

Access to justice in environmental matters – developments at EU level

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This article highlights the recent judicial and legislative activities at European Union ("EU") level relating to access to justice in environmental matters, undertaken to ensure compliance with the obligations of the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, signed 15 years ago at Aarhus in Denmark ("the Aarhus Convention").

As this article will show, most of the recent progress towards full implementation of the "3rd pillar" of this "Driving Force for Environmental democracy"² has come from the EU court system, thanks to the close cooperation between national courts, including at the highest level, and the European Court of Justice in Luxembourg. The question that is now open is therefore whether the evolution will continue to be purely judge-made, or whether the EU legislators in Brussels and Strasbourg will now step in the debate, as proposed by the European Commission since 2003.

1. Background : Brussels.

At the outset, it is appropriate to briefly recall certain specific features of the EU institutional structure, as they have an impact on the way the EU and its Member States will comply with their international law obligations under the Aarhus Convention.

First, the Aarhus Convention is a "mixed agreement"³, which means that the EU and its 28 Member States are each Party to the Convention⁴.

As required by Article 19(5) of the Aarhus Convention, the EU submitted a "declaration of competences" when it concluded the Aarhus Convention in 2005⁵. In the specific context of access to

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² Jeremy Wates, "The Aarhus Convention: a Driving Force for Environmental Democracy", *Journal for European Environmental and Planning Law*, 2005, 1, p.2.

³ On this concept, see Piet Eeckhout, *EU External Relations Law*, Oxford, Oxford University Press, 2011; Alan Rosas, "The Future of Mixity", in Christophe Hillion and Panos Koutrakos, ed., *Mixed Agreements Revisited*, Oxford, Hart Publishing, 2010, 367-374.

⁴ Ireland was the last Member State to accede to the Aarhus Convention, in September 2012. Croatia, which acceded to the Convention in March 2007, joined the EU on 1 July 2013.

⁵ OJ L124 of 17 May 2005, p. 3.

justice, the then European Community stated that "*the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2(2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations.*" The EU therefore claimed that it could not assume the international liability for a possible violation by one of its Member States of its obligations under Article 9(3) of the Aarhus Convention.

On the other hand, Member States face another layer of legal obligations in addition to those under international law. Indeed, because the European Union has concluded the Aarhus Convention, Member States are bound by the Convention as part of EU law⁶ as well. This implies for example that the European Commission can initiate infringement proceedings under Article 258 TFEU against a Member State that would not comply with its obligations under Article 9 of the Aarhus Convention⁷, and request fines from the court of Justice under Article 260 TFEU in case of continued non-compliance with a Court ruling on the matter.

Second, the Lisbon Treaty has firmly confirmed the constitutional value of certain general principles previously established by the case law that are relevant for access to justice in environmental matters.

In particular, Article 19(1) of the Treaty on European Union states that "*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*", and the Charter of Fundamental Rights of the European Union confirms in its Article 47 the right to an effective remedy to everyone whose rights and freedoms guaranteed by the law of the Union are violated. It can also be recalled that Article 37 of the Charter provides for the integration of a high level of environmental protection and the improvement of the quality of the environment into the policies of the Union.

This recognition of the right of access to justice as a human right in the EU legal order is particularly important in the Aarhus context. Indeed, the Aarhus Convention itself is clearly the international instrument that establishes environmental rights as human rights⁸, and that guarantees the respect

⁶ Article 216(2) of the Treaty on the Functioning of the European Union ("TFEU"): "*Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States*".

⁷ For an example of such action involving the Convention for the protection of the Mediterranean Sea against pollution, see the ruling of the Court of Justice of 7 October 2004 in case C-239/03 *Commission vs. France*. More generally, see Martin Hedemann-Robinson, "*EU enforcement of international environmental agreements: the role of the European Commission*", *European energy and environmental law review*, 2012, v. 21, n. 1, February, p. 2-30.

⁸ In the words of the then UN Secretary-General Kofi Annan, "*the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations*".

of those rights through good governance mechanisms and through enforcement procedures open to the public.

Thirdly, a number of legal instruments have been specifically adopted by the EU to ensure its own compliance and that of the Member States with the obligations of the Aarhus Convention.

For the EU institutions themselves, the obligations deriving from each of the three pillars of the Aarhus Convention has been covered by one single legal instrument, Regulation (EC) No 1367/2006⁹, also known as the "Aarhus Regulation", adopted after the conclusion of the Aarhus Convention by the EU. The Aarhus Regulation has created in its Article 10 a mechanism of administrative review of certain categories of administrative acts¹⁰ open to well-established environmental NGOs. Doubts have been expressed on whether the EU is actually in compliance with its obligations under the Aarhus Convention, in particular with respect to access to justice¹¹. The Lisbon Treaty has however broadened the conditions under which individuals and associations may have access to the EU courts, by removing the requirement of "individual concern" in case of regulatory acts not entailing implementation measures¹². This could have a positive impact on the access to the EU Courts by the public in the environmental sector.

As far as the implementation of the Aarhus Convention by the Member States is concerned, the European Commission took a different approach, and proposed a separate legislative text for each of the pillars of the Convention.

Because the obligations contained in the Aarhus Convention in the access to information and the public participation pillars were relatively similar¹³ to the pre-existing EU legal framework, the

⁹ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L264, 25.9.2006, p. 13.

¹⁰ The General Court has found that the definition of those administrative acts contained in Article 2 of the Aarhus Regulation was in breach on the Aarhus Convention (rulings of 14 June 2012 in cases T-396/09 *Vereniging Milieudefensie vs. Commission* and T-338/08 *Stichting Natuur en Milieu vs. Commission*; both cases have been appealed by the EU institutions and are now pending before the Court of Justice as cases C-401/12P, C-402/12P, C-403/12P, C-404/12P and C-405/12P, and the rulings are expected in 2014).

¹¹ See the conditional findings made by the Aarhus Convention Compliance Committee in case ACCC/C/2008/32, as well as Marc Pallemmaerts, "Access to environmental Justice at EU level. Has the Aarhus Regulation Improved the Situation?", in Marc Pallemmaerts, ed., *The Aarhus Convention at Ten, Interactions and tensions between Conventional international Law and EU Environmental Law*, Groningen, *Europa Law Publishing*, 2011, p. 309-312.

¹² Article 263(4) of the TFEU. For a very broad interpretation of the new Treaty rules on access to the EU Courts, see the Opinion of Advocate General Wathelet of 29 May 2013 in case C-132/12P *Stichting Woonpunt vs. Commission*. The ruling of the Court of Justice is expected in 2013.

¹³ Ralph Hallo, "Access to Environmental Information, the Reciprocal Influences of EU Law and the Aarhus Convention", in Marc Pallemmaerts, ed., op. cit., p. 57; Jerzy Jendrośka, "Public Participation in Environmental Decision-Making", in Marc Pallemmaerts, ed., op. cit., p. 94.

adoption of the legal texts corresponding to the 1st and 2 pillars went relatively smoothly and did not stand in the way of the ratification of the Aarhus Convention by the EU. Concerning access to environmental information, Directive 2003/4/EC¹⁴ was adopted on 28 January 2003, and Directive 2003/35/EC¹⁵ concerning public participation in Environmental Impact Assessment procedures and in Integrated Pollution Prevention and Control procedures was adopted shortly after.

It is interesting to note that each of the Directives included the relevant provisions on access to justice designed to enforce the rights of access to information¹⁶ and public participation¹⁷ guaranteed by the Directive.

However, the legislative proposal made in October 2003 by the European Commission to implement Article 9(3) of the Aarhus Convention¹⁸ met heavy resistance from the Member States. Indeed, while the European Parliament did adopt a first-reading position on 31 March 2004¹⁹, the Council flatly refused to process the proposal under the legislative procedure.

A large majority of the Member States were indeed not convinced that EU legislation was at all necessary to help them implement their obligations under the Aarhus Convention, in other words that it would satisfy the principles of subsidiarity and proportionality enshrined in the Treaty²⁰. A smaller group of Member States was fundamentally opposed to any EU in such sensitive matters where Member States traditionally enjoyed total freedom without interference "from Brussels".

To put the debate into historical perspective, it should be remembered that at that time, most justice and home affairs issues were not decided under the "Community method" but under the inter-governmental procedures of the Treaty on the European Union. It is incidentally also in 2003 that the Council refused for institutional reasons to adopt a Commission proposal for a Directive on the protection of the environment through criminal law, and instead adopted an inter-governmental

¹⁴ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41, 14.2.2003, p. 26–32. A report on the implementation of the Directive by the Member States and on the experience gained has been published by the European Commission at the end of 2012 (COM(2012) 774 final of 17 December 2012, available at http://ec.europa.eu/environment/aarhus/pdf/COM_2012_774_en.pdf).

¹⁵ Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 156, 25.6.2003, p. 17–25

¹⁶ Article 9(1) of the Aarhus Convention.

¹⁷ Article 9(2) of the Aarhus Convention.

¹⁸ COM(2003) 624 final of 24 October 2003.

¹⁹ EP-PE_TC1-COD(2003)0246. The European Economic and Social Committee did also delivered its Opinion on the Commission proposal, published in OJ C 117, 30.4.2004, p. 55–57.

²⁰ Articles 5(3) and 5(4) of the TEU.

Framework Decision. At the request of the European Commission, the Court of Justice condemned the Council for not having followed the correct legal procedure and legal basis²¹, and the Council was subsequently forced to adopt the correct legal instrument in 2008²².

The last meeting of the competent Working Group of the Council met in 2005, without making any progress. The European Commission did not withdraw its proposal, which therefore remained a Sleeping Beauty patiently waiting for its legislative Prince Charming.

But as scientists know well, nature hates vacuum, so it was only a matter of time before another EU institutional actor would start occupying the field left empty by the lack of legislative action at EU level.

2. Evolution : Luxembourg

The Court of Justice has played and continues to play an essential role in the development of EU law. 2013 marks the celebration of the 50th anniversary of the landmark ruling in case 26/62 *Van Gend en Loos*²³, where the Court established the principle of direct effect of EU law by ruling that that

the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community (p. 12).

But it is often overlooked that the Court of Justice added that

The vigilance of individuals concerned to protect their rights amounts to an effective supervision in addition to the supervision entrusted by Articles 169 and 170 [now Articles 258 and 260 of the TFEU] to the diligence of the Commission and of the Member States (p. 13).

²¹ Judgment of the Court of Justice of 13 September 2005 in case C-176/03 *Commission vs. Council*.

²² Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJ L 328, 6.12.2008, p. 28–37. The first example of the growing interaction between the protection of the environment and judicial implementation was Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30.4.2004, p. 56–75.

²³ Judgment of the Court of 5 February 1963 in case 26/62 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*. See Miguel Poiães Maduro and Loïc Azoulai, ed., *The past and future of EU law : the classics of EU law revisited on the 50th anniversary of the Rome Treaty*, Oxford, Hart, 2010, as well as the conference organised on 13 May 2013 by the Court of Justice of the European Union at http://curia.europa.eu/jcms/jcms/P_95693/.

In other words, the Court stressed that the public was also the guardian of the correct application of EU law, through access to the national court systems.

It is therefore not at all accidental that the Court of Justice would apply the same line of reasoning when dealing with the enforcement of environmental law, and produce a consistent series of rulings improving and widening the access to national courts granted to individuals and NGOs under the laws of the Member States., and improving the effectiveness of the review by national courts.

In doing so, the Court of Justice would not only be guided by the obligations of the Aarhus Convention, but also by the principle of effectiveness of EU law and by the right to an effective remedy now guaranteed by Article 47 of the Charter of Fundamental Rights.

2.1. A growing body of EU case law

A first judgment to note is the ruling of the Court of Justice in *Janecek*²⁴. Mr Janecek is a citizen concerned by air pollution in Munich, who brought legal action against Bavaria because that German State had not produced the air quality management plan required by the EU air legislation. The problem was that German law did not grant standing to individuals to bring this kind of case, and that there was no EU legislation requiring Germany to grant standing.

The Court of Justice replied to a question from the Bundesverwaltungsgericht (the supreme Federal Administrative Court) on this point as follows

42 The answer to the first question must therefore be that Article 7(3) of Directive 96/62 must be interpreted as meaning that, where there is a risk that the limit values or alert thresholds may be exceeded, persons directly concerned must be in a position to require the competent national authorities to draw up an action plan, even though, under national law, those persons may have other courses of action available to them for requiring those authorities to take measures to combat atmospheric pollution.

It should be noted that the Court of Justice did not base itself on the Aarhus Convention to establish standings for individuals. In point 38 of the judgment, the Court stressed that the air quality legislation was designed to protect public health, and recognised standing on that basis. It would therefore seem logical to assume that in future cases, the Court of Justice would similarly recognise standing for the public in other sectors of EU environmental law where public health considerations are a basis for the legislation, such as in the legislation on drinking water, bathing waters, waste management, landfills, or the management of chemicals²⁵.

²⁴ Judgement of the Court of Justice of 28 July 2008 in case C-237/07 *Dieter Janecek vs. Freistaat Bayern*.

²⁵ See for example the first recital of Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), OJ L 396, 30.12.2006, p. 1: "*This Regulation should ensure a high level of protection of human health and the environment as well as the free movement of substances, on their own in preparations and in articles, while enhancing competitiveness and innovation*".

A second judgement concerned the lack of transposition in Irish national law of the provisions on access to justice of Directive 2003/35/EC. While the *Commission vs. Ireland* ruling²⁶ is especially relevant for *common law* countries, the requirement of sufficient legal precision applies to all jurisdictions

55 It follows from an equally consistent line of case-law that the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity required in order to satisfy the need for legal certainty, which requires that, in the case of a directive intended to confer rights on individuals, the persons concerned must be enabled to ascertain the full extent of their rights (see, inter alia, Case C-197/96 Commission v France [1997] ECR I-1489, paragraph 15; Case C-207/96 Commission v Italy [1997] ECR I-6869, paragraph 26; and Commission v Luxembourg, paragraph 34).

This judgement is also the first so far to be delivered on the basis of an infringement action brought by the European Commission under Article 258 TFEU. Other cases are however in the pipeline (see below).

The third case in the series concerned also the standing issue, this time for NGOs in Sweden. Under previous Swedish law, access to Courts was restricted to NGOs having at least 2000 members. During the proceeding before the Court of Justice in the *Djurgården* case²⁷, the Swedish government had to acknowledge that only 2 Swedish NGOs had more than 2000 members. The Court therefore found that

47 Furthermore, it is conceivable that the condition that an environmental protection association must have a minimum number of members may be relevant in order to ensure that it does in fact exist and that it is active. However, the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its scope. (emphasis added)

and that

51 [...] Finally, such a system would give rise, by its very nature, to a filtering of appeals directly contrary to the spirit of the directive which, as stated in paragraph 33 of this judgment, is intended to implement the Aarhus Convention.

After that judgement of 2009, Sweden modified its legislation, and set the minimum number of members at 100 instead of 2000. This relaxation of the conditions for standing did not at all lead to an increase in the workload of the Swedish administrative courts.

2011 proved to be an important year for the development of the Court case law on standing.

²⁶ Judgement of the Court of Justice of 16 July 2009 in case C-427/07 *Commission vs. Ireland*.

²⁷ Judgement of the Court of Justice of 15 October 2009 in case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd*.

The fourth case dealt again with standing of NGOs, but this time put in question one of the key features of German law, i.e. the "Schutznormtheorie" under which complainants have only standing to invoke legal provisions that are designed to protect their specific interests (which excludes, for example, the general interest of the environment in a case involving nature protection). In the landmark *Trianel* ruling²⁸, the Court of Justice found that

48 It follows more generally that the last sentence of the third paragraph of Article 10a of Directive 85/337 [i.e. the access to justice provision of the EIA Directive] must be read as meaning that the 'rights capable of being impaired' which the environmental protection organisations are supposed to enjoy must necessarily include the rules of national law implementing EU environment law and the rules of EU environment law having direct effect.

And that therefore

50 Consequently, the answer to Questions 1 and 2, read together, is that Article 10a of Directive 85/337 precludes legislation which does not permit non-governmental organisations promoting environmental protection, as referred to in Article 1(2) of that directive, to rely before the courts, in an action contesting a decision authorising projects 'likely to have significant effects on the environment' for the purposes of Article 1(1) of Directive 85/337, on the infringement of a rule flowing from EU environment law and intended to protect the environment, on the ground that that rule protects only the interests of the general public and not the interests of individuals.

Before the Court of Justice, the German government tried to defend its restrictive system of access to justice by the consideration that the judicial review performed by German administrative courts was more thorough than in other Member States. This line of defence, which has no basis in the Aarhus Convention, attracted the following graphic criticism from Advocate General Sharpston: "*Like a Ferrari with its doors locked shut, an intensive system of review is of little practical help if the system itself is totally inaccessible for certain categories of action.*"²⁹

It should be noted that the German restrictive rules on standing have been subject to parallel legal challenges, first before the Aarhus Convention Compliance Committee³⁰ and then by the European Commission in an infringement case under Article 258 TFEU³¹. This pattern of multiple-track

²⁸ Judgement of the Court of Justice of 12 May 2011 in case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein -Westfalen eV vs. Bezirksregierung Arnsberg*. See Bilun Müller, Access to the Courts of the Member States for NGOs in Environmental Matters under European Union Law, *Journal of Environmental Law*, 23:3, 2011, 505-516.

²⁹ Opinion delivered on 16 December 2010, point 77.

³⁰ Case ACCC/C/2008/31, still pending.

³¹ The European Commission issued a Reasoned Opinion on 26 April 2013, in view of the fact that the modifications to the German Environmental Appeals Act adopted to comply with the *Trianel* ruling is in its view still not compatible with EU law. See the press communication at http://europa.eu/rapid/press-release_MEMO-13-375_en.htm.

enforcement is now becoming common on access to environmental justice issues (see below concerning the United Kingdom). Furthermore, while the judgement of the Court of Justice relates strictly speaking to the implementation of the obligations under Article 9(2) of the Aarhus Convention, its reasoning could similarly apply to the obligations under Article 9(3).

The fifth case constituted a real (and unexpected) breakthrough in terms of implementing the obligations of Article 9(3) of the Aarhus Convention. The case concerned the challenge by a Slovak NGO against a hunting permit concerning brown bears, and is therefore known in the literature as the *Slovak Brown Bears* case³². In its judgement, the Court applied its traditional case law and found that Article 9(3) of the Aarhus Convention has no direct effect in the EU legal order, because it does not contain any clear and precise obligation capable of directly regulating the legal position of individuals. But it then went on to stress, on the basis of the principle of effectiveness, that

49 *Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.*

50 *It follows that, in so far as concerns a species protected by EU law, and in particular the Habitats Directive, it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.*

51 *Therefore, it is 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 the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law, 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 (see, to that effect, Case C-432/05 Unibet [2007] ECR I-2271, paragraph 44, and Impact, paragraph 54).*

In other words, the obligations of Article 9(3) do have an indirect effect, which can be captured through the interpretation of national legal provisions in conformity with the objectives of the Aarhus Convention, in particular the objective of giving the public wide access to justice.

Some have questioned the *Slovak Brown Bears* judgement³³, because the Court would have ignored the fact that the EU legislature had failed to adopt a directive implementing Article 9(3) of the Aarhus

³² Judgment of the Court of Justice of 8 March 2011 in case C-240/09 *Lesoochránárske zoskupenie VLK vs. Ministerstvo životného prostredia Slovenskej republiky*. See Mariolina Eliantonio, "Case C-240/09, Case C-115/09", *Common Market Law Review*, 2012, 49, 767-792.

³³ Damian Krawczyk, " *Enforcement of EU environmental law by individuals and non-governmental organizations*", in Maciej Rudnicki, Izabela Wereśniak-Masri, Anna Kozińska, ed., *European environmental law in the EU member states : an overview of implementation effectiveness*, Warszawa, Ministry of Environment, 2011.

Convention and would therefore have "stepped into the legislature's shoes"³⁴ and they therefore do not consider that it will remain the definitive position of the Court³⁵. However, that view neglects the fact that the Aarhus Convention is part of EU law by virtue of Article 216(2) TFEU, and the obligations of Article 9(3) do not require an EU implementing act in order to be enforced in the monist EU legal order. While it is true that the absence of a directive may complicate the tasks of the Member States in complying with their obligations under Article 9(3), it cannot be a justification for not complying at all with their existing obligations. From a practical point of view, that view also seems to forget that the ruling was delivered by the Grand Chamber of the Court of Justice, a chamber of 13 judges, and that therefore the Court is unlikely to dramatically revise this precedent. In fact, the Court explicitly referred to the case in its *Edwards* ruling of 11 April 2013 (see below). Indeed, the Court has confirmed systematically its line of thinking concerning the wide access to justice in subsequent cases. Finally, the national courts themselves have started to follow without hesitation the *Slovak Brown Bears* case law (see below at 2.2), as well as the General Court³⁶ itself.

The sixth and seventh Court judgements illustrate the far-reaching consequences of the developing case law on access to justice in terms of limiting the procedural autonomy of the Member States. The factual issue was the same in both the *Boxus*³⁷ and in the *Solvay*³⁸ cases : the Parliament of the Belgian Region of Wallonia had adopted by legislative decree a number of development consents for certain important infrastructure projects, while normally those consents are adopted by the executive after an appropriate environmental impact assessment. The (desired) effect under Belgian law was that the Supreme Administrative Court (the "Council of State") no longer had jurisdiction on challenges against the development consents, because its jurisdiction extends only to executive acts. The Belgian Constitutional Court is competent for challenges against legislative acts, but the legal basis for such challenges is limited, and for example does not extend to the review of the quality of an environmental impact assessment. This therefore created a judicial gap, which was challenged by Belgian citizens in the Constitutional Court (*Solvay*) and in the Supreme Administrative Court (*Boxus*), and both courts referred the issue in a preliminary ruling to the Court of Justice.

The Court of Justice first recalled its case law on the applicability of the EIA Directive in case of development consents adopted by a legislative body, stressing in essence that the legislature cannot be a mere rubber-stamp for a file prepared by the administration. The Court then drew the

³⁴ Jan H. Jans, "Who is the referee? Access to justice in a globalised legal order", *Review of European Administrative Law*, vol. 4, nr 1 (2011), p.98.

³⁵ For the more EU institutional question on whether the Court of Justice has jurisdiction to interpret mixed agreements, see Marcus Klamert, "Dark matter : competence jurisdiction and "the area largely covered by EU law": comment on *Lesoochránárske*", *European Law review*, 2012, v. 37, n.3, p. 340-350.

³⁶ In the cases quoted in footnote 9.

³⁷ Judgment of the Court of Justice of 18 October 2011 in case C-128/09 *Antoine Boxus and others vs. Région wallonne*.

³⁸ Judgment of the Court of Justice of 16 February 2012 in case C-182/10 *Marie-Noëlle Solvay and Others vs. Région wallonne*.

conclusion in terms of enforcement and compliance with the obligations under Article 9(2) of the Aarhus Convention

56 In the present instance, if the referring court finds that the Decree of the Walloon Parliament of 17 July 2008 does not satisfy the conditions laid down in Article 1(5) of Directive 85/337 and recalled in paragraph 37 of the present judgment, and if it turns out that, under the applicable national rules, no court of law or independent and impartial body established by law has jurisdiction to review the substantive or procedural validity of that decree, the decree must then be regarded as incompatible with the requirements flowing from Article 9 of the Aarhus Convention and Article 10a of Directive 85/337. The referring court must then disapply it (Boxus; point 51 of Solvay is similar).

In practical terms, this implied an intervention by the Court of Justice in the allocation of jurisdictions among Belgian supreme courts, so as to ensure the correct judicial enforcement of the disciplines of the Environmental Impact Assessment Directive.

In 2013, the Court of Justice delivered again important rulings on the implementation of Article 9 of the Aarhus Convention, on a broader range of issues than in 2011.

In the eighth case, *Križan*³⁹, originating in a request for a preliminary ruling from the same Supreme Court of the Slovak Republic that had already referred the *Slovak Brown Bears* case, the Court of Justice provided clarification on the effective remedies available under the Integrated Prevention Pollution Control Directive. In particular, the Court of Justice established that despite the silence of the Directive on this point, the public concerned had a right to request interim measures from the national courts

109 However, exercise of the right to bring an action provided for by Article 15a of Directive 96/61 would not make possible effective prevention of that pollution if it were impossible to prevent an installation which may have benefited from a permit awarded in infringement of that directive from continuing to function pending a definitive decision on the lawfulness of that permit. It follows that the guarantee of effectiveness of the right to bring an action provided for in that Article 15a requires that the members of the public concerned should have the right to ask the court or competent independent and impartial body to order interim measures such as to prevent that pollution, including, where necessary, by the temporary suspension of the disputed permit.

As in previous cases, the principle of effectiveness played an important role in the reasoning of the Court of Justice.

In terms of effective remedies, it worth mentioning the ruling of the Court of Justice in *Leth*⁴⁰, where the Court opened the door (albeit in a very prudent way) to financial compensation in case of an

³⁹ Judgment of the Court of Justice of 15 January 2013 in case C-416/10 *Jozef Križan vs. Slovenská inšpekcia životného prostredia*.

⁴⁰ Judgement of the Court of Justice of 14 March 2013 in case C-420/11 *Jutta Leth vs. Republik Österreich and Land Niederösterreich*, point 47 : "Consequently, it appears that, in accordance with European Union law, the

omission to undertake an environmental impact assessment (the case at hands concerned the development of the Vienna airport in Austria).

While the Trianel ruling of 2011 had drastically affected a core principle of the German judicial system, the ninth ruling of the Court of Justice in the analysed series, referred to as *Edwards*⁴¹, would have the same effect for the United Kingdom, but this time on the issue of the prohibitive nature of the costs of access to justice. Costs of access to justice have traditionally be very high in the United Kingdom's various jurisdictions, which means that the loser-pays principle can have a huge deterrent effect on prospective complainant, as stressed by English senior judges themselves in various reports. The *Edwards* case arose out of an unsuccessful challenge in the UK courts against an approval given to a cement installation. The unsuccessful plaintiff was ordered to pay the costs of the national proceedings (up to 80.000 pounds to the defendant, plus its own costs) and, in this context, the UK Supreme Court introduced a preliminary reference focusing on the interpretation of the provision in the Directive and in Article 9(4) of the Aarhus Convention that costs should not be prohibitively expensive.

The Court first recalled the fundamental principle of the right to an effective remedy and the principle of effectiveness, as already applied in the *Slovak Brown Bears* case

33 *Moreover, the requirement that the cost should be 'not prohibitively expensive' pertains, in environmental matters, to the observance of the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the European Union, and to the principle of effectiveness, in accordance with which detailed procedural rules governing actions for safeguarding an individual's rights under European Union law must not make it in practice impossible or excessively difficult to exercise rights conferred by European Union law (see, inter alia, Case C-240/09 Lesoochránárske zoskupenie VLK [2011] ECR I-1255, paragraph 48).*

And in a language recalling its *Van Gend en Loos* judgment of 50 years ago, it noted the active role of the public in enforcing EU environmental law⁴², to establish a test that combines a subjective and an objective approach.

fact that an environmental impact assessment was not carried out, in breach of the requirements of Directive 85/337, does not, in principle, by itself confer on an individual a right to compensation for purely pecuniary damage caused by the decrease in the value of his property as a result of environmental effects. However, it is ultimately for the national court, which alone has jurisdiction to assess the facts of the dispute before it, to determine whether the requirements of European Union law applicable to the right to compensation, in particular the existence of a direct causal link between the breach alleged and the damage sustained, have been satisfied."

⁴¹ Judgment of the Court of Justice of 11 April 2013 in case C-260/11 *The Queen, on the application of David Edwards and Lilian Pallikaropoulos v Environment Agency and Others*.

⁴² See also Jeremy Wates, "*The Aarhus Convention: a Driving Force for Environmental Democracy*", *Journal for European Environmental and Planning Law*, 2005, I, p.6 : "[the access to justice pillar] *also points the way to empowering citizens and NGOs to assist in the enforcement of the law*".

40. That assessment cannot, therefore, be carried out solely on the basis of the financial situation of the person concerned but must also be based on an objective analysis of the amount of the costs, particularly since, as has been stated in paragraph 32 of the present judgment, members of the public and associations are naturally required to play an active role in defending the environment. To that extent, the cost of proceedings must not appear, in certain cases, to be objectively unreasonable. Thus, the cost of proceedings must neither exceed the financial resources of the person concerned nor appear, in any event, to be objectively unreasonable.

The Court also established that the requirement that litigation should not be prohibitively expensive concerns all the costs arising from participation in the judicial proceedings⁴³, and applies to all its steps (first-instance proceedings, an appeal or a second appeal)⁴⁴.

As was the case for Germany in *Trianel*, the violation by the United Kingdom of its obligations concerning costs of access to justice has also been pursued in parallel before the Aarhus Convention Compliance Committee, which found the UK in non-compliance⁴⁵ with its obligations under the Aarhus Convention. This meant that in any event, the United Kingdom had the obligation to modify its legal regime to comply with its international obligations.

In addition, the European Commission has initiated in 2007 an infringement case under Article 258 TFEU against the United Kingdom, which is now pending before the Court of Justice⁴⁶. The judgement of the Court in that case will establish in a general way whether the UK costs system (including in terms of the availability of interim relief) is in line with the interpretation given by the Court in the *Edwards* case. In her opinion delivered on 12 September 2013, Advocate General Kokott confirmed that, on the basis of the principles already established by the Court in *Edwards*, the United Kingdom was in violation of its obligations under EU law. In particular, the Advocate General found that the UK courts' wide discretion to grant costs protection (under the form of Protective Cost Orders) was not tied to the objective of costs protection in environmental litigation and that the criteria used under the case law were incompatible with those identified by the Court in *Edwards*. She also took issue with the reciprocal cap system, which limits the costs to be paid by the opposing part (usually a public authority) in case of successful challenge and therefore has also a dissuasive effect for prospective applicants, and with the need for an undertaking to pay damages in case of application for interim relief (except in Scotland).

The Court of Justice is expected to deliver further rulings. For example, a judgement should be coming soon in the *Altrip*⁴⁷ case, which will clarify the scope of the judicial review, an issue not yet

⁴³ Point 27.

⁴⁴ Point 45.

⁴⁵ Case ACCC/C/2008/33.

⁴⁶ Case C-530/11 Commission vs. United Kingdom. The judgment of the Court is expected early 2014.

⁴⁷ Case C-72/12 *Gemeinde Altrip, Gebrüder Hört GbR, Willi Schneider vs. Rhineland-Palatinate*. Advocate General Cruz Villalón has delivered his opinion on 20 June 2013, but it is not yet available in English.

addressed by the case law of the Court. In particular, the Court will have to assess the compatibility of the German law providing that an EIA decision can only be reversed if the alleged error affects the subjective rights of the complainant and if without the error the decision would have been different in respect of those rights.

Furthermore, the European Commission has initiated infringement proceedings against a number of Member States such as Belgium, Austria, Ireland, Slovenia, the Czech Republic, Slovakia and Malta (in addition to the already quoted cases against Germany and the United Kingdom), and those cases could reach the Court of Justice in the near future if no satisfactory solution is found in order to bring those Member States into compliance with their obligations concerning access to justice.

Finally, the Aarhus Convention Compliance Committee has delivered a significant number of findings identifying situations of non-compliance with Article 9 of the Convention in a number of EU Member States, such as Belgium, Austria, the United Kingdom, Germany, Bulgaria, Spain or the Czech Republic. It was argued in the past that those findings were not immediately transferrable into the context of enforcement actions under the EU legal framework, in particular because of the "*non-confrontational, non-judicial and consultative nature*"⁴⁸ of the Aarhus system of review of compliance. However, a door has recently been opened to a fruitful interaction between the enforcement mechanisms of the two legal orders by Advocate General Kokott, who made an explicit reference to the assessments performed by the Aarhus Convention Compliance Committee in her conclusions in the above-mentioned *Edwards* case :

36. The Compliance Committee (23) has already given its view on the issue of prohibitive costs on several occasions, indeed mainly in relation to the United Kingdom. (24) In each case it conducts a comprehensive assessment of the circumstances of the individual case and of the national system. This approach is necessary because Article 9(4) of the Convention – just like the provisions of the directives – does not contain any specific criteria.

While the Court of Justice itself has not made an explicit direct link with the findings of the Aarhus Convention Compliance Committee in one of its judgements, it seems that those findings will at least be part of the context in which the Court assesses possible breaches by Member States of their obligations on access to environmental justice.

Finally, it is worth mentioning that a further avenue for the possible cross-fertilisation on access to justice issues between the case law of enforcement mechanisms at supranational level will be created when the EU accedes to the European Convention for the Protection of Human Rights ("ECHR"), as mandated by Article 6(2) TEU⁴⁹. Indeed, the ECHR contains provisions⁵⁰ which are

⁴⁸ See Article 15 of the Aarhus Convention.

⁴⁹ See Paul Gragl, *The accession of the European Union to the European Convention on Human Rights*, Oxford, Hart, 2013.

⁵⁰ See Council of Europe, *Manual on human rights and the environment*, Strasbourg, 2012; Sabrina Praduroux, "The European Convention on Human Rights and Environmental Nuisances", *European Review of Private Law*, 2008, 269-281.

relevant both procedurally in terms of access to justice⁵¹ and substantively in terms of protection of human health and the environment⁵².

2.2. A full reception of this case law by national courts

Despite the long-standing principle of primacy of EU law established by the Court of Justice in *Costa vs. Enel* in 1964⁵³, national courts have sometimes not shown a great enthusiasm in giving effect domestically to judgements of the European Court of Justice⁵⁴.

To the contrary, the case law of the Court concerning the Aarhus Convention has been easily followed and integrated by the national courts.

As a follow up to the *Slovak Brown Bears* case, the Supreme Court of the Slovak Republic did grant standing to the NGOs by judgments of 2 August 2010 with respect to the authorisations to hunt the bears⁵⁵. By doing so, it actually went beyond the "conform interpretation" approach advocated by the Court judgment, because it was simply not possible to merely interpret the Slovak law clearly denying standing to NGOs. In essence, the Supreme Court gave direct effect to the obligations of Article 9(3) of the Aarhus Convention⁵⁶, by disapplying the contrary standing rules of national law. It would also seem that the *Slovak Brown Bears* case law has also been relied upon by the Stockholm Administrative Court in a ruling of 2 May 2013 in case 2428-23 annulling the 2013 governmental decision to authorise the killing of wolves, a strictly protected species under Annex IV of the EU Habitats Directive⁵⁷.

The German courts have immediately acted upon the condemnation of the *Schutznormtheorie* by the Court of Justice in the *Trianel* case. A list of 17 judgements by German administrative courts

⁵¹ For example Article 6 ECHR on the right to a fair trial.

⁵² For example Article 8 ECHR on the respect for private and family life. A striking example of congruence between EU law and the ECHR is the so-called "Campania waste crisis" in Italy, which led to the ruling of the European Court of Human Rights of 10 January 2012 in case No.30765/08 *Di Sarno and others v. Italy* and to the ruling of the Court of Justice of 25 April 2007 in case C-135/05 *Commission vs. Italy* (the Commission has decided to refer the issue back to the Court of justice with a request for fines under Article 260 TFEU and is now pending as case C-196/13; see the press release at the following address http://europa.eu/rapid/press-release_IP-12-1140_en.htm).

⁵³ Judgment of the Court of Justice of 15 July 1964 in case 6/64 *Flaminio Costa vs. Enel*

⁵⁴ Even governments are not very enthusiast: at the request of some Member States, the principle of primacy of EU law has voluntarily not been written in the text of the Lisbon Treaty, but is only part of Declaration 17 annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.

⁵⁵ Which, unfortunately, had been killed in the meantime.

⁵⁶ Mariolina Eliantonio, "Case C-240/09, Case C-115/09", *Common Market Law Review*, 2012, 49, p. 784.

⁵⁷ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7–50.

applying the *Trianel* case law has been submitted by the German government in case ACCC/C/2008/31⁵⁸.

Concerning the *Boxus* and *Solvay* cases, the Belgian Constitutional Court quickly found in its judgment n° 144/2012 of 29 November 2012 that the Walloon Decree subject to the preliminary rulings was in violation of the anti-discrimination provisions of the Belgian Constitution, and therefore annulled it. In a related development, the Belgian Supreme Court ("Cour de Cassation") recently demonstrated that it shares the "Aarhus-friendliness" of the Constitutional Court, by radically modifying its case law on the standing of NGOs in civil action brought in the context of criminal proceedings, in order to bring it in line with Article 9(3) of the Aarhus Convention⁵⁹.

The judicial follow up to the *Edwards* case is currently pending before the Supreme Court of England and Wales.

2.3. Conclusion

For the last years, the Court of Justice has significantly clarified and expanded the scope of the provisions of the Aarhus Convention and of the EU Directives ensuring the widest access of the public to justice in environmental matters. The case law covers issues such as standing, the cost of the procedure, the scope of the judicial review, and the effectiveness of the judicial remedy. It relates to the various subparagraphs of Article 9 of the Aarhus Convention.

Furthermore, national courts, including at the highest level, seem to have enthusiastically received "the message from Luxembourg", and have applied the Aarhus case law without hesitation.

The problem however is that most of the case law originates in preliminary ruling requests from national courts facing individual cases. Therefore, the case law evolves in a random way, and does not seem to address in a systemic way the deficiencies found in most Member States in terms of compliance with the obligations under Article 9 of the Aarhus Convention.

3. Evolution II : back to Brussels ?

3.1. A new political context to address the problem

In March 2012, the European Commission adopted a Communication on "*Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness*"⁶⁰ (hereafter, the "2012 Communication"). With this Communication, the Commission wanted to restart a debate with governments and all other stakeholders on how to achieve better implementation of EU law, and proposed first to move towards a more systematic approach to collecting and sharing knowledge and second to enhance responsiveness to environmental problems at a local level, closer to the citizen. The focus on knowledge and access to information, as well as on

⁵⁸ http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-31/correspondence/DE_Annex_examples_jurisprudence.pdf

⁵⁹ Judgement of 11 June 2013 in case P P and P S L V vs. gewestelijk stedenbouwkundig inspecteur

⁶⁰ COM(2012)95 final of 7 March 2012.

enforcement at local level through administrative and judicial means, reveals the strong influence of the Aarhus Convention in the drafting of the 2012 Communication.

The 2012 Communication, designed to improve the tools used by the competent authorities of the Member States, is therefore complementary to the Commission Communication adopted in 2008 "*on implementing European Community Environmental Law*"⁶¹, which deals with the tools available to the Commission, in particular the infringement procedures under Articles 258 and 260 of the TFEU.

In the part of the 2012 Communication devoted to Improving the enforcement at national, regional and local levels, the Commission proposed the following four objectives: (1) improve the inspections and surveillance applying to EU legislation, (2) ensure better complaint-handling and mediation at national level, (3) improve access to justice, and (4) deliver improvements in environmental outcomes through capacity-building and implementation agreements that engage Member States. While the fulfilment of each of those objectives could be obtained through a separate instrument, including potentially a binding legal instrument at EU level, it is clear that they are interlinked and deliver a better outcome in terms of effective implementation of EU environmental law if they are achieved together. For example, inspectors can play a role in handling complaints from interested parties⁶² and provide information with a specific probative value in court proceedings. National complaint handling mechanisms can solve implementation problems before they reach the court system, and be part of an implementation agreement between the Commission and the Member State concerned. Implementation agreements are designed to prevent the existence of non-compliant situations, but require inspections to verify the factual situation on the ground and the threat of possible legal action before the courts in order to deliver credible outcomes.

Concerning access to justice more specifically, the 2012 Communication⁶³ first recalled the change in the wider context, in particular the development of the case law of the Court of justice. It then specifically identified as an issue the fact that "*national courts and economic as well as environmental interests face uncertainty in addressing this challenge.*" The Commission proposed to address this issue of uncertainty along two possible strategies:

"· Developing guidance to take account of a significant recent body of case-law in order to improve implementation of existing access to justice provisions as well as

· Defining at EU level the conditions for efficient as well as effective access to national courts in respect of all areas of EU environment law. "

The main difference between the two approaches contemplated by the Commission was that the second one could require some legislative action at EU level, while this was not the case under the first approach.

⁶¹ COM(2008)773 final of 18 November 2008.

⁶² As mentioned in point V.3.a of Recommendation 2001/331/EC of the European Parliament and of the Council of 4 April 2001 providing for minimum criteria for environmental inspections in the Member States, OJ L 118, 27.04.2001, p. 41 -46.

⁶³ At page 9.

Given that communications are political documents drafted to stimulate the discussion among the EU institutions, the next step was to assess the reactions of the co-legislators to the diagnostic posed by the Commission in its 2012 Communication.

The Council did not adopt a specific document in reaction to the 2012 Communication, but its assessment of the Commission views on access to justice is contained in its Conclusions "*Setting the framework for a Seventh EU Environment Action Programme*" adopted on 11 June 2012⁶⁴. In those conclusions, adopted under the remarkably efficient Danish Presidency, the Council agreed the following:

6. UNDERLINES that better implementation should be an essential part of the 7th EAP, and therefore WELCOMES the Commission Communication of 7 March 2012 on improving the delivery of benefits from EU environment measures 15 and the ongoing efforts in this respect; REITERATES the need for ensuring a full implementation of environmental policies and legislation at EU level, and therefore ENCOURAGES the Commission and as appropriate the Member States, while respecting the principle of subsidiarity, to further develop and implement the objectives and initiatives set out in the Communication such as:

[...],

- improving access to justice in line with the Aarhus Convention,

[...].

Furthermore, URGES the Commission to include these objectives and initiatives as an important part of the 7th EAP.

This political statement adopted by the (then) 27 Ministers of the Environment confirmed the validity of the Commission's diagnostic, the fact that the situation was not satisfactory⁶⁵, and the need to address it in line with the Aarhus Convention as a guiding principle.

The position from the European Parliament is expressed in its report 2012/2104 on "*Improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness*" adopted on 12 March 2013⁶⁶. In that report, the European Parliament was much more prescriptive in terms of options than the Council or the Commission. Indeed, having noted "the importance of citizens' access to justice"⁶⁷, it specifically

⁶⁴ Council document 11186/12.

⁶⁵ Otherwise there would logically be nothing to "improve".

⁶⁶ Document P7_TA(2013)0077.

⁶⁷ Point 41

*"regrets that the procedure for adopting the proposal for a directive on public access to justice in environmental matters has been halted at first reading; calls, therefore, on the co-legislators to reconsider their positions with a view to breaking the deadlock."*⁶⁸

This clear preference for a legally binding instrument did not exclude recourse to guidance documents on how to apply the case law of the Court of justice, as the Parliament also recommended *"the pooling of knowledge between the respective judicial systems of the Member States that deal with infringements of, or failure to comply with, EU environmental legislation."*⁶⁹

Finally, the Commission's views on how to address the issues of access to justice in environmental matters received also specific attention by the Committee of the Regions. In its opinion of 30 November 2012 on *"Towards a 7th Environment Action Programme: better implementation of EU environment law"*⁷⁰, the Committee of the Regions also agreed with the diagnostic of the Commission by noting that *"due to case-law which foresees greater access to courts for citizens and NGOs, national courts, local and regional authorities and economic as well as environmental interests now face uncertainty in addressing this challenge."*⁷¹ Similarly to the European Parliament, the Committee also identified as the appropriate solution the adoption of a legally binding instrument, i.e. the proposal for a directive made in 2003 by the Commission:

"37. reiterates therefore, that there is a need to revive the stalled Access to Justice Directive. This would close existing gaps in many Member States in complying with the requirements of Article 9(3) and (4) of the Aarhus Convention. It would also enhance the role of the public as a catalyst for better enforcement of environmental law at all levels. The current Communication is not explicit on how the European Commission intends to resolve this."

The position of the Committee of the Regions is particularly relevant in light of the application of the "subsidiarity principle", which had been used as an argument by a significant number of Member States to oppose the adoption of any legally binding instrument at EU level. Indeed, the Committee of the Regions is traditionally seen as the "guardian of the principle of subsidiarity", and it is therefore politically important to note that the two approaches contemplated by the Commission comply with that principle, as *"the contributions from its Subsidiarity Monitoring Network (SMN), [...] generally indicate that the options in the Communication, when fully formulated, are unlikely to constitute a significant breach of subsidiarity"*⁷².

Having collected those institutional views from the other institutions and advisory bodies, the Commission felt that there was sufficient political momentum to propose a specific objective concerning access to justice in environmental matters in its proposal for a 7th Environmental Action

⁶⁸ Point 29 of the report.

⁶⁹ Point 30 of the report.

⁷⁰ OJ C 17, 19.1.2013, p. 30–36

⁷¹ Point 36 of the opinion

⁷² Point 47 of the opinion.

programme to 2020⁷³, under the 4th priority objective devoted to maximising the benefits of EU environment legislation. More precisely, the Commission proposed the following objective

60. Fourth, EU citizens will gain better access to justice in environmental matters and effective legal protection, in line with international treaties and developments brought about by the entry into force of the Lisbon Treaty and recent case law of the European Court of Justice. Non-judicial conflict resolution will also be promoted as an alternative to litigation.

Under point 63(e) of the proposal, the principle of effective legal protection for citizens and their organisations is to be facilitated by 2020.

The reaction from the two co-legislators have been quick and very positive, both the European Parliament and the Council agreeing broadly with the language proposed by the Commission on access to justice when they reached a political agreement at first reading during the trilogue held on 19 June 2013⁷⁴.

The text agreed, which still need to be formally adopted by the European Parliament and the Council, replaces the expression "*better access to justice*" with "*effective access to justice*" in point 60 of the 7th EAP, thereby actually transforming the proposed obligation of means into an obligation of results, while reflecting the fact that a limited number of Member States do already comply with their access to justice obligations under EU law and international law. In addition, the reference to "international treaties" is replaced by a more specific one to "the Aarhus Convention", thereby confirming the inspirational nature of the Convention for the development of EU law.

To complete this overview of the political context, it is also interesting to note the views of the other advisory body established by the Treaties, i.e. the European Economic and Social Committee. In point 4.4.9 of its opinion adopted on 20 March 2013⁷⁵, the Committee stressed that

"Ultimately, effective implementation of environmental protection means giving civil society an active role, enabling the public to take on a watchdog role. Tools to allow this were introduced into European environment law pursuant to the Aarhus Convention in particular – for example, free access to environmental information, involvement of civil society organisations in decision-making on environment law, and access to justice."

3.2. Defining the solution

The 7th EAP political agreement among the EU institutions to ensure effective access to justice in environmental matters does not identify precisely the appropriate instrument to fulfil that shared objective.

⁷³ COM(2012)710 final of 29 November 2012.

⁷⁴ See <http://eu2013.ie/news/news-items/201306197theappr/>. The political agreement has been confirmed by the Coreper on 26 June 2013 and by the competent committee of the European Parliament on 10 July 2013.

⁷⁵ Document CESE 296/2013 - NAT/592.

As explained above, the provisional view of the Commission, as expressed in its 2012 Communication, was that the options were either reliance on guidance, good practices or more generally soft law, or a legally binding instrument. The reaction from the other EU institutions and advisory bodies did not reveal any dramatically different additional option.

At that stage, the Commission refined its assessment of the universe of possible options, and identified four of them.

The first one is the classical "zero option", i.e. no action at all, except guidance to the public on how to use the case law as well as promotion activities among judges or legal professionals on the potential benefits of the Aarhus Convention as interpreted by the Court of justice and the Compliance Committee. It should be recalled that in the context of access to justice in environmental matters, this option actually implies that the development of EU rules will exclusively be decided by the case law. A variation on this option is a second option consisting in continuing to rely on judge-made legal developments, but with the additional action of directing the evolution of the case law through cases selected and brought by the Commission to the Court under its enforcement powers under Article 258 of the TFEU. A third option is the adoption of a completely new proposal for a Directive on access to justice in environmental matters. A fourth option would be to ask the co-legislators to restart the legislative work on the 2003 proposal for a Directive⁷⁶. A discussion held in the competent Working Group of the Council on 13 May 2013 confirmed that no other option had been identified by the Member States, and that therefore the "universe" to analyse was therefore in principle the one proposed by the Commission.

In order to be in a position to make the best informed choice, the Commission decided to build an extremely robust knowledge base for its further analysis of the options.

First, it entrusted Professor Jan Darpö, chair of the Aarhus Convention Access to Justice Task Force and a number of leading national experts to draw up the detailed state of play of implementation of Articles 9 (3) and (4) of the Aarhus Convention in each of the 28 Member States. A first batch of reports covering 17 member States have been delivered in May 2013, and have been placed on the Internet⁷⁷. The remaining reports will be placed on the Internet in September 2013. In addition, Professor Darpö made a synthesis report of the national reports, including his views on possible proposals to address all the issues identified in the synthesis report⁷⁸. This set of 29 reports offers a solid basis to identify clearly, for each of the jurisdictions concerned, the difficulties in terms of effective access to justice, and therefore puts the Commission in a position to select the option that is the most proportionate to the problems to be solved. Not surprisingly, given the issues already identified by the EU and international adjudicating bodies, the most problematic areas to be

⁷⁶ A fifth option could have been a proposal for a Regulation, but it was felt that such an option would be difficult to justify in terms of compliance with the principles of proportionality and subsidiarity.

⁷⁷ http://ec.europa.eu/environment/aarhus/access_studies.htm

⁷⁸ The report is also available at the address mentioned in the previous footnote, and will be updated once the remaining 11 national reports have been completed. A presentation of the report is available in English at http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2013/04/ayb11_darpo.pdf

addressed concern standing, the intensity of the review, the costs in the procedure, the effectiveness of the procedure, as well as the handling of administrative omissions.

Second, the Commission contracted Professor Michael Faure and his team from Maastricht University to study the possible economic implications of access to justice in environmental matters⁷⁹. In particular, the extensive study, completed in January 2013, examined the four options of access to justice from a Law and Economics and Law and Sociology perspective. This solid scientific material offers the Commission a very good basis for selecting the option which complies the most adequately with the subsidiarity principle.

These two sets of studies have been shared and discussed informally with Member States experts, as well as with an informal network of superior judges specialised in environmental law. In addition, the Commission is engaged in an extensive dialogue with the business community, the NGO community and academia.

Thirdly, the Commission has received a substantial input from the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA), which discussed at its seminar of 23 November 2012 a comprehensive series of national reports on the organisation of the national jurisdictions in environmental litigation, their national specificities and the influences of European Union law⁸⁰.

Finally, it is worth noting that the Commission has contracted other studies on national complaint-handling mechanisms. A first one, completed in December 2012, covers 10 Member States. These studies are relevant in the context of a possible initiative on national complaint handling mechanisms as contemplated in the 2012 Communication and in the 7th EAP, but provide useful insights on mediation mechanisms, to which the 7th EAP specifically refers in the context of access to justice.

The comprehensive scientific material collected so far seems to indicate that the best option would be a legally binding instrument⁸¹, preferably a new directive as the 2003 proposal is 10-year old, was drafted at a time when the Union had only 15 Member States instead of 28, and could not take into account the substantial development of the case law at EU and international levels.

However, the choice of a new directive as the most appropriate option to meet the objective set by the 7th EAP must be validated by a proper impact assessment⁸². This implies that a 3-month public

⁷⁹ The study and its executive summary are also available at the address mentioned in footnote 77. A presentation is also available at <http://ec.europa.eu/environment/aarhus/pdf/Philipsen.pdf>

⁸⁰ http://193.191.217.21/en/colloquiums/sem_2012_Brussels2.html. There is unfortunately no report for Austria, Cyprus or Ireland.

⁸¹ See the speech of Environment Commissioner Potočnik on 23 November 2012, "*The fish cannot go to Court*" – *the environment is a public good that must be supported by a public voice*", SPEECH/12/856, http://europa.eu/rapid/press-release_SPEECH-12-856_en.htm.

⁸² See the Communication from the Commission on impact assessment, COM(2002)276 final of 5 June 2012 and point 29 of the Interinstitutional agreement on better law-making, OJ C 321, 31.12.2003, p. 1–5

consultation in 22 languages must first take place in order to inform the drafting of the impact assessment.

The public consultation⁸³ started on 28 June 2013, and closed on 23 September 2013. The public consultation collected the views of the general public and all stakeholders in order to help assess whether legislative action at EU level would have added value in ensuring effective and non-discriminatory access to justice in environmental matters across the EU Member States (subsidiarity test) and to identify those issues where targeted EU legislative action would be needed to fulfil the objective of ensuring access to national courts in environmental matters (proportionality test). The consultation uses a questionnaire with 23 main questions. 631 replies were received, and a summary of all the contributions will be established and published on the Internet.

The next step in the Commission internal procedure will be the preparation of the impact assessment, and the formal decision by the Commission on the legal approach that will be proposed on that basis.

4. Conclusion

At the time of drafting⁸⁴, the rules on access to justice in environmental matters in the EU face one uncertainty and one certainty.

The uncertainty concerns the possible adoption of a directive on access to justice by the EU co-legislators. While such a positive development finds support within most of the Commission, the European Parliament and the Committee of the Regions, it still needs to be formally adopted as a proposal by the Commission, which will soon be in its last year of activity, and to overcome the opposition of Member States so as to reach at least the qualified majority necessary for its adoption in the Council.

The certainty concerns the continuous development of the case law widening the access to justice in the EU. The Court of Justice is building this expanding case law not only on the basis of the obligations of the Member States under the Aarhus Convention, but also on the basis of the principles of effectiveness of EU law and the constitutional right to an effective remedy. Given that the information on those legal principles is becoming every day more widespread in the legal communities of the Member States, more preliminary references from national courts will arrive in Luxembourg, thereby allowing the Court to deliver more judgements. In the view of the author, it is only in case the EU co-legislators would take their responsibility and adopt a directive that the Court would feel obliged to show self-restraint in order to respect the "magic balance" between the many different interests at stake that would have been found by the political institutions.

The EU law on access to justice in environmental matters will therefore continue to develop, in order to allow the public to better monitor the implementation of EU environmental law. The only question that remains, is who will guide that development.

⁸³ http://ec.europa.eu/environment/consultations/access_justice_en.htm.

⁸⁴ 1 October 2013.