



# COMPLIANCE BY THE EUROPEAN COMMUNITY WITH ITS OBLIGATIONS ON ACCESS TO JUSTICE AS A PARTY TO THE AARHUS CONVENTION

An IEEP Report for WWF-UK

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## ACRONYMS

CEPIC	Conseil Européen des Fédérations de l'Industrie Chimique (European Chemical Industry Council)	OHIM	Office for Harmonization in the Internal Market
CFCA	Community Fisheries Control Agency	RAC	Regional Advisory Council
CFI	Court of First Instance of the European Communities	REACH	Regulation (EC) No 1907/2006 on the Registration, Evaluation, Authorisation and Restriction of Chemicals
COREPER	Committee of Permanent Representatives (Comité des Représentants Permanents)	REIO	regional economic integration organisation
CPVO	Community Plant Variety Office	SNF	Svenska Naturskyddsföreningen (Sweden)
DG	Directorate-General	SNM	Stichting Natuur en Milieu (Netherlands)
EACI	Executive Agency for Competitiveness and Innovation	TAC	Total Allowable Catch
EEA	European Environment Agency	TEN-T EA	Trans-European Transport Network Executive Agency
EEB	European Environmental Bureau	TFEU	Treaty on the Functioning of the European Union
EC	European Community	UN	United Nations
ECHA	European Chemicals Agency	UNECE	United Nations Economic Commission for Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms		
ECJ	Court of Justice of the European Communities		
ECR	European Court Reports		
EASA	European Aviation Safety Agency		
EFSA	European Food Safety Authority		
EIA	environmental impact assessment		
EMSA	European Maritime Safety Agency		
EP	European Parliament		
ERDF	European Regional Development Fund		
EU	European Union		
EU-OSHA	European Agency for Safety and Health at Work		
EUROFOUND	European Foundation for the Improvement of Living and Working Conditions		
GMO	genetically modified organism		
IGC	intergovernmental conference		
LIFE	L'Instrument Financier pour l'Environnement (Financial Instrument for the Environment)		
NGO	non-governmental organisation		

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## FOREWORD



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Environment.**

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The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, adopted on 25 June 1998 in the Danish city of Aarhus, came into force on 30 October 2001. The Convention has now been ratified by 42 Parties, including the European Community and, with the exception of Ireland, all member states of the European Union.

The Aarhus Convention links environmental rights and human rights. It acknowledges that we owe an obligation to future generations. It establishes that sustainable development can be achieved only through the involvement of all stakeholders. It focuses on interactions between the public and public authorities in a democratic context and is forging a new process for public participation in the negotiation and implementation of international agreements.

But... is it effective? Is it working satisfactorily? Is the European Community complying with its provisions? After all, the Convention goes to the heart of the relationship between people and governments; it is therefore not only an environmental agreement, but also a Convention about government

accountability, transparency and responsiveness. It grants the public rights and imposes on Parties and public authorities obligations regarding access to information, public participation and access to justice.

The third pillar of the Convention (Article 9) aims to provide access to justice in three important contexts: review procedures with respect to information requests; review procedures with respect to specific (project-type) decisions which are subject to public participation requirements; and challenges to breaches of environmental law in general. Thus the inclusion of an 'access to justice' pillar not only underpins the first two pillars; it also points the way to empowering citizens and NGOs to assist in the enforcement of the law.

Article 9 (3) concerns all types of violations of environmental law. The Convention requires Parties to provide access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which breach laws relating to the environment. It is generally acknowledged that Article 9 (3), in conjunction with the quality requirements of Article 9 (4), is among the most challenging provisions of the Convention, so far as its implementation by the Parties is concerned.

The study I have the pleasure to present to you, carried out by Dr Marc Pallemarts, Senior Fellow with the Institute for European Environmental Policy and Professor of European Environmental Law at the University of Amsterdam and the Université Libre de Bruxelles, explores in much detail the extent to which the European Community is complying with the provisions of the Aarhus Convention. The author concludes that the EC has a major problem of non-compliance with its obligations in this respect. Different solutions to overcome the actual problems are presented. In hope these suggestions will be picked up by the different institutions to which they are addressed.

## EXECUTIVE SUMMARY

By ratifying the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters in 2005, the European Union (technically the European Community, but in this summary we shall systematically refer to the EU for the sake of readability) took upon itself the obligation to ensure that members of the public have access to administrative or judicial procedures to challenge acts and omissions by EU institutions which contravene provisions of EU law relating to the environment. The procedures in question shall be available to all natural or legal persons (i.e. individuals or corporate bodies), including NGOs, which “meet the criteria, if any, laid down in” EU law; the procedures shall “provide adequate and effective remedies” and shall “be fair, equitable, timely and not prohibitively expensive”.

With a view to ensuring compliance with the EU's obligations under the Convention, the European Parliament and Council on 6 September 2006 adopted Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies (hereafter referred to as the Aarhus Regulation). This Regulation introduced an “internal review procedure” whereby environmental NGOs meeting certain criteria can request an EU institution or body to reconsider an “administrative act” taken under EU environmental law or rectify an omission to take such an act. It also provides that, if the NGO is not satisfied with the institution's response to its request for internal review, or if the institution fails to respond altogether within a certain period of time, it can “institute proceedings before the European Court of Justice in accordance with the relevant provisions of the EC Treaty”.

Has the EU, by adopting the Aarhus Regulation, complied with its obligations on access to justice arising from the provisions of the Aarhus Convention? This is the question addressed in this study. First, it defines the precise scope and nature of the EU's obligations arising from Article 9(3) of the Convention, in conjunction with the related provisions of Article 9(4). Then, it

examines the judicial and administrative procedures currently available to private individuals and organisations under EU law for the review of the acts and omissions of EU institutions and bodies, and the relevant case-law of the Court of Justice of the European Communities (ECJ) and its Court of First Instance (CFI). Finally, it assesses whether those procedures are sufficient to comply with the requirements of the Aarhus Convention.

The study shows that the EU has a major problem of non-compliance with its obligations under Article 9(3) of the Aarhus Convention. There is effectively no standing for NGOs or individuals to challenge acts or omissions of EU institutions and bodies in judicial review procedures at EU level, as long as the ECJ continues to apply its settled case-law on *locus standi* (the right to bring a case to court) for individuals and organisations who seek to have the legality of acts or omissions of EU institutions reviewed through an action for annulment or an action for failure to act under the relevant provisions of the EC Treaty. The ECJ has continued to take this position ever since the EU became a contracting party to the Aarhus Convention.

Some administrative review procedures are available, but the main one ostensibly introduced by the EU legislator in order to comply with Aarhus obligations – the internal review procedure instituted by the Aarhus Regulation – falls far short of what would be required to achieve full compliance. It is only accessible to some environmental NGOs and there is as yet no evidence that it provides an effective remedy, since any proceedings instituted by an NGO following an unsuccessful request for internal review addressed to an EU institution or body are likely to be judged by the CFI and ECJ according to the same restrictive criteria for standing as have been applied since 1963.

Where the formidable obstacle of *locus standi* can be overcome and proceedings before EU courts reach the merits, a resulting judicial decision can in theory provide an effective remedy, but not a timely one, due to the length of proceedings and the limited availability of injunctive relief. However, contrary to the

situation in many member states, the cost of proceedings is not a major obstacle to access to justice at the EC level. The actual proceedings are free of charge and the costs that a losing plaintiff may have to bear are relatively limited and rather predictable.

The study argues that the EU institution that has the most immediate power to act to ensure compliance by the EU with its obligations under Article 9(3) of the Aarhus Convention is the ECJ, which could, within the limits of its judicial prerogatives, interpret the relevant Treaty provisions on standing in a manner consistent with those international obligations, and reverse the latest rulings of the CFI which are unnecessarily conservative in their application of the traditional case-law.

If, however – as unfortunately seems more likely – the ECJ confirms those CFI decisions on appeal and continues to assert that only the member states, as “masters of the Treaties”, have the power to expand access to EU courts by amending Article 230 of the EC Treaty, one could then only hope that such an amendment would be put on the agenda of the first post-Lisbon Treaty reform. The pressure on the EU to act would increase if the Aarhus Convention Compliance Committee were to find, on the basis of an NGO complaint now before it, that the Union is not in compliance with Article 9(3), as may happen later this year or in 2010.

There may nevertheless be an alternative solution to provide adequate public access to a judicial review procedure in environmental matters at EU level, short of amending the Treaties. Article 225a of the EC Treaty empowers the Council to “create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas”. On this basis, it would seem quite possible for the EU institutions together to take constructive action to establish a Judicial Panel for Environmental Disputes to provide judicial review of acts and omissions of EU institutions and bodies which contravene EU environmental law in accordance with the requirements of the Aarhus Convention.

Finally, the study concludes that, in order to make the system of legal protection established by the EC Treaty more operational, it remains crucial for the Council to adopt the proposal for a Directive on access to justice that has been before it since 2003 in order to establish minimum harmonised standards of access to environmental justice in the member states, and enable national courts to fully play their role in ensuring the effectiveness of EU environmental law by enforcing the rights it grants to individuals and organisations.

## I INTRODUCTION, CONTEXT AND SCOPE

The purpose of this study is to assess the extent to which the European Community (EC), as a contracting Party to the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters,<sup>1</sup> is complying with its obligations under Article 9(3) of that Convention, which requires each Party to “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 (...) public authorities which contravene provisions of its national law relating to the environment”.

This applies in conjunction with Article 9(4), which provides that such procedures “shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive”. It has to be interpreted taking into account the definition of the concept of “public authority” as laid down in Article 2(2), which specifies that, for the purposes of the Convention, this includes “[t]he institutions of any regional economic integration organization referred to in article 17 which is a Party to [the] Convention”.

The latter provision refers to “regional economic integration organizations constituted by sovereign States members of the [United Nations] Economic Commission for Europe [UNECE] to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters”. The EC is the only regional economic integration organisation (REIO) in the UNECE region which falls within the scope of this definition and has become a contracting Party to the Aarhus Convention.

Its instrument of approval, expressing its formal consent to be bound by the Convention in accordance with international law, was deposited with the Secretary-General of the United Nations on 17 February 2005. At the same time, the EC made a declaration of “the extent of [its] competence with respect to the matters governed by [the] Convention”, in accordance

with the requirements of Article 19(5). This declaration of competence states, in relevant part:

“[T]he European Community declares that it has already adopted several legal instruments, binding on its Member States, implementing provisions of this Convention and will submit and update as appropriate a list of those legal instruments to the Depositary in accordance with Article 10 (2) and Article 19 (5) of the Convention. *In particular, the European Community also declares 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.*

*Finally, the Community reiterates its declaration made upon signing the Convention that the Community institutions will apply the Convention within the framework of (...) 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. (...)”<sup>2</sup>

The earlier declaration made by the EC when it signed the Aarhus Convention on 25 June 1998, to which the declaration of competence refers, contains the following elements which are relevant for the subject of this study:

*“Fully supporting the objectives pursued by the Convention and considering that the European Community itself is being actively involved in the protection of the environment through*

<sup>1</sup> The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters was negotiated within the framework of the UNECE and signed by 35 of its member states and by the European Community at the “Environment for Europe” ministerial conference in Aarhus on 25 June 1998. It entered into force on 30 October 2001, following ratification by 16 states, and currently has 42 contracting parties, including the European Community and all its individual member states, with the sole exception of Ireland. The EC became a contracting party to the Convention in May 2005, pursuant to Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ L 124, 17.05.2005, p. 1).

<sup>2</sup> OJ L 124, 17.05.2005, p. 3 (emphasis added).

*a comprehensive and evolving set of legislation, it was felt important not only to sign up to the Convention at Community level but also to cover its own institutions, alongside national public authorities.*

*“Within the institutional and legal context of the Community and given also the provisions of the Treaty of Amsterdam with respect to future legislation on transparency, the Community also declares 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 Community will consider whether any further declarations will be necessary when ratifying the Convention for the purpose of its application to Community institutions.”<sup>3</sup>*

Neither of the two successive declarations explicitly addresses the application of the Convention's provisions on access to justice to the Community's institutions. However, the declaration of competence implies, on the contrary, that the Community recognises its responsibility for the performance of the obligations arising from Article 9(3) insofar as they relate to its institutions. It also implies that the application of this provision to those institutions was in fact covered by provisions of Community law in force at the time of approval of the Convention by the EC. In substance, the declaration of competence merely reiterates the terms of the declaration made upon signature and the EC apparently did not deem it necessary to make any further declarations relating specifically to this matter when it approved the Convention. It did, however, make a further declaration concerning the respective responsibility of the EC and its member states for the performance of the obligations arising from Article 9(3) with respect to the acts and omissions of “private persons and public authorities *other than* the institutions of the European Community as covered by Article 2(2)(d) of the Convention”, i.e. private persons and public authorities within the member states as defined in Article 2(2)(a)-(c).

The matter of access to justice at the national level has been extensively debated both within the bodies established by the Aarhus Convention (including its Compliance Committee and Meeting of the Parties) and the institutions of the EU, the latter as a result of a proposal for a Directive on this question which was submitted to the European Parliament and Council by the European Commission in 2003<sup>4</sup> but has not been adopted so far. Consequently, no provisions of Community law covering the implementation of those obligations have been adopted since the entry into force of the Convention and, according to the terms of the declaration of competence, the member states remain responsible for the implementation of the provisions of Article 9(3) insofar as they apply to their own public authorities as well as to private persons.

Although the Community unquestionably has the power, under Article 175(1) of the EC Treaty, to adopt EC legislation covering this matter;<sup>5</sup> it has thus far chosen not to exercise this power, because a majority of member states are opposed to the proposed Directive, despite the favourable opinion which the European Parliament expressed on the Commission's proposal almost five years ago. It falls outside the scope of this study to assess the state of individual member state compliance with the access to justice provisions of the Aarhus Convention. In fact, this question has been the subject of a comprehensive study commissioned by the European Commission itself in 2006. The results of this study, which provides a detailed analysis of the state of the law in 25 member states as regards standing, costs, remedies and transparency, were published on DG Environment's website.<sup>6</sup> However, the Commission's consultants, Milieu Ltd, were not engaged to assess compliance by the European Community itself with its obligations on access to justice. This is precisely the purpose of this study, commissioned by WWF-UK.

However, it should be stressed from the outset that the substantive scope of this study is limited in the same way as that of the study by Milieu Ltd. It addresses only compliance by the

<sup>3</sup> The text of this declaration was not published in the OJ but is accessible through the UNECE website at <http://www.unece.org/env/pp/ratification.htm>

<sup>4</sup> Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM(2003) 624 final, 24 October 2003.

<sup>5</sup> Provisions on access to justice based on Article 175(1) have already been adopted by the Community legislator in 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, 14.02.2003, p. 26 (art. 6) and 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, 25.06.2003, p. 17 (arts. 3(7) and 4(4)).

<sup>6</sup> [http://ec.europa.eu/environment/aarhus/study\\_access.htm](http://ec.europa.eu/environment/aarhus/study_access.htm)

EC with the provisions of Article 9(3) requiring it to provide access to administrative or judicial review procedures allowing members of the public (i.e. individuals and organisations) to challenge acts and omissions by Community institutions and bodies which contravene provisions of EC law relating to the environment. Legal protection against acts and omissions of private persons contravening EC environmental law will not be considered here. Neither will this study consider compliance by the EC with the provisions of the Aarhus Convention concerning access to justice in relation to access to environmental information (Article 9(1)) and to decisions concerning activities subject to the public participation requirements of Article 6 of the Convention (Article 9(2)).

The purpose of this study is not to assess overall implementation of the Aarhus Convention by the EC. As a result, it will not address all provisions of Regulation 1367/2006/EC on the application of the provisions of the Aarhus Convention to European Community institutions and bodies, also known as the 'Aarhus Regulation', either:

First, we shall define the precise scope and nature of the Community's obligations arising from Article 9(3) of the Convention, in conjunction with the related provisions of Article 9(4). Then, we will examine the judicial and administrative procedures currently available to private individuals and organisations under Community law for the review of the acts and omissions of EC institutions and bodies, and the relevant case-law of the Court of Justice of the European Communities (ECJ) and its Court of First Instance (CFI). Finally, we shall assess whether those procedures are sufficient to comply with the requirements of the Aarhus Convention, evaluating access to justice at Community level against the same standards as were applied to assess the member states' performance in the above-mentioned *Milieu Ltd* study.

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## 2 NATURE OF THE EUROPEAN COMMUNITY'S OBLIGATIONS ON ACCESS TO JUSTICE UNDER THE AARHUS CONVENTION

### 2.1 What acts and omissions are to be subject to a review procedure?

Under Article 9(3) of the Aarhus Convention, the EC has to provide access to review procedures for members of the public with respect to “acts and omissions” of its “public authorities”, other than “bodies or institutions acting in a judicial or legislative capacity”.<sup>7</sup> The first question that needs to be addressed is that of identifying the EC institutions and bodies whose acts and omissions fall within the scope of this obligation. As mentioned above, Article 2(2) of the Convention equates with “public authorities” only the “institutions” of REIOs which are Parties to the Convention. In the EC Treaty, the notion of “institutions” has a specific legal meaning: technically, only the European Parliament, the Council, the European Commission, the Court of Justice and the Court of Auditors are institutions within the meaning of Article 7(1) of the Treaty. The declarations made by the EC upon signing and approving the Aarhus Convention consistently refer to the “Community institutions”, which, as a matter of Community law, would exclude any institutions not explicitly named in Article 7(1) EC.

This raises the question whether, as a matter of international law, either the Aarhus Convention or the EC itself intended to restrict the scope of application of the Convention obligations to the institutions of the EC as strictly defined. As regards Article 2(2)(d) of the Convention, there is no evidence to support such an interpretation, since, formally, this provision is drafted in such a way as to apply to any REIO as defined Article 17 of the Convention, and it cannot therefore be presumed that the term “institutions” in Article 2(2)(d) has to be given the same technical meaning that it has in Community law. Moreover, the institutions of the EC, by their own practice after the Community became a Party to the Convention, have indicated that, notwithstanding the wording of the above-mentioned formal declarations, they themselves consider that the scope of the term “institutions”

in Article 2(2)(d) of the Aarhus Convention is broader than the scope of the same term in Article 7(1) of the EC Treaty. Indeed, Regulation 1367/2006/EC, adopted by the European Parliament and Council in October 2006, applies to “Community institutions *and bodies*”, a notion which has been broadly defined as encompassing “any public institution, body, office or agency established by, or on the basis of, the Treaty except when acting in a judicial or legislative capacity.”<sup>8</sup> In its explanatory memorandum to the proposal for a Regulation, the Commission justified this broad definition in the following terms:

“The Aarhus Convention addresses the relationship between individuals and their associations on the one hand, and the public authorities on the other hand. (...) The basic idea is that wherever public authority is exercised – parliaments and courts are exempted to the extent they act in their legislative or judicial capacity – there should be rights under the Convention for individuals and their organisations. (...) It follows from the broad concept used in the remainder of the definition [of ‘public authority’ in Article 2(2) of the Convention] that, for the Community [the notion ‘institutions’ in Article 2(2)(d)] has to be interpreted in a broad sense, and cannot be limited to the Community institutions mentioned in Article 7 of the EC Treaty.”<sup>9</sup>

Accordingly, for the purposes of this study we will interpret the provisions of Article 9(3) of the Aarhus Convention in accordance with the Community’s own interpretation of its obligations as reflected in the definition of “Community institutions and bodies” in Regulation 1367/2006/EC. However, it should be pointed out that, should the ECJ ever have to interpret the same provisions independently of the interpretation of the Aarhus Regulation, it would not formally be bound by the secondary law definition contained in the Regulation, although it would be more likely than not to follow the interpretation given to the concept of ‘institutions’ by the Commission, Council and Parliament.

<sup>7</sup> Aarhus Convention, art. 2(2)(d).

<sup>8</sup> Regulation 1367/2006/EC, art. 2(1)(c).

<sup>9</sup> Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies, COM (2003) 622 final, 24 October 2003, p. 8.

The second legal issue that arises in circumscribing the scope of the EC's Aarhus obligations is the exemption for institutions acting in a legislative capacity. While the interpretation of this notion may already be difficult in a national public law context, it is an even more complex matter in Community law, because the EC Treaty, in its current form, does not clearly distinguish legislative action from other formal action taken by the institutions, which in national legal systems would be characterised as executive, administrative or regulatory action. Actually, there was a lot of debate on this question in the Convention which drafted the unsuccessful Treaty establishing a Constitution for Europe, in which a new typology of acts of the institutions was proposed, clearly distinguishing legislative acts, non-legislative acts, delegated regulations and implementing acts. However, this typology was not included in the subsequent Treaty of Lisbon.

How, then, is the Aarhus notion of public authorities "acting in a legislative capacity" to be interpreted as applied to the institutions of the EC, for the purpose of determining which acts of those institutions fall outside the scope of the Convention and therefore also of the access to justice provisions of Article 9(3)?

The provisions of the EC Treaty provide some indications which may be relevant to answer this question, but it is important to stress that the scope of the exemption for public authorities "acting in a legislative capacity" cannot be determined exclusively by reference to the internal law of any Party to the Convention, but must be considered to have an independent meaning as a provision of conventional international law. As a result, any Party's own definition of legislative action, to the extent such a definition exists in domestic law, cannot by itself determine the proper interpretation of the scope of obligations under the Aarhus Convention. In EC law as it currently stands, there is at any rate no clear and comprehensive definition of when institutions are acting in a legislative capacity and when they are not. The European Parliament and Council, acting jointly under the co-

decision procedure, which under the Treaty of Lisbon would be called "ordinary legislative procedure", are often referred to as the "co-legislators". But not all action taken by either institution individually is necessarily of a legislative nature. The European Parliament has actually adopted a terminology for its decisions distinguishing "legislative resolutions" from other decisions. And the Council, for its part, also recognises in its rules of procedure that it sometimes acts in a legislative capacity and sometimes in a non-legislative capacity. This is the result of the single provision in the EC Treaty, as it currently stands, in which that distinction is explicitly made: Article 207(3) provides that, for the purpose of applying the provisions of Article 255(3) on access to documents, the Council, in its rules of procedure, "shall define the cases in which it is to be regarded as acting in its legislative capacity".

As to the Commission, its role as initiator of the legislative process is well known, but it should be pointed out here that it can and often does exercise delegated rule-making authority, whenever authorised to do so by a legislative act of the Council and Parliament. On the other hand it also has the power, in specific areas of Community law, to take legally binding decisions in individual cases which, in national legal systems, would normally be characterised as administrative decisions of an executive nature. Some of the Commission's acts clearly can be regarded as amounting to what the Convention, in its Article 8, refers to as "executive regulations and other generally applicable legally binding rules". The provisions of this article with respect to public participation imply that the elaboration of such rules and regulations by public authorities other than parliaments falls within the scope of the Convention and that such normative action is not to be regarded, for the purposes of the Convention, as action taken "in a legislative capacity". Consequently, such action, when taken by an EC institution such as the Commission, falls within the scope of the "acts of public authorities" for which administrative or judicial review procedures should be accessible to "members of the public" in accordance with Article 9(3) of the Aarhus Convention.

In the absence of a clear categorisation of legislative versus non-legislative acts in the Treaties – as will remain the case even after the still uncertain entry into force of the Lisbon Treaty – it ultimately falls on the ECJ to determine when the Commission is acting in a legislative capacity and when it is not. This is effectively what it does when interpreting the provisions of Article 230 EC to determine whether a particular Commission act can be challenged by an action for annulment and by whom. The Court's case-law on this matter, and the potential implications of an amendment of Article 230 which would result from the entry into force of the Treaty of Lisbon, will be considered in detail in section 3.2.1 below.

Finally, the nature and scope of Parties' obligations under Article 9(3) of the Aarhus Convention is also delimited by the undefined concept of "national law relating to the environment", since access to justice must be provided to allow members of the public to challenge acts and omissions contravening provisions of a Party's law falling within this category. The Convention does not explicitly define the term "environment" either, though the broad scope of what is meant by this term could be inferred from the definition of "environmental information" in Article 2(3).

The interpretation of the notion of "national law relating to the environment" was discussed in the Task Force on Access to Justice which drafted the decision on "promoting effective access to justice" that was adopted by the 2nd Meeting of the Parties to the Aarhus Convention in May 2005.<sup>10</sup> During the drafting process, language was considered which would have noted that this notion "is broader than national legislative provisions specifically aimed at the protection of the environment and includes any provisions of national law, whether statutory or regulatory, whose enforcement has an effect on the state of the elements of the environment or on factors and activities or measures affecting or likely to affect these elements".<sup>11</sup> However, no consensus could eventually be reached to insert such a provision in the draft decision which was submitted to the Meeting of the Parties for adoption. As a result, the decision, as

adopted by the Parties, does not refer to this question at all. The notion remains subject to interpretation by Parties in accordance with their domestic legal systems, though there are strong contextual arguments in favour of a broad interpretation, in view of the Convention's definition of "environmental information" and of the fact that the drafters of the Convention apparently deliberately chose not to use the more common concept of "environmental law", which may have a clear-cut, technical meaning in some legal systems.

## 2.2 What sort of review procedures should be available?

This brings us to the next question to be addressed in determining the nature of Parties' obligations under Article 9(3): what is to be understood by "administrative or judicial procedures" within the meaning of that provision? Again, this is not a straightforward question, because the very notions of "administrative" and "judicial", in the context of review procedures, have different meanings in different legal systems. From the overall context of Article 9, when the provisions of paragraph 3 are interpreted against the background of the related provisions of paragraphs 1, 2 and 4, it can be inferred that a judicial procedure means a procedure before a court of law or tribunal, whereas the notion of "administrative procedures" covers the other two types of review procedures referred to in Article 9 – i.e. reconsideration by a public authority or review by an independent and impartial body established by law other than a court or tribunal.

In the EC legal and institutional system, only review by the ECJ or CFI would qualify as a judicial procedure. Any other review procedures, such as review by the European Ombudsman, review by the independent and impartial boards of appeal established by secondary Community law to consider appeals against certain acts of regulatory agencies set up under the EC Treaty, and reconsideration by an EC institution or body different from the previous, would have to be viewed as administrative procedures within the meaning of Article 9(3).

<sup>10</sup> Decision II/2, Promoting effective access to justice, adopted at the 2nd Meeting of the Parties, Almaty, Kazakhstan, 27 May 2005, UN Doc. ECE/MPPP/2005/2/Add.3, available at <http://www.unece.org/env/documents/2005/pp/ece/ece.mp.pp.2005.2.add.3.e.pdf>.

<sup>11</sup> Report of the second meeting of the Task Force on Access to Justice, UN Doc. MPPP/WG.1/2004/3, 8 January 2004, available at <http://www.unece.org/env/documents/2004/pp/mp.pp/wg.1/mp.pp.wg.1.2004.3.e.pdf>, Annex, p. 15, para. 17.

As the Meeting of the Parties to the Aarhus Convention has noted, under Article 9(3), “Parties may choose to apply administrative or judicial procedures *or both*”, but, “*whatever procedures are applied, these should be fair and equitable and provide adequate and effective remedies*”. Indeed, according to Article 9(4), whatever the kind of administrative or judicial review procedures chosen by Parties to discharge their obligations under Article 9(3), such procedures have to meet certain minimal legal standards. In fact, those standards go beyond those explicitly noted by the Meeting of the Parties. The Parties’ review procedures shall not only “provide adequate and effective remedies”<sup>12</sup> and “be fair [and] equitable”, but also “timely and not prohibitively expensive”. The decisions taken as a result of those procedures also have to be “given or recorded in writing”.

It is important to point out here that the concept of “effective remedies” in Article 9(4) of the Aarhus Convention was ostensibly inspired by Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). There is extensive case-law of the European Court of Human Rights on this concept, and since, pursuant to Article 6 of the Treaty on European Union, EU institutions have a duty to respect the fundamental rights guaranteed by the ECHR “as general principles of Community law”, this case-law is arguably relevant to the interpretation of the Community’s obligations under Article 9(3) of the Aarhus Convention. The same could be said for the interpretation of the requirement that administrative and judicial review procedures shall be “fair”, which has an obvious similarity with the right to a fair trial guaranteed by Article 6(1) of the ECHR. Both the concepts of “effective remedy” and “fair hearing” also feature in Article 47 of the EU Charter of Fundamental Rights, which will become legally binding on all EU institutions if the Lisbon Treaty enters into force.

### 2.3 Who should have access to review procedures?

Who are the “members of the public” who should have access to the review procedures provided for in Article 9(3) of the Aarhus Convention? As such, this concept is not explicitly defined in Article 2 of the Convention, but that provision contains a definition of the related notions of “public” and “public concerned”. The latter concept is not used in Article 9(3) and therefore not directly relevant to its interpretation. As to “the public”, that concept was given a very broad definition in Article 2(4). It refers to “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups”. Accordingly, the concept of “members of the public” can only be interpreted as encompassing any natural or legal person, as well as informal groups without legal personality, but the latter only to the extent that such groups are recognised as entities in their own right in accordance with the internal law or domestic practice of the Parties.

Since public authorities, as defined in Article 2(2), generally have the status of legal persons under domestic law, an interesting question in this connection is whether such authorities should also be able to avail themselves of the review procedures which Parties must provide to comply with their obligations under Article 9(3). If so, public authorities would have the possibility to challenge the acts and omissions of other public authorities, as well as those of private persons, infringing provisions of environmental law. As the present study focuses on access to justice at the EU level for individuals and non-governmental organisations (NGOs), that particular question will not be further addressed in this report.<sup>13</sup>

From the outset, it should be pointed out that Article 9(3) does not require Aarhus contracting Parties to provide access to justice to any and all members of the public without distinction. It requires such access to be provided to members of the public who “meet the criteria, if any, laid down in (...) national law”. As regards the EC, this provision should be interpreted, *mutatis*

<sup>12</sup> Decision II/2, *supra* n. 10, para. 17 (emphasis added).

<sup>13</sup> However, it should be noted that the provisions of the Aarhus Convention have already been invoked before the CFI by a regional government seeking to establish its standing to sue for the annulment of a Community act affecting the protection of its marine living resources. See CFI Judgment of 1 July 2008, Case T 37/04, *Região autónoma dos Açores v Council*.

*mutandis*, as referring to criteria laid down in Community law. The drafters of the Convention clearly intended to give Parties some discretion in defining the categories of members of the public who may challenge acts and omissions under Article 9(3) and establishing the conditions under which access to justice shall be granted to them. But this discretion is not unlimited; it must be exercised in accordance with the general public international law principle of good faith in the performance and interpretation of treaty obligations<sup>14</sup> and with the overall scheme and purpose of the Aarhus Convention itself.

In this respect, reference must be made to the provision of Article 1 of the Convention which states that the right of access to justice in environmental matters is to be “guaranteed” by each Party “[i]n 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”. Moreover, the Convention’s preamble contains a recital in which the contracting Parties express their concern “that effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced”. Such provisions clearly indicate that an excessively restrictive interpretation of Article 9(3) obligations would be inconsistent with the objective and spirit of the Convention. The Meeting of the Parties has actually recognised this in a decision in which it “[i]nvites those Parties which choose to apply criteria in the exercise of their discretion under article 9, paragraph 3, to take fully into account the objective of the Convention to guarantee access to justice”.<sup>15</sup> Though the same decision, adopted by consensus at the 2nd Meeting of the Parties, also “[s]tresses that (...) it is for each Party to determine the criteria, if any, which must be met by members of the public in order to have access to administrative or judicial review procedures”, it notes at the same time “that the Convention puts no obligation on Parties to establish criteria for standing”.<sup>16</sup>

The Aarhus Convention Compliance Committee, in its findings and recommendations concerning compliance by Belgium with its obligations under the Convention in relation to the rights of environmental organisations to have access to justice, adopted on 16 June 2006, further elaborated on the interpretation of Article 9(3), referring inter alia to the above-mentioned preambular clause and decision of the 2nd Meeting of the Parties, in the following terms:

“While referring to ‘the criteria, if any, laid down in national law’, the Convention neither defines these criteria nor sets out the criteria to be avoided. Rather, the Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action (“*actio popularis*”) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, *the Parties may not take the clause ‘where they meet the criteria, if any, laid down in its national law’ as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging act or omissions that contravene national law relating to the environment.* (...) Accordingly, the phrase ‘the criteria, if any, laid down in national law’ indicates a self-restraint on the parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception. (...) This interpretation of article 9, paragraph 3, is clearly supported by the Meeting of the Parties (...).”<sup>17</sup>

These statements of different bodies established by the Aarhus Convention – in particular the consensus decision of the Meeting of the Parties – have legal significance for its interpretation under the rules laid down in Article 31(3) of the Vienna Convention on the Law of Treaties.

<sup>14</sup> Vienna Convention on the Law of Treaties, arts. 26 and 31(1).

<sup>15</sup> Decision II/2, supra n. 10, para. 16 (emphasis added).

<sup>16</sup> *Ibid.*, paras. 14 and 15 (emphasis added).

<sup>17</sup> Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Compliance Committee, Findings and recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice (Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium), UN Doc. ECE/MPPP/C.1/2006/4/Add.2, 28 July 2006, available at <http://www.uncece.org/env/documents/2006/pp/ece.mp.pp.c.1.2006.4.add.2.e.pdf> (emphasis added).

## 3 COMPLIANCE BY THE EUROPEAN COMMUNITY WITH ITS OBLIGATIONS ON ACCESS TO JUSTICE AS A PARTY TO THE AARHUS CONVENTION

Having explored the contours of the obligations arising from Article 9(3) of the Aarhus Convention for the EC as a contracting Party, we will now proceed to examine to what extent Community law in force guarantees compliance with these obligations. In doing so, we will first discuss a number of review procedures which can be characterised as administrative in accordance with the criteria set out in section 2.2 above, before addressing the procedures for judicial review of acts and omissions of Community institutions and bodies by the Community judicature (ECJ and CFI). The analysis will focus exclusively on acts and omissions of EC institutions and bodies contravening provisions of Community law “relating to the environment” which are binding on them, as opposed to acts and omissions of private persons and public authorities of the member states infringing EC environmental law or provisions of national law transposing it. Consequently, infringement proceedings instituted by the Commission against a member state under Article 226 or 228 EC, which fall outside the scope of Article 9(3) of the Aarhus Convention as outlined in the previous chapter, will not be addressed.

### 3.1 Administrative review procedures

#### 3.1.1 Review by the European Ombudsman

The Ombudsman appointed by the European Parliament pursuant to Article 195 EC is “empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a member state concerning instances of maladministration in the activities of the Community institutions or bodies”. His jurisdiction does not extend to the Court of Justice and the Court of First Instance “acting in their judicial role”, an exception which is consistent with the terms of the Aarhus Convention. The Ombudsman’s power to “conduct inquiries for which he finds grounds, either

on his own initiative or on the basis of complaints submitted to him,” does not apply “where the alleged facts are or have been the subject of legal proceedings”. These provisions are clearly designed to separate the administrative review of acts and omissions of Community institutions or bodies by the Ombudsman from judicial review by the ECJ or CFI.

Though, according to Article 195(3) EC, “[t]he Ombudsman shall be completely independent in the performance of his duties” and “shall neither seek nor take instructions from any body,” his inquiries do not lead to a decision that is binding on the institution or body concerned. If he “establishes an instance of maladministration”, he shall, ultimately, “forward a report to the European Parliament and the institution concerned” and inform the complainant of the outcome of his inquiries. But the delinquent institution is free to disregard the Ombudsman’s findings and recommendations. Therefore, administrative review by the Ombudsman does not satisfy the requirements of Article 9(4) of the Aarhus Convention, since it cannot provide an effective remedy in the event of a violation of EC environmental law by a Community institution or body.

#### 3.1.2 Special review procedures for acts of Community agencies

One of the important trends in European governance is the establishment, by the Community legislator, of functional agencies entrusted with specific tasks of a scientific, technical or even regulatory nature. These Community agencies are bodies governed by European public law, with their own legal personality, distinct from the institutions established by the EC Treaty itself.

The first example in the field of EU environmental policy was the creation of the European Environment Agency (EEA) in 1990.<sup>18</sup> A more recent example is the European Chemicals Agency (ECHA), which was established under the REACH

<sup>18</sup> Council Regulation (EEC) No 1210/90 of 7 May 1990 on the establishment of the European Environment Agency and the European environment information and observation network, OJ L 120, 11.05.1990, p. 1.

Regulation and is playing a key role in the implementation of this new and unprecedented regulatory system for chemicals.<sup>19</sup> Other EU agencies whose mandate touches upon particular areas of environmental policy in the wider sense are the European Foundation for the Improvement of Living and Working Conditions (EUROFOUND),<sup>20</sup> the Community Fisheries Control Agency (CFCA),<sup>21</sup> the Community Plant Variety Office (CPVO),<sup>22</sup> the European Agency for Safety and Health at Work (EU-OSHA),<sup>23</sup> the European Food Safety Authority (EFSA),<sup>24</sup> the European Maritime Safety Agency (EMSA),<sup>25</sup> as well as some executive agencies fulfilling administrative tasks with respect to EU funding programmes, such as the Trans-European Transport Network Executive Agency (TEN-T EA), and the Executive Agency for Competitiveness and Innovation (EACI), which now incorporates the former Intelligent Energy Executive Agency, and manages, on behalf of the Commission, funding programmes in the area of renewable energy, energy efficiency and eco-innovation.<sup>26</sup> All these agencies, to the extent that they are “legal persons having public responsibilities or functions, or providing public services, in relation to the environment”,<sup>27</sup> are to be regarded as public authorities whose acts and omissions fall within the scope of Article 9(3) of the Aarhus Convention. However, the nature of their activities varies widely.

Executive agencies operate under the direct control of the Commission and are established in order to carry out certain implementation tasks within the framework of EU funding programmes, such as the selection of projects submitted in response to calls for proposals and the disbursement of funds to projects eligible for support. They are established by a Commission Decision taken in accordance with a number of general rules laid down in a 2003 Council Regulation.<sup>28</sup> This Regulation also establishes a special administrative procedure for the review of the legality of their acts. Under Article 22 of Regulation 58/2003/EC, “[a]ny act of an executive agency which injures a third party may be referred to the Commission by any person directly or individually concerned or by a Member State for a review of its legality”.<sup>29</sup> The Commission acts as an administrative review body and is to take a decision on such administrative proceedings within two months of the date on which they were instituted and reply in writing to the complainant, giving grounds for its decision. The fact that executive agencies are under the Commission’s ultimate control also appears from the provisions of Article 22(2) of the Regulation, which give the Commission the power to review acts of executive agencies also “[o]n its own initiative”, in the absence of any complaint from a third party. The decision taken by the Commission as a result of administrative appeal proceedings is binding on the agency concerned: “In its final decision the Commission may uphold the executive agency’s act or decide that the agency must modify it either in whole or in part.” The Commission’s decision is itself subject to judicial review by the ECJ, as an action for annulment of an “explicit or implicit decision to reject the administrative appeal may be brought before the Court of Justice, in accordance with Article 230 of the Treaty.”

<sup>19</sup> 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), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC, OJ L 36, 29.05.2007, p. 3.

<sup>20</sup> Council Regulation (EEC) No. 1365/75 of 26 May 1975 on the creation of a European Foundation for the improvement of living and working conditions, OJ L 139, 30.05.1975, p. 1. It is worth recalling that the establishment of this agency was one of the first actions taken by the Community legislator pursuant to the 1st Environmental Action Programme adopted in November 1973.

<sup>21</sup> Council Regulation (EC) No 768/2005 of 26 April 2005 establishing a Community Fisheries Control Agency and amending Regulation (EEC) No 2847/93 establishing a control system applicable to the common fisheries policy OJ L 128, 21.05.2005, p. 1.

<sup>22</sup> Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, OJ L 227, 01.09.1994, p. 1.

<sup>23</sup> Council Regulation (EC) No 2062/94 of 18 July 1994 establishing a European Agency for Safety and Health at Work, OJ L 216, 20.08.1994, p. 1.

<sup>24</sup> Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31, 01.02.2002, p. 1.

<sup>25</sup> Regulation (EC) No 1406/2002 of the European Parliament and of the Council of 27 June 2002 establishing a European Maritime Safety Agency, OJ L 208, 05.08.2002, p. 1.

<sup>26</sup> Commission Decision 2007/372/EC of 31 May 2007 amending Decision 2004/20/EC in order to transform the ‘Intelligent Energy Executive Agency’ into the Executive Agency for Competitiveness and Innovation, OJ L 140, 01.06.2007, p. 52.

<sup>27</sup> Aarhus Convention, art. 2(2)(c).

<sup>28</sup> Council Regulation (EC) No 58/2003 of 19 December 2002 laying down the statute for executive agencies to be entrusted with certain tasks in the management of Community programmes, OJ L 11, 16.01.2003, p. 1.

<sup>29</sup> *Ibid.*, art. 22(1) (emphasis added).

The agencies which are not executive agencies governed by the provisions of Regulation 58/2003/EC are referred to generically as “regulatory agencies”, even though their tasks are very varied and would not necessarily be categorised as ‘regulatory’ in national legal systems. As the Commission puts it in a recent policy paper on the role of agencies:

**“Some can adopt individual decisions with direct effect, applying agreed EU standards; some provide additional technical expertise on which the Commission can then base a decision and some focus more on networking between national authorities. (...) There are clear and strict limits to the autonomous power of regulatory agencies in the current Community legal order. Agencies cannot be given the power to adopt general regulatory measures. They are limited to taking individual decisions in specific areas where a defined technical expertise is required, under clearly and precisely defined conditions and without genuine discretionary power.”**<sup>30</sup>

The number of regulatory agencies which truly have the power to adopt individual decisions which are legally binding on third parties (CPVO, OHIM, EASA and ECHA) is actually quite limited. Most of the agencies rather have an advisory or information-collecting role, either within a specific regulatory framework under which the Commission or the member states are still responsible for actual regulatory decision-making, or outside the context of such decision-making procedures, as a general contribution to developing the information base for EU policies.

The latter is the case of the EEA, and of some other above-mentioned agencies (EU-OSHA and EUROFOUND); their role can best be described as information-gathering and analysis to support policy-making. It is hard to imagine situations in which the activities of such agencies might violate EC environmental law. The role of EFSA in providing direct assistance to the Commission in the form of scientific advice in the context of regulatory procedures concerning GMOs is well known and

controversial.<sup>31</sup> However, this role remains an advisory one; the Commission has the actual decision-making authority, which it exercises in consultation with the member states through a comitology procedure. So the decisions taken are ultimately the Commission’s, not EFSA’s. EMSA, for its part, has technical and scientific advisory tasks as well as operational tasks in the field of maritime safety, including inspection tasks. Though it is not unimaginable that this agency, in its operations, could contravene provisions of Community law relating to the marine environment, this seems rather unlikely, given the nature of its activities.

From the perspective of Article 9(3) of the Aarhus Convention, the regulatory agency whose activities are most relevant is undoubtedly ECHA, the new agency established under the REACH Regulation.<sup>32</sup> ECHA has extensive powers with respect to the administration of the complex regulatory system for chemicals created by that Regulation. This is not the place for a detailed analysis of those powers, but some of the scientific and technical matters in which ECHA exercises autonomous decision-making authority are of considerable importance for the protection of human health and the environment.

The most important regulatory decisions under REACH, are, however, still reserved for the Commission, which exercises its regulatory decision-making authority in consultation with various ECHA committees and, ultimately, with the member states through a comitology procedure. Since ECHA can take decisions with legally binding consequences for third parties, in particular economic actors whose activities involve the production, marketing or use of chemicals, a special appeal procedure is provided for by the REACH Regulation. An independent Board of Appeal has been set up within ECHA to examine appeals against certain specified Agency decisions. The review procedure is modelled on that of regulatory agencies with similar powers, such as the Community Plant Variety Office (CPVO), which administers the system of Community industrial property rights

<sup>30</sup> COM(2008) 135 final, 11 March 2008, p. 5.

<sup>31</sup> Regulation (EC) No 178/2002, art. 22(5).

<sup>32</sup> Regulation (EC) No 1907/2006, *supra* n. 19.

for new plant varieties,<sup>33</sup> and the Office for Harmonization in the Internal Market (OHIM), which grants Community trade marks.<sup>34</sup>

Not all ECHA decisions can be challenged before the Board of Appeal. An exhaustive list of those that can is to be found in Article 91(1) of the REACH Regulation. Though the provisions of the REACH Regulation guarantee the independence and impartiality of the Board of Appeal, the review procedure before this body must, in our view, be characterised as an administrative procedure rather than a judicial one within the meaning of Article 9(3) of the Aarhus Convention. Perhaps it could most adequately be described as *quasi-judicial*, as it has features of both kinds of procedures. Indeed, when an appeal is lodged, it is not automatically examined by the Board of Appeal, but the Regulation provides for a preliminary consultation phase in which the Executive Director of the Agency, “after consultation with the Chairman of the Board of Appeal”, has an opportunity to “rectify” the challenged decision if he “considers the appeal to be admissible and well founded”. In this case, the Board of Appeal, through its chairman, effectively functions as an independent administrative advisory body within the Agency rather than a judicial review body.

In other cases, when the Board proceeds to examine the appeal on its merits, and comes to the conclusion that the challenged decision is unlawful, it can either “remit the case to the competent body of the Agency for further action” or “exercise any power which lies within the competence of the Agency” – i.e. substitute its decision for that of another ECHA body. Only the first alternative, where the unlawful decision is set aside and the competent ECHA body is compelled to take a new decision in accordance with the ruling of the Board of Appeal, would seem to fit a judicial review model. In the second alternative, the Board of Appeal effectively acts as in a procedure for internal administrative review as, in the end, it exercises the administrative powers of the Agency itself. In any event, the decisions of the

Board of Appeal, though binding, are not necessarily final, since they can themselves be appealed before the CFI. So the review system established by REACH, for all practical purposes, consists of an administrative or quasi-judicial review procedure followed by a judicial review procedure.

According to the preamble of the REACH Regulation, the appeal procedure was established for the benefit of “any natural or legal person *affected by decisions taken by the Agency*”.<sup>35</sup> Other provisions of the Regulation recognise that there are a wide range of “stakeholders” with a legitimate interest in ECHA decisions. However, the wording of the operative provisions on the appeal procedure, which apparently was copied directly from earlier legislative acts establishing regulatory agencies with the power to make decisions that are legally binding on certain categories of economic operators, such as CPVO<sup>36</sup> and OHIM,<sup>37</sup> indicates that the right of appeal was instituted primarily in order to provide legal protection to the addressees of ECHA decisions – i.e. natural or legal persons importing, manufacturing, marketing or using chemicals, rather than to other persons who may be “affected by” such decisions, such as, for example, workers subject to occupational exposure or members of the public who may be exposed to those chemicals through other pathways.

Article 92(1) of REACH lays down the following conditions for the exercise of the right of appeal:

**“Any natural or legal person may appeal against a decision addressed to that person. Any natural or legal person may also appeal against a decision which, although addressed to another person, is of direct and individual concern to the appellant.”**

Accordingly, a person who is not the addressee of the challenged decision may appeal that decision only if he or she is “directly and individually concerned” by it. This requirement was modelled on the wording of Article 230 EC, fourth indent, on which there is extensive case-law of the ECJ and CFI. The implications of

<sup>33</sup> Council Regulation (EC) No 2100/94 of 27 July 1994 on Community plant variety rights, OJ No L 227, 01.09.1994, p. 1.

<sup>34</sup> Council Regulation (EC) No 40/94 of 20 December 1993 on the Community trade mark, OJ No L 11, 14.01.1994, p. 1, arts. 131 et seq.

<sup>35</sup> Regulation (EC) No 1907/2006, supra n. 19, recital 106 (emphasis added).

<sup>36</sup> Cf. Regulation (EC) No 2100/94, art. 68.

<sup>37</sup> Cf. Regulation (EC) No 40/94, art. 58.

the prevailing judicial interpretation of the notion of “direct and individual concern” for access to justice in environmental matters will be analysed in section 3.2.3 below.

### 3.1.3 Internal review by a Community institution or body pursuant to the Aarhus Regulation

As mentioned in chapter 1, when it signed the Aarhus Convention in June 1998, the EC formally declared its willingness to apply the provisions of that Convention to its own institutions. In October 2003, the Commission submitted to the Council and European Parliament, together with its proposal for a Council Decision authorising the Community to become a contracting Party to the Convention, a proposal for a Regulation on the application of the provisions of the Convention to EC institutions and bodies.<sup>38</sup> This Regulation was adopted by the European Parliament and Council only three years later, as Regulation (EC) No 1367/2006 of 6 September 2006 (hereafter referred to as Regulation 1367/2006/EC or ‘Aarhus Regulation’) following a protracted legislative procedure which ended in conciliation between the two institutions.<sup>39</sup> One of the most important and controversial elements of the Commission’s proposal was the introduction of a special administrative review procedure, accessible to environmental NGOs meeting specific criteria, enabling them to force reconsideration of certain acts and omissions of EC institutions and bodies. This so-called “internal review procedure” will be analysed in this section. We will not, however, discuss the other provisions of the Aarhus Regulation, which concern the other two ‘pillars’ of the Convention, since these fall outside the scope of this study.<sup>40</sup>

The new administrative procedure for the “internal” review of “administrative acts” or omissions of EU institutions and bodies falling within the scope of Community environmental law is presented as a means of compliance with the Convention’s provisions on access to justice. The institution or body whose act or omission is challenged is required to “consider” any such

request for review and to issue a “written reply”, stating its reasons.<sup>41</sup> Regulation 1367/2006/EC furthermore provides that the NGO which made the request for internal review “may institute proceedings before the Court of Justice *in accordance with the relevant provisions of the Treaty*”.<sup>42</sup> This possibility exists both where a “written reply” has been duly made but is considered unsatisfactory by the applicant, and “[w]here the Community institution or body fails to act” in response to the request for internal review.<sup>43</sup> In this section, we shall focus on the administrative review procedure; the availability of judicial review will be considered in detail in section 3.2.

According to the original Commission proposal, access to the internal review procedure would have been reserved to “qualified entities”, i.e. environmental NGOs “active at Community level”, recognised by the Commission in accordance with criteria laid down in the Regulation. In order to be able to exercise the right to request internal review, these NGOs would have had to submit to a prior “recognition” procedure, the further modalities of which would have been laid down by the Commission in implementing rules. However, the Council, in its common position, decided to relax the criteria to be fulfilled by NGOs and to omit the recognition procedure provided for in the Commission’s original proposal. The Council apparently felt that it was inappropriate to give the Commission, which is the Community institution whose acts and omissions are most likely to be the subject of requests for internal review, the power to decide whether or not to give NGOs the status of “qualified entities”.

In the Council’s common position, access to the internal review procedure is no longer reserved to NGOs active at EU level alone, and there is no provision for a separate recognition procedure for “qualified entities” any more. The “criteria for entitlement” laid down in the Aarhus Regulation are the following:

<sup>38</sup> Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies, COM(2003) 622 final, 24 October 2003.

<sup>39</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.09.2006, p. 13.

<sup>40</sup> For a more general discussion of Regulation 1367/2006/EC, see *The Aarhus Regulation: New Opportunities for Citizens in the EU and Beyond?* Report of the ECOSPHERE Forum held in Brussels, 27 October 2006, European Centre on Sustainable Policies for Human and Environmental Rights, Brussels, 2007, available at <http://www.ecosphere.be/pdf/flyers/ReportForumOct2006.pdf>

<sup>41</sup> Regulation 1367/2006/EC, art. 10(2).

<sup>42</sup> *Ibid.*, art. 12(1) (emphasis added).

<sup>43</sup> *Ibid.*, art. 12(2).

“A non-governmental organisation shall be entitled to make a request for internal review (...) provided that:

- (a) it is an independent non-profit-making legal person in accordance with a Member State’s national law or practice;
- (b) it has the primary stated objective of promoting environmental protection in the context of environmental law;
- (c) it has existed for more than two years and is actively pursuing the objective referred to under (b);
- (d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.”<sup>44</sup>

Although the Regulation, as adopted, does not give the Commission the power to grant or deny “recognition” to NGOs, it does contain a provision mandating it to “adopt the provisions which are necessary to ensure transparent and consistent application of the criteria” set out in Article 11(1). Pursuant to this delegated rule-making authority, the Commission has adopted implementing provisions,<sup>45</sup> which specify how a request for internal review is to be submitted, how the applicant NGO is to provide evidence that it meets the requirements for entitlement to make such a request and how the institution or body to which the request is addressed shall satisfy itself that those requirements have been met. According to those provisions, laid down in a Commission Decision but applying to all requests for internal review under the Aarhus Regulation, including those addressed to other Community institutions and bodies, the NGO submitting a request shall, *inter alia*, “specify the administrative act or alleged administrative omission whose review is sought and the provisions of environmental law which it considers not to have been complied with”.<sup>46</sup> This implies that the Commission considers that only violations of EC “environmental law”, as defined in the Aarhus Regulation, can be invoked as grounds for internal review, and that other pleas of substantive or procedural illegality arising from provisions of

primary or secondary Community law which do not qualify as “environmental law” within the meaning of the Regulation may not be raised.

By making access to the administrative review procedure instituted by Regulation 1367/2006/EC subject to certain criteria, the EC, as a contracting Party to the Aarhus Convention, has exercised the discretion available to any Party under Article 9(3) of the Convention. However, it should be noted that the right to request internal review is open only to certain legal persons – i.e. environmental NGOs meeting those criteria – but not to individuals. The Commission did not consider it “reasonable” to extend access to justice to members of the public other than selected NGOs.<sup>47</sup> The Council agreed, but the European Parliament initially proposed an amendment to open up the internal review procedure to natural persons meeting certain criteria.<sup>48</sup> This amendment was not maintained at second reading.<sup>49</sup> Arguably, the lack of any possibility of access to the internal review procedure for individuals may be inconsistent with the requirements of Article 9(3).<sup>50</sup>

The Aarhus Regulation does not allow NGOs to have recourse to the internal review procedure to challenge any acts or omissions of Community institutions and bodies. The procedure applies only to “administrative acts” and “administrative omissions” under “environmental law”. While the latter term is broadly defined as “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”,<sup>51</sup> the definition of “administrative act” – and its corollary “administrative omission” – is more problematic.

First of all, it should be pointed out that the notion of “administrative act” is nowhere to be found in the EC Treaty.

<sup>44</sup> *Ibid.*, art. 11(1).

<sup>45</sup> Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts, OJ L 13, 16.01.2008, p. 24.

<sup>46</sup> *Ibid.*, art. 1(1) (emphasis added).

<sup>47</sup> COM(2003) 622 final, p. 16.

<sup>48</sup> Position of the European Parliament adopted at first reading on 31 March 2004 with a view to the adoption of European Parliament and Council Regulation (EC) No .../2004 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, arts. 13 and 15.

<sup>49</sup> See Position of the European Parliament adopted at second reading on 18 January 2006 with a view to the adoption of Regulation (EC) No .../2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies.

<sup>50</sup> Wenneras, P. 2007. *The Enforcement of EC Environmental Law*. Oxford University Press, Oxford, UK, p. 228.

<sup>51</sup> Regulation 1367/2006/EC, art. 2(1)(f) (emphasis added). This provision goes on to reproduce, *verbatim*, the objectives set out in art. 174(1) EC.

The definition of this term as given in Regulation 1367/2006/EC is an *ad hoc* one, specially devised for the purpose of limiting the scope of application of the internal review procedure. An “administrative act” is defined as “any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects.”<sup>52</sup> The qualification “of individual scope” did not feature in the original Commission proposal but was added by the Council in its common position.<sup>53</sup>

Again, this is a term which does not as such occur in the Treaties, but is used sometimes in the case-law of the ECJ and CFI to distinguish Community acts of an administrative nature from those of a legislative or regulatory nature. For instance, in an important judgment on the respective powers of the Council and the Commission with respect to implementing measures, the Court of Justice referred to “the division of powers resulting from the various provisions of the Treaty which authorize the Council and the Commission to adopt *generally applicable or individual measures* within specific areas”,<sup>54</sup> and, in slightly different terms, to “the powers of the institutions to adopt *acts of general or individual application* in the fields covered by the Treaty”.<sup>55</sup> The same judgment goes on to hold that, where Article 211 EC, third indent, provides that the Commission shall “exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter”, “[t]he concept of implementation for the purposes of that article comprises both the drawing up of implementing rules and *the application of rules to specific cases by means of acts of individual application*.”<sup>56</sup> It can be inferred from this case-law that a “measure of individual scope” is the contrary of a “generally applicable measure” – also referred to as an “act of general application” or a “measure of general scope”<sup>57</sup> – and involves the application of general rules to specific cases. This is not necessarily the same as a measure addressed to a particular individual natural or legal person.

The requirement that a measure shall have “legally binding and external effects” in order to be subject to internal review is apparently derived from the established case-law interpreting the provisions of Article 230 EC to determine which acts of the institutions can be challenged through an action for annulment, i.e. are subject to judicial review by the Community judicature.

Together, both qualifications in the definition of “administrative act” operate to restrict the range of acts and omissions which can be challenged under the internal review procedure created by the Aarhus Regulation. Further restrictions are laid down in Article 2(2) of the Regulation, which stipulates that “[a]dministrative acts and administrative omissions shall not include measures taken or omissions by a Community institution or body *in its capacity as an administrative review body*”. This clause is followed by a non-exhaustive list of examples of such measures, which includes acts and omissions of the Commission in the context of infringement proceedings against member states under Articles 226 and 228 EC. As a result, acts and omissions of Community bodies and institutions cannot be challenged through the internal review procedure not only when such bodies or institutions are acting in a judicial or legislative capacity<sup>58</sup> – an exemption that is consistent with the terms of the Aarhus Convention – but also when they are acting in their capacity “as an administrative review body”, a further exemption for which there is no legal basis in the Convention and whose scope is unclear even as a matter of Community law, as several commentators have pointed out.<sup>59</sup>

Which acts and omissions under environmental law are actually open to internal review? From the outset, it is clear that legislative acts adopted jointly by the European Parliament and Council under the co-decision procedure are excluded from such review. The same applies to other acts of the Council when it is acting in a legislative capacity – e.g. under Treaty provisions which do not provide for co-decision, as in the case of environmental measures within the scope of the common agricultural or fisheries policy.

<sup>52</sup> *Ibid.*, art. 2(1)(g) (emphasis added).

<sup>53</sup> Common Position (EC) No 31/2005 adopted by the Council on 18 July 2005, OJ C 264E, 25.10.2005, p. 18.

<sup>54</sup> ECJ Judgment of 24 October 1989, Case 16/88, *Commission v Council*, ECR [1989] 3457, para. 16.

<sup>55</sup> *Ibid.*, para. 9 (emphasis added).

<sup>56</sup> *Ibid.*, para. 11 (emphasis added).

<sup>57</sup> The latter term is used in Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, art. 2(b). See also ECJ Judgment of 23 February 2006, Case C-122/04, *Commission v European Parliament and Council*.

<sup>58</sup> Regulation 1367/2006/EC, art. 2(1)(c).

<sup>59</sup> Jans, J.H. 2008. *European Environmental Law*. 3rd ed. Europa Law Publishing, Groningen, Netherlands, pp. 215-216; Wenneras, P., o.c., *supra* n. 50, pp. 231-232.

Implementing measures taken by the Commission pursuant to a mandate received from the Council or European Parliament and Council, as the case may be, are a more complex matter. Such measures are legally binding and have external effects whenever they are taken in the form of Directives, Regulations or Decisions. But is the Commission acting in “a legislative capacity” and are such measures “of individual scope”? In our view, this should depend on the exact nature and content of the Commission act, rather than its legal form.

In its administrative practice under Regulation 1367/2006/EC thus far, the Commission has considered four out of five requests for internal review to be inadmissible on the grounds that the acts challenged were not “administrative acts” within the meaning of the Regulation. A Commission decision short-listing candidates for the position of Executive Director of ECHA for ultimate appointment by the Management Board of the Agency was held to fall outside the scope of the definition because the Commission considered that it lacked “external effects” (although ECHA is a separate legal entity independent from the Commission and the Commission decision had the effect of restricting the choice of its Management Board).<sup>60</sup>

A request for internal review of a Commission decision adopting an operational programme for Community assistance from the European Regional Development Fund and the Cohesion Fund in the Czech Republic was dismissed on the grounds that this decision, although legally binding, did not have “external effects”, because the beneficiary member state remained free to decide on the ultimate approval of projects for funding.<sup>61</sup> A request for internal review of a Commission Regulation setting maximum residue levels for pesticides<sup>62</sup> was declared inadmissible because the Regulation determines residue levels “applicable to all food business operators” and was not therefore a measure

“of individual scope”.<sup>63</sup> Finally, a request by a Portuguese NGO for review of a Commission decision closing an infringement procedure against Portugal concerning a dam project was predictably dismissed on the grounds that this decision was taken by the Commission acting as an “administrative review body” under Article 226 EC.<sup>64</sup> The only request for internal review so far which was not considered inadmissible, but rejected following an examination of its merits, concerned three Commission Decisions authorising the placing on the market of genetically modified maize products taken pursuant to its implementing powers under Regulation 1829/2003/EC on genetically modified food and feed<sup>65</sup> and addressed to individual biotech companies.<sup>66</sup>

Commission decisions with respect to the deliberate release or placing on the market of GMOs or GMO products are quite typical examples of acts of individual scope involving the application of rules of Community environmental law to specific cases. The same could be said of similar decisions concerning the placing on the market of other products or substances under different rules of EC environmental law – such as future authorisations for the production, importation or use of substances under Title VII of REACH<sup>67</sup> – or of decisions taken by the Commission pursuant to Article 95(5) EC, in response to notifications by member states desiring to continue to apply or introduce more stringent national environmental regulations in an area covered by a Community harmonisation measure adopted under Article 95(1). All these decisions involve the application of general rules to specific cases and have legally binding and external effects, within the meaning of Regulation 1367/2006/EC.

But, as pointed out above, it is not the legal form but the scope and substance of an act of a Community body which will be decisive in determining whether or not it qualifies as an “administrative act” for the purposes of the internal review procedure. While acts of individual scope within the

<sup>60</sup> Reply of the Commission services to the European Environmental Bureau of 12 December 2007, published on the Commission’s website at [http://ec.europa.eu/environment/aarhus/pdf/title\\_iv/Reply%20to%20EEB.pdf](http://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20EEB.pdf)

<sup>61</sup> Reply of the Commission services to Ekologicky Pravní Servis of 6 August 2008, published on the Commission’s website at [http://ec.europa.eu/environment/aarhus/pdf/title\\_iv/Reply%20to%20EPS.pdf](http://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20EPS.pdf)

<sup>62</sup> Commission Regulation (EC) No 149/2008 of 29 January 2008 amending Regulation (EC) No 396/2005 of the European Parliament and of the Council by establishing Annexes II, III and IV setting maximum residue levels for products covered by Annex I thereto, OJ L 58, 01.03.2008, p. 1.

<sup>63</sup> Reply of the Commission services to Pesticide Action Network Europe of 1 July 2008, published on the Commission’s website at [http://ec.europa.eu/environment/aarhus/pdf/title\\_iv/Reply%20to%20PAN.pdf](http://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20PAN.pdf)

<sup>64</sup> Reply of the Commission services to Liga para a Protecção da Natureza of 23 October 2008, published on the Commission’s website at [http://ec.europa.eu/environment/aarhus/pdf/title\\_iv/Reply%20to%20LPN.pdf](http://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20LPN.pdf). In parallel with this unsuccessful request for internal review, and without awaiting its outcome, LPN has also brought an action for annulment of the same Commission decision to terminate infringement proceedings against Portugal before the CFI on 9 May 2008. See Case T-186/08, *Liga para a protecção da natureza v Commission*, OJ C 183, 19.07.2008, p.25.

<sup>65</sup> Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed, OJ L 268, 18.10.2003, p. 1, arts. 7(3) and 19(3).

<sup>66</sup> Reply of the Commission services to Justice & Environment of 26 May 2008, published on the Commission’s website at [http://ec.europa.eu/environment/aarhus/pdf/title\\_iv/Reply%20to%20J\\_E.pdf](http://ec.europa.eu/environment/aarhus/pdf/title_iv/Reply%20to%20J_E.pdf)

<sup>67</sup> See Regulation (EC) No 1907/2006, art. 64.

meaning of the Aarhus Regulation will most often be in the form of decisions, it is not inconceivable that particular acts in the form of Directives or Regulations might also satisfy the definition of “administrative act” set out in this Regulation. For instance, decisions to include a particular active substance in the Community list of substances which may be used in plant protection or biocidal products placed on the internal market are formally taken in the form of Commission Directives, amending the relevant annex of Directive 91/414/EEC,<sup>68</sup> or, respectively, Directive 98/8/EC.<sup>69</sup> Like all Directives, such Commission Directives are addressed to the member states. However, an analysis of the procedure leading to the listing of active substances under both Directives indicates that this procedure is, for all practical purposes, an administrative procedure concerning the application of general rules to specific cases, which is initiated by an application submitted by a producer of the substance who wishes it to be considered for inclusion in the Community list,<sup>70</sup> rather than an act of the Commission acting in a legislative capacity under delegated rule-making authority.<sup>71</sup>

Since the Commission has not, at the time of writing, taken any decision in which a request for internal review was considered both admissible and well-founded, there is as yet no practice on the basis of which one can judge whether or not this administrative review procedure is fair and equitable and provides an “adequate and effective” remedy, as required by Article 9(4) of the Aarhus Convention.

However, it should be noted that the Commission has amended its own rules of procedure in order to specify how requests for internal review are to be dealt with by its services and members.<sup>72</sup> These new provisions provide for a two-stage procedure consisting of a decision as to the admissibility of the request, followed, if the request is found to be admissible, by a decision on the merits. The Commission has chosen to delegate the power to take decisions on the admissibility of requests for internal review “to the Director-General or the head of department concerned” – i.e. the senior official whose department was responsible for the challenged act or omission. This decision-making power extends to all matters concerning the entitlement of the NGO to make the request as well as “the indication and substantiation of the grounds on which the request is made, as required in Article 1(2) and (3) of Decision 2008/50/EC”.<sup>73</sup> Only in the second stage of the procedure will a member of the Commission, and possibly the Commission as a whole, be involved in deciding on the request.

In fact, “the Member of the Commission responsible for the application of the provisions on the basis of which the administrative act concerned was adopted or to which the alleged administrative omission relates” shall have the power, without referring to any other members or to the College of Commissioners as a whole, “to decide that the administrative act whose review is sought, or the alleged administrative omission, is *not in breach of environmental law*”<sup>74</sup> – i.e. to dismiss the request as substantively ill-founded. Only if the Commission member responsible finds that the request may be well-founded will he or she be required to refer the matter to the College, as the amended rules of procedure provide that “[a]ny decision whereby it is determined that the administrative act whose review is sought, or the alleged administrative omission, is *in breach of environmental law shall be taken by the Commission*”.<sup>75</sup> Interestingly, the rules of procedure do not specify what is to

<sup>68</sup> Council Directive 91/414/EEC of 15 July 1991 concerning the placing of plant protection products on the market, OJ L 230, 19.08.1991, p. 1.

<sup>69</sup> The ECJ has noted the similarity of the procedures in both Directives in the following terms: “Directive 98/8 contains, in relation to the placing of products on the market, provisions which bear a large number of similarities to those of Directive 91/414, in particular so far as concerns the principle of establishing a Community list of permitted active substances, a Community procedure for assessing whether an active substance can be entered in the Community list and the regular review of active substances on such a list.” ECJ Judgment of 3 May 2001, Case C-306/98, *Monsanto plc*, para. 44.

<sup>70</sup> This circumstance was considered to be of special relevance by the CFI in a case in which a pharmaceutical company challenged a similar Community measure taken under the EC legislation on animal feed additives. See CFI Judgment of 11 September 2002, Case T-13/99, *Pfizer Animal Health SA v Commission*, paras. 96-105.

<sup>71</sup> See CFI Judgment of 11 July 2007, Case T 229/04, *Sweden v Commission*.

<sup>72</sup> Commission Decision 2008/401/EC, Euratom of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institution and bodies, OJ L 140, 30.05.2008, p. 22.

<sup>73</sup> *Ibid.*, Annex, art. 4(3).

<sup>74</sup> *Ibid.*, Annex, art. 5(2) (emphasis added).

<sup>75</sup> *Ibid.*, Annex, art. 5(1) (emphasis added).

happen next, following such a decision, other than that “the author of the request shall be informed of the outcome of the review in writing (...) stating the reasons”, a rule which is entirely redundant since it merely replicates what is already stated in Regulation 1367/2006/EC itself. Presumably, the Commission will formally withdraw the illegal act, or proceed to rectify the illegal omission. This is, at any rate, what the preamble to the Aarhus Regulation contemplates, since it contains a recital which implies that the purpose of the internal review procedure is to give the institution or body concerned “the opportunity to reconsider its former decision, or, in the case of an omission, to act”.<sup>76</sup>

However, the decision taken as a result of the request for internal review, whether it is taken by a senior official acting under delegated powers, by a member of the Commission or formally by the Commission itself, is not final, since the Aarhus Regulation provides, in its Article 12, for a possibility of judicial review by the ECJ:

**“1. The non-governmental organisation which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.**

**2. Where the Community institution or body fails to act in accordance with Article 10(2) or (3) the non governmental organisation may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.”**

In the Commission’s original proposal, the corresponding provision was formulated somewhat less opaquely. It read:

**“1. Where the qualified entity which made a request for internal review according to Article 9 considers that a decision by the Community institution or body in response to that request is insufficient to ensure compliance with environmental law, the qualified entity may institute proceedings before the Court of Justice in accordance with Article 230(4) EC Treaty, to review the substantive and procedural legality of that decision.**

**2. Where a decision on a request for internal review made according to Article 9 has not been taken by the Community institution or body within the period mentioned in that Article, the qualified entity may institute proceedings before the Court of Justice in accordance with Article 232(3) EC Treaty.”<sup>77</sup>**

In essence, the provisions as proposed by the Commission thus clearly distinguished two alternative situations in which the “qualified entities”, i.e. NGOs entitled to submit a request for internal review, would have access to different judicial review procedures. In the event of an explicit decision taken by the institution or body to which the request has been submitted, that decision would be subject to review by the ECJ, on both substantive and procedural grounds, in accordance with the provisions of Article 230, fourth indent EC. If, however, the institution or body did not take any decision within the period prescribed by the Regulation, the NGO would be able to institute proceedings for failure to act under Article 232, third indent EC.

In the statement of reasons accompanying its common position, the Council pointed out that “provisions from the original Commission proposal were deleted or thoroughly redrafted”.<sup>78</sup> This certainly applies to the provisions on access to justice. On this matter, the Council stresses that “criteria for entitlement to make a request for internal review have been simplified. Qualified entities (now defined as NGOs meeting the relevant criteria) are no longer required to be active at Community level as such, yet any requests have to address Community level issues”.<sup>79</sup> The Council also explains that the European Parliament’s first-reading amendments designed to provide access to justice to individuals meeting certain criteria “were unacceptable as the Århus Convention leaves it to Parties to determine the modalities for granting access to justice.”<sup>80</sup> The statement of reasons furthermore stresses that “the Common position carefully sticks

<sup>76</sup> Regulation 1367/2006/EC, preamble, recital 19.

<sup>77</sup> COM(2003) 622 final, art. 11 (emphasis added).

<sup>78</sup> Common Position (EC) No 31/2005, Statement of the Council’s reasons, OJ C 264E, 25.10.2005, p. 25.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

to the provisions contained in Articles 230(4) and 232(3) of the EC Treaty, which are sufficient to ensure compliance".<sup>81</sup> At second reading, the EP Environment Committee had proposed an amendment that would have reinstated the provisions on judicial review as originally proposed by the Commission, but this was not endorsed by the plenary of the Parliament.<sup>82</sup> The provisions of Article 12 of the Regulation were eventually adopted as they stood in the Council common position, without further changes during the conciliation procedure.

The Council's statement is not altogether straightforward as to the reasons which prompted this institution to rewrite the Aarhus Regulation's provisions on access to justice. Ostensibly, the Council chose to "carefully stick to" the Treaty provisions which it deemed "sufficient to ensure compliance" with Article 9(3) of the Aarhus Convention. This implies that, in the Council's view, both the Commission's original draft and the EP's amendments went beyond what the Treaty allows and what is strictly necessary to comply with the Community's international obligations.

In the explanatory memorandum to its proposal, the Commission had clearly explained the rationale of the access to justice provisions – consisting of an administrative review procedure with a possibility of subsequent judicial review – as follows:

**"The present proposal provides to limit legal standing to environmental organisations at European level, which meet a number of conditions – the 'qualified entities'. Such limitation is considered to be in line with Article 9(3), as this provision gives the possibility to the Contracting Parties to lay down criteria for the members of the public to be granted legal standing. (...) "Qualified entities may submit a request for internal review of an administrative act or omission that in their opinion has contravened environmental law. This request is to be addressed to the relevant Community institution or body and must precede any judicial action.**

**"This preliminary procedure was introduced in order not to interfere with the right to access to justice under Article 230 EC Treaty, under which a person may institute proceedings with the Court of Justice against decisions of which it is individually and directly concerned. The addressee of the decision of internal review may have recourse to Article 230 EC Treaty; thus, this proposal keeps the necessary parallelism with (...) Article 230 EC Treaty."**<sup>83</sup>

The internal review procedure was thus conceived by the Commission as a means of meeting the Aarhus Convention obligations by providing easy access to an administrative procedure for selected "members of the public", but also, by indirectly giving those same legal persons meeting the Regulation's criteria for entitlement access to the existing judicial review procedures of Articles 230 and 232 EC. The internal review procedure is a necessary step to achieve the latter aim, because it was designed to result in a decision addressed to the NGO having made the request for review, which would automatically give it legal standing to institute an action for annulment or an action for failure to act under those Treaty provisions.

The substantial drafting changes made by the Council appear designed to avoid or minimise the possibility of subsequent access to the Community judicature following an unsuccessful prior request for internal review. The relevant provisions of the Commission proposal were amended during the consideration of the draft regulation by the Council's Working Party on the Environment under the Dutch Presidency in the autumn of 2004, during the long period of political transition between the outgoing Prodi Commission and then incoming Barroso Commission, which formally took office on 22 November 2004.

Council documents reveal that there was a debate on the consistency of the access to justice provisions as proposed by the Commission with the Treaty, which led the Presidency to

<sup>81</sup> *Ibid.*, p. 26 (emphasis added).

<sup>82</sup> Draft European Parliament legislative resolution on the Council common position for adopting a regulation of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, EP Doc. A6-0381/2005, Amendment 25.

<sup>83</sup> COM(2003) 622 final, p. 16 (emphasis added).

request a formal opinion from the Council's Legal Service, in which the latter vehemently criticised the Commission's position on the internal review procedure and subsequent possibility of judicial review as set out in its explanatory memorandum. The Legal Service argued that the proposed provisions of Title IV of the Regulation "would raise serious problems" because they were incompatible with the system of judicial review as laid down in the Treaty and interpreted by the established case-law of the ECJ and advocated their deletion.<sup>84</sup> The opinion expresses particular concern that the internal review procedure might effectively enable NGOs "to obtain substantive judicial review of any administrative act, whether or not they have been involved in its elaboration".<sup>85</sup> It questions the argument raised by the Commission's representative in the course of the Council Working Party's discussions that any judicial review following internal review would be limited to the legality of the institution's reply to the request for internal review and not extend to the underlying "administrative act".<sup>86</sup> The debate was summarised as follows in a note to the Committee of Permanent Representatives (COREPER):

**"At the last Working Party meeting, the question was raised that Articles 9 and 11 as currently drafted might broaden the rights, deriving from Article 230(4) and 232(3) of the Treaty establishing the European Community, to challenge a decision or an omission before the Court of Justice. The view was defended that the abovementioned treaty provisions are sufficient to ensure compliance with the Aarhus Convention and that, as a consequence, Title IV might not be indispensable.**

**"A majority of Member States strongly opposed the suggested deletion of Title IV for at least two reasons. Firstly, it would go against the Aarhus Convention's obvious aim to improve environmental protection through greater involvement of the public, including through access to justice. Secondly, the European Parliament considers Title IV to be a very important**

**element of the Regulation and even suggested in its proposed amendment to broaden the scope of Title IV provisions. Deleting it would certainly jeopardise quick agreement between EP and Council and, ultimately, rapid ratification of the Convention."**<sup>87</sup>

Interestingly, the Commission was not very outspoken in defence of its own proposal. Even before the Council Legal Service had put its objections in writing, the Commission had itself told the Working Party that Article 11 of its proposal was in fact "superfluous". The Commission, which could have vetoed any amendment it considered would undermine the purpose of its legislative proposal, actually seemed more eager to compromise than many member states, who "strongly opposed" the deletion of this provision.<sup>88</sup> COREPER instructed the Working Party to seek a compromise in order to enable the Environment Council to reach political agreement on its common position at its meeting of 20 December 2004. Further discussions were held "on the basis of a text proposal prepared by the Council Legal Service after consultations with the Commission legal service."<sup>89</sup>

At the next COREPER meeting, the Presidency presented "a compromise text for Articles 9 and 11 on the basis of consultations with the legal services of the Council and the Commission", which it stressed "represents a careful balance between positions that would be very difficult to reconcile."<sup>90</sup> This Presidency compromise – apparently strongly inspired by the Council Legal Service – was accepted by COREPER and ultimately included in the common position as agreed by ministers on 20 December 2004.

Whether the provisions of Title IV of Regulation 1367/2006/EC will actually result in wider access to justice at Community level for NGOs meeting the criteria for entitlement or merely confirm the *status quo* remains an open question as long as neither the CFI nor the ECJ have ruled on any cases arising from the application of the Regulation. The implications of these

<sup>84</sup> EU Council Doc. 15434/04, 30 November 2004.

<sup>85</sup> *Ibid.*, p. 5, para. 12 (author's translation from the French).

<sup>86</sup> *Ibid.*, p. 3, para. 5.

<sup>87</sup> EU Council Doc. 15153/04, 29 November 2004, p. 3. Article 11 became Article 12 in the final version of the Regulation.

<sup>88</sup> EU Council Doc. 14587/04, 17 November 2004, p. 16, n. 26.

<sup>89</sup> EU Council Doc. 15540/04, 3 December 2004, p. 2.

<sup>90</sup> *Ibid.*

provisions and the resulting prospects for litigation will be further examined in section 3.2.3. But it is, at any rate, revealing that strong conservative bureaucratic interests within the Council and Commission civil service took advantage of the political vacuum in November 2004 in an attempt to weaken the access to justice provisions of the Aarhus Regulation.

### 3.2 Judicial review by the Court of Justice and the Court of First Instance

Under Article 220 EC, the Court of Justice and the Court of First Instance are jointly given the task to ensure that the law is observed in the interpretation and application of the EC Treaty. It falls on them, *inter alia*, to review the legality of acts and omissions of Community institutions. In this section, we will consider whether the judicial review procedures available to members of the public before the ECJ and CFI are adequate to ensure compliance by the EC with its obligations under Article 9(3) of the Aarhus Convention.

#### 3.2.1 Acts and omissions subject to judicial review

The action for annulment under Article 230 EC was first and foremost created in order to enable member states to seek judicial review of the legality of acts adopted by the supranational institutions of the Community as well as to provide a procedure whereby the institutions themselves could have the legality of each other's acts scrutinised by the Court of Justice in the event of inter-institutional conflicts. In the original version of Article 230, second indent, such actions could be brought only by a member state, the Council or the Commission, but, after the ECJ had also admitted actions brought by the European Parliament in order to protect its institutional prerogatives,<sup>91</sup> its right of action was later explicitly recognised by an amendment of that provision. In addition to the right of action of member states and institutions – often referred to as “privileged applicants” because their standing cannot be questioned – Article 230, fourth indent,

also recognises a more limited right for natural and legal persons meeting specific conditions – referred to as “non-privileged applicants” because their *locus standi* is never presumed but has to be established in each individual case – to bring an action for annulment against certain kinds of acts in particular, rather exceptional, circumstances, which will be analysed in detail in section 3.2.3.

The acts whose legality can be challenged by means of an action for annulment are those adopted jointly by the European Parliament and the Council, as well as acts of the Council and of the Commission, “other than recommendations and opinions”, and “acts of the European Parliament intended to produce legal effects vis-à-vis third parties”. The first category of acts – those adopted jointly by the European Parliament and the Council under the co-decision procedure – fall outside the scope of Article 9(3) of the Aarhus Convention, as they would be regarded as legislative acts, as explained above in section 2.1. The same would apply to acts of the Council alone, whenever this institution is acting in a legislative capacity, as it mostly does in environmental matters. The final category, which covers certain acts of the European Parliament of an administrative nature (as this institution can never act alone in a legislative capacity), is not relevant for the purposes of this study. The relevant acts for our purposes are most likely to be acts of the Commission, though it cannot be excluded that some Council acts which cannot be considered to be of a legislative nature might occasionally also fall within the scope of Article 9(3) of the Aarhus Convention, for instance when the Council takes a decision in lieu of the Commission in a comitology procedure, as it has the power to do under the comitology provisions of certain Directives and Regulations in the environmental field.

In any event, only legally binding acts are subject to judicial review, as the Court has inferred from the explicit exclusion of opinions and recommendations in the second indent of Article 230. On

<sup>91</sup> ECJ Judgment of 4 October 1991, Case C-70/88, *European Parliament v Council*, [1990] ECR I-2041.

the other hand, all legally binding acts can be challenged by an action for annulment, not only the categories of formal acts of the institutions listed in Article 249 EC. This has been clearly affirmed by the ECJ in its seminal *ERTA* judgment, involving a classic inter-institutional dispute:

“Since the only matters excluded from the scope of the action for annulment open to the Member States and the institutions are ‘recommendations or opinions’ – which by the final paragraph of Article [249] are declared to have no binding force – Article [230] treats as acts open to review by the Court all measures adopted by the institutions which are intended to have legal force.

“The objective of this review is to ensure, as required by Article [220], observance of the law in the interpretation and application of the Treaty.

“It would be inconsistent with this objective to interpret the conditions under which the action is admissible so restrictively as to limit the availability of this procedure merely to the categories of measures referred to by Article [249].

“An action for annulment must therefore be available in the case of all measures adopted by the institutions, whatever their nature or form, which are intended to have legal effects.”<sup>92</sup>

As appears from this case-law, the Court does not follow a formalistic approach in determining whether or not a particular act is open to review, but examines its scope and effects. It should be pointed out that the *ERTA* case concerned an action for annulment brought by a privileged applicant, not an action by a non-privileged natural or legal person, whose right of action is limited to challenging decisions addressed to that person or decisions “which, although in the form of a regulation or a decision addressed to another person, [are] of direct and individual concern to the former”<sup>93</sup>.

The requirement of “direct and individual concern”, which is the main obstacle for non-privileged applicants’ access to judicial review, will be examined in the following section. But the wording of this Treaty provision also seems to limit the scope of the action for annulment in terms of the nature and form of the acts that can be challenged to decisions and, in exceptional cases, to certain regulations.<sup>94</sup> However, in its interpretation of this provision too, the ECJ has followed a non-formalistic approach and not declared inadmissible outright all actions for annulment directed against other kinds of acts than those expressly mentioned, provided the acts challenged had legally binding consequences.

For example, in a competition law case, the Court has considered that a simple letter addressed to a number of cement producers by the Director-General of DG Competition effectively amounted to a decision subject to judicial review because “the said measure affected the interests of the undertakings by bringing about a distinct change in their legal position. It is unequivocally a measure which produces legal effects touching upon the interests of the undertakings concerned and which is binding on them. It thus constitutes not a mere opinion but a decision.”<sup>95</sup>

In a more recent case in which many private plaintiffs representing the tobacco and advertising industries sought annulment of a Directive of the European Parliament and of the Council banning advertising and sponsorship of tobacco products,<sup>96</sup> the CFI, although “not[ing] that the fourth paragraph of Article [230] of the Treaty makes no provision, for the benefit of individuals, for a direct action before the Community judicature challenging a directive”, found that “even though a directive is in principle binding only on its addressees, the Member States, it is generally an indirect means of legislating or regulating” and that “even a legislative measure which applies to economic operators generally may [in certain circumstances]

<sup>92</sup> ECJ Judgment of 31 March 1971, Case 22/70, *ERTA*, [1971] ECR 263, paras. 39-41 (emphasis added).

<sup>93</sup> EC Treaty, art. 230, 4th indent.

<sup>94</sup> An example of a case in which a private litigant – a pharmaceutical company – was found admissible in an action for annulment of a Council Regulation is *Alpharma Inc. v Council*, CFI Judgment of 11 September 2002, Case T-70/99.

<sup>95</sup> ECJ Judgment of 15 March 1967, Joined Cases 8-11/66, *SA Cimenteries CBR Cementsbedrijven NV and others v Commission*, [1967] ECR 91.

<sup>96</sup> Directive 98/43/EC of the European Parliament and of the Council of 6 July 1998 on the approximation of the laws, regulations and administrative provisions of the Member States relating to the advertising and sponsorship of tobacco products, OJ L 213, 30.07.1998, p. 9.

be of direct and individual concern to some of them”.<sup>97</sup> Consequently, the Court proceeded to “ascertain whether the Directive of itself affects the legal situation of the applicants”<sup>98</sup> and only dismissed the action as inadmissible after it had established it did not.

As regards omissions, the relevant provision of the Treaty is Article 232 EC, which provides that “[s]hould the European Parliament, the Council or the Commission, in infringement of this Treaty, fail to act, the Member States and the other institutions of the Community may bring an action before the Court of Justice to have the infringement established”. Such an action, known as action for failure to act, can be brought only where the institution concerned is legally obliged to act and “has first been called upon to act”, but has failed to define its position within two months of receiving such a formal invitation to act.

An action for failure to act may also be brought by a natural or legal person under the same conditions, but only where an institution was under an obligation “to address to that person any act other than a recommendation or an opinion”. Though the relevant terms of Articles 230 and 232 are not identical, the case-law of the ECJ on Article 232 has evolved in parallel with that on Article 230 and tended to apply the same criteria for standing in actions for failure to act as in actions for annulment. These criteria will be examined in section 3.2.3. In view of the convergent interpretation of both provisions and the space constraints applying to this study, we will not specifically discuss actions for failure to act brought against omissions of Community institutions in that section and subsequent sections of this report.

The Treaty of Lisbon, if and when it enters into force, would modify the provisions of Article 230 EC, which would become Article 263 of the Treaty on the Functioning of the European Union (TFEU). For the purposes of this study, the most relevant amendment would be that of the current fourth indent of Article 230 EC, which, in Article 263 TFEU would be reworded as follows:

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

The requirement of “direct and individual concern” would still apply, but not in the case of a “regulatory act” which “does not entail implementing measures”, in which case the non-privileged applicant would henceforth only have to demonstrate “direct concern”. The term “regulatory act” is not defined or used anywhere else in the TFEU, but is assumed to refer to a normative act of general application, as opposed to an administrative act of individual scope. Since, as we shall see in section 3.2.3 below, the main obstacle to access to justice to challenge acts of Community institutions which contravene EC environmental law is not “direct” but “individual” concern, the reform of the standing requirements of Article 230, fourth indent EC that would result from the Lisbon Treaty would not constitute a major step forward. It would at any rate only apply to a limited sub-category of acts of Community institutions.

### **3.2.2 Grounds of judicial review**

According to Article 230 EC, the grounds on which an action for annulment can be based are lack of competence, infringement of an essential procedural requirement, infringement of the Treaty or of any rule of law relating to its application, or misuse of powers. Effectively, Article 230 allows any claimant who manages to establish *locus standi* to seek full judicial review of “the substantive and procedural legality” – within the meaning of Article 9(2) of the Aarhus Convention – of acts of Community institutions which are subject to an action for annulment.

However, for the purposes of Article 9(3) of the Convention, the most relevant of the grounds listed in Article 230 are infringements of rules of law relating to the application of the EC Treaty – i.e. rules of secondary Community law – especially

<sup>97</sup> CFI Judgment of 27 June 2000, Joined Cases T-172/98 and T-175/98 to T-177/98, *Salamander AG and others v European Parliament and Council*, paras. 27-30.

<sup>98</sup> *Ibid.*, para.53.

those adopted within the scope of EU environmental policy, since these would be the “provisions (...) relating to the environment” whose violation members of the public have to be able to challenge through, *inter alia*, judicial procedures. However, the provisions of the EC Treaty itself which “relate to” the environment, including in particular Articles 174-176, but also other “environmental” provisions such as Article 6 and Article 95 (3)-(8), would equally fall within the scope of Article 9(3) as applied to the EC. A finding of infringement of any of those provisions, as well as of any other provision of the Treaty, would be sufficient grounds for the ECJ or CFI to declare void an act falling within the scope of Article 230.

As the wording of Article 9(3) seems to imply that Parties have an *obligation* to give members of the public access to justice to enable them to challenge acts of public authorities *only insofar* as such acts “contravene provisions of [their] national law relating to the environment”, as opposed to any other provisions of the Parties’ domestic law, the judicial procedure provided for in Article 230 EC potentially provides broader legal protection than required under the terms of the Aarhus Convention. Grounds other than infringements of environmental law can also be relied on in actions for annulment, once such actions clear the hurdle of admissibility. As will be shown in the following section, the admissibility of actions brought by non-privileged claimants is in fact the main obstacle to judicial review of acts and omissions of Community institutions which violate EC environmental law.

### 3.2.3 Standing for members of the public

By definition, “members of the public” within the meaning of the Aarhus Convention are non-privileged claimants for the purposes of the action for annulment under Article 230 EC. According to the fourth indent of that provision, natural or legal persons may institute proceedings to seek annulment of an act of a Community institution only if the challenged act is a decision addressed to them or is otherwise “of direct and individual

concern” to them. From the outset, the system of judicial protection instituted by Article 230 was designed to grant non-privileged claimants access to it only in exceptional cases. Though the ECJ has repeatedly extended the scope of the action for annulment beyond the express terms of Article 230, especially as regards inter-institutional disputes and the kinds of acts open to review, it has rather consistently interpreted the requirement of “direct and individual concern” very restrictively. The conservative interpretation of those terms is long established and not in any way peculiar to environmental cases. Though challenged by the CFI in the *Jégo-Quéré* case in 2002,<sup>99</sup> the established doctrine was strongly reaffirmed by the ECJ on appeal.<sup>100</sup>

In environmental matters, decisions addressed to a natural or legal person are extremely rare. The addressees of Commission or Council Decisions are normally member states. This is the case even where the Commission exercises regulatory authority at EU level with respect to market access for certain hazardous products or substances. Though the procedure which ultimately leads to a Commission Decision is generally initiated by the submission of an application or notification by a private economic operator, the resulting Decision is addressed to the member state whose competent authority introduced the dossier at EU level or to all member states. A rare exception relates to the control of imports of ozone-depleting substances into the Community, where the relevant Regulation provides

<sup>99</sup> CFI Judgment of 3 May 2002, Case T-177/01, *Jégo-Quéré et Cie SA v Commission*, [2002] ECR II-2365. In this case, the plaintiff was a French company which brought an action for annulment of certain provisions of a regulation imposing minimum mesh sizes for nets used in its whiting fishing activities in a particular area of Community waters off the coast of Ireland. It claimed that this legislation would especially affect its activities as it was the largest fishing company operating in those waters and the only one fishing on a regular basis for whiting in the area concerned with vessels over a certain size to which the new provisions applied. The CFI found that although “the applicant cannot be regarded as individually concerned within the meaning of the fourth paragraph of Article 230 EC, on the basis of the criteria hitherto established by Community case-law”, it was necessary and justified to deviate from this case-law “in order to ensure effective judicial protection for individuals”. It therefore ruled that “a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him”. The CFI justified its position by reference, *inter alia*, to the opinion delivered by Advocate General Francis Jacobs on 21 March 2002 in a similar case which was at that time still pending on appeal before the ECJ, in which non-privileged applicants were also challenging the legality of an EC regulation. Case C-50/00 P, *Unión de Pequeños Agricultores (UPA) v Council*.

<sup>100</sup> ECJ Judgment of 1 April 2004, Case C-263/02 P, *Commission v Jégo-Quéré & Cie SA*. Cf. ECJ Judgment of 25 July 2002, Case C-50/00 P, *Unión de Pequeños Agricultores (UPA) v Council*, [2002] ECR I-6677. Following the CFI judgment in *Jégo-Quéré*, the ECJ expedited its consideration of the pending UPA appeal and promptly ruled, against the opinion of Advocate General Jacobs, that an interpretation of the standing requirements laid down in Article 230, fourth indent, “cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts” and that “a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles” could only be introduced, “if necessary”, by member states through an amendment of the Treaty. Two years later, the CFI’s unorthodox *Jégo-Quéré* decision was itself explicitly reversed on appeal on similar grounds. These developments have been abundantly commented upon in the literature, but since the settled case-law has effectively been upheld by the ECJ and remained unchanged to this day, we have not deemed it useful to dwell on the ongoing doctrinal debates in this report. We have done so in an earlier article: Dodeller, S and Pallemarts, M. 2005. L'accès des particuliers à la Cour de Justice et au Tribunal de Première Instance des Communautés européennes en matière d'environnement: bilan du droit positif et perspectives d'évolution. In : C Larssen and M Pallemarts (eds), *L'accès à la justice en matière d'environnement/Toegang tot de rechter in milieuzaken*, pp. 287-316. Bruylant, Brussels, Belgium.

for the Commission to allocate import quotas to individual enterprises.<sup>101</sup> It does this through an annual Decision addressed to them.<sup>102</sup> Other examples of Commission or Council decisions addressed to legal persons would be decisions on requests for access to documents containing environment-related information under Regulation 1049/2001/EC.<sup>103</sup> The addressees of decisions denying access to such information have had no admissibility problems in seeking judicial review by the CFI.<sup>104</sup> However, as such cases fall within the scope of Article 9(1) of the Aarhus Convention, they will not be further considered in this study.

From the perspective of Article 9(3), the main question in this connection is whether NGOs which have unsuccessfully availed themselves of the internal review procedure instituted by Regulation 1367/2006/EC will effectively have access to judicial review under the fourth indent of Article 230 EC. As has been explained in section 3.2.3 above, the provisions of this Regulation on access to justice were significantly watered down by the Council during the legislative procedure. It remains to be seen what will be the consequences of these drafting changes and whether the opponents of access to justice for environmental NGOs will eventually be successful in their efforts to prevent the use of the Aarhus Regulation as a means for these organisations to gain wider access to the Community judicature.

The Regulation provides that the applicant for internal review shall, within a specified period, receive a “written reply” from the institution or body responsible for the challenged act or omission. It is to be noted that the Commission’s original proposal used the term “decision” instead of “written reply”. It explicitly required the “Community institution or body [to] take a decision on a request for internal review” and specified that this decision “shall be addressed to the qualified entity that has made the request”.<sup>105</sup> The Council carefully deleted the term “decision” from all provisions of the Regulation concerning access to justice,

apparently in an attempt to avoid creating automatic standing for the addressee to bring an action for annulment under Article 230, fourth indent. This move was welcomed by the European chemical industry association, CEFIC, which claimed that “[b]y qualifying the denial as a written reply, the Council had achieved the right balance between a desirable enhanced involvement of the public in environmental matters and the safeguarding of proper administration of justice”.<sup>106</sup>

Given the Court’s non-formalistic interpretation of the term “decision” in Article 230, fourth indent, which was discussed in section 3.2.1, we consider it unlikely that the use of a different term by the Community legislator will be judged a sufficient reason to remove acts and omissions pursuant to the Aarhus Regulation from the scope of judicial review. All published “written replies” made so far by the Commission to requests for internal review were in the form of letters addressed to the applicant NGO and signed by one or several Directors-General.<sup>107</sup> As mentioned in section 3.2.1 above, there are precedents in other fields of Community law of similar letters being considered tantamount to a reviewable decision within the meaning of Article 230, fourth indent EC.<sup>108</sup>

A different question, however, is whether an action for annulment brought against a reply rejecting an NGO’s request for internal review of an administrative act under environmental law can possibly lead to a full review of the substantive and procedural legality of the act or omission allegedly contravening EC environmental law which the request for internal review was actually aimed at challenging. Formally, the measure that would be the subject of the judicial proceedings referred to in Article 12 of the Aarhus Regulation would be the “written reply”, not the original act or omission. As the addressee of that reply, the applicant NGO would no doubt be entitled to have its legality reviewed by the Community judicature, but the Court may well limit the scope of its review to the conformity of the institution’s handling of the request for initial review with the provisions

<sup>101</sup> See Regulation (EC) No 2037/2000 of the European Parliament and of the Council of 29 June 2000 on substances that deplete the ozone layer, OJ L 244, 29.09.2000, p. 1, art. 7. For an example of recent litigation on these quotas see CFI Judgment of 22 May 2007, Case T-216/05, *Mebrum NV v Commission*; ECJ Judgment of 2 April 2009, Case C-373/07 P, *Mebrum NV v Commission*.

<sup>102</sup> Most recently Commission Decision 2009/51/EC of 15 December 2008 on the allocation of import quotas for controlled substances for the period 1 January to 31 December 2009 under Regulation (EC) No 2037/2000 of the European Parliament and of the Council, OJ L 21, 24.01.2009, p. 43.

<sup>103</sup> Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.05.2001, p. 43.

<sup>104</sup> See e.g. CFI Judgment of 25 April 2007, Case T-264/04, *WWF European Policy Programme v Council*; CFI Judgment of 10 September 2008, Case T-42/05, *Williams v Commission*.

<sup>105</sup> COM(2003) 622 final, art. 9(2).

<sup>106</sup> CEFIC Position Paper: “Second reading of the Aarhus-Regulation – Parliament’s Environment Committee reintroduced broader but discriminatory access to justice – Plenary vote in January”, 8 December 2005, p. 2, available at <http://www.cefic.org/Files/Publications/6.doc>

<sup>107</sup> See n. 60-64 *supra*.

<sup>108</sup> ECJ Judgment of 15 March 1967, Joined Cases 8-11/66, *SA Cimenteries CBR Cementsbedrijven NV and others. v Commission*, [1967] ECR 91.

of Regulation 1367/2006/EC, which are entirely procedural in nature. A reply that does not meet those requirements may well be voided, but the initial act or omission contravening environmental law would not be affected by the annulment of the “written reply”. At most, the institution would have an obligation to consider the request for internal review again, taking into account the ruling of the Court, and issue another reply upon reconsideration.

Of course, where there has been an unsuccessful request for internal review, there is nothing to prevent an NGO bringing an action under Article 230 EC to seek the annulment of both the institution’s reply to that request and the initial act or omission which was the subject of the request. But the NGO’s standing as addressee of the “written reply” would not automatically guarantee the admissibility of the action for annulment insofar as it is directed against the underlying measure. It is not unlikely that the Court would apply the classical test of “direct and individual concern” to judge the admissibility of the action in that respect. This would bring the environmental plaintiff back to square one. Let us therefore consider next how this controversial requirement has been applied in the case-law so far.

In order to establish *locus standi* under Article 230, fourth indent, any non-privileged claimant must demonstrate that he or she is both “directly” and “individually” concerned by the challenged act. These are two distinct conditions; failure to satisfy a single one of them will render the action for annulment inadmissible.

As to the requirement of “direct concern”, this has been consistently interpreted in the case-law of the Court as implying that the Community measure under review

**“must directly affect the legal situation of the individual and leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the**

**application of other intermediate rules.”<sup>109</sup>**

The standard test of “individual concern” was enunciated by the ECJ in the 1962 *Plaumann* case, in which the Court held:

**“Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.”<sup>110</sup>**

This double test has never been found to have been fulfilled in any action for annulment brought by a member of the public, whether an NGO or individual, seeking to enforce Community environmental law. But one should be aware that the difficulty of clearing the threshold of admissibility is not limited to public interest environmental plaintiffs, but is faced in quite the same manner by claimants seeking to protect their private economic interests against the adverse effects of EC environmental regulation. The number of cases in which economic actors have successfully brought actions for annulment against Community environmental measures affecting their business interests is also extremely limited.

The emblematic environmental case on standing decided by the CFI and ECJ to date remains the *Greenpeace* case.<sup>111</sup> This involved an action for annulment brought by the international environmental NGO, together with a number of local environmental groups and fishermen, farmers, trade unionists, health and tourism professionals and other local residents, against the Commission’s decision to disburse financial assistance from the European Regional Development Fund (ERDF) to Spain for the construction of two coal-fired power plants on the Canary Islands for which no proper environmental impact assessment (EIA) had been carried out in violation of the relevant provisions of the EIA Directive<sup>112</sup> and the Structural Funds Regulation.<sup>113</sup>

<sup>109</sup> ECJ Judgment of 5 May 1998, Case C-386/96 P, *Société Louis Dreyfus & Cie v Commission*, [1998] ECR I-2309, para. 43.

<sup>110</sup> ECJ Judgment of 15 July 1963, Case 25/62, *Plaumann & Co v Commission*, [1963] ECR 95 (emphasis added).

<sup>111</sup> CFI Order of 9 August 1995, Case T-585/93, *Stichting Greenpeace Council and others v Commission*, [1995] ECR II-2205; ECJ Judgment of 2 April 1998, Case C-321/95 P, *Stichting Greenpeace Council (Greenpeace International) and others v Commission*, [1998] ECR I-1651.

Referring to the settled case-law since *Plaumann*, the CFI upheld the objections of inadmissibility raised by the Commission against all the plaintiffs, whether private individuals or associations, rejecting the argument raised by them that “when determining the admissibility of their action the Court should free itself from the restrictions those authorities impose (...) and concentrate rather on the sole fact that they have suffered or potentially will suffer detriment or loss from the harmful environmental effects arising out of unlawful conduct on the part of the Community institutions”.<sup>114</sup>

The CFI found that none of the applicants could be considered to be individually concerned within the meaning of Article 230, fourth indent EC, “without there being any need to consider whether a decision capable of being challenged in an action under Article [230] of the Treaty exists in the present case and whether the applicants are directly concerned by the contested decision”.<sup>115</sup> The individual plaintiffs did not “rely on any attribute substantially distinct from those of all the people who live or pursue an activity in the areas concerned”.<sup>116</sup> The contested decision was no more than “a measure whose effects are likely to impinge on, objectively, generally and in the abstract, various categories of person and in fact any person residing or staying temporarily in the areas concerned”. The applicant NGOs did not have standing either, as “an association formed for the protection of the collective interests of a category of persons cannot be considered to be directly and individually concerned (...) by a measure affecting the general interests of that category, and is therefore not entitled to bring an action for annulment where its members may not do so individually”.<sup>117</sup>

The CFI’s ruling was confirmed on appeal by the ECJ. The Court was not swayed by the appellants’ plea that, “by applying the case-law developed by the Court of Justice in relation

to economic issues and economic rights, according to which an individual must belong to a ‘closed class’ in order to be individually concerned by a Community act, the Court of First Instance failed to take account of the nature and specific character of the environmental interests underpinning their action”.<sup>118</sup> It rather summarily dismissed the appeal, as regards the *locus standi* of natural persons, on the grounds that, “where, as in the present case, the specific situation of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the act”. It went on to reaffirm, in response to the pleas concerning the standing of legal persons, that “[t]he same applies to associations which claim to have locus standi on the basis of the fact that the persons whom they represent are individually concerned by the contested decision”.<sup>119</sup>

The most interesting aspect of the appeal judgment is, however, the Court’s answer to the appellants’ argument that the consequence of the CFI denying them standing would be to deprive environmental rights and interests such as those recognised by the 1985 EIA Directive of effective legal protection in the face of unlawful action by a Community institution. To this argument, the ECJ replied that “it should be emphasised that *it is the decision to build the two power stations in question which is liable to affect the environmental rights arising under Directive 85/337 that the appellants seek to invoke. In those circumstances, the contested decision, which concerns the Community financing of those power stations, can affect those rights only indirectly*”.<sup>120</sup> This reasoning, rather than supporting the CFI’s holding that the applicants were not individually concerned by the challenged Commission decision, in fact asserts that they were not directly concerned, an altogether different test which the CFI did not actually address in its order at all.

The *Greenpeace* judgment has been widely criticised by

<sup>112</sup> Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ L 175, 05.07.1985, p. 40.

<sup>113</sup> Council Regulation (EEC) No 2052/88 of 24 June 1988 on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the European Investment Bank and the other existing financial instruments, OJ L 185, 15.07.1988, p. 9, art. 7; Council Regulation (EEC) No 1787/84 of 19 June 1984 on the European Regional Development Fund, OJ L 169, 28.06.1984, p. 1.

<sup>114</sup> CFI Order of 9 August 1995, Case T-585/93, *Greenpeace and others v Commission* [1995] ECR II-2205, para. 49.

<sup>115</sup> *Ibid.*, para. 65.

<sup>116</sup> *Ibid.*, para. 54.

<sup>117</sup> *Ibid.*, para. 59.

<sup>118</sup> ECJ Judgment of 2 April 1998, Case C-321/95 P, *Stichting Greenpeace Council (Greenpeace International) and others v Commission*, [1998] ECR I-1651, para. 17.

<sup>119</sup> *Ibid.*, paras. 28-29.

<sup>120</sup> *Ibid.*, paras. 30-31 (emphasis added).

commentators who have rightly pointed out that the rigid *Plaumann* doctrine to which the ECJ so obstinately clings is singularly inapt to accommodate the protection of environmental interests which are, by their very nature, collective and diffuse and therefore almost never concern any particular person in a way in which that individual is “differentiated from all other persons”. But it should not be disregarded that the *Plaumann* test also frequently operates to the detriment of the legal protection of economic interests which are adversely affected by EU environmental policy measures and often shields those measures, like other measures of European public policy, from legal challenges brought on behalf of private interests. From that perspective, it is appropriate to highlight a virtually contemporaneous case considered by the CFI and ECJ which, from a legal viewpoint, bears a striking similarity to the *Greenpeace* case, despite the opposite nature of the interests at stake.

In *Associazione Agricoltori della Provincia di Rovigo*<sup>121</sup> a number of Italian associations and cooperatives representing agricultural and fishing interests together with an individual farmer and landowner applied to the CFI for annulment of a Commission decision granting Community financial assistance to the Veneto region under the LIFE programme<sup>122</sup> for the implementation of nature protection measures in a regional park in the Po delta area aimed at the conservation of species and habitats protected under Directive 92/43/EEC.<sup>123</sup> As in the *Greenpeace* case, the Commission’s objection of inadmissibility was accepted by the Court. The CFI held that “the decision in question concerns the applicants who are natural persons merely by virtue of their objective capacity as agriculturalists operating in the Po delta area in the same manner as any other agriculturalist who is, or might be in the future, in the same situation”.<sup>124</sup> As regards the claimant associations, it found that they “are not affected by the contested decision, which affects the general interests of the

category of traders which they represent, otherwise than in their capacity as representatives of that category”, and are therefore not individually concerned any more than their members.<sup>125</sup> The claimants’ appeal to the ECJ was dismissed as unfounded.<sup>126</sup>

Since the *Greenpeace* judgment, the Community judicature has had to consider the admissibility of a few more actions for annulment brought by individuals or organisations in cases involving alleged violations of EC environmental law. In each and every one of those cases these actions were found to be inadmissible on the grounds that the claimants were not “directly and individually concerned” within the meaning of Article 230, fourth indent EC.

Two recent cases concerned Commission measures taken pursuant to Directive 91/414/EEC with respect to the inclusion of certain substances on the Community list of active substances authorised for use in plant protection products. In the first case,<sup>127</sup> involving the herbicides atrazine and simazine, the Commission had decided not to include those substances in the positive list, but to allow member states to maintain authorisations for the placing on the market of products containing them during a three-year transitional period. The claimant environmental NGOs – the European Environmental Bureau (EEB) and the Dutch federation Stichting Natuur en Milieu (SNM) – sought annulment of the provisions in the respective Commission decisions granting member states and the agrochemical industry this generous phase-out period.

In the second case,<sup>128</sup> the contested act was a Commission Directive including the herbicide paraquat in the Community list. The action for annulment was brought jointly by EEB, SNM, the Pesticides Action Network Europe, the Swedish environmental group Svenska Naturskyddsföreningen (SNF), and two international trade union federations concerned about the occupational hazards of paraquat to agricultural workers. In both

<sup>121</sup> CFI Order of 21 February 1995, Case T-117/94, *Associazione agricoltori della provincia di Rovigo and others v Commission*, [1995] ECR II-455; ECJ Judgment of 12 December 1996, Case C-142/95 P, *Associazione agricoltori della provincia di Rovigo et al. v Commission*, [1996] ECR I-6669.

<sup>122</sup> Council Regulation (EEC) No 1973/92 of 21 May 1992 establishing a financial instrument for the environment (LIFE), OJ L 206, 22.07.1992, p. 1.

<sup>123</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural and semi-natural habitats and of wild fauna and flora, OJ L 206, 22.07.1992, p. 7.

<sup>124</sup> CFI Order of 21 February 1995, Case T-117/94, *Associazione agricoltori della provincia di Rovigo and others v Commission*, [1995] ECR II-455, para. 25.

<sup>125</sup> *Ibid.*, para. 28.

<sup>126</sup> ECJ Judgment of 12 December 1996, Case C-142/95 P, *Associazione agricoltori della provincia di Rovigo and others v Commission*, [1996] ECR I-6669.

<sup>127</sup> CFI Order of 28 November 2005, Joined Cases T-236/04 and T-241/04, *European Environmental Bureau and Stichting Natuur en Milieu v Commission*, [1995] ECR II-3051.

<sup>128</sup> CFI Order of 28 November 2005, Case T-94/04, *European Environmental Bureau and others v Commission*, [2005] ECR II-4919.

these cases the CFI ruled that all the plaintiffs were inadmissible on grounds of lack of individual concern.<sup>129</sup>

Several arguments raised, invoking particular factual or legal circumstances by which the plaintiffs considered they were differentiated from other persons in the way in which the contested acts affected them, were systematically rejected by the Court. EEB and the trade unions referred to their special advisory status at the EU level, recognised by the Commission by appointing them as members of consultative bodies such as the Standing Group on Plant Health, the Advisory Committee on Agriculture and the Environment, and the European Habitats Forum. SNM and SNF relied on provisions of Dutch, respectively Swedish law under which they are recognised as being directly and individually concerned by infringements of environmental law in their countries. SNF also invoked its property rights as the owner of an organic farm and high-biodiversity agricultural land in south-east Sweden harbouring amphibian species of Community interest protected under Directive 92/43/EEC. Finally, EEB and SNM invoked the special procedural rights granted by Article 12(1) of Directive 2004/35/EC on environmental liability<sup>130</sup> to any NGO promoting environmental protection and meeting any requirements under national law to submit to the “competent authority” observations relating to “instances of environmental damage or an imminent threat of such damage of which they are aware” and to request that authority to take action under that Directive.

In its two orders of the same date, the CFI dismissed both actions as inadmissible on the grounds that the contested provisions “affect the applicants in their objective capacity as entities whose purpose is to protect the environment or workers' health, or even as holders of property, in the same manner as any other person in the same situation”.<sup>131</sup> It recalled the *Greenpeace* case-law in support of its conclusion that “that capacity is not by itself sufficient to establish that

the applicants are individually concerned” by the contested provisions.<sup>132</sup>

None of the special circumstances invoked by different claimants was found to be relevant for the purpose of the *Plaumann* test. The status of SNM and SNF under their respective national law was deemed “irrelevant for the purposes of determining whether they have standing to bring an action for annulment of a Community act pursuant to the fourth paragraph of Article 230 EC”.<sup>133</sup> The advisory status of EEB and the trade union federation at Community level was also found not to be relevant, since “the Community legislation applicable to the adoption of the contested act does not provide for any procedural guarantees for the applicants, or even for any form of participation by the Community advisory bodies (...) to which the applicants allegedly belong”.<sup>134</sup> The CFI stressed “that the fact that a person participates, in one way or another, in the process leading to the adoption of a Community act does not distinguish him individually in relation to the act in question unless the relevant Community legislation has laid down specific procedural guarantees for such a person.”<sup>135</sup> Finally, it held that the procedural rights under Directive 2004/35/EC relied on by the applicants apply vis-à-vis competent authorities of the member states only and “may not be usefully relied on as against the Commission in the context of the procedure for adopting the atrazine and simazine decisions and (...) are therefore not relevant in determining whether or not the applicants are individually concerned by those decisions.”<sup>136</sup> In both rulings, the CFI concludes in the same terms that “Community law, as it now stands, does not provide for a right to bring a class action before the Community courts, as envisaged by the applicants in the present case”.<sup>137</sup>

The reference to a “class action” in this context is rather puzzling and actually quite inappropriate, because the actions

<sup>129</sup> Commission Directive 2003/112/EC of 1 December 2003 amending Council Directive 91/414/EEC to include paraquat as an active substance, OJ L 321, 06.12.2003, p. 32, was nevertheless declared void by the CFI as a result of a separate action for annulment brought by a member state which did not have to establish its *locus standi*. See CFI Judgment of 11 July 2007, *Sweden v Commission*, Case T-229/04, [2007] ECR II-2437.

<sup>130</sup> Directive 2004/35/EC 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, 30.04.2004, p. 56.

<sup>131</sup> CFI Order of 28 November 2005, Case T-94/04, *European Environmental Bureau and others v Commission*, [2005] ECR II-4919, para. 53. Cf. CFI Order of 28 November 2005, *Joined Cases T-236/04 and T-241/04, European Environmental Bureau and Stichting Natuur en Milieu v Commission*, [1995] ECR II-3051, para. 56.

<sup>132</sup> CFI Order of 28 November 2005, Case T-94/04, *European Environmental Bureau and others v Commission*, [2005] ECR II-4919, para. 54. Cf. CFI Order of 28 November 2005, *Joined Cases T-236/04 and T-241/04, European Environmental Bureau and Stichting Natuur en Milieu v Commission*, [1995] ECR II-3051, para. 56.

<sup>133</sup> CFI Order of 28 November 2005, Case T-94/04, *European Environmental Bureau and others v Commission*, [2005] ECR II-4919, para. 58.

<sup>134</sup> *Ibid.*, para. 57.

<sup>135</sup> CFI Order of 28 November 2005, *Joined Cases T-236/04 and T-241/04, European Environmental Bureau and Stichting Natuur en Milieu v Commission*, [1995] ECR II-3051, para. 58.

<sup>136</sup> *Ibid.*, para. 60.

<sup>137</sup> CFI Order of 28 November 2005, Case T-94/04, *European Environmental Bureau and others v Commission*, [2005] ECR II-4919, para. 59. Cf. CFI Order of 28 November 2005, *Joined Cases T-236/04 and T-241/04, European Environmental Bureau and Stichting Natuur en Milieu v Commission*, [1995] ECR II-3051, para. 63 (emphasis added).

for annulment brought in both cases by a number of individual legal persons, each of them acting on its own behalf, do not by any stretch of the imagination fit that description. It seems symptomatic of some sort of latent prejudice on the part of the CFI against the type of public interest environmental litigation brought by EEB and its allies before the Community judicature.

The most recent environmental case arguably within the scope of Article 9(3) of the Aarhus Convention considered by the CFI and currently being appealed before the ECJ is an annulment action brought by WWF-UK against certain provisions of Council Regulation (EC) No 41/2007 fixing the total allowable catches (TACs) of cod for the year 2007 in certain Community waters.<sup>138</sup> The applicant environmental NGO relied on its membership of the Executive Committee of the North Sea Regional Advisory Council (RAC) established under the 2002 Common Fisheries Policy Regulation,<sup>139</sup> which was consulted by the Commission in the preparatory process of the contested measure, as conferring on it special procedural rights which distinguish it for the purpose of the *Plaumann* test. The CFI rejected this plea in the following terms:

“Even assuming that the provisions referred to concern procedural guarantees within the meaning of the case-law referred to (...), those guarantees would exist for the benefit of the RACs and not for the benefit of their members. Accordingly, only the RACs would be entitled to claim that those supposed procedural guarantees are capable of distinguishing them individually for the purposes of the fourth paragraph of Article 230 EC; the applicant cannot, either as a member of the North Sea RAC or of its Executive Committee, profit from those same guarantees (...).

“The involvement of the applicant as a member of the North Sea RAC or of its Executive Committee, in the course of the procedure which led to the adoption of the contested regulation, cannot therefore establish that the disputed TACs are of individual

concern to it within the meaning of the fourth paragraph of Article 230 EC.”<sup>140</sup>

The above-mentioned line of case-law clearly shows that the requirement of “direct and individual concern” laid down in Article 230, fourth indent EC, as restrictively interpreted by the ECJ and CFI since *Plaumann*, and applied to applications for annulment of Community acts contravening EC environmental law since *Greenpeace*, is such as to effectively deny all “members of the public” within the meaning of Article 9(3) of the Aarhus Convention access to judicial review procedures. It should be mentioned in this context that a number of environmental NGOs have, on these grounds, recently submitted a communication to the Aarhus Convention Compliance Committee alleging that the EC fails to comply with its obligations under Article 9(2)-(5) of the Convention because of this situation.<sup>141</sup> Given the Committee’s earlier findings and recommendations in a similar case involving the lack of effective NGO access to the Belgian administrative court,<sup>142</sup> there is a serious chance that it may actually find the EC in breach of its obligations under the Convention.

Without anticipating the examination of this communication by the Aarhus Convention Compliance Committee, which has only just started, it is necessary at this stage to consider any possible impact of the Community’s international obligations as a Party to the Convention and of the Aarhus Regulation on the existing unfavourable situation regarding access to justice at the EU level. In fact, in some of the above-mentioned recent cases, the applicants have already raised arguments based on the Convention and Regulation which, however, have not found any favour with the CFI so far.

The first time the Court had to consider an Aarhus-based argument was in the two cases in which EEB and its co-applicants challenged Community acts with respect to the listing of active substances under Directive 91/414/EEC. At the time proceedings

<sup>138</sup> Council Regulation (EC) No 41/2007 of 21 December 2006 fixing for 2007 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks, applicable in Community waters and, for Community vessels, in waters where catch limitations are required, OJ L 15, 20.01.2007, p. 1. It is debatable whether this act was taken by the Council “acting in a legislative capacity”; if so, it would fall outside the scope of Article 9(3).

<sup>139</sup> Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ L 358, 31.12.2002, p. 59, art. 31; Council Decision 2004/585/EC of 19 July 2004 establishing Regional Advisory Councils under the Common Fisheries Policy, OJ L 256, 03.08.2004, p. 17.

<sup>140</sup> CFI Order of 2 June 2008, Case T-91/07, *WWF-UK Ltd v Council*, paras. 72-73.

<sup>141</sup> Communication ACCC/C/2008/32, submitted on 1 December 2008 by ClientEarth and others, see <http://www.unece.org/env/pp/compliance/C2008-32/DatasheetC-2008-32v2009.01.19.doc>

<sup>142</sup> Findings and recommendations with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice (Communication ACCC/C/2005/11 by Bond Beter Leefmilieu Vlaanderen VZW (Belgium), UN Doc. ECE/MPPP/C.1/2006/4/Add.2, 28 July 2006, supra n. 17.

were instituted in both these cases, the EC was not yet a contracting Party to the Aarhus Convention and Regulation 1367/2006/EC had not yet been adopted by the European Parliament and Council. On the date of the CFI's ruling, however, the Convention had entered into force with respect to the Community, but the Aarhus Regulation was formally still a mere legislative proposal.

The second time the Convention and Regulation were relied upon by parties in annulment proceedings before the CFI, the main claimant was not a "member of the public" within the common meaning of the term, but a regional public authority of a member state – the Autonomous Region of the Azores in Portugal. The Aarhus-related arguments in this case were raised jointly by the applicant and three intervening parties in the proceedings who were environmental NGOs<sup>143</sup> – Seas at Risk, WWF and Greenpeace – whose applications to intervene were allowed by the Court on the very day before the adoption by the Council of its Decision on the approval of the Aarhus Convention by the EC. By the time of the hearing, the Community had become a contracting Party and the Aarhus Regulation had been adopted and published. In the third and so far latest relevant case, the applicant, WWF-UK, was actually an environmental NGO. It had brought its action at a time at which the EC was bound by the Convention – but the Regulation, though adopted, was not yet in force.

None of those four proceedings therefore involved a situation in which an NGO was bringing an action for annulment following a prior request for internal review. In only one of them was the action brought following an environmental decision-making process to which the applicant NGO claimed the provisions of the Aarhus Regulation actually applied. It is important to draw attention to those legal and factual circumstances because they may have influenced the way in which the pleas based on the Convention and Regulation were considered and dismissed by the Court.

In both pesticides cases decided by the CFI in November 2005, the applicants argued that they should be granted standing because "first, the Commission, in the statement of reasons of the Aarhus Regulation Proposal, states that European environmental protection organisations which meet certain objective criteria have standing for the purposes of the fourth paragraph of Article 230 EC and, second, in the present case the applicants meet those objective criteria".<sup>144</sup> They did not directly invoke the provisions of Article 9(3) of the Convention and could not rely on the Regulation itself since that was not yet enacted, let alone in force. Instead, they invoked the position taken by the Commission in the explanatory memorandum of the proposed Regulation, which in their view contradicted the same institution's pleas before the CFI. The Court rejected this argument in the following terms:

*"The Court notes, first, that the principles governing the hierarchy of norms (...) preclude secondary legislation from conferring standing on individuals who do not meet the requirements of the fourth paragraph of Article 230 EC. A fortiori the same holds true for the statement of reasons of a proposal for secondary legislation.*

*"Accordingly, the statement of reasons relied on by the applicants does not release them from having to show that they are individually concerned by the contested act. Moreover, even if the applicants were acknowledged as qualified entities for the purposes of the Aarhus Regulation Proposal, it is clear that they have not put forward any reason why that status would lead to the conclusion that they are individually concerned by the contested act."*<sup>145</sup>

In the *Açores* case, the CFI started its reasoning by noting that the Aarhus Convention "had not been approved by the Community when the present action was brought – the date by reference to which admissibility falls to be assessed – and that Decision 2005/370 approving that Convention has not provided for its retroactive application".<sup>146</sup> Actually, that argument was in itself sufficient answer to the intervening parties' plea and the Court

<sup>143</sup> CFI Judgment of 1 July 2008, Case T-37/04, *Região autónoma dos Açores v Council*, para. 43.

<sup>144</sup> CFI Order of 28 November 2005, Case T-94/04, *European Environmental Bureau and others v Commission*, [2005] ECR II-4919, para. 66. Cf. CFI Order of 28 November 2005, Joined Cases T-236/04 and T-241/04, *European Environmental Bureau and Stichting Natuur en Milieu v Commission*, [1995] ECR II-3051, para. 70.

<sup>145</sup> CFI Order of 28 November 2005, Case T-94/04, *European Environmental Bureau and others v Commission*, [2005] ECR II-4919, paras. 67-68 (emphasis added). The same paragraphs can be found in the Order of the CFI of 28 November 2005, Joined Cases T-236/04 and T-241/04, *European Environmental Bureau and Stichting Natuur en Milieu v Commission*, [1995] ECR II-3051, paras. 71-72.

could have refrained from further addressing it. Technically, the rest of what the CFI said in that order is merely *obiter dictum*, but unfortunately it effectively prejudices pleas that other NGO applicants might later make in future similar cases. The Court went on to state:

“In addition, it should be recalled that Article 9(3) of the Aarhus Convention refers expressly to ‘the criteria, if any, laid down in [the] national law’ of the contracting parties which are laid down, with regard to actions brought before the Community judicature, in Article 230 EC. Although it is true that the conditions for admissibility laid down in that provision are strict, the fact remains that the Community legislature adopted, in order to facilitate access to the Community judicature in environmental matters, Regulation (EC) No 1367/2006 (...). “Title IV (Articles 10 to 12) of that regulation lays down a procedure on completion of which certain non-governmental organisations may bring an action for annulment before the Community judicature under Article 230 EC. Since the conditions laid down in Title IV of that regulation are manifestly not satisfied in the present case, it is not for the Court to substitute itself for the legislature and to accept, on the basis of the Aarhus Convention, the admissibility of an action which does not meet the conditions laid down in Article 230 EC. That argument, also, must therefore be rejected.”<sup>147</sup>

Since the CFI had first held that the EC was not bound by the Aarhus Convention at the material time, the latter argument is somewhat puzzling and in fact contradictory.

In the *WWF-UK* case, the applicant asserted that both the Convention and the Regulation “entitle[d] it to be informed early in the decision-making procedure leading to the adoption of TACs and that that entitlement to be involved in the adoption of such measures thereby confers on it a particular status with regard to the adoption of the contested regulation”.<sup>148</sup> Again, there was a temporal issue with respect to the legal effect of Regulation 1367/2006/EC at the material time, since the CFI

observed that the Regulation became applicable only after the adoption of the contested TAC Regulation and went on to argue: “Having regard to the fact that *the question whether an act is of individual concern to a person can be assessed only in the light of the circumstances existing when the contested measure is adopted* (...), the particular status to which the applicant refers would not enable the contested regulation to be considered to have been of individual concern to the applicant at the time of its adoption.”<sup>149</sup>

Though the CFI could have employed this finding alone to dispose of the claimant’s argument, the Court did in fact address the substantive provisions of the Aarhus Regulation and the nature of the rights it confers on “members of the public”. However, instead of considering whether the contested act would actually have been subject to the public participation provisions of the Regulation if it had been adopted after its entry into force – whether a TAC regulation can be considered a “plan or programme relating to the environment” as defined in Article 2 of the Regulation – it chose to digress on the nature of the rights deriving from the Convention and Regulation in terms which do not bode well for the fate of any future pleas that may be raised before the CFI based on those legal instruments. The Court “pointed out that *any entitlements which the applicant may derive from the Aarhus Convention and from Regulation No 1367/2006 are granted to it in its capacity as a member of the public. Such entitlements cannot therefore be such as to differentiate the applicant from all other persons within the meaning of the [settled] case law (...)*”.<sup>150</sup> If this ruling is affirmed on appeal by the ECJ, any hopes that the Convention and Regulation may have a positive impact on standing before the Community judicature may well be shattered for ever.

In essence, the position of the CFI on the Aarhus Convention as set out in this suite of successive decisions between 2005 and 2008 can be summarised as follows:

- The criteria for standing of members of the public as referred to in Article 9(3) of the Convention, with regard to actions

<sup>146</sup> CFI Judgment of 1 July 2008, Case T 37/04, *Região autónoma dos Açores v Council*, para. 93 (emphasis added). Cf. CFI Judgment of 25 April 2007, Case T-264/04, *WWF European Policy Programme v Council*, para. 72, where the Court rejected “the applicant’s argument that the principle of access to information in environmental matters is applicable on the basis of the Aarhus Convention since, at the time when the contested decision was adopted, neither the Aarhus Convention nor the regulation implementing it was in force”.

<sup>147</sup> *Ibid.*, (emphasis added).

<sup>148</sup> CFI Order of 2 June 2008, Case T-91/07, *WWF-UK Ltd v Council*, para. 80.

<sup>149</sup> *Ibid.*, para. 83 (emphasis added).

<sup>150</sup> *Ibid.*, para. 82 (emphasis added).

brought before the Community judicature, are those laid down in the fourth indent of Article 230 EC (and, as a Party to the Convention, the EC is fully entitled to lay down such restrictive criteria).

- The internal review procedure on completion of which certain NGOs may bring an action for annulment before the Community judicature under Article 230 EC was instituted by the Community legislature in Title IV of Regulation 1367/2006/EC in order to facilitate access to justice in environmental matters.
- Whenever the conditions of entitlement laid down in Title IV of that Regulation are not satisfied, the Court cannot substitute itself for the legislature and accept, on the basis of the Aarhus Convention, the admissibility of an action for annulment which does not meet the conditions laid down in Article 230, fourth indent EC.
- Any rights which natural or legal persons may derive from the Aarhus Convention and from Regulation 1367/2006/EC are granted to them in their capacity as members of the public and cannot therefore be such as to differentiate them from all other persons so as to make them individually concerned by a Community act within the meaning of Article 230, fourth indent EC.

Though the CFI has not yet had the opportunity to rule directly on the question of the admissibility of an action for annulment brought by an NGO meeting the criteria for entitlement under the Aarhus Regulation following the actual completion of an internal review procedure under that Regulation, it seems quite likely, in view of this line of reasoning, that the Court will consider such an action admissible only insofar as it is directed against the decision on the request for internal review (or lack thereof) and aimed at protecting the procedural prerogatives granted to NGOs by that special administrative review procedure. This would imply that, insofar as the action is actually aimed at the

judicial review of the initial act or omission contravening EC environmental law, the full rigour of the *Plaumann* doctrine will continue to apply. In view of this position, we do not consider it very useful to speculate on the consequences of the procedural rights granted to certain members of the public by the Aarhus Regulation for their standing before the Community judicature. In view of the judgments of the CFI in the *Açores* and *WWF-UK* cases, there is no basis to support the view of commentators who expect these rights will automatically result in an extension of *locus standi*.<sup>151</sup>

One has the impression that the CFI, following its failed 2002 “revolt” against that doctrine in the *Jégo-Quééré* case, has now returned to the doctrinal fold with a vengeance and is entrenching itself in a conservative interpretation of Article 230 which at times seems to be going even beyond the dictates of the settled ECJ jurisprudence.

Though the ECJ itself has not yet ruled on any Aarhus-related pleas raised in actions for annulment, it will soon have to do so in the pending appeals against the orders of the CFI in the *Açores* and *WWF-UK* cases. Though the Court’s earlier appeal judgments in *UPA* and *Jégo-Quééré* have forcefully rejected all arguments advanced by appellants in their attempts to convince it to depart from the *Plaumann* orthodoxy – arguing that no relaxation of the standing rules laid down in the fourth indent of Article 230 EC is possible without an amendment of that Treaty provision – it is submitted that, in the case of an appeal falling within the scope of Article 9(3) of the Aarhus Convention, there are special legal circumstances that would justify an interpretation of those rules in a manner consistent with the Community’s international obligations under the Convention. According to Article 300(7) EC, international agreements concluded by the EC are “binding on the institutions of the Community”, a category that includes the ECJ. As there is nothing in the actual wording of Article 230, fourth indent, that would prevent a different interpretation of

<sup>151</sup> Thus, inter alia, Crossen, T and Niessen, V. 2007. NGO Standing in the European Court of Justice – Does the Aarhus Regulation Open the Door? 16 *Review of European Community and International Environmental Law*, pp 332-340 at pp 339-340.

the “individual concern” requirement in environmental cases, taking into account the special nature of environmental interests, it would be possible for the Court – which, after all, has itself developed the doctrine of “consistent interpretation” as a means of enhancing the effectiveness of Community law – to depart from the *Greenpeace* case-law without exceeding the bounds of its judicial powers and without necessarily having to reverse its more recent *UPA* and *Jégo-Quéré* jurisprudence. We consider that, as a matter of international law, it actually has an *obligation* to do so.

### 3.2.4 Remedies, their effectiveness and timeliness

From a first glance at the Treaty, one has the impression that actions for annulment or failure to act, in theory, can provide the successful plaintiff with an effective remedy. Indeed, Article 231 EC provides that if an action for annulment is found admissible and well founded, the ECJ or CFI “shall declare the act concerned to be void”. However, if the illegal act is a Regulation, the Court has the discretionary power to state that certain legal effects of the annulled act “shall be considered as definitive”.<sup>152</sup> When an act has been declared void or a failure to act has been declared contrary to the Treaty, the institution concerned “shall be required to take the necessary measures to comply with the judgment of the Court of Justice”.<sup>153</sup> The Court’s decision is clearly legally binding on the defendant institution. However, the specific nature of the Community legal order and the duration of proceedings before the Community judicature may in practice limit the timeliness and effectiveness of the remedies provided in the Treaty, especially in environmental cases.<sup>154</sup>

First of all, as a general rule, actions brought before the ECJ or CFI shall not have any automatic suspensive effect.<sup>155</sup> To be sure, the Court has the power to order the suspension of the application of the contested act pending the outcome of the annulment proceedings, but it will only do so in rare cases in which the plaintiff succeeds in convincing it “that circumstances

so require”.<sup>156</sup> In addition, the Court has the power, in all cases before it, to “prescribe any necessary interim measures”.<sup>157</sup> It has done so in only a few environmental cases since the beginning of EU environmental policy. Under Article 39 of the Statute of the Court of Justice, these powers to take urgent measures, which can be considered “injunctive relief” within the meaning of the Aarhus Convention, are exercised by the President of the Court, acting alone, by way of a summary procedure. Any ruling on suspension or interim measures “shall be provisional and shall in no way prejudice the decision of the Court on the substance of the case”.

### 3.2.5 Cost of legal action and availability of legal aid

The Statute of the Court of Justice provides that, subject to two exceptions which do not seem relevant in environmental cases, “[p]roceedings before the Court shall be free of charge”.<sup>158</sup> While there are, consequently, no court fees to be paid, the Statute does require all parties to proceedings other than member states or institutions to be represented by a lawyer authorised to practise before a national court of a member state.<sup>159</sup> However, the provisions on legal aid provide for the possibility of counsel being appointed and remunerated by the Court for any party “who is wholly or in part unable to meet the costs of the proceedings”.<sup>160</sup>

A decision on whether or not legal aid should be granted in full or in part is to be taken by a formation of the Court, which shall not only consider whether the applicant fulfils the conditions for entitlement to aid, but also “whether there is manifestly no cause of action”.<sup>161</sup> In the order by which it decides that a person is entitled to receive legal aid, the Court shall order that a lawyer be appointed to act for him or her.<sup>162</sup> If it decides to deny the application in whole or in part, the order shall state the reasons for such refusal.<sup>163</sup>

<sup>152</sup> EC Treaty, art. 232.

<sup>153</sup> EC Treaty, art. 233.

<sup>154</sup> According to data compiled by Ludwig Krämer, the average duration of annulment proceedings under Article 230 in environmental cases has doubled since the early 1990s and was 30 months in the period 2004-2005. See Krämer, L. 2006. Statistics on Environmental Judgments by the EC Court of Justice, 18 *Journal of Environmental Law*, pp. 407-421, at p. 413 (Table 7).

<sup>155</sup> Contrast this Treaty provision with Article 91 (2) REACH which provides that an appeal lodged before the Board of Appeal of the ECHA “shall have suspensive effect”.

<sup>156</sup> EC Treaty, art. 242.

<sup>157</sup> EC Treaty, art. 243.

<sup>158</sup> Rules of Procedure of the Court of Justice, available at <http://curia.europa.eu/en/instit/btxdocfr/btxsenvigueur/btx5.pdf>, art. 72.

<sup>159</sup> Statute of the Court of Justice, available at <http://curia.europa.eu/en/instit/btxdocfr/btxsenvigueur/statut.pdf>, art. 19.

<sup>160</sup> Rules of Procedure of the Court of Justice, art. 76(1).

<sup>161</sup> *Ibid.*, art. 76(3).

<sup>162</sup> Supplementary Rules, available at <http://curia.europa.eu/en/instit/btxdocfr/btxsenvigueur/regladd.pdf>, art. 4.

<sup>163</sup> Rules of Procedure of the Court of Justice, art. 76(3).

The person granted legal aid in principle remains free to choose his or her lawyer; but if the Court considers that the choice of counsel is “unacceptable”, it can, in the light of the suggestions made by a competent authority of the assisted party’s country of residence, “of its own motion appoint a lawyer to act for the person concerned”.<sup>164</sup> The lawyer’s expenses and fees shall be paid by the Court, which, in its final decision as to costs, can order the losing party to refund the amounts advanced as legal aid.<sup>165</sup> Prior to that decision, the President of the Court may even, on application by the lawyer, order that he or she receive an advance from the Court’s funds.<sup>166</sup>

The application for legal aid – which may be made at any time, including prior to proceedings – shall be accompanied by “evidence of the applicant’s need of assistance”. This rule was obviously drafted in relation to the situation of individual applicants rather than NGOs. This appears from the clause specifying that such evidence shall be provided “in particular by a document from the competent authority certifying [the applicant’s] lack of means”.<sup>167</sup> There may be difficulties for NGOs to obtain such a document from a “competent authority” in their country, but there is nothing in the rules that excludes them in principle from the benefit of legal aid, though we have not found any cases in which an NGO has been granted this benefit so far. An application for legal aid need not be made through a lawyer,<sup>168</sup> and there are no particular other formalities to be fulfilled. If the application is made prior to the commencement of proceedings, it shall “briefly state the subject of [the] proceedings” which the applicant wishes to initiate.<sup>169</sup>

Unless they have been able to secure legal aid or legal representation on a pro bono basis, applicants will have to advance the costs and fees of their own counsel. Apart from any “sums payable to witnesses and experts” – who are very

seldom summoned or consulted in proceedings before the Community judicature – the only recoverable costs are the “expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers”.<sup>170</sup> These costs are awarded only if applied for by the successful party.<sup>171</sup>

Since in annulment proceedings the defendant is by definition an institution which is represented by agents of its own legal service, who are civil servants of that institution, the financial risk for an individual or NGO bringing an action for annulment is rather limited, as the only recoverable expenses would be the travel and subsistence expenses of those agents, based in Brussels or even, in the case of the European Parliament, in Luxembourg itself, for the purpose of attending the hearing in Luxembourg, if a hearing is actually held. The institutions would be able to claim costs for the remuneration of lawyers only where they have recourse to the services of external counsel, which they sometimes do in complex competition or state aid cases, but have not done in any environmental cases so far.

In the type of proceedings which have been the focus of this study, it therefore appears that the cost of recourse to judicial review before the Community judicature is “not prohibitively expensive” within the meaning of Article 9(4) of the Convention and that there are “assistance mechanisms to remove or reduce financial (...) barriers” to access to justice in accordance with Article 9(5).

<sup>164</sup> Supplementary Rules, art. 4.

<sup>165</sup> Rules of Procedure of the Court of Justice, art. 76(5).

<sup>166</sup> Supplementary Rules, art. 5.

<sup>167</sup> Rules of Procedure of the Court of Justice, art. 76(1).

<sup>168</sup> *Ibid.*, art. 76(2).

<sup>169</sup> *Ibid.*, art. 76(2).

<sup>170</sup> *Ibid.*, art. 73.

<sup>171</sup> Rules of Procedure of the Court of Justice, art. 69. If costs are not claimed each party shall bear its own costs.

## 4 CONCLUSIONS AND RECOMMENDATIONS

### 4.1 Conclusions of the compliance assessment

Based on the assessment in chapter 3, we shall now provide an overall evaluation of access to justice at EC level using the standards that were applied in the Milieu Ltd study carried out for DG Environment in 2007. That study contains an overview table presenting a comparative assessment of each of the 25 member states studied. Using exactly the same evaluation criteria, we have added a 26th row to this table for the EC as a Party. The “grading” system applied in this table<sup>172</sup> – which we also used to evaluate the EC’s performance below – was justified in the following terms by the authors of the Milieu Ltd report:

“The most important element for the overall evaluation of the system is legal standing, since if no legal standing is granted, members of the public can hardly have access to justice. As a consequence, if a country limited legal standing (either establishing strict criteria or strictly interpreting the concept of “interest”) to *effectively bar all or almost all environmental organisations from challenging acts or omissions that contravene national law relating to the environment*, the overall assessment of the system was negative.”<sup>173</sup>

Member State / Contracting Party	Legal standing	Effective Remedies	Costs and length (including legal aid)	Overall assessment
Austria	--	+	+++	--
Belgium	--	+	+	+
Cyprus	+	--	++	+
Czech Republic	+	--	++	+
Denmark	++	+++	+++	+++
Estonia	+++	+++	+	++
Finland	+	+	++	+
France	+++	+++	+	++
Germany	--	++	+	--
Greece	++	++	+	++
Hungary	+++	+	--	--
Ireland	+++	+++	--	+
Italy	+++	++	--	++
Latvia	+++	+	--	+
Lithuania	++	+	++	++
Luxembourg	++	+++	+	++
Malta	--	+	+	--
Netherlands	+	++	+	+
Poland	+	++	++	+
Portugal	+++	++	++	++
Slovakia	++	++	++	++
Slovenia	++	++	+	++
Spain	+++	--	++	+
Sweden	+	++	++	+
United Kingdom	+++	--	--	--
<b>European Community</b>	<b>--</b>	<b>+</b>	<b>Costs +++ Length --</b>	<b>--</b>

**172** The symbols used in this table are explained as follows:

KEY:	
--	= unsatisfactory (obstacle)
+	= could be better
++	= satisfactory
+++	= good

Table adapted from: Milieu Ltd (2007) *Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters*, Report for the European Commission, DG Environment, Brussels, p. 18.

**173** Milieu Ltd (2007) *Summary Report on the inventory of EU Member States' measures on access to justice in environmental matters*, Report for the European Commission, DG Environment, Brussels, p. 17 (original emphasis).

The preponderance attributed to the criterion of standing is based on the findings of the Aarhus Convention Compliance Committee, which concluded from an analysis of Article 9(3) in the context of the other provisions of the Convention that contracting Parties “may not take the clause ‘where they meet the criteria, if any, laid down in its national law’ as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organisations from challenging acts or omissions that contravene national law relating to the environment”.<sup>174</sup>

It is obvious from the analysis in this study that the EC has a major problem of non-compliance with its obligations under Article 9(3) of the Aarhus Convention. There is effectively no standing for either NGOs or individuals to challenge acts or omissions of EC institutions and bodies in judicial review procedures at EC level, as long as the ECJ continues to apply the *Plaumann* test, as it has continued to do ever since the Community became a contracting Party to the Convention. Some administrative review procedures are available but the main one ostensibly introduced by the Community legislator in order to comply with Article 9(3) obligations – the internal review procedure instituted by Regulation 1367/2006/EC – falls far short of what would be required to achieve full compliance. It is only accessible to some environmental NGOs and there is as yet no evidence that it provides an effective remedy.

Where the formidable obstacle of *locus standi* can be overcome and proceedings before the Community judicature reach the merits, a resulting judicial decision can in theory provide an effective remedy, but not a timely one, due to the length of proceedings and the limited availability of injunctive relief. However, contrary to the situation in many member states, the cost of proceedings is not a major obstacle to access to justice at the EC level. The actual proceedings are free of charge and the costs that a losing plaintiff may have to bear are relatively limited and rather predictable.

Nevertheless, in view of the major problem of standing as analysed in section 3.2.3, the overall assessment of the EC’s performance as a Party to the Convention can only be negative, as indicated in the final column of the table.

#### 4.2 Recommendations

The EU institution that has the most immediate power to act to ensure compliance by the Community with its obligations under Article 9(3) of the Aarhus Convention is the ECJ which, as explained above, could, within the limits of its judicial prerogatives, interpret the provisions of Article 230 EC and Regulation 1367/2006/EC in a manner consistent with those international obligations, and reverse the latest rulings of the CFI which are unnecessarily conservative in their application of the traditional case-law on standing for non-privileged applicants.

If, however – as unfortunately seems more likely – the ECJ confirms those CFI decisions on appeal and further entrenches itself in defending its *Greenpeace*, *UPA* and *Jégo-Quééré* jurisprudence and asserting that only the member states, as “masters of the Treaties” have the power to expand access to the Community judicature by amending Article 230 of the EC Treaty, those member states will be again squarely faced with their responsibilities as contracting Parties to the Aarhus Convention. The pressure on them to act would increase if the Convention’s Compliance Committee were to find, on the basis of the communication from a member of the public now before it, that the EC is not in compliance with Article 9(3), as may happen later this year or in 2010.

In view of the current institutional and political quagmire in which the EU finds itself, and certainly for as long as the Treaty of Lisbon has not entered into force, it would be naïve to expect that the member states would be prepared to initiate an intergovernmental conference (IGC) only to consider an amendment to Article 230 EC. If one accepts the ECJ’s position that such an amendment would be required, one could then only

<sup>174</sup> The italicised words in the above quotation from the *Milleu Ltd* report are a literal quote from the findings and recommendations of the Aarhus Convention Compliance Committee in the case concerning compliance by Belgium, see *supra* n. 17.

hope that this will be put on the agenda of the first post-Lisbon IGC, whenever that is convened.

However, there may be an alternative solution to provide adequate public access to a judicial review procedure in environmental matters at EU level, short of amending the Treaties. Article 225a EC empowers the Council to “create judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas”. Such a Council decision establishing a judicial panel, which can only be taken “unanimously on a proposal from the Commission and after consulting the European Parliament and the Court of Justice”, shall not only “lay down the rules on the organisation of the panel” but also “the extent of the jurisdiction conferred upon it”. On this basis, it would seem quite possible for the EU institutions together to take constructive action to establish a Judicial Panel for Environmental Disputes to provide judicial review of acts and omissions of EU institutions and bodies which contravene EC environmental law in accordance with the requirements of the Aarhus Convention.

Finally, in order to make the system of legal protection established by the EC Treaty more operational, it remains crucial for the Council to adopt the proposed Directive on access to justice in order to establish minimum harmonised standards of access to environmental justice in the member states, and enable national courts to fully play their role in ensuring the effectiveness of EC environmental law by enforcing the rights it grants to individuals and organisations. The incoming European Parliament should call upon the Council to do so without further delay, in view of the favourable opinion which the EP expressed on the Commission’s proposal in 2004.

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### About the author



Professor Dr Marc Pallemmaerts has been Senior Fellow and Head of the Environmental Governance Research Programme at IEEP since 2005. In this capacity, he has been responsible for a wide range of policy research projects commissioned by EU institutions, national

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A lawyer and political scientist by training, he is also professor of European environmental law at the University of Amsterdam and professor of international and European environmental law at the Université Libre de Bruxelles. Before joining IEEP, he served as a legal and policy advisor to successive government ministers at the regional and federal level in Belgium, most recently as Deputy Chief of Staff to the Belgian State Secretary for Energy and Sustainable Development from 1999 to 2003. Previously, in his capacity as senior advisor to the State Secretary for Environment, he headed Belgium's delegation to the UNECE working group which negotiated the Aarhus Convention. In 2003, he was elected Chairman of the Convention's Task Force on Access to Justice, as well as Chairman of its Meeting of the Parties, a position he held until May 2005.

Professor Pallemmaerts has published widely on national, European and international environmental law. His books include *Human Rights and the Environment* (Council of Europe Publishing, Strasbourg, 2002, with M. Déjeant-Pons) and *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law* (Europa Law Publishing, Groningen, 2009, forthcoming).

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The Institute for European Environmental Policy (IEEP) is an independent not for profit institute dedicated to advancing an environmentally sustainable Europe through policy analysis, development and dissemination. Based in London and Brussels, the Institute's major focus is the development, implementation and evaluation of the EU's policies in the field of environment and sustainable development, with programmes on climate change and energy, transport, industrial pollution and waste, agriculture, biodiversity, fisheries, and EU environmental governance. IEEP brings an independent and critical analytical perspective to bear on policy questions and seeks to raise awareness of European environmental policy and to advance policy-making along sustainable paths. IEEP undertakes research and provides consultancy and information services, working both independently and on commissioned projects. Its partners and audience range from international and European institutions to local government, academia, non-governmental organisations, business and other stakeholders who contribute to policy formulation and implementation.



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We are the UK affiliate of the WWF Network, the global environmental organisation founded in 1961 and now active in over 100 countries. Using our unique combination of practical experience, knowledge and credibility, our staff work with governments, businesses and communities both here in the UK and around the world so that people and nature thrive within their fair share of the planet's natural resources. In 2007/08 we spent £42m on our work; most of our income comes from our dedicated members and supporters.

WWF-UK is a member of the Coalition for Access to Justice for the Environment (CAJE) and is campaigning for improved access to justice for citizens and organisations at the UK and EC level.

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