)

It is however strange that the report referred to the aforementioned provision of the EIA Directive as an example when an almost identical provision already exists in the Aarhus Convention, cf. Article 2(5) of the Convention.

The report pointed out that standing for individuals was generally decided by courts on a case-by-case basis. The report stated that this approach was acceptable for EU law on the matter as well. On the other hand, the so-called *double approach* was opposed, meaning that standing rights were awarded to those who had a “sufficient interest or maintained the

\(^{318}\) See discussion in chapter 2.5.4.

\(^{319}\) Synthesis report (n 138) 28.

\(^{320}\) ibid 29-30.


\(^{322}\) Synthesis report (n 138) 30-31.
impairment of a right”. The sufficient interest requirement can be found in Article 9(2) of the Aarhus Convention.

On the other hand, the national reports indicated that standing for ENGOs was decided by criteria in express legislation, although they varied significantly. The report concluded that the criteria from the directive proposal should be used. Even so, it was recommended that the requirement for ENGOs to have their annual accounts certified by an official auditor was abandoned and a common requirement for registering ENGOs was opposed.

The report addressed limiting standing rights for foreign ENGOs. This was contemplated in relation to Article 3(9) of the Aarhus Convention, which bans discrimination as to domicile, nationality or citizenship, and regarding ENGOs without discrimination as to where they are registered. This needed to be clarified by EU legislation.

The report proposed that EU legislation on access to justice clarified that members of the public had standing rights whether or not they participated in the decision-making procedure. It was pointed out that strong arguments suggested that this matter had already been clarified by the CJEU in the DLV case, in which the Court declared that the public concerned ought to have access to justice “regardless of the role they might have played in the examination of that request by taking part in the procedure before that [permit] body and by expressing their views”. This statement has generally been interpreted as meaning that participation cannot be used as a precondition for standing rights in cases concerning the environment, even though that was not the main issue in the DLV case.

6.2.3.5 Administrative or judicial procedures
It is far from clear what members of the public can expect when allowed to challenge environmental acts and omissions in court. The scope of review in Article 9(3) of the Aarhus Convention is access to administrative or judicial procedures for members of the public. The report pointed out that a problem arose from the different ideas of the Member States about what constituted effective judicial review. In that way, systems that restricted standing were not compatible with modern day environmental legislation and contrary to ideas of safeguarding
collective interests. ENGOs should have standing rights to be able to enforce national law that implemented EU environmental law.

6.2.3.6 Administrative omissions
The study revealed the Member States’ concerns regarding the shortage few possibilities for members of the public to challenge administrative omissions, although those concerns were not explained any further. The report suggested that a procedure should be prescribed to handle administrative omissions, based on the directive proposal. This should be structured as a general concept, not limited to Article 9(3) issues, as this possibility seemed to be lacking notwithstanding Article 9(2) of the Aarhus Convention. If administrative authorities did not act according to legal requirements, the present situation was that their omission was not generally regarded as a challengeable administrative omission. An example of this was given of a national authority legally required to reconsider permit conditions on the basis of the IED Directive. If the authority did not take action, such omission could not be challenged since that could not be clearly read from the Directive.

The report pointed out that EU law generally left Member States great discretion regarding which administrative acts or omissions should be considered as decisions, in addition to administrative omissions being a big concern, as stated above. Accordingly, there was need for clarification.

6.2.4 Administrative appeal and judicial review
Obstacles to access to justice for members of the public were greater in systems, in which they only had the option of applying for direct judicial review to challenge administrative acts and omissions, compared to systems that included a middle level with an administrative appeal. Administrative appeal had certain advantages, such as experience and expertise, and the appeal often had suspensive effect, in addition to a common obligation of investigation. Administrative procedures also often allowed for more relaxed proceedings than court proceedings and the costs for the parties were usually low.

330 Synthesis report (n 138) 35-36.
331 ibid 36.
332 ibid 37-38.
333 ibid 38.
334 ibid 44.
335 ibid 44.
At the end of the synthesis report, it was suggested that different administrative tribunals of the EU Member States were studied in order to improve and distribute information on good examples among Member States and among other parties to the Aarhus Convention.\footnote{ibid.}
7. Iceland and Article 9(3) of the Aarhus Convention

7.1 A parliamentary resolution

As mentioned above in chapter 1.1, the Aarhus Convention was adopted in Aarhus, Denmark on June 25th 1998. On that same day 35 states signed the Convention, Iceland among them.\(^{337}\)

During the 126th session of the Icelandic parliament, 2000-2001, Iceland’s Minister of Foreign Affairs submitted a proposal for a resolution regarding the ratification of the Aarhus Convention. The proposal read that the Ministry for the Environment considered that Iceland’s ratification of the Convention did not require any legislative amendments.\(^{338}\)

The international law office at the Ministry of Foreign Affairs prepared a memorandum of the proposal. The conclusion of the memorandum was that comparison of Article 9 of the Aarhus Convention and Article 25 of the Icelandic Civil Procedure Act no. 91/1991 revealed that they were incompatible. This conclusion referred to Article 2(5) of the Convention, which defines the term of *the public concerned*.\(^{339}\)

The memorandum furthermore stated that if Icelandic procedural law would be amended in accordance with Article 9 of the Aarhus Convention, it would result in a *revolution* for Icelandic rules on standing rights. Standing rights had remained unchanged for a long period and it would be unacceptable to amend rules on standing as it would entail unforeseeable consequences.\(^{340}\)

The memorandum also included reference to the response of the Ministry of Justice, stating that the Ministry considered that some provisions of the Aarhus Convention were incompatible with Icelandic procedural law. Furthermore, the Ministry suggested postponing the matter since there was uncertainty as to how to structure these legislative amendments.\(^{341}\)

The concluding remarks of the memorandum stated that it would be unacceptable to pass a resolution regarding the ratification of the Aarhus Convention when it was clear that Icelandic law was incompatible with the Convention. Otherwise, Iceland would knowingly breach international law. What mattered the most was the issue on whether Icelandic law could

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340 ibid.
341 ibid.
be amended to create the conditions for the proper performance of the contractual obligations. While this was uncertain, the matter had to be postponed.\textsuperscript{342}

The proposal was at the end not processed by the parliament.\textsuperscript{343}

\textbf{7.2 Committee on the Aarhus Convention}

\textbf{7.2.1 The opinion of the procedural law committee}

In May 2001, the Ministry for the Environment requested an opinion from the Ministry of Justice on whether the Aarhus Convention, in particular Article 9, required legislative amendments if ratified by Iceland. The Ministry of Justice, together with the procedural law committee, concluded that the ratification would inevitably require amendments since some of the provisions of the Convention were not compatible with Icelandic procedural law.\textsuperscript{344}

In an unpublished opinion of the procedural law committee, dated September 17 2001, the committee listed Article 9(3) as one of the Aarhus Convention’s provision that related to procedural law and was therefore reviewed. The opinion emphasized that according to Icelandic jurisprudence, consistent with procedural law theories, a general rule applied before Icelandic courts that a plaintiff must have a legitimate interest in the resolution of a case. The plaintiff furthermore carried the burden of proof regarding the existence of such interests. A similar rule has also prevailed in other Northern Europe countries.\textsuperscript{345}

The committee pointed out that a few of the provisions of the Aarhus Convention anticipated a derogation from this general rule. Thus, law amendments would be inevitable in order to ensure that Icelandic legislation complied with the Aarhus Convention. The committee could not recommend that such change would go further than necessary for the provisions of the Convention. The committee also suggested imposing a special legislation in connection with the ratification of the Convention, opposing amendments to the provisions of the Icelandic Act of Civil Procedure no. 91/1991.\textsuperscript{346}

The committee did not propose a wording for the aforementioned legislative amendments, but instead offered its assistance in this regard upon request.\textsuperscript{347}

\textsuperscript{342} ibid.
\textsuperscript{343} Proposal for a Resolution on the Aarhus Convention (n 338).
\textsuperscript{344} Skýrsla Árósanefndar (n 270), 3.
\textsuperscript{345} Óbirt álit réttarfarsnefndar vegna Árósamenningsins (Unpublished opinion) (17. september 2001).
\textsuperscript{346} ibid.
\textsuperscript{347} ibid.
7.2.2 The working group’s memorandum

Subsequent to the aforementioned opinion of the procedural law committee, the Ministry for the Environment, Ministry of Foreign Affairs and Ministry of Justice set up a working group in 2003. The task of the group was to review the Aarhus Convention and its position with respect to Icelandic law. The group submitted their results in a memorandum to the Ministries in May 2003.\footnote{Óbirt minnisblað starfshóps um Árósasamninginn á vegum umhverfis-, utanríkis- og dóms- og kirkjumálaráðuneytis (Unpublished memorandum) (7. maí 2003), 1.}

The working group reviewed the matters it considered most important regarding the position of the Aarhus Convention with respect to Icelandic law and necessary amendments in order to comply with the Convention.\footnote{ibid.} Strangely enough, the group mentioned all paragraphs of Article 9 of the Convention except for Article 9(3). The group did mention the aforementioned rule of legal interests, in relation to its discussion on Article 9(2).\footnote{ibid 3-4.} The group also concluded that Article 9(4) of the Convention required legislative amendments as regard to legal standing in relation to injunction relief and suggested special laws for the amendments.\footnote{ibid 5.}

The group noted that Denmark had ratified the Aarhus Convention. Although Denmark had made quite a few legislative amendments, its procedural law remained unchanged. The same applied to Norway, which had already passed legislative amendments in relation to the ratification of the Convention.\footnote{ibid.}

7.2.3 The translation of Article 9(3)

In February 2005, Iceland’s Minister for the Environment appointed a committee to analyse the content of the Aarhus Convention and consider whether any amendments to national law were necessary in relation to Iceland’s ratification of the Convention. The committee published its conclusions in a report on September 28, 2006.\footnote{Umhverfisraduneyti.is, Nefnd um Árósasamninginn hefur skilað áliti sínu available at: https://www.umhverfisraduneyti.is/frettir/nr/940 (Accessed 17 March, 2017).}

According to Appendix 1 to the 2005 committee’s report, which is an Icelandic translation of the Aarhus Convention, the committee relied on the translation from the parliamentary resolution discussed above in chapter 7.1. The translation of Article 9(3) of the Convention is partly different from the original English version. The translation reads as follows:

\footnote{ibid.}
Firstly, the Committee translated *members of the public as individuals*. Secondly, it stated that access should be granted both to *administrative and judicial procedures*, whereas the original version reads *administrative or judicial procedures*. Thirdly, the Committee used the term *provisions of national law on the environment* instead of *relating to the environment*.354

### 7.2.4 The Committee’s conclusions

The Committee stated that the wording of Article 9(3) of the Aarhus Convention was extremely unclear and that it needed interpretation. It noted that implementation methods of the parties to the Convention varied and that they did not agree on whether the provision required legislative amendments. It pointed out that the EU ratified the Aarhus Convention despite not adopting the proposal for a directive on access to justice in environmental matters, as discussed above in chapter 5.3.355

The Committee concluded that ENGOs should have access to justice on the basis of Article 9(3). As regards acts and omissions by private persons, the Committee noted that supervisory authorities and the police monitor compliance with provisions of Icelandic laws. There were no limits in general on who could appeal or attract the attention of relevant administrative authorities. Accordingly, provisions of Icelandic law should be consistent with the Aarhus Convention.356

On the other hand the Committee pointed out that the same did not apply regarding acts and omissions by public authorities, firstly because the Convention did not clarify the term *acts and omissions*. Secondly because the Convention was open regarding the term *national law relating to the environment*.357

The Committee concluded that it was impossible to assert whether access to justice, in the meaning of Article 9(3) of the Convention, was even a possibility. The Committee furthermore stated that according to Icelandic law, everyone was free to comment on the practices of administrative authorities and that they were obligated by law to respond. If the
response was unacceptable the person concerned could file a complaint to the Icelandic Parliamentary Ombudsman or possibly the relevant ministry.\textsuperscript{358} The Committee referred to an opinion of the Icelandic ombudsman.\textsuperscript{359}

I do not agree with the Committee on this conclusion, but the opinion in question concerned a person whose request for an explanation regarding the allocation of certain excess VAT payments he had made was not sufficiently responded to.

The Committee furthermore pointed out that other Nordic countries did not make legislative amendments in relation to Article 9(3). This suggested that the Nordic countries considered the provision to be sufficiently open and, accordingly, they did not require direct implementation. Thus, the Committee concluded that the provision could be interpreted in the same manner in Iceland.\textsuperscript{360}

In this context, it is noted that the parties to the Aarhus Convention shall implement the Convention’s obligations through their national legislation in accordance with the objectives and principles of the Convention. According to the preamble to the Convention, parties are to invite legislative bodies to “implement the principles of this Convention in their proceedings” and according to Article 1 of the Convention, each party shall take all necessary measures to implement the provisions of the Convention. The Convention does not aim for full harmonization as it contains objectives, principles and minimum standards. Article 3.5 of the Convention, inter alia, demonstrates this.\textsuperscript{361}

\section*{7.3 Preparation for the ratification of the Aarhus Convention}

On 13 March 2009, the Icelandic Minister for the Environment appointed a working group that was assigned the task of preparing the ratification of the Aarhus Convention. The group was appointed based on a decision from the Icelandic government from 6 February 2009. The group’s assignment was to evaluate how to implement the Convention into Icelandic law. A report from the working group was published in December 2009. The report referred to the conclusions of the Committee on the Aarhus Convention, previously reviewed in chapter 7.2.4. Since the Committee concluded that there was no need for legislative amendments in relation to Article 9(3) of the Convention, the working group did not propose any legislative measures to implement it, but focused on the implementation of Article 9(2) of the Convention. Appendix

\begin{footnotesize}
\textsuperscript{358} ibid 11.
\textsuperscript{359} An opinion of the Icelandic Parliamentary Ombudsman in case no. 3540/2002.
\textsuperscript{360} ibid.
\textsuperscript{361} Jóhannsdóttir, A. (n 6) 207-208.
\end{footnotesize}
1 to the report indicated that the working group also relied on the Icelandic translation from the parliamentary resolution discussed above in chapter 7.1.362

7.4 Ratification

On 16 September 2011, the Icelandic Parliament, Alþingi, passed a resolution permitting the government to ratify the Aarhus Convention. A parliamentary resolution had been submitted previously in 2001, but was not processed by the parliament, as previously mentioned in chapter 7.1.363 The proposal to the 2011 resolution reviewed the main points of the Convention stating, inter alia, that Article 9(3) contained a general provision on access to justice for public that met the criteria laid down in a party’s national law, skipping the part about the criteria being optional (if any).364

The Icelandic translation of Article 9(3) differed to some extent from the original English version. The translation read as follows:

3. Til viðbótar og með fyrirvara um þær endurskoðunarleiðir sem vísað er til í 1. og 2. mgr. hér að framan skal sérver samningsaðli tryggja að uppfylli almenningur þau viðmiðunarskilyrði, ef einhver eru, sem mælt er fyrir um í landslögum skuli hann hafa aðgang að stjórnýslu- og dómstólameðferð til að geta krafist þess að aðgerðir og aðgerðaleysi af þálta einstaklinga og stjórnvalda, sem ganga gegn ákvæðum eigin landslagsa um umhverfið, verði tekin fyrir.

Firstly, the Icelandic translation referred to access for the public instead of members of the public. Secondly, it stated that the access should be to both administrative and judicial procedures, instead of administrative or judicial procedures. Thirdly, the Icelandic translation referred to provisions of national law on the environment instead of relating to the environment.365

The proposal was submitted to the Foreign Affair Committee of the parliament for consideration. The majority of the Committee recommended that the proposal would be adopted intact.366

362 Skýrsla starfshóps til undirbúnings fullgildingar Árósasamningsins um aðgang að upplýsingum, þátttöku almennings í ákvarðanatöku og aðgang að réttlátri málsmeðferð i umhverfismálum (the report from the working group) (18. desember 2009), 1.
364 Proposal for a Resolution (n 339).
365 ibid.
A total of three communications were submitted to the parliament on the proposal. No communication mentioned Article 9(3) of the Aarhus Convention in particular, but the communication of Landsvirkjun, the national power company of Iceland, suggested that the translation of the Convention should be thoroughly examined before its approval.\textsuperscript{367}

One is not able to conclude otherwise than that the proposal’s translation is simply incorrect. It only refers to Article 9(3) in general, but its content is not discussed. It is also particularly noticeable that no communication referred to Article 9(3), let alone discussed its main content.

7.5 Amendments

7.5.1 Appeal Committee for Environmental and Resource matters

Alongside the resolution, the Minister for the Environment proposed various law amendments with Act no. 131/2011 in relation to the ratification of the Aarhus Convention. The proposal for the Act referred to the implementation of Article 9(2) of the Convention.\textsuperscript{368} The main proposed amendments were that certain administrative decisions could be appealed to an independent Appeal Committee for Environmental and Resource matters.\textsuperscript{369}

The Appeal Committee was established on 28 September 2011 by Act no. 130/2011. As previously mentioned, the Committee was established in relation to various law amendments relating to ratification of the Aarhus Convention. According to the law proposal, the scope of the Committee’s tasks were limited by the provisions of the aforementioned Act no. 131/2011. Accordingly, the Committee was to rule on matters covered by Article 9.2 of the Convention\textsuperscript{370} as well as other issues of the same sort.\textsuperscript{371}


\textsuperscript{368} Article 9.2 of the Aarhus Convention entails that members of the public concerned shall have access to a review procedure to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and of other relevant provisions of the Convention. Article 6 of the Convention addresses public participation in decisions on specific activities.

\textsuperscript{369} See “Frumvarp til laga um breytingu á ýmsum lögum vegna fullgildingar Árósasamningsins” (Preparatory work for a proposal for the Act regarding various law amendments in relation to the ratification of the Aarhus Convention)” < http://www.althingi.is/altext/139/s/1227.html > accessed 15 March 2017.

\textsuperscript{370} Article 9.2 of the Aarhus Convention concerns access to justice to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where wo provided for under national law. Article 6 of the Convention addresses public participation in decisions on specific activities.

7.5.2 In general
The preparatory work for the Minister’s proposal also referred to the public instead of members of the public and did not specify that national criteria was optional, when discussing Article 9(3) of the Convention. It furthermore referred to national law on the environment instead of relating to the environment.\textsuperscript{372}

The preparatory work also referred to the aforementioned report from 2006 and did thus not provide for legislative amendments relating to Article 9(3).\textsuperscript{373}

7.6 Iceland’s Aarhus Convention implementation report
On 14 March 2017, Iceland submitted an implementation report concerning the Aarhus Convention, in accordance with decision IV/4. According to the report, Article 9(3) of the Convention was implemented by Act no. 130/2011, establishing the Appeal Committee for Environmental and Resource matters\textsuperscript{374}. The report furthermore stated that the provision was “considered to be implemented through the general administrative system”\textsuperscript{375}, as well as the public being able to “take matters to the police” in cases of criminal offences regarding the environment. The report also referred to the Icelandic Ombudsman institution. Finally, the report stated that the Ministry had decided to look further into the issue of whether Article 9(3) had been implemented correctly in Iceland.\textsuperscript{376}

\begin{footnotesize}
\begin{enumerate}
\item Preparatory work for a proposal (n 370).
\item ibid.
\item See further in chapter 7.5.1.
\item Implementation report of Iceland (Ministry for the Environment, 14 March 2017) 22.
\item ibid.
\end{enumerate}
\end{footnotesize}
8 Icelandic law and Article 9(3) of the Aarhus Convention: An independent research

8.1 A review of Article 9(3)

As discussed in chapter 2.4.1 above, Article 9(3) of the Aarhus Convention provides additional rights to Articles 9(1) and 9(2), creating more instances where members of the public can access administrative or judicial mechanisms. Compared to paragraphs one and two, it applies to a significantly broader range of acts and omissions as well as being more flexible regarding implementation.377

Article 9(3) anticipates both direct and indirect enforcement by the members of the public; direct as they can have law enforced by bringing a case to judicial bodies and indirect as they can set of and take part in administrative processes to have law enforced. The Implementation Guide to the Convention refers to this, either as public enforcement378 or citizen enforcement379 of environmental law. The provision has been claimed to empower citizens and NGOs in assisting with enforcing environmental law.380

The text of Article 9(3) states that access to justice shall be ensured for members of the public, meeting criteria laid down in national law. It is therefore that optional criterion, which determines standing rights according to the law of each Member State.

According to chapter 7 above, there seems to have been a general understanding that Article 9(3) of the Aarhus Convention did not require changes in Icelandic laws. Nevertheless an independent research will be conducted on the matter in the following chapters, namely whether Icelandic law meets the requirements of Article 9.3 of the Aarhus Convention.

The text and content of the provision have been thoroughly discussed above. Therefore, the following coverage will mainly focus on Icelandic law in this context.

8.2 Standing

8.2.1 Administrative procedures

8.2.1.1 Administrative Law

As previously stated, members of the public shall, according to Article 9(3) of the Aarhus Convention, have access to administrative or judicial procedures to challenge acts and

378 ibid 197.
379 ibid 198.
380 Wates (n 18) 401.
omissions by private persons and public authorities which contravene provisions of the parties’ national law relating to the environment.

Only a party to a case or a complaint can attain rights based on the Icelandic Administrative Act no. 37/1993. The so-called interest rule of administrative law is a general and unregistered rule which entails that one can only become a party to an administrative case if one has direct, individual and legally protected interests in the resolution of a case. This rule is compatible with the principal rule of civil procedural law, discussed below in chapter 8.2.2.381 It is, however, generally recognized that administrative rules on legal standing are less stringent than those, which apply to courts of law.382

According to Article 26(1) of the Icelandic Administrative Act, an involved party may appeal the decision of an administrative authority to a superior authority in order to overturn it or have it amended except otherwise provided for by law or custom. The Act does not mention the omission of an authority in particular, but as a supervisory body, the higher authority could demand that the subordinate authority performed its duties. Superior administrative authorities usually have more extensive authority to review a subordinate authority than the courts. The unique relationship between the subordinate and the superior authority explains this fact.383

8.2.1.2 Actio Popularis
The interest rule is a general rule on legal standing in administrative law. The concept of actio popularis, or standing rights regardless of specific legal interests in a case is contrary to the interest rule. Actio popularis enables the public to influence procedures and resolutions of certain types of cases in certain areas of the law without needing to fulfil general standing requirements. Thus, anyone can get involved in a matter.384 The preparatory work for the Act on the Appeal Committee for Environmental and Resource matters proposed a standing based on actio popularis permitting everyone to appeal certain governmental decisions.385 This proposal was abandoned and actio popularis is currently nowhere to be found in Icelandic environmental law.386

381 Gunnarsdóttir, S., „Aðild að málum sem varða umhverfið“, in Úlfljótur (2nd issue 2005) 349.
383 Jóhannsdóttir and Tómasson (n 5) 21.
386 Jóhannsdóttir and Tómasson (n 5) 36.
8.2.1.3 Special Appeal Committees
Special administrative appeal committees have been established, which have a specified role of revision, inter alia in the field of environmental law. The role of the committees differs as well as the effect of their rulings.387

The Appeal Committee for Environmental and Resource Matters has already been discussed above in chapter 7.5.1. Parallel to the establishment of the Committee, a few rulings’ committees and complaints processes were disbanded. The Committee was originally established to fulfil the requirements of Article 9.2 of the Aarhus Convention, so Article 9(3) is irrelevant in this context.388

8.2.1.4 The Icelandic Parliamentary Ombudsman
The Icelandic Parliamentary Ombudsman operates under Act no. 85/1997. According to Article 2 of the Act, the Ombudsman monitors the administration of the state and local authorities and ensures the rights of the citizens against the authorities.389

The aforementioned Committee on the Aarhus Convention pointed out that everyone could complain about the practice of administrative authorities to the Ombudsman. The Committee also noted that, e.g. Swedes, considered that their supervisory system and Ombudsman meet the requirements of Article 9(3) of the Aarhus Convention.390

Attention must be drawn to the fact that the range of authority for the Ombudsman’s operations is not without limitations. According to Article 4(1) of the Act on Parliamentary Ombudsman, the Ombudsman may initiate a case following a complaint. According to Article 4(2) of the Act, anyone who believes they have been subjected to wrongdoing by any of the parties listed in Article 3(1) and 3(2), can complain to the Ombudsman on that occasion. In addition, according to Article 3(3)(c), the decisions and other acts of administrative authorities that are subject to an appeal to a court of law according to law, cannot be reviewed by the Ombudsman.

8.2.1.5 Conclusions
As pointed out in chapter 7.2, the conclusion of the Icelandic Committee on the Aarhus Convention was that both supervisory authorities and the police monitor compliance with provisions of Icelandic laws. Furthermore, that there were generally no limits to standing rights

387 ibid.
388 Preparatory work for a proposal (n 373).
390 Skýrsla Árósanefndar (n 270), 11.
in this context. To that extent, provisions of Icelandic law were consistent with the Aarhus Convention regarding acts and omissions by private persons.\(^{391}\)

Although there are no limits in general on who can draw the attention of relevant authorities or of the police to violations of Icelandic law, the same does not apply to the right to actually challenge through administrative procedures the acts and omissions by private persons, which contravene provisions of Icelandic law relating to the environment. Declarations to the contrary must be considered a major simplification. There is a great difference between the ability to attract the attention of authorities and actually challenge an act or an omission by private persons due to their breach of Icelandic law. In that regard, the aforementioned interest rule of administrative law is generally the basis for legal standing, as it is regarding administrative procedures.

The possibility of a complaint lodged to the Icelandic Parliamentary Ombudsman has been mentioned in connection with Article 9(3) of the Aarhus Convention.\(^{392}\) As pointed out in chapter 8.2.1.4 above, the range of the Ombudsman’s operations is limited. Furthermore, a recent reasoned opinion of the EFTA Surveillance Authority (ESA), noted that the ruling of the Icelandic Ombudsman was not legally binding. An opinion of the Ombudsman did not produce any legal effects vis-à-vis the parties concerned and it was not equivalent to a binding resolution. The opinion stated that the “non-binding nature of the procedure [did] not provide for the possibility to challenge decisions, acts or omissions”\(^{393}\), which seems to suggest that the Ombudsman does not fulfil the requirements of Article 9(3) of the Aarhus Convention either.

### 8.2.2 Judicial procedures

#### 8.2.2.1 Constitutional Law

According to Article 70(1) of the Constitution of the Republic of Iceland (the Constitution)\(^{394}\), everyone has the right to access Icelandic courts and to a fair trial within a reasonable time before an independent and impartial court of law. According to Article 60 of the Constitution, judges settle all disputes regarding the limits to the power of authorities. Courts have gradually gone further regarding their review of authorities’ decisions, which encourages and lays the foundation for an effective protection of human rights. For that reason, there is a tendency not

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\(^{391}\) ibid 10.

\(^{392}\) ibid 11.


\(^{394}\) The Constitution of the Republic of Iceland, Act no. 33/1944.
to limit the potential to challenge decisions of authorities, see Article 60 and Article 70 of the Icelandic Constitution.\(^{395}\)

### 8.2.2.2 Rules of Civil Procedure

In order to have legal standing in Icelandic courts of law or to become a party to administrative proceedings, one must have legally protected interests in the resolution of a case.\(^{396}\) A dispute cannot be submitted to courts otherwise. This rule is considered customary law in Iceland.\(^{397}\)

Generally, the interests need to be direct, legally protected and particular according to the Icelandic rule of interests. The courts make sure *ex officio* that the requirement of legally protected interests is met in a court, i.e. irrelevant to the request of the parties.\(^{398}\)

The principal rule of the Icelandic rules of civil procedure appears in Article 16(1) of Act no. 91/1991. According to the provision, an individual, a company or an organisation can have legal standing in judicial proceedings, if they can have rights or bear obligations under national law.

According to Article 24(1) and 25(1) of Act no. 91/1991, courts only resolve legal issues. They do not answer general questions on legal issues. In the *Supreme Court case no. 566/2008*, an owner of a land in Flóahreppur, Iceland, demanded a declaratory judgment from the Court stating that Landsvirkjun and the Icelandic state were prohibited from constructing a dam, planned in and by her land in a certain manner. The Court held that the owner’s claim constituted a request for a legal opinion and, accordingly, the case was dismissed on the grounds of Article 25.1 of Act no. 91/1991.

With reference to the above, it is clear that access to courts in Iceland is limited.\(^{399}\)

### 8.2.2.3 Actio popularis

The principal rule of legally protected interests was briefly covered in chapter 8.2.2.2. Never the less, access to courts can also be on the grounds of so-called *actio popularis*, as mentioned above in chapter 8.2.1.2. Such standing has to be granted by a positive act of law, but wider standing rights and exceptions in such context are primarily found in the field of environmental law where there is doubt as to who has legal standing.\(^{400}\) The principal rule remains the rule of

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\(^{396}\) Magnússon, S., „Aðgangur að dómstólum á svíði einkamála“, in *Tímarit lögfræðinga* (2nd issue 2005) 139.

\(^{397}\) Jóhannsdóttir and Tómasson (n 5) 26.

\(^{398}\) Gunnarsdóttir, S. (n 383) 355.


\(^{400}\) Hreinsson, P. (n 386) 389.
legally protected interests. Interests based on e.g. interest in environmental matters are not considered to be sufficient according to Icelandic law.\textsuperscript{401}

8.2.2.4 Icelandic courts and the principal rule of legally protected interests

Access to Icelandic courts for members of the public is, in general, limited by the principal rule of legally protected interests in the resolution of a case, cf. discussion in chapter 8.2.2.2 above. This has been confirmed in environmental case law, although it is not extensive as already mentioned.

In the \textit{Supreme Court case no. 231/2002}, two proclaimed environmentalists and an environmental protection organisation brought proceedings against the Icelandic state, demanding that the ruling of the Minister for the Environment on the EIA of the hydropower plant, Kárahnjúkar, be repealed. They had been involved when the EIA was under consideration at the Icelandic National Planning Agency. At the time, an actio popularis rule of Article 12.4 of Act no. 106/2000 on EIA was in effect. The basis for their lawsuit was that the plant would cause significant and irreversible environmental impact. They also referred to the Aarhus Convention, stating that the Convention ensured extended standing rights in cases regarding the environment. The Court nevertheless referred to the principal rule of the civil procedure law, Act no. 91/1991 on legally protected interests and dismissed their claim.

In the \textit{Supreme Court case no. 20/2005}, the Court confirmed that legal standing could not be extended except by a positive act of law. In that case, the issue of the legality of the EIA and granting of operating to an aluminium plant in Reyðarfjörður, Iceland, was the subject of the dispute. An individual demanded that two decisions of the Minister for the Environment would be overturned. On one hand, the decision concerned the Minister’s confirmation of the conclusion of the Icelandic National Planning Agency that a new EIA was not necessary for amended detail plans. On the other hand, the decision concerned the granting of an operating permit for the plant by the Environmental Agency of Iceland. The individual had appealed the Agency’s decision to the Minister for the Environment, who dismissed his appeal. The Court agreed that due to various factors, an EIA had to be conducted again. Regarding the granting of an operating permit for the aluminium plant, the Court held that since the law in question did not mention who could appeal based on the law, the aforementioned interest rule of administrative law was applied and the second claim was dismissed.

\textsuperscript{401} ibid 394.
8.2.2.5 Conclusions

The principal rule in Iceland concerning legally protected interests applies in civil procedural law regarding access to judicial procedures. Access can only be granted more widely by positive act of law. No general rule exists on legal standing for members of the public to challenge acts and omissions by private persons or public authorities, which contravene provisions of Icelandic law relating to the environment. The case law in the field of Icelandic environmental law is not extensive. Only limited conclusions can be drawn from existing case law that have relevance for this specific matter.

The legislative amendments following the implementation of Act no. 130/2011 and 131/2011 have previously been discussed in this thesis. It appears that Icelandic law is mostly compatible with the obligations the Aarhus Convention imposes on its parties after their entry into force. However, it has not been tested before an Icelandic court whether Article 9(3) has been properly implemented into Icelandic law, but there is considerable doubt. At least the statements of the Committee on the Aarhus Convention and the ones in the law proposal no. 131/2011, repeated in a recent implementation report, cannot be accepted without grain of salt. There still is considerable doubt whether legislative amendments are necessary due to Article 9(3) of the Aarhus Convention.

8.3 Icelandic law relating to the environment: Access to justice

8.3.1 Nature Conservation Act no. 60/2013

8.3.1.1 General remarks

On 15 November 2015, The Icelandic Nature Conservation Act no. 60/2013 came into effect. According to the preparatory work for the proposal to the Act, a new attitude towards environmental issues, in addition to Iceland’s ratification of international agreements, called for legislative amendments. Specifically mentioned in that context was the Aarhus Convention.

In preparation for the Act, the Minister for the Environment appointed a committee on the revision of existing Act on Nature Conservation. The committee submitted a comprehensive report in August 2011, discussing the legal environment relating to nature conservation in Iceland. Among other things, the report Iceland’s ratification of international agreements and it

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402 See chapter 7.6.
contained a brief chapter on the Aarhus Convention, although it did not mention Article 9(3) in particular.\footnote{Skýrsla nefndar um endurskoðun náttúruverndarlaga, Náttúruvernd: Hvítbók um löggjöf til verndar náttúru Íslands (Umhverfisráðuneytið 31. ágúst 2011) 94.}

According to Article 1 of the Act, its objective is to protect the future of the diversity of the Icelandic nature, aiming at the protection and sustainable use of natural resources. According to Article 6 of the Act, everyone is obliged to treat the Icelandic nature well and a special care should be taken regarding certain areas of the country in accordance with other provisions of the Act.

The Icelandic Minister for the Environment is in charge of nature conservation, according to Article 13 of the Act. The Icelandic Environmental Agency monitors the implementation of the Act, according to Article 75 of the Act. The Agency’s monitoring role entails, inter alia, monitoring that the country’s natural environment is not damaged, and monitoring nature conservation areas. Violation of the Act can result in fines or even imprisonment, according to chapter 15 of the Act.

8.3.1.2 Access to justice
According to Article 29(1) of the Nature Conservation Act, landowners may not prevent the public from enjoying the right free travel through the country, laid down in the Act. Anyone who becomes aware of obstacles, which he considers are violating these rights, may demand the Environmental Agency’s resolution on the matter. Outdoors associations and nature and environmental protection associations have the same rights. The resolution of the Environmental Agency may be appealed to the Minister of the Environment. According to Article 29(2), the Agency can apply remedies under the Act to have unlawful obstacles removed.

The provisions of this Article were new and according to the preparatory work for the proposal to the Act, it was considered necessary that standing rights based on the provision were broad. This provision is among the main changes the Act entails.\footnote{Preparatory work for a proposal (n 405).} The main disputes during the preparatory work for the proposal on the Act on Nature Conservation concerned the public’s right, inter alia, according to Article 29.\footnote{See e.g. “Nefndarálit um frumvarp til laga um náttúruvernd. Frá 1. minni hluta umhverfis- og samgöngunefndar” (Preparatory work for a proposal for the Act on Nature Conservation)” < http://www.althingi.is/altext/141/s/1248.html> accessed 2 May 2017.} The abovementioned revisory committee pointed out that prior existing rule, on the prohibition of erecting fences by waters, rivers and
the seabed, preventing people’s access was often ignored. Therefore, a recourse for the public was necessary.⁴⁰⁷

8.3.3 Conclusions

The Icelandic Nature Conservation Act has been discussed above in light of access to justice. The Act provides anyone, who becomes aware of obstacles, which violate certain rights, with access to an administrative procedure to demand resolution on the matter. Outdoors associations and nature and environmental protection associations have the same right. The standing rights according to the provisions are broad, as intended according to the preparatory work for the proposal to the Act.

Based on the aforementioned study, it is my conclusion that Article 29(1) of the Act grants members of the public access to administrative procedure in compliance with Article 9(3) of the Aarhus Convention.

⁴⁰⁷ Skýrsla nefndar um endurskoðun náttúruverndarlag (the report of the revisory committee) (n 406) 333.
9. Conclusions

9.1 International law

As mentioned in the introduction of this thesis, its objective was to investigate the possibility of the public to enforce environmental law with an emphasis on the Aarhus Convention, in particular Article 9(3) of the Convention. To achieve this objective, the material scope of the provision was analysed, inter alia, by using the Convention’s preparatory documents and relevant decisions of its Compliance Committee. The outcome of the analysis was compared to relevant EU law, EEA law and Icelandic law and practices thereof.

Article 9(3) provides additional rights to the previous two paragraphs, creating more instances where members of the public should be able to have an access to administrative or judicial mechanisms. Compared to paragraphs one and two, it applies to a significantly broader range of acts and omissions as well as being more flexible regarding implementation. The pros of the remedy of paragraph three is that effective monitoring role of the public supports environmental authorities, thus ensuring greater public interest.

The wording of Article 9(3) is in many aspects unclear and raises many questions concerning its interpretation. For that reason, the preparatory documents of the Aarhus Convention were scrutinized in relation to the paragraph, as well as the relevant decisions of the ACCC. The study of these documents lead to the conclusion that they simply did not bring much to the table. In many instances, the paragraph was not even mentioned or barely mentioned. What I then discovered was often contradictory and confusing. The conclusions of the thesis regarding the material scope of Article 9(3) are thus not unequivocal.

However, among the results that can be summarized regarding Article 9(3) are that if the parties to the Convention choose to set criteria for standing under the provision, they must be in accordance with the objective of the Convention, including a wide access to its rights. The wording acts and omissions according to Article 9(3) thus covers both failure to take action according to law and actions, which infringe the law. It is also evident that Article 9(3) was meant to apply to a broader range of acts and omissions compared to Articles 9(1) and 9(2). Finally, the term public authority in Article 9(3) covers a wide span of governmental activities.

For the sake of context, Article 9(4) of the Convention was discussed briefly in chapter 4 of the thesis, but the provision sets general minimum standards, applicable to all review procedures, decisions and remedies named in paragraphs 1, 2 and 3 of Article 9. Article 9(4) of the Aarhus Convention underlines that the public should have an actual potential of preventing permanent impairment of the environment and that laws, intended to prevent impairment,
should be applied. The requirement in Article 9(4) applies to both courts and other review bodies. Among what was concluded regarding the provision, was that the cost of challenging decisions and enforcing national environmental law should not be so expensive that it hindered the public from doing so.

9.2 EU/EEA law
A substantial part of the research, concerned the interactions between Article 9(3) of the Aarhus Convention and EU law, but the EU was an entrepreneur regarding the engagement of members of the public in environmental matters. Before the EU approved the Convention, it declared that the implementation of the commitment following Article 9(3) was not completely covered by the legal instruments that the Union had already put into practice. Therefore, the Member States were responsible for these obligations until the EU adopts legislation to cover these obligations. The EU has adopted two directives concerning the first two pillars of the Convention. A proposal concerning the third pillar, Directive of the European Parliament and the Council on access to justice in environmental matters, was withdrawn in 2014 since it did not gather enough support from the EU Member States. Instead, the Commission decided to prepare an interpretative guidance document based on the case law of the CJEU.

The CJEU has rather recently rendered three landmark judgments concerning the interpretation and scope of Article 9(3) of the Aarhus Convention. Those cases were briefly outlined and analysed in the chapter on the EU. The first one was the 2011 Slovak Brown Bear judgment. The conclusion of that judgment was that members of the public within the EU cannot rely on the direct effect of Article 9(3). The parties to the Convention must thus make sufficient changes in their national legislation to comply with the requirements of the provision.

The other cases were on the one hand the joined case of Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht and on the other the joined case of Stichting Natuur en Milieu and Pesticide Action Network Europe. The findings of the CJEU were identical in those two judgments, but there the Court found that Article 9(3) of the Aarhus Convention could not be relied on by individuals to challenge the legitimacy of EU acts, confirming its conclusion in the Slovak Brown Bear judgment. The circumstances after these landmark judgments were found to be contrary to one of the fundamental objectives of the Aarhus Convention: To guarantee access to justice in environmental matters, an obligation the EU has committed itself to by ratifying the Convention.
Article 9(3) of the Aarhus Convention has not yet been incorporated into EU legislation through a legislative instrument and therefore not into the EEA Agreement. The obligation of the EEA States that are parties to the Convention are therefore not based on the Agreement.

Chapter 6 reviewed a 2012-2013 study on the implementation by all 28 EU Member States of Articles 9(3) and 9(4) of the Aarhus Convention, which resulted in the preparation of a synthesis report. The report proposed a common EU legal framework to bring all the Member States in line with Articles 9(3) and 9(4) of the Aarhus Convention, preferably in an EU directive on access to justice. In that way, the wording of those provisions could be defined which would prevent deficiencies that would result from various understanding of the terms among the Member States. However, the report was criticized, e.g. for containing incomprehensible references to the EIA Directive as an example, when such example was already present in the Convention.

9.3 Icelandic law

Studying the ratification process of the Aarhus Convention in Iceland revealed some interesting facts. Iceland’s Minister of Foreign Affairs initially submitted a proposal for a resolution regarding the ratification of the Aarhus Convention in 2001. The proposal was never processed by the parliament, but after the Minister’s submission, his own Ministry concluded in a memorandum that comparison of Article 9 of the Convention and the Icelandic Civil Procedure Act no. 91/1991 revealed that they were incompatible.

At first sight, it appeared as if the preparation work for Iceland’s ratification of the Aarhus Convention was carefully conducted. Committees and working groups were established to review the content of the Aarhus Convention and its position with respect to Icelandic law. During the preparation of legislation in relation to the Convention, comments were sought from various sources. Nevertheless, there were several deficiencies in these processes. In many cases and in many sources, Article 9(3) of the Convention was not even mentioned, let alone interpreted. Furthermore, the translation of Article 9(3) relied upon by those committees and in the preparation work, was partly different from the original English version. Therefore, the majority of those who contributed to this work concluded that no legislative measures were necessary to implement Article 9(3) in Iceland.
9.4 Final remarks

This thesis has studied the international obligation entailed in Article 9(3) of the Aarhus Convention, aiming to enhance the possibilities of the public to enforce environmental law. International development in the recent years has been towards officially recognizing the importance of public participation in environmental decision-making. Nevertheless, the discussion above gives cause to conclude that there is considerable reluctance towards the enforcement of this concept.

With respect to the EU, it is clear that a common legal framework would be preferable to prevent an uneven situation in the Member States. This applies particularly to the unclear and open language of Article 9(3). The recent precedents of the CJEU support this conclusion.

As regards the Icelandic legal system, the discussion about Article 9(3) of the Aarhus Convention has been surprisingly silent on the matter. In spite of that, it appears to be abundantly clear that special legislative amendments are necessary to implement the provision in Iceland.

Article 9(3) of the Aarhus Convention takes citizen enforcement one step further than has been done before. The vague wording of the provision is, however, a disadvantage and has led to divergent interpretations. Nevertheless, the parties to the Convention have largely underestimated the provision, either consciously or unconsciously. Either way, they must fulfil their obligations according to the Convention, or risk a possible breach of it.
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