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What Room for the 1998 Aarhus Convention in the European Green Deal? An Analysis of the Possible Reluctance of the Court of Justice

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1. *Introduction*

In the Communication setting out the European Green Deal, the European Union (EU) Commission affirmed that «[s]ince it will bring substantial change, active public participation and confidence in the transition is paramount if policies are to work and be accepted. A new pact is needed to bring together citizens in all their diversity, with national, regional, local authorities, civil society and industry working closely with the EU's institutions and consultative bodies»[1]. The role explicitly granted to citizens in the elaboration and implementation of EU environmental policies and laws significantly ties the delivery of the Green Deal to the enforcement in the EU legal order of the Aarhus Convention, the 1998 landmark environmental mixed agreement that enables citizens and environmental Non-Governmental Organizations (NGOs) to participate in decision-making procedures and have access to information and justice in environmental matters[2].

This article aims at discussing the Commission's efforts to exploit the functional connection between the Green Deal and the Aarhus Convention. It asks whether the Commission's attempts to improve EU and its Member States' implementation of the Aarhus Convention are sufficient to the purpose of the

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[1] COM (2019) 640 final, p. 1.

[2] For an in-depth analysis of the procedural rights in the field of environmental law enshrined in the Aarhus Convention, please see R. LANCEIRO, *The Review of Compliance with the Aarhus Convention of the European Union*, in *Global Administrative Law and EU Administrative Law Relationships, Legal Issues and Comparison*, edited by E. CHITI, B.G. MATTARELLA (eds.), Springer-Verlag Berlin Heidelberg, 2011, pp. 359-383.

European Green Deal, in particular in light of the «overly rigid»[3] jurisprudence of the Court of Justice of the European Union (CJEU). The article is organized as follows. The second Section assesses how the CJEU has managed the opening of the EU legal order towards environmental protection through the 1998 Aarhus Convention. To this end, three emblematic case-laws will be analysed. In particular, the fact that the CJEU persistently refuses to confer direct effect to certain provisions of the 1998 Aarhus Convention seems to demonstrate the Court's attempt to protect EU environmental law, and the potential legislation stemming from the Green Deal, from the Convention's influence. In light of the reported failure of EU institutions, including the Court of Justice, to fully comply with the Aarhus Convention's requirements on access to justice in environmental matters, the third Section analyses the efforts of the Commission to restore EU institutions' compliance in the field, by amending Regulation (EC) No 1367/2006 (so-called Aarhus Regulation)[4]. In its conclusions, this paper points out three reasons why the Commission, via the Green Deal, should encourage a wider openness towards the Aarhus Convention.

2. *The Court's effort to protect EU environmental law from the influence of the Aarhus Convention*

To start with, it is important to stress that, according to Article 4.2 of the Treaty on the Functioning of the European Union (TFEU), environmental policy is a shared competence, where the Member States, by virtue of the principle of subsidiarity, shall exercise their competence only to the extent that the Union has not already exercised, or has decided to cease exercising, its own competence. The possibility given by the Treaties to the EU and the Member States to implement environmental objectives is also affirmed in Article 191.4 TFEU, according to which both, within their respective spheres of competence, shall cooperate with third countries and competent international organisations to promote environmental protection. In the case of an international environmental

[3] B. PIRKER, *Access to Justice in Environmental Matters and the Aarhus Convention's Effects in the EU Legal Order: No Room for Nuanced Self-executing Effect?*, in *Review of European Community & International Environmental Law*, 25 (1) 2016, p. 1.
[4] 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.

treaty, cooperation between EU, its Member States and third parties should be concluded in the form of a mixed agreement,[5] i.e. treaties touching on exclusive competences respectively to the EU and to the Member States.

The Aarhus Convention is a perfect example of a mixed agreement in the field of environmental protection. Other international environmental treaties that bind both the EU and its Member States are, to mention but a few, the UN Framework Convention on Climate Change (UNFCCC)[6], which provides the fundamental international framework to address climate change issues, the 1997 Kyoto Protocol[7], with the aim to reduce greenhouse gas emissions through mitigation and reduction mechanisms, and the Paris Agreement[8], adopted in December 2015, which substitutes the Kyoto Protocol.

As confirmed under Article 216.2 TFEU, EU's international agreements bind EU institutions and its Member States. This gives rise to what Katja Ziegler calls «a triangular relationship» [9] between EU law, international law and the Member States, where EU's approach to international law influences Member States' approaches to international law, which in turn impact on EU's approach to international law. The substantive interaction between these three distinctive but closely connected legal orders results in their miscellaneous «cross-fertilization»[10], promoting legal coherence and uniform application. In other words, from Article 216.2 TFEU stems, firstly, the obligation both for EU institutions and the Member States to adopt, when required, pieces of legislation to give effect to those international provisions that need to be implemented[11]. Secondly, from their entry into force, EU international agreements become «an

[5] For a thorough analysis on the particular features of a mixed agreement, please see J.H. JANS, *Who is the referee? Access to justice in a globalised legal order: A case analysis of ECJ judgment C-240/09 Lesoochranárske zoskupenie*, in *Review of European Administrative Law*, Vol. 4, Nr. 1, 87-99, 8 March 2011.
[6] UN Framework Convention on Climate Change, 1992, FCCC/INFORMAL/84 GE.05-62220 (E) 200705.
[7] Kyoto Protocol to the United Nations Framework Convention on Climate Change, FCCC/CP/1997/7, 1997.
[8] Paris Agreement, Conference of the Parties Twenty-first session Paris, 30 November to 11 December 2015, FCCC/CP/2015/L.9/Rev.1.
[9] K. ZIEGLER, *The Relationship between EU Law and International Law*, University of Leicester School of Law Research Paper No. 15-04, 2015, p. 4.
[10] ID., *op. ult. cit.,* p. 6.
[11] F. MARTINES, *Direct Effect of International Agreements of the European Union*, in *The European Journal of International Law*, Vol. 25 no. 1, 2014, p. 132.

integral part of the European legal order»[12], and are included within the hierarchy of EU law. As Francesca Martines explained, the principles governing the relationship between the international and the EU legal orders lie in the rank that international law assumes within the hierarchy of EU sources, as well as in the chosen method of incorporation of international law into the EU legal order[13]. As to the former, the Court traditionally established the supremacy of international law over EU secondary legislation, positioning it between secondary and primary sources, unless it constituted a norm of *ius cogens*. As to the latter, the *Haegeman* doctrine[14] privileged the technique of automatic treaty incorporation within EU law, according to which there is no *ex ante* evaluation of the international law norm to be incorporated, rather the assessment of its exhaustiveness is operated *ex post* by the CJEU, which not only guarantees the uniform application of the incorporated provision, but also exercises its exclusive jurisdiction to interpret and to determine the effects of the international law norm contained in the agreement. Hence, the CJEU plays a paramount role in deciding whether an international provision may, or may not, be directly effective in the EU legal order. This is all the more relevant in the field of the environment, considering that climate change is a worldwide phenomenon requiring global political and legal solutions, and that environmental law necessarily entails elements of interaction among different levels and systems of law, which strengthen the breadth and efficacy of environmental provisions. Therefore, adopting a strict approach towards the incorporation of international provisions into EU law in the field of the environment may invalidate the efforts of this multi-layered legal context.

In her influential work on the relationship between international law and EU law, Ziegler concludes that the approach traditionally endorsed by the CJEU has changed since *Kadi I* in 2008, turning it into an «outcome-oriented», «selective» and «instrumental»[15] use of international law. In both *Kadi I*[16] and

[12] CJEU, Case 181/73, R. & V. Haegeman v. Belgian State, 1974.
[13] F. MARTINES, *op. cit.,* pp. 132 ss.
[14] CJEU, *Haegeman*, cit.
[15] K. ZIEGLER, *op. cit.,* p. 16.
[16] CJEU, Joined Cases C-402/05 P and C-415/05 P, Yassin Abdullah Kadi and Al Barakaat International Foundation, 2008.

Kadi II[17] cases, the Court challenged the validity of Regulation n. 881/2002/EC[18] transposing UN Security Council Resolutions imposing sanctions (asset freezing and travel ban) on individuals included in a list of persons suspected of terrorism, giving a rather narrow interpretation of direct effect than it used to. In *Kadi I*, in fact, the CJEU interpreted restrictively Article 351 TFEU[19], holding that «the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the Treaties»[20]. Therefore, the Court concluded that an international obligation that is in conflict with the core EU principles of liberty, democracy, and human rights cannot be part of the EU legal order, and ruled the annulment of Regulation n. 881/2002/EC in so far as it concerned the appellant[21]. As widely acknowledged, *Kadi I* has been seen as «a perfect representation of the jurisprudential boldness of the CJEU»[22], where the Court was not afraid to step up to defend the primacy of the EU legal order, an approach that the CJEU confirmed in the following *Kadi II* decision[23]. In this occasion, the Court, in Ziegler's view[24], showed to be more prone to open the door to international law when its provisions serve to confirm the autonomy and

[17] CJEU, Joined Cases C-584/10 P, C-593/10 P, and C-595/10 P, Commission, Council, United Kingdom v. Yassin Abdullah Kadi, 2013.
[18] EC Council Regulation n. 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the AlQaida network, 2002 O.J. (L139) 9 (EC).
[19] Article 351 TFEU: «The rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of the Treaties. To the extent that such agreements are not compatible with the Treaties, the Member State or States concerned shall take all appropriate steps to eliminate the incompatibilities established. Member States shall, where necessary, assist each other to this end and shall, where appropriate, adopt a common attitude. In applying the agreements referred to in the first paragraph, Member States shall take into account the fact that the advantages accorded under the Treaties by each Member State form an integral part of the establishment of the Union and are thereby inseparably linked with the creation of common institutions, the conferring of powers upon them and the granting of the same advantages by all the other Member States».
[20] CJEU, *Kadi*, cit., para 285.
[21] K. LENAERTS, *The Kadi Saga and the Rule of Law within the EU*, in *SMU Law Review* Vol. 67, Issue 4, 2014, p. 707, p. 710.
[22] G. MARTINICO, *Building supranational identity: Legal reasoning and outcome in Kadi I and Opinion 2/13 of the Court of Justice*, in *Italian Journal of Public Law*, Vol. 8, Issue 2, 2016, p. 242. See also, N. WALKER, *Opening or Closure? The Constitutional Intimations of the ECJ*, in L. AZOULAI, M. POIARES MADURO (eds.), *The past and the future of EU Law*. *The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty*, 2010.
[23] G. MARTINICO, *op. cit*., p. 247.
[24] K. ZIEGLER, *op. cit.,* p. 17.

the primacy of the EU legal order, while becoming more reluctant to do so when international law may limit the power of the EU.

In light of the foregoing, understanding whether the Court provides the Aarhus Convention or part of its provisions with direct effect is of primary importance, since, if this is the case, they can be used to review internal implementing legislation in the field of the environment and they can also be invoked by individual addresses. In this regard, Article 9.2 of the Convention states that the contracting parties should «ensure that members of the public concerned (a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure» to challenge environmental decisions. It leaves therefore a certain margin of discretion in defining those members of the public who have that right. Article 9.3 provides that these criteria shall be laid down in national law, while also containing the obligation for contracting parties to give the public wide access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene environmental provisions established therein.

As we can read in the preamble of Directive 2003/4/EC[25] on public access to environmental information, the Aarhus Convention was signed by the European Community on 25 June 1998 and was later approved on 17 February 2005 by Decision 2005/370/EC[26] in order to provide for consistent Community provisions aligned with the Convention. Several pieces of secondary legislation have been adopted since then to comply with the three pillars of the Convention. For instance, Directive 2011/92/EU[27] on the assessment of the effects of certain public and private projects on the environment, Directive 2004/35/CE[28] on environmental liability with regard to the prevention and remedying of

[25] 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.
[26] Council Decision 2005/370/EC of 17 Feb. 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.
[27] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment Text with EEA relevance.
[28] Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

environmental damage or Directive 2003/35/EC[29] providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment. For the purposes of this paper, specific attention is devoted to Regulation n. 1367/2006/EC, whose Article 10.1 restricts the scope of Article 9.3 of the Convention by establishing a system of internal review to EU institutions and bodies limited to environmental NGOs. In order to evaluate the selective or, on the contrary, the flexible approach undertaken by the CJEU on access to justice in environmental matters, the next paragraphs will examine three cases concerning preliminary rulings referred by national courts on Article 9.3 of the Aarhus Convention.

2.1 *The Lesoochranárske case*

In the *Lesoochranárske* case[30], the applicant (*Lesoochranárske zoskupenie VLK*), a Slovakian environmental NGO[31], requested the Slovakian Ministry of the Environment to participate in the administrative proceedings concerning a derogation from the system of protection of brown bears[32] proposed by pro-hunting groups. In support of its notification, the applicant claimed that the Aarhus Convention, and particular Article 9.3 thereof, had direct effect in EU law. The Slovakian Ministry rejected the NGO's request on the basis that the Convention, pursuant to the abovementioned Article 9.3, had to be implemented in national law in the first place before it could be invoked. On appeal, the Slovakian Supreme Court referred the question of whether Article 9.3 had direct effect to the CJEU[33].

[29] 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.
[30] CJEU, Case C-240/09, Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011.
[31] On the obstacles environmental NGOs have to deal with to have access to justice in the framework of the Aarhus Regulation, please see DG Environment – Milieu Consulting Sprl, Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters, Final report, September 2019, 07.0203/2018/786407/SER/ENV.E.4.
[32] Such standards of protection had been conferred by the so-called Habitats Directive. Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, O.J. 1992, L 206/7.
[33] The issue of jurisdiction on the Aarhus Convention, being it a mixed agreement, is not discussed in this occasion. For an in-depth analysis on the matter, please see J.H. JANS, cit., and M.

The Court held[34] that Article 9.3 of the Aarhus Convention does not contain any clear and precise obligation capable of directly regulating the legal position of individuals, given that that provision is subject to the adoption of a subsequent measure to be adopted at the national level. In the absence of EU rules governing the matter, the Court nevertheless recognized that in order to ensure effective environmental protection, Member States should lay down detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law. The Court also stressed that such detailed procedural rules must be no less favourable than those governing similar domestic actions (in light of the principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (by virtue of the principle of effectiveness).

The legal reasoning of the Court thus led to the conclusion that, in order to ensure effective judicial protection in the field of EU environmental law, national courts have a duty to interpret their national law in a way which, «to the fullest extent possible»[35], is consistent with the objectives laid down in Article 9.3 of the Aarhus Convention, so as to enable an environmental protection organisation, such as the applicant, to challenge before a court a decision contrary to EU environmental law.

This judgement has been widely discussed and two main positions may be identified. For some commentators[36], the Court seems to have developed a perfectly functioning framework of direct effect but almost never uses it, with just few exceptions, preferring to delegate to national courts the obligation to broaden access to justice pursuant to the principle of effectiveness. Other commentators[37] looked more at the bright side, focusing on the crucial relevance

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ELIANTONIO, *Case C-240/09, Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky, Judgment of the Court of Justice (Grand Chamber) of 8 March 2011*, *nyr, and Case C-115/09, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg (intervening party: Trianel Kohlekraftwerk Lünen GmbH & Co. KG) Judgment of the Court of Justice (Fourth Chamber) of 12 May 2011*, in *Common Market Law Review* 49, 2012, pp. 767–792. See also, a G. LIGUGNANA, *Poteri giustiziali dell'amministrazione europea e decisioni in materia ambientale*, in *Federalismi*, 8 March 2017.

[34] CJEU, Case C-240/09, para. 45.

[35] ID., para. 50-51.

[36] A. ROGER, *A lost opportunity for improving access to justice in environmental matters: the CJEU on the invocability of the Aarhus Convention*, in EU Law Analysis, 15 February 2015.

[37] M. ELIANTONIO, cit., p. 784 and ff.

that the CJEU gave to national courts as Union courts in the effectively enforcement of EU law.

On this behalf, the Aarhus Convention Compliance Committee (ACCC), the compliance mechanism put in place under the Aarhus Convention, interpreted this judgment as an example of the Court's non-compliance with Article 9.3 and 9.4. In particular, it expressed its regret that «despite its finding with respect to the national courts, the CJEU does not consider itself bound by this principle [ensuring effective judicial protection, N/A»[38], and continued by affirming that if the Court had bound itself in the same way as the national courts, the EU might have improved its compliance with the abovementioned provisions.

2.2 *The Stichting Natuur en Milieu and the Vereniging Milieudefensie cases*

In *T-396/09*[39] and *T-338/08*[40], two Dutch environmental NGOs (*Stichting Natuur en Milieu* and *Vereniging Milieudefensie*) asked the General Court, the lower court of the CJEU, to annul the decision taken by the Commission in which it rejected their request for internal review of its own decision[41]. The denial of the Commission to their request was justified by the fact that, according to the Commission, Article 2.1(g) of the Aarhus Regulation applied only in respect of a measure of individual scope[42] under environmental law. The applicants brought the issue before the General Court, claiming that Article 10.1 of the Aarhus

[38] Aarhus Convention Compliance Committee, Findings and Recommendations of the Compliance Committee concerning compliance by the European Union with the Aarhus Convention, adopted on 17 March 2017 (ACCC/C/2008/32(EU)), para. 83.
[39] CJEU, Case T-396/09, *Vereniging Milieudefensie & Stichting Stop Luchtverontreiniging Utrecht v European Commission*, (General Court), 14 June 2012.
[40] CJEU, Case T-338/08, *Stichting Natuur en Milieu, Pesticide Action Network Europe v Commission* (General Court), 14 June 2012.
[41] Directive 2008/50/EC.
[42] The Court examined the notion of individual scope in CJEU, T-12/17, *Mellifera eV, Vereinigung für wesensgemäße Bienenhaltung v European Commission*, 27 September 2018. For a comment, please see M. PAGANO, *The "Mellifera" case and access to environmental justice under the Aarhus Regulation: new findings, old story*, in *EU Law Analysis*, http://eulawanalysis.blogspot.com/2018/10/the-mellifera-case-and-access-to.html. See also, C. PITEA, *Il caso Mellifera dinanzi alla Corte di giustizia e l'accesso alla giustizia nell'Unione europea: prime considerazioni in una prospettiva internazionalistica*, in Rivista giuridica dell'ambiente, 4/2020; E. PALADINI, *La difficile attuazione della Convenzione di Århus: accesso alla giustizia in materia ambientale e adattamento al diritto internazionale nella sentenza Stichting Natuur en Milieu*, in Eurojus, 16 February 2015.

Regulation was unlawful since it limited the concept of "acts" in Article 9.3 of the Convention to measures of individual scope, although acts on environmental matters are typically of public interest and of general scope.

The General Court held that Article 9.3 had to be interpreted in light of the Convention's objectives. Consequently, it observed that an internal review procedure which covered only measures of individual scope would be indeed very limited[43]. As a result, the General Court annulled both Commission's decisions.

However, upon appeal[44], the CJEU set aside the General Court's decisions and went far from the opinion delivered by the Advocate General Jääskinen[45] on the matter, who adopted a more nuanced approach towards Article 9.3 of the Aarhus Convention. In particular, the Advocate General admitted that «[i]t increasingly often appears difficult for the Court to guarantee observance of the international obligations incumbent on the European Union whilst also preserving the autonomy of EU law, quite particularly in international law relating to the environment. Environmental law is, in fact, one example of an area in which the law is being drawn up and applied in an increasing number of locations, which necessarily entails instances of the interaction, internationalisation and even globalisation of that law. This multi-layered legal context requires, in my view, the adoption of a nuanced approach»[46].Therefore, he interpreted the norm as a mixed provision, which contains parts with a self-executing core that satisfy the criteria of being sufficiently clear, precise, and of not requiring the adoption of subsequent measures[47]. On the contrary, the Court neither agreed nor disagreed with the General Court's reasoning and insisted on the path already traced, simply refusing to provide Article 9.3 with direct effect[48].

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[43] CJEU, Case T-396/09 (General Court), para. 65. The Aarhus Convention Compliance Committee shared the General Court's opinion on the matter. Please see, DG Environment – Milieu Consulting Sprl, September 2019; I. HADJIYIANNI, *Access to Justice in Environmental Matters in the EU Legal Order – Too little too late?*, in *European Law Blog*, 4 November 2020.

[44] CJEU, Joined Cases C-404/12 P and C-405/12 P *Council of the European Union, European Commission v Stichting Natuur en Milieu, Pesticide Action Network Europe* (Grand Chamber) of 13 January 2015 and CJEU, Joined Cases C-401/12 P to C-403/12 P *Council of the European Union, European Parliament, European Commission v Vereniging Milieudefensie, Stichting Stop Luchtverontreiniging Utrecht* Grand Chamber of 13 January 2015.

[45] Opinion of Mr Advocate General Jääskinen delivered on 8 May 2014.

[46] ID., para. 71.

[47] B. PIRKER, *op. cit.,* p. 89.

[48] Joined Cases C-401/12 P to C-403/12 P, para. 54.

Therefore, it reversed the legal reasoning of the General Court and confirmed that internal review is limited to individual acts. In this way, the ACCC noted that the CJEU «left itself unable to mitigate the flaws correctly identified by the General Court. So, it remains the case that article 9, paragraph 3, of the Convention is not adequately implemented by Article 10(1) of the Aarhus Regulation»[49]. Accordingly, the judgment «does not bring the Party concerned into compliance with article 9, paragraph 3, and, consequently, article 9, paragraph 4, of the Convention»[50]. In dismissing both cases due to its overly rigid jurisprudence[51], the Court, according to some commentators[52] and the ACCC, missed the chance to reconcile the conflicting views of the EU Aarhus Regulation with that of the Convention.

3. *The Commission's effort to improve access to justice in environmental matters*

As highlighted, the ACCC issued two reports on the EU implementation of the Aarhus Convention, respectively in 2011[53] and 2017. In both cases, as also reiterated by an external study published in October 2019 by the Commission[54], it found that the EU failed to fully comply with its obligations under the Convention's requirements on access to justice in environmental matters, especially with regard to Article 9.3 and 9.4 of the Aarhus Convention[55]. In particular, the Committee pointed out that neither the Aarhus Regulation nor the jurisprudence of the CJEU granted adequate access to justice in environmental matters to citizens and NGOs, especially in relation to EU acts and omissions in

[49] Aarhus Convention Compliance Committee, 17 March 2017, para. 56.
[50] ID., para. 57.
[51] B. PIRKER, *op. cit.,* p. 1.
[52] A. ROGER, *op. cit.*
[53] Aarhus Convention Compliance Committee, Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part 1) concerning compliance by the European Union, adopted on 14 April 2011
[54] Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters, Final Report, September 2019.
[55] For an in-depth analysis of the findings of the Compliance Committee, please see B. PIRKER, *Implementation of the Aarhus Convention by the EU – An Inconvenient Truth from the Compliance Committee,* in *European Law Blog*, 24 April 2017, https://europeanlawblog.eu/2017/04/24/implementation-of-the-aarhus-convention-by-the-eu-an-inconvenient-truth-from-the-compliance-committee/.

the field of the environment[56]. In its January 2020 resolution on the European Green Deal, the European Parliament aligned itself with the Committee's findings, recalling how essential it is to guarantee public participation and access to justice to comply with fundamental rights as well as to promote the implementation of the Green Deal, calling on the Commission to ensure EU observance of its international obligations[57].

For its part, in response to these assessed critics, the European Commission contextually published a proposal to amend the Aarhus Regulation, mainly to improve environmental NGOs' possibilities to challenge EU acts and omissions, and a Communication on improving access to justice in environmental matters in the EU and the Member States, where it recognizes that «[t]he involvement and commitment of the Member Stats, of the public and of all stakeholders is crucial to the success of the European Green Deal. […] The public is and should remain a driving force of the green transition and should have the means to get more actively involved in developing and implementing new policies»[58]. The Commission acknowledged, therefore, the importance of an efficient and fully functioning system to access justice both at the EU level, via the CJEU, and at the national level, via national courts, to help deliver the Green Deal transition.

In particular, the Commission proposed to amend the definition of administrative acts endorsed by the Aarhus Regulation so to include not only those acts of individual scope that directly or individually address natural or legal persons, but also those acts of general scope, coherently with the nature of the majority of environmental acts adopted by EU institutions. This might solve the issue of the Court's restricted interpretation on the matter highlighted in the *Stichting Natuur en Milieu* and *Vereniging Milieudefensie* cases analysed in the previous paragraph. Moreover, it would make it possible for NGOs to request an administrative review of any EU non-legislative act, which has legally binding

[56] Some scholars found more gaps than those spotlighted by the Committee. For instance, Bogojević noted that the Aarhus Regulation is not only restrictive «in defining who is entitled to review and what can be reviewed but, the impact of such a review is also narrow in scope». S. BOGOJEVIĆ, *Judicial Protection of Individual Applicants Revisited: Access to Justice through the Prism of Judicial Subsidiarity*, in *Yearbook of European Law*, Volume 34, Issue 1, 2015, Pages 5–25. Following this line of reasoning, Hadjiyianni added that «[t]he proposed amendments address only the 'what', while the 'who' and the 'impact' remain the same». I. HADJIYIANNI, *op. cit.*
[57] European Parliament, Resolution of 15 January 2020 on the European Green Deal, 2019/2956 (RSP).
[58] European Commission, COM (2020) 643 final, para.1 and 2.

and external effects. In this regard, the refusal of the Commission to give effect to the Committee's observations on the need to extend internal review also to administrative acts without legally binding and external effects in order to comply with the wording of the Aarhus Convention represents a point of concern. The proposal, in fact, roughly dismissed the argument, by considering that «only acts that are intended to produce legal effects are capable of 'contravening' environmental law, as indicated in Article 9(3) of the Convention»[59].

Secondly, the Commission proposed to extend the administrative review procedure under Article 2.1(g) not only to environmental acts, or acts adopted under environmental law, but also to all those administrative acts that contravene EU environmental law, regardless of their policy objectives. This amendment would lead to two main benefits: a) it would help aligning the references to environmental law with the scope of the Aarhus Convention as well as the relevant jurisprudence, such as in the *Stichting Natuur en Milieu* and the *Vereniging Milieudefensie* cases; b) it complies with Article 11 TFEU, establishing that environmental protection requirements must be integrated into the definition and implementation of all Union's policies and activities.

Finally, it is proposed to extend the time frames for requests by environmental NGOs (from 6 to 8 weeks) and replies by the Commission (from 12 to 16 weeks), in order to improve the quality of the administrative review process. Most recently, the report drafted by the Committee on the Environment, Public Health and Food Safety to provide amendments to the Commission proposal was adopted by the Parliament in plenary, enabling the inter-institutional negotiations with the Council[60].

Although relevant, it has been noted[61] that the Commission's proposal still does not fully cover the gaps spotlighted by the Committee. Among other points[62], members of the public beyond entitled environmental NGOs are still excluded from administrative review, something that may affect those parties of

[59] COM (2020) 642 final, p. 8.
[60] European Parliament, legislative observatory, Procedure file on Environment: access to information and justice, public participation, application of the Aarhus Convention, 2020/0289 (COD), 20 May 2021
[61] I. HADJIYIANNI, *op. cit*.
[62] For a thorough analysis, please see CLIENTEARTH, *Amending the Aarhus Regulation: an internal review mechanism that delivers the EU Green Deal*, 2020, available at https://www.clientearth.org/latest/documents/position-paper-amending-the-aarhus-regulation-an-internal-review-mechanism-that-delivers-the-eu-green-deal/.

the public not organized in formal organizations. The Commission justified this omission on multiple grounds. First, the Convention requires for either administrative or judicial review, not necessarily both. Therefore, while NGOs with an environmental mandate are entitled to access administrative review, individuals can still a) bring national implementing measures before a national court and request the domestic judges to present a preliminary ruling in front of the CJEU by virtue of Article 267 TFEU; b) challenge before the General Court acts directly and individually addressed to them as well as regulatory acts of direct concern which do not entail implementing measures, pursuant to Article 263.4 TFEU. Moreover, the Convention provides for privileged access to justice as compared to individuals given their structured and higher professional position and, according to the Commission, this provision would not be respected if individuals were granted access to both judicial and administrative review, something that the Convention does not require.

Although it is certainly true that Article 9.3 does not literally expect the EU and its Member States to allow for both administrative and judicial review, still it does not prevent to do so. Additionally, it is widely known that State parties may provide for higher standards of rights' protection than those set therein. Unsurprisingly, in fact, Article 3.5 of the Aarhus Convention coherently states that «[t]he provisions of this Convention shall not affect the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention». It is also important to stress that the fact that individuals have the possibility to ask the national court to send a preliminary reference to the CJEU does not mean that the domestic judges automatically do so. What is more, a procedure as such might take years and, as already pointed out by the Committee, the preliminary reference procedure does not provide a suitable alternative to the internal review mechanism.

Remarkably, these loopholes have been confirmed once again by the Committee in early February 2021, whose advice on the legislative proposal was expressly requested by the Commission[63]. The Committee, in fact, while welcoming the significant positive developments advanced in the proposal, still finds some areas of concern. It reiterates, *inter alia*, that the EU should ensure

[63]Advice by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3, 12 February 2021.

access to review procedures not only to NGOs, but also to other members of the public. Contrary to the Commission's proposal and the Court's line of reasoning in *Stichting Natuur en Milieu* and the *Vereniging Milieudefensie* cases, the Committee reaffirms the need to immediately open the review of a national implementing measure at the EU level. Most importantly, it restates that there is no legal basis in the Aarhus Convention to limit the scope of review to acts with "binding" legal effects. It therefore recommends to remove that reference from the definition of an administrative act.

4. *Concluding remarks*

This article has discussed whether the Commission's efforts to improve the implementation and enforcement of the Aarhus Convention by the EU and its Member States are sufficient to the purpose of the European Green Deal, in particular in light of the Court's selective opening of the EU legal order towards the Aarhus Convention. It has pointed to some emblematic elements of non-compliance that the ACCC found respectively in the jurisprudence of the Court and in the legislations adopted by the EU institutions.

Section 2 meant to assess whether the alleged «parochial»[64] and «outcome-oriented» approach of the Court to protect EU law from possible interferences from international law could be observed also in the context of the 1998 Aarhus Convention. In the cases under review, the CJEU repeatedly denied that the Aarhus Convention, in particular Article 9.3, was sufficiently precise and unconditional to be capable of being directly applicable in the EU and its Member States legal orders, respectively quashing the view of some scholars, the ruling of the General Court, and the opinion of the Advocate General Jääskinen. Moreover, the narrow interpretation of direct effect appears not fully in line with the requirement the Court set itself in *Hermès*, where it held that if the EU is party to an international treaty, including a mixed agreement, EU secondary legislation shall be interpreted «as far as possible»[65] in view of the international obligations of the EU.

[64] G.DE BÚRCA, *The European Court of Justice and the International Legal Order After Kadi*, in 51 *Harvard International Law Journal*, 1, 2010.
[65] CJEU, Case C-53/96 Hermès International v FHT Marketing Choice BV, 1998, para 28.

It seems therefore that the CJEU is attempting to protect EU law also in the field of the environment, and supposably the legislation that will stem from the European Green Deal, from the possible influence of the Aarhus Convention. In spite of the fact that the Court's need to defend the values and core principles of the EU legal order, being an expression of its legal identity, is understandable, it is crucial to stress that, as straightforwardly affirmed by the Advocate General Jääskinen, «at the current stage of development of EU law, the theory of direct effect, which has been regarded as an 'infant disease' of EU law, is no longer intended to protect its autonomy internationally»[66]. If the Court aims to keep the rights recognized by EU treaties practical and effective, rather rendering them impossible and illusory, the Court should provide a coherent, yet dynamic and evolutive interpretation of the rights stemming from EU environmental law and from EU's international environmental obligations, which is in light of present-day conditions[67].

Section 3 examined the Commission's attempts to overcome the divide between the Convention and the EU restrictive secondary legislation. However, as highlighted, several significant deficiencies have been ignored or not fully solved, such as the persistent exclusion of members of the public other than NGOs from review procedures, as well as the need to immediately open the review of a national implementing measure at the EU level, and most importantly, the inconsistency to limit the review procedures only to acts with binding legal effects. It seems therefore that further improvements are needed for the EU to perfectly align itself with the Convention's requirements. Moreover, the broader amendments suggested by the Compliance Committee would integrate the actions envisaged by the Green Deal concerning public involvement.

Although it is undoubtedly true that all institutions should engage with EU civil society to deliver the Green Deal, the ambition of a neutral-climate EU cannot possibly be achieved without the constant and comprehensive involvement of all EU citizens, as single individuals and as collectively engaged in public and private organizations, in all phases of the Green Deal, from its inception to its implementation and monitoring. As the Commission acknowledged, «[t]he public is and should remain a driving force of the transition

[66] Opinion of Mr Advocate General Jääskinen, para. 72.
[67] The so-called «living-instrument doctrine». European Court of Human Rights, Tyrer v. The United Kingdom, 5856/72, 15 March 1978, para. 31.

and should have the means to get actively involved in developing and implementing new policies»[68]. For instance, the European Climate Pact, envisaged in the Communication setting out the Green Deal and subsequently in a dedicated Communication[69], endorses a proactive participation of the public in climate actions, which however only focuses on information sharing, inspiration, and public understanding, leaving aside public engagement through consultation in policy-making processes and through administrative and judicial review. In this perspective, the Aarhus Convention can positively influence the potential legislations stemming from the Green Deal inasmuch as it has the potential to better coordinate the different instruments of the Green Deal, turning public engagement into a more structured and transversal element.

It can be concluded that the Commission, via the Green Deal, should encourage a wider openness towards the Aarhus Convention for three reasons. First, for the EU and its Member States to comply with their international obligations in the field of the environment, in general, and in environmental justice matters, in particular. Second, to clearly communicate to the Court of Justice the intention of the EU to become more open to the influence of international environmental law that, together with EU provisions, provide for stronger and more coherent responses to the threats posed by a global phenomenon such as climate change. Indeed, worldwide challenges require a global, coordinated response between the international and EU legal orders. This might, in turn, stimulate a new direction in the jurisprudence of the CJEU that would ensure compliance with the third and fourth paragraph of Article 9 of the Convention, as wished by the Compliance Committee. Lastly, all EU institutions and the Member States should ensure the widest and seamless implementation of the Convention's goals, for it to be, in the words of Advocate General Jääskinen, the truly expression of the human right to the environment in its most solemn form.

ABSTRACT

[68] COM (2020) 642 final, p. 1.
[69] COM (2020) 788 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: European Climate Pact, 9 December 2020, Brussels.

Chiara Scissa - *What room for the 1998 Aarhus Convention in the European Green Deal? An analysis of the possible reluctance of the Court of Justice*

Both the Court of Justice' case-law and part of EU institutions' secondary legislation have been found in violation of the 1998 Aarhus Convention's requirements on access to justice in environmental matters. For the European Green Deal to succeed both for the EU and its citizens not only should the Commission grant wide and consistent public engagement in the promotion and implementation of environmental policies and legislations, but it should also ensure adequate enforcement of EU environmental law. The aim of this contribution is, therefore, to explore some emblematic elements of non-compliance stemming from, respectively, the Court's «overly rigid» jurisprudence and from EU implementation of the Aarhus Convention to assess whether the Commission's efforts to improve EU and its Member States' implementation of the Convention are sufficient to the purpose of the European Green Deal.

KEY WORDS: *European Green Deal; Aarhus Convention; Access to justice; Environmental law; Direct effect; Court of Justice.*