



# **Compliance Mechanism under Aarhus Convention - Effective Legal Instrument for Enforcement of International Environmental Law**

## **Master Thesis**

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## **ABSTRACT**

United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters is first and unique international legal instrument which consists of strictly procedural provisions in environmental matters.

The institutional structure of Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters consists of a particular subsidiary body, namely Compliance Committee, responsible to assess submissions of civil society regarding failure to comply with treaty provisions.

Although Compliance Committee issues unbindings findings and recommendations of the Parties to international legal instrument, currently the quasi-judicial practice of Compliance Committee has gained recognition beyond scope of application of Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in a broader transboundary context.

In this thesis the influence of compliance mechanism under Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters will be studied. The most important factors which enables efficient implementation and application of environmental participatory rights within the framework of Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters and relevant framework of EU law will be determined and analysed.

## SUMMARY

The aim of Master Thesis “Compliance Mechanism under Aarhus Convention – Effective Legal Instrument for Enforcement of International Environmental Law” (thereafter –thesis) is to identify the role of compliance mechanism under Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to address issues of application and implementation of treaty based binding international commitments and to enhance coherent application of environmental participatory rights.

The introduction of thesis will provide for a brief inside into the overall topic and the main research goals will be defined.

The main body of substance of thesis will be divided into three chapters.

In order to highlight historical background with regard to recognition environmental participatory rights and their linkages with the concept of compliance mechanism will be presented in the first chapter of Thesis. Developments of CJEU jurisprudence with respect of recognition of environmental participatory rights as well theoretical background on applied theories on compliance mechanisms also will be presented within first chapter of Thesis.

The second chapter will be devoted to the assessment of implementation and application of environmental participatory rights as enshrined in Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters through findings and recommendations of Compliance Committee. Comparative assessment with respect to application of “three Aarhus pillars” will be applied in case studies of CJEU jurisprudence and quasi-judicial practice of Compliance Committee will also be provided within second chapter of Thesis.

Lastly, in the third chapter of Thesis case study with regard to findings and recommendations of Compliance Committee in case ACCC/C/2008/32 in conjunction with relevant CJEU case-law will be provided. Legal assessment on various options including potential amendments to the EU legislation will also be provided in third chapter of Thesis.

In the conclusion a summary of findings of Thesis will be provided.

## **INDEX OF ABBREVIATIONS**

Aarhus Regulation - 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

CJEU – Court of Justice of the European Union

EC – European Communities

ECJ – European Court of Justice

EIB – European Investment Bank

Espoo Convention – UN Economic Commission for Europe Convention on Environmental Impact Assessment in a Transboundary Context

MOP – Meeting of the Parties

NGO – Non-governmental organisation

TFEU – Treaty on the Functioning of the European Union

UN – United Nations

VCLT - Vienna Convention on the Law of Treaties

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## INTRODUCTION

On 17 March 2017 the Compliance Committee to the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (thereafter – Aarhus Convention)<sup>1</sup> made a landmark decision by finalizing its findings and recommendations regarding non-compliance with Article 9, paragraph 3 and 4 by the EU in case ACCC/C/2008/32. The ongoing case ACCC/C/2008/32 since 1 December 2008 brought before Compliance Committee by a NGO ClientEarth (thereafter - the communicant) and supported by the members of the public concerned alleged con-compliance by the EU on two grounds with regard to access to justice in environmental matters. Namely, judicial review of decisions of the EU institutions might not be brought directly before the Court of Justice of the European Union because of restrictive *locus standi* of NGOs and incompatibility of Article 10 paragraph 1 of the Aarhus Regulation with Article 9, paragraph 3 of Aarhus Convention.

In particular, cautious approach of Compliance Committee not to provide authoritative assessment on pending judicial proceedings before CJEU refrained to reach a conclusion on EU compliance with Article 9, paragraph 3 and 4 of Aarhus Convention by encouraging the EU judiciary to put forwards new approaches to the case-law to access to justice in environmental matters and urging all competent EU institutions to adopt measures for full enforcement of access to justice in environmental matters of any individual concerned. Based on EU judiciary of first instance progressive stance regarding access to justice by the general public in environmental matters Compliance Committee by assessing established case-law of CJEU on access to justice reached conclusion of EU non-compliance with Article 9, Paragraph 3 and 4 of Aarhus Convention. Not only conclusion of EU failure to comply with Article 9, Paragraph 3 and 4 of Aarhus Convention but also Compliance Committee's quasi-judicial guidance on how compliance of the EU might be restored by issuing precise recommendations on legislative measures to be adopted and implemented to reach full compliance with treaty-based binding requirements of access to justice are of importance to analyze. Namely, whether NGO's increased participation in various environmentally related international fora and their active contribution to oversee compliance and address non-compliance of parties to multilateral environmental agreements in fact, firstly fill the void of internationally negotiated and adopted legal instrument on protection of the environment and secondly whether exercise of their participatory rights in environmental matters contributes also for enforcement of substantial human rights. Based on the foregoing, the following research question is proposed – whether, and to what extent a compliance mechanism under the Convention provides effective enforcement of environmental participatory rights.

The aim of this thesis therefore is to analyze and conduct research on the outcomes of compliance mechanism under Aarhus Convention through an examination of decisions of the Committee related to non-compliance. Particular attention will be given to the proceedings and outcomes of the compliance case ACCC/C/2008/32. The Master thesis is structured in three general sections. The first two sections serve as a basis to conclude the overall analysis in the last section in order to provide potential amendments to the EU legislation. Thus in the first section there will be analysis provided on general aspects of compliance mechanism with and its linkages with multilateral environmental agreements. In the second section analysis of so called Convention “three pillars” will be provided regarding recent developments in compliance cases of Compliance Committee. The third section will describe the development of the compliance case ACCC/C/2008/32 concerning EU and will assess scope of potential risks on setting up bad precedent of non-compliance and even jeopardizing effective enforcement of international

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<sup>1</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998), United Nations, *Treaty Series*, vol. 2161, p. 447., entered into force 30 October 2001. Available on: [https://treaties.un.org/doc/Treaties/1998/06/19980625%2008-35%20AM/Ch\\_XXVII\\_13p.pdf](https://treaties.un.org/doc/Treaties/1998/06/19980625%2008-35%20AM/Ch_XXVII_13p.pdf). Accessed 20 February 2020.

environmental law as well provide the way forward ensuring compliance by the EU. Legal assessment and analysis of various options including potential amendments to the EU legislation will be assessed in order to bring EU in full compliance.

## 1. Evolution of International Environmental Law

### 1.1. Origins/Recognition of procedural rights in environmental matters and their linkages with compliance mechanism

The recognition of environmental law as a subject of international law is due to on one hand emergence of the functional necessity to address transboundary challenges related to environment and natural resource increased consumption, as well as to tackle air and water pollution, depletion of ozone layer, deforestation, desertification, loss of biodiversity and on the other to acknowledge nefast and irreversible impact of human activity in the 1960s and 1970s<sup>2</sup>. Although state-centric clarification of the nature of state obligation in transboundary context provide principle 21 of 1972 Stockholm Declaration, it should be also emphasized that the United Nations' Conference on the Human Environment held in Stockholm, Sweden was the very first global forum which recognized the rights to an adequate environment which encompasses the right to "freedom, equality and adequate conditions of live" of any individual and declared reciprocal duty for any individual "to protect and improve the environment for present and future generations"<sup>3</sup>.

Interestingly though, ahead of venue of abovementioned international conference academia reflected on an establishment of guardians of nature by legal provisions aiming at representation of the environment. Using analogy it was argued that as legal representation is already established for certain socially vulnerable groups of public, the representation of "voiceless environment"<sup>4</sup> should be protected equally by law. From a perspective of procedural rights it was also argued that NGOs should be provided with legal capacity to represent environmental interests thus considering NGOs technical and legal resources they might be best placed to determine and to bring to the attention of judiciary negative impact to the environment associated with particular territory.<sup>5</sup> Official recognition of the environment as a subject of general international concern is among outcomes of the Stockholm Conference, in particular regarding principle 21 and 22 of Stockholm Declaration together with a an action plan constituted for global assessment of the environment of 200 recommendations. In legal perspective the approach taken by the Stockholm conference to recognize importance for more coordinated and harmonious response to environmental challenges by adopting so called non-binding "soft-law" instruments have been criticized by some environmental rights scholars for not awarding strong enough normative value for international lawmaking in environmental matters. Such position cannot be supported because Stockholm Conference established also institutional framework under United Nations Environment Program to develop and strengthen environmental policies and law<sup>6</sup> besides a formal treaty negotiating,

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<sup>2</sup> Maria L. Banda, "Regime Congruence: Rethinking the Scope of State Responsibility for Transboundary Environmental Harm", *Minnesota Law Review*, 1879 (April 25, 2019): 1895-1896. Available on: <https://minnesotalawreview.org/article/regime-congruence-rethinking-the-scope-of-state-responsibility-for-transboundary-environmental-harm/>. Accessed on 9 March 2020.

<sup>3</sup> Declaration of the United Nations Conference on the Human Environment, Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/4, at 2-65 (June 16, 1972). Available on: <http://www.imo.org/en/KnowledgeCentre/ReferencesAndArchives/HistoryofMARPOL/Documents/A%20CONF.48%2014%20Rev.1.pdf> (also referred to as the "Stockholm Declaration"). Accessed on 9 March 2020.

<sup>4</sup> Marjan Peeters, "About Silent Objects and Barking Watchdogs: The Role and Accountability of Environmental NGOs", *European Public Law* 24, no. 3 (2018): p.452.

<sup>5</sup> Christopher D. Stone, "Should Trees Have Standing-toward legal rights for natural objects", *Southern California Law Review* 450 (1972): pp.450-501.

<sup>6</sup> Marjan Peeters, "About Silent Objects and Barking Watchdogs: The Role and Accountability of Environmental

drafting and adopting process thus responding to “transformation in the valuation of environmental concerns in all levels of society”<sup>7</sup>.

Legal scholars of international law are in general consent that constitution and importance of procedural rights in environmental matters were affirmed by adoption the United Nations Rio Declaration on Environment and Development (thereafter – Rio Declaration) within the United Nations’ Conference on Environment and Development in 1992. Importance of full participation of all concerned individuals is emphasized as a prerequisite to respond most efficiently to environmental challenges. Principle 10 of Rio Declaration defines scope and legal architecture for procedural rights in environmental matters also called participatory rights insofar it recognized any individual’s access to information in environmental matters and opportunity to participate in decision-making processes<sup>8</sup>. Apart from stressed necessity to grant any individual access to justice and administrative review procedures Principle 10 of Rio Declaration does not provide equal recognition for civil society to access to justice, information and participation in decision-making. Although recognition of the general public to be consulted, heard and included in decision-making is not included *expressis verbis*, the European Coal and Steel Community already in 1957 were under obligation within its institutional framework to cooperate with “parties concerned”<sup>9</sup>. Therefore Consultative Committee and nowadays European Economic and Social Committee role was not only to serve in its capacity to consult and be consulted by the High Authority but also to create itself a balanced fora consisting of representatives of industries and labour representatives. Committee of the Regions established by the Treaty of European Union<sup>10</sup> (Maastricht Treaty) also reflected incentives of newly-founded economic and regional organisation to encourage by representatives of regional and local bodies to participate implicitly in decision-making. Involvement of the social partners representing industries and labour were first affirmed by the Protocol on Social Policy to the Maastricht Treaty and later all EU and its Member States legally binding regulatory framework were included in the Treaty of Amsterdam<sup>11</sup>. Regarding environmental regulation legal scholars assumes that as early as 1985 Environmental Impact Directive was first legal instrument containing mostly procedural requirements and providing general public rights to participate in transborder environmental decision-making.<sup>12</sup> Rising awareness and so called upgrade of environmental impact assessment procedural rights was ensured by the ratification of Espoo Convention by EC whereas Article 2 Paragraph 6 requires signatory Party to provide opportunities to the general public to participate in environmental impact assessment procedures.<sup>13</sup> Adoption by the Council of Directive 90/313 on access to environmental information is described by legal scholars as “another milestone in community legislation that addresses “environmental rights””<sup>14</sup>.

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NGOs”, *European Public Law* 24, no. 3 (2018); p.453.

<sup>7</sup>Luis E.Rodriguez-Rivera, “Is the Human Right to Environment Recognized Under International Law? It depends on the Source”, *Colorado Journal of International Environmental Law and Policy*, no.12 (2001).

<sup>8</sup> Declaration of the United Nations Conference on Environment and Development, A/CONF.151/26 (Vol. I) (12 August 1992). Available on: [https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_CONF.151\\_26\\_Vol.I\\_Declaration.pdf](https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf). Accessed 9 March 2020.

<sup>9</sup> Treaty Establishing The European Coal and Steel Community (Paris, in force 23 July 1952). Available on: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11951K:EN:PDF>.

<sup>10</sup> *Supra* note 8, Article 4 Paragraph 2.

<sup>11</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, Articles 118., 118a, 118b, 118c; *OJ C 340, 10.II.1997, p. 1–144*

<sup>12</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, 5.7.1985, p. 40–48.*; Richard Macrory and Sharon Turner, “Participatory Rights, Transboundary Environmental Governance and EC Law”, *Common Market Law Review*, no. 39 (2002): p.498.

<sup>13</sup> Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention) (Espoo, 25 February 1991) UNTS 309 157 Available on: [https://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo\\_Convention\\_authentic\\_ENG.pdf](https://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf). Accessed: 6 April, 2020

<sup>14</sup> Jerzy Jendroska, “Aarhus Convention and Community Law: the Interplay”, *European Environmental and Planning*



However, it should be also emphasized that abovementioned EC secondary legislation were mostly accentuated by any public authority of Member States binding and defined obligations on how information relating to the environment should be disseminated. The requirements although lacking a reference to an active dissemination of environmentally related information contained precise and clear requirements regarding actions authorities are upon obligation to observe, for instance, dissemination of information relating to environment upon request of individuals should had been provided without a constraint to justify their legitimate interests. In addition, such generally acknowledged nowadays environmental participatory rights as access to justice and its related issues of prohibitory expensive court costs were also invoked in the scope of application, however the wording of the requirements conferred to Members States at that time a large marge of appreciation on how to introduce and apply review mechanisms for insufficient dissemination of information to individuals in environmental matters.<sup>15</sup>

## **1.2. Approach of Court of Justice of the European Union towards recognition of participatory rights**

Steady emergence of transboundary participatory rights were facilitated also by the jurisprudence of the Court of Justice regarding conferral of rights on individuals in matters of environmental protection. The ECJ in case *Commission v. Germany (C-131/88)* found the Member State in non-compliance of its obligation to adopt and apply sufficiently clear and precise measures in order a secondary legislation of EC to be implemented into German legal system. The ECJ also ephasized the necessity measures of transposition to be clear and precise thus enabling individuals to enforce them fully and also rely on them before national judiciary.<sup>16</sup> In case *Comission v. Germany (C-361/88)* ECJ reaffirmed its previous jurisprudence regarding the Member State by establishing a mandatory approach to interpret environmental legislation as creating rights and obligations for individuals if its main purpose is to protect human health and environment.<sup>17</sup> It might be assumed that at an early age of construction of the EU despite the lack of generalization approach to include a broad range of interest groups besides consultative bodies comprised of representatives of industries and regional entities were promising. EU strategy to expand gradually inclusion of sectoral representatives of general public and to enforce new commitments regarding participatory rights in environmental matters was an assertion for EU to become a driving force in environmental matters.

A clear manifestation within EU integration proceedings to recognize participatory democracy and participation itself “as a value or a founding principle of the Union”<sup>18</sup> was introduced by Article 11 TFEU. Article 11 TFEU prescribes mandatory provision for any institution on EU or Member States’ level to include citizens and their organisations for public consultations. Interestingly though procedural mechanisms aiming at enhancing access to justice, public participation in decision-making and access to information in environmental matters were formalized and introduced in EC legal system with EC signature of UN Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) in 1998 and its 15 Member States. According to legal scholars the greatest legal value of the multilateral environmental agreement among others is being “the first

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Law 12, (2005): p.13

<sup>15</sup> Council Directive 90/313/EEC of 7 June 1990 on the freedom of access to information on the environment, O.J. L 158,23.6. 1990, p. 56-58; Articles 3, 4,5.

<sup>16</sup> Judgment of 28 February 1991, *Commission of the European Communities v Federal Republic of Germany*, C-131/88, ECLI:EU:C:1991:87, paragraph 61.

<sup>17</sup> Judgment of 30 May 1991, *Commission of the European Communities v Federal Republic of Germany*, C-361/88, ECLI:EU:C:1991:224, paragraph 15.

<sup>18</sup> Jane Rachel and Agnes Hellner, “EU Participatory Democracy from Promise to Practice:the Role of IOs and NGOs”, *Scandinavian Studies in Law* 62, (2016): p.200.

binding international instruments that attempts to address, comprehensively and exclusively, the issues of citizens' environmental rights"<sup>19</sup>.

Obligations arising under Aarhus Convention which are framed in so-called "Aarhus pillars", namely, access to information (Article 4 and 5), public participation in decision making (Article, 6, 7 and 8) and access to justice (Article 9). Among distinction of shared and exclusive competence conferred to EU solely or in mixed proportions with its Member States in accordance with Article 2 TFEU competence in environmental matters to adopt EU legislation is shared with its Member States<sup>20</sup>. Therefore regarding environmental matters EU by exercising conferred rights in accordance with Article 216 TFEU might enter into international agreements which have consequently binding legal effect on EU institutions and on its Member States. The extent of protection and effective application without grounded restrictions of environmental procedural rights provided for individuals and civil society under Aarhus Convention should be assessed in terms of EU compliance with public international law.

Also it should be emphasized that EU ongoing proceedings and issues settled under Aarhus Convention compliance mechanism have arisen from somehow ambiguous perceptions and interpretations of a relationship between secondary law, international treaties and customary international law. The prevalence of EC legal order over national legal systems of EC Member States was affirmed in case *van Gend&Loos (C-26/62)*.<sup>21</sup> consequently in case *Costa v. Enel (C-6/64)*<sup>22</sup> the supremacy of EC law was established by ECJ. The ECJ in case *AETER (C-22/70)*<sup>23</sup> assessed the question of capacity of EC to act in international matters regardless of vested rights by the primary EC law. The ECJ asserted EC competence to act internationally as it sees fit even in a case of absence of expressly recognized competence to negotiate and conclude agreements with third countries beyond conferred power by the primary source of law. The fact that international requirements which stem from binding international agreements constitutes an integral part of EC legislation was confirmed in case *Haegeman v. Belgium (C-181/73)*<sup>24</sup>. It is worth to note ECJ however did not developed legal reasoning on how it came to a such conclusion and somehow avoided to provide an assessment on interaction which might have had taken place between an application of supremacy of EC law and place in the hierarchy of norms of concluded international agreements. ECJ in case *Kupferberg (C-104/81)*<sup>25</sup> in declarative terms rather than in extended argumentative approach presumably relying on its jurisprudence regarding EC capacity to act in international matters established that international commitments taken on behalf of EC and its Member States should be enforced in full compliance. ECJ also reaffirmed in a broader context its competence to supervise and enforce uniform application of EC law insofar measures to be adopted to implement international commitments should be aligned in content with EC law in force. Following the rationale of uniform application Member States' ECJ also hold that international commitments should be applied and enforced in accordance with EC legal framework. In absence to initiate a discussion on hierarchy of norms ECJ provided a certain clarification using analogy in case *Commission v. Germany (C-61/94)* stating that insofar EC secondary legislation should be interpreted in accordance with EC primary law those provisions of EC secondary law which shares scope of application similar to EC international commitments should also be interpreted

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<sup>19</sup> *Supra* note 14.;p.12.

<sup>20</sup> *Supra* note 8, Article 2

<sup>21</sup> Judgment of 5 February 1963, *NV Algemene Transport-en Expeditie Onderneming van Gend&Loos v Netherlands Inland Revenue Administration*, C-26/62, ECLI:EU:C:1963:1.

<sup>22</sup> Judgment of 15 July 1964, *Flaminio Costa v E.N.E.L.*, C-6/64, ECLI:EU:C:1964:66, p.593

<sup>23</sup> Judgment of 31 March 1971, *Commission of the European Communities v Council of the European Communities*, C-22/70, ECLI:EU:C:1971:32, p.264

<sup>24</sup> Judgment of 30 April 1974, *R. & V. Haegeman v Belgian State*, C-181/73, ECLI:EU:C:1974:41, paragraph 5.

<sup>25</sup> Judgment of 26 October 1982, *Hauptzollamt Mainz v C.A. Kupferber&Cie KG a.A.*, C-104/81, ECLI:EU:C:1982:362, paragraphs 11 and 12.

consistently with those international obligations.<sup>26</sup>

Although findings of ECJ clarified a mechanism for an international requirement to be interpreted, introduced and applied within EC law, ECJ remained silent regarding discussion on a status of public international law within EC legal framework. Unfortunately huge hopes on two cases before ECJ in 2008 *Intertanko (C-308/06)* and *Kadi (C-0402/05 P)* did not result in obtained outcome on ECJ's clear guidance what effects should be given to binding international norms in the framework of EC law. In *Intertanko*-case although relying on its well-established law-case ECJ reaffirmed binding force of EC concluded international agreements and their supremacy over secondary EC law. However, it should be noted that ECJ provided a narrow interpretation regarding mandatory requirements a measure of secondary EC law should comply to in order to be valid. ECJ concluded that a validity check of EC secondary legislation to be compatible with EC binding international commitments encompasses two conditions. Namely, in accordance with well-established case-law international commitment should have binding force upon EC and a content of international provision should be precise and unconditional thus judicial conclusions were reached on hierarchy of norms regarding ranking between international provisions and EC law whereas EC judiciary remained silent on hierarchy of norms arising out of international agreements and EC primary law.<sup>27</sup>

In the ruling of *Kadi*-case ECJ summarized EC commitment to apply a conformity review of EC legislation based on the rule of law and recognition of fundamental rights being an integral part of general principles of law. In the meantime ECJ in accordance of well-established case law emphasized importance of EC primary law with advanced assertion that it constitutes effective system of legal remedies and procedures. Also it should be noted that ECJ assessed with great care interlinkages of EC primary law with protection of fundamental rights. With regard to interpretation of international agreements ECJ took a strong stance establishing that the autonomy of EC legal system cannot be affected by international agreement. Therefore ECJ concluded that international agreement should not constitute negating direct effect to constitutional principles enshrined in EC primary law.<sup>28</sup> Following the well-established case-law by ECJ on EU competence to act in international matters, its rights and obligations arising from international commitments, its various sectoral secondary legislation in environmental matters it might be argued that EU currently does not encounter deficiencies of compliance when environmental procedural rights are applied and enforced. Also it might be argued that in accordance with conclusions of ECJ in case *Commission v. Ireland (C-459/03)* legal framework to enjoy environmental procedural rights is being constituted in compliance with international commitments and EU legal order. ECJ confirmed mixed agreement equal status to sole EC concluded international agreement which consequently constitutes an integral part of EC law thus ECJ by conferral of EC primary law has jurisdiction to settle disputes regarding its correct application and interpretation as well as to assess Member State's compliance<sup>29</sup>.

The issue of EU institutions' compliance under Aarhus Convention remains though unresolved insofar NGOs are restricted to have access to EU judicial institutions to challenge decisions, acts and omissions by EU institutions. In addition, it is worth to note existence of extensive case-law of ECJ [CJEU] assessing any EU Member State performance based EU law induced obligation to comply with treaty based obligations which stems from EU secondary law. Legal scholars have noted that Aarhus Convention treaty terms are interpreted by three structures of

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<sup>26</sup> Judgment of 10 September 1996, *Commission of the European Communities v Federal Republic of Germany*, C-61/94, ECLI:EU:C:1996:313, paragraph 52.

<sup>27</sup> Judgment of 3 June 2008, *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport*, C-308/06, ECLI:EU:C:2008:312, paragraphs 42, 43, 44, 45

<sup>28</sup> Judgment of 18 July 2013, *European Commission and Others v Yassin Abdullah Kadi*, C-584/10 P, C-593/10 P, C-595/10 P, ECLI:EU:C:2013:518, paragraph 22.

<sup>29</sup> Judgment of 30 May 2006, *Commission of the European Communities v Ireland*, C-459/03, ECLI:EU:C:2006:345, paragraphs 82, 84 and 85.

governance, namely, national administrative authorities and judiciary, ECJ and Compliance Committee. Also it should be noted that not only MOP have a major role in interpreting treaty provisions but also facilitating compliance of the Parties under Aarhus Convention. Therefore it is worth to note that while ECJ long before EU became a Party to Aarhus Convention established direct effect of legally binding international commitment with a third country if taken conjointly its wording and purpose the provision refers to clear and precise obligation which might be brought before national judiciary, it's established case-law reflects on huge challenges NGOs are faced with. Legal standing and direct access of NGOs to EU judicial institutions are denied in most cases without assessment if NGO might be admitted as a party in a case. In addition, legal scholars have observed that constitution of nowadays effective compliance mechanism under Aarhus Convention took place "out of the relatively weak provisions of the Convention" and it is by consensual decision of COP that compliance mechanism to monitor Parties commitments was introduced. Additionally with reference to assumed extended discretionary power of Parties to vary approaches on how provisions of Aarhus Convention are being implemented, it might be argued that instead of submissions with requests to provide guidance on how particular treaty provision should be interpreted and implemented at national level civil society predominantly constituted by NGOs will submit communications claiming Parties' administrative and judicial procedures non-compliance with Aarhus three pillars. The conclusions of compliance-case ACCC/C/2008/32 initiated more than ten years ago and still pending under approval in the future by MOP is affirmative in this regard.

### 1.3. Measuring compliance – theoretical background

Legal scholars have asserted that a treaty is "the most formal and reliable international commitment" based on twofold assumption that "treaties represent clear and well-defined of states; treaties can provide explicit dispute resolution" and "treaties define rules for accession to and exit from their terms"<sup>30</sup>. Also a treaty constitutes a contract among contracting parties because States tend to "agree to an elevated level of commitment in a treaty to obtain an elevated level of commitment from others"<sup>31</sup>. Article 18 of VCLT implies equal importance of any international treaty provided that any is legally binding<sup>32</sup>. Furthermore, with regard to applicable provisions on treaty interpretation VCLT provides that treaty interpretation must be enforced in conformity with "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" as well as "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation"<sup>33</sup>.

Additionally, general assumption should be made that upon approval of provisions of Aarhus Convention any contracting party was well-aware of its preparedness of national legal system with intention to commit to the commonly agreed obligations and to reach the objectives of the agreements as fully and as promptly as possible. Also it is important to note the EU whilst becoming a contracting Party to Aarhus Convention asserted unilaterally that "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" and it has already adopted several legal instruments, binding on its Member States, implementing provisions of this Convention<sup>34</sup> and also that the Community [EU] bears responsibility "for the

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<sup>30</sup> Andrew T. Guzman, "A Compliance-Based Theory of International Law", *California Law Review* 90(6), (2002):p.1873.

<sup>31</sup> *Ibid.*

<sup>32</sup> Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), United Nations, *Treaty Series*, vol. 1155, p. 331., entered into force 27 January 1980. Available on: [https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch\\_XXIII\\_01.pdf](https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf) . Accessed 18 May 2020.

<sup>33</sup> *Ibid.*, Article 31 Paragraph 1 (a); Article 31 Paragraph 1 (b).

<sup>34</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998), United Nations, *Treaty Series*, vol. 2161, p. 447., entered into force 30 October 2001; Declarations of the European Union upon signature and approval, available

performance of those obligations resulting from the Convention which are covered by Community law in force”<sup>35</sup>. This leads to an assumption that given distinct legal order of the EU based of well-established case law of ECJ [CJEU] and repartition of obligations with Member States invoked unilaterally to enforce treaty requirements under Aarhus Convention the EU took strong confident stance as to correct enforcement of environmental law up to date and willingness to adopt and apply supplementary measures for improving application of environmental law. It suffices here to note that although recognition to guarantee environmental participatory rights for NGOs and public in general within EU institutions was a positive incentive in theory, shortcomings in compliance with provisions regarding NGOs’ legal standing before EU judicial institutions diminish not only their capacity of “being legitimate representative of the environment and of environmental interests”<sup>36</sup> but also the concept of participatory democracy which is not endorsed to the fullest extent possible due to incapacity of NGOs “to strengthen the environmental perspective in law-making”<sup>37</sup>.

A meaningful step in the process of acknowledgment of EU non-compliance of Aarhus Convention to ensure its own institutions’ compliance would be to assess how EU interacts with other Parties of the treaty, what are legal arguments and grounds advanced by EU to interpret the treaty provision of question and what are the outcomes, namely, amended provision or administrative practice to be applied in order to commit to adequate compliance. Professor Koh has advanced theory based on asserted incompleteness of two branches of a coherent group of general propositions explaining why nations comply with international law also known as compliance continuum<sup>38</sup>. Professor Koh is not persuaded by approach of managerial school advanced by Professors Chayes and by Thomas Franck’s fairness theory<sup>39</sup>. The criticism of the “Chayesian approach” comes from the lack of grounded course of action how procedurally international provision either “procedural, such as a requirement to report” or “substantive, such as an undertaking to control an activity”<sup>40</sup> is being accepted, applied and enforced.

In accordance with managerial school legal provisions are “prescriptions for action in situations of choice, carrying a sense of obligation, a sense that they ought to be followed” and “management tools, such as transparency, reporting, verification and monitoring, dispute resolution, and capacity building are the key to designing a compliance regime to encourage compliance”<sup>41</sup>. Regarding factors that initiate non-compliance the managerial school distinguishes three: ambiguous terms setting-up obligations, lack of capacity to enforce obligation and change in circumstances<sup>42</sup>. Managerial school also identifies approach to be adopted for maintaining treaty compliance and it is “an iterative process of discourse among the parties, the treaty organization, and the wider public.”<sup>43</sup>

Professor Koh have also expressed scepticism towards “fairness theory” by Thomas Franck. Fairness theory is based on an assumption that if the law is considered to be fair compliance will be reached. Fairness is characterized as substantive and procedural. Substantive fairness is related to equity of distributive justice whereby notion of distributive justice has gained wide acceptance in the international fora due to challenges faced with resource scarcity<sup>44</sup>. Legitimacy is a procedural

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on: [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg\\_no=XXVII-13&chapter=27#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XXVII-13&chapter=27#EndDec).

Accessed 18 May 2020.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Supra* note 17, p.227.

<sup>37</sup> *Supra* note 17, p.225.

<sup>38</sup> *Supra* note 30, p.1873.

<sup>39</sup> Teal Crossen, “Multilateral Environmental Agreements and the Compliance Continuum”, *Georgetown International Environmental Law Review*, 16(3), (2004):p.486.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*, p.482.

<sup>42</sup> *Supra* note 39, p.482.

<sup>43</sup> *Supra* note 39, p.483.

<sup>44</sup> *Supra* note 39, p.483.

component which relates to “that attribute of a rule which conduces to the belief that it is fair because it was made and is applied in accordance with “right process””<sup>45</sup>. Five indicators under fairness theory are applied to measure right process or legitimacy such as “clarity of the rule”, “cues that constitutes authority”, “treating like cases alike and relating in a principled fashion to other rules of the same system” and conformity with international community’s procedural and institutional framework”<sup>46</sup>. An important aspect is that Thomas Franck has developed partially fairness theory based on analysis of processes and outcomes of other multilateral environmental agreements asserting that “legitimate and legitimating regimes” are being created due to acknowledgment of restricted capacity of developing countries to deliver on their international commitments.<sup>47</sup>

It seems justified to assume that compliance-mechanism under Aarhus Convention in fact encourages in accordance with fairness theory perception that the environmental participatory rights for NGOs and public in general are fair thus there is expectations for high level of conformity. Article 15 of Aarhus Convention relates to obligation of the Parties to constitute by consent “non-confrontational, non-judicial and consultative”<sup>48</sup> mechanism for review of compliance whereby rights of public in general to refer directly to this mechanism as well as to submit communications related to three Aarhus pillars are granted. The compliance-mechanism operates under the principle “members of the public have the right to make complaints to an independent and impartial committee at international level”<sup>49</sup> including a novelty to submit a claim against a state before Compliance Committee. However, it should be emphasized that due to specificity of the composition of Compliance Committee’s nine elected members and their serving as independent experts in personal capacity Compliance Committee does not exercise functions of the court of justice<sup>50</sup>.

Furthermore, as by consensual agreement of the MOP nomination of elected members is extended also to nominees of environmental NGOs it might be assumed that it strengthens legitimacy of environmental NGOs to be recognized as a legitimate representative of the environment. In addition, a compliance mechanism under Aarhus Convention is a body of procedures aiming to promote compliance or under terms of Aarhus Convention “to review compliance”<sup>51</sup>. Compliance mechanism under Aarhus Convention is designed by treaty based institutional arrangement, namely, Compliance Committee whereby it is tasked to review compliance under five so far in practice identified circumstances as follows: when a Party exercise its right to submit non-compliance claim by another party; when a Party on its own initiative submits communications with regard to its own compliance; upon referral of the Secretariat to the Convention; in response to communications made by public with regard to Party’s compliance and upon request of MOP to examine Party’s compliance with provisions of Aarhus Convention<sup>52</sup>.

From the preceding summary of main features of fairness theory it might be assumed that established institutionalized multilateral arrangements for review of compliance, clear, plain and simple avenues to assess and to respond to non-compliance and obligations for the Parties to report on performance of Aarhus Convention enhances obedience of binding multilateral commitment. If

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<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.*, p.484

<sup>47</sup> *Supra* note 39, p.485.

<sup>48</sup> *Supra* note 34, Article 15.

<sup>49</sup> Attila Pánovics “Case ACCC/C2008/32 and Non-compliance of the EU with the Aarhus Convention”, *Pécs Journal of International and European Law*, (2017/II):p.7.

<sup>50</sup> *Supra* note 34, Article 15 Paragraph 5 and 7; Article 4 of Annex to Decision 1/7 (adopted at MOP1, 2002); ECE/MP.PP/2/Add.8. Available on: <https://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf> . Accessed 18 May 2020.

<sup>51</sup> *Supra* note 34, Article 15

<sup>52</sup> Guide to the Aarhus Convention Compliance Committee (adopted at the Committee’s 63rd meeting, Geneva, 11 - 15 March 2019): p.23. Available on: [https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC\\_Guidance/Guide\\_to\\_the\\_Aarhus\\_Convention\\_Compliance\\_Committee\\_2019.pdf](https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC_Guidance/Guide_to_the_Aarhus_Convention_Compliance_Committee_2019.pdf) . Accessed 18 May 2020.

Parties under Aarhus Convention are persuaded that compliance-mechanism in restrictive terms and compliance-review in a broader context are applied non-discriminatory and in transparency it might be concluded that with regard to compliance-mechanism under Aarhus Convention the main features of fairness theory provides an explanation why Parties tend to comply.

Managerial thought relies on a different approach regarding various obligations to report. A general assumption under managerial school regarding reporting is that obligations help to avoid conflicts and provide for transparent assessment of compliance is supported by advanced theory that “states tend to comply with agreements they have explicitly committed to, and breaches occur because of lack of resources rather than lack of will”<sup>53</sup>. Under managerial school another important procedural incentive to enhance compliance is compliance monitoring procedures. It is worth to note that Parties to Aarhus Convention by common intent and based on overall objective to promote uniform application of participatory environmental rights in fact have constituted with nearly perfection non-adversary and non-confrontational compliance mechanism whereby anyone from the public in environmental matters have access to submit requests for treaty interpretation and review of compliance in accordance with a set of procedural rules which themselves are being adopted in nearly ordinary legislative procedure.

As well-established quasi-judicial practice of Compliance Committee under Aarhus Convention helps to promote outreach within contracting Parties and environmental NGOs to encourage civil society to participate as observers in law-making in area of access to information, public participation in decision-making and access to justice, advanced theory by Harold Koh provides further thought and consideration why extensive inclusion of general public strengthens compliance under multilateral environmental agreements. Additionally and equally importantly, theory of Harold Koh and managerial school are in agreement with an assumption that “when a certain level of openness and transparency has been attained, the diplomatic ties between states, pressure from non-governmental organizations and the awareness of public are likely to keep complying with treaties”<sup>54</sup>.

Having regard to aforementioned the main reasons why Parties comply with provisions of multilateral environmental treaty which has exclusively recognized environmental participatory rights might be found in managerial theory, in the fairness theory and in the theory advanced by Harold Koh. In case of increased risks for a contracting Party to favour breach of Aarhus provision rather to comply with its international commitments the main features of abovementioned theories provide guidance what measures should be implemented and followed to erase circumstances which lead to treaty-violating conduct.

## **Section: 2. Legal appraisal and recent developments of Aarhus pillars**

### **2.1. Access to information**

Access to information is one of the cornerstones under Aarhus Convention which also was emphasized unilaterally by EU as an area of regulation in which conformity with treaty provisions has been established<sup>55</sup>. As early as in 1998 ECJ were requested to provide an interpretation of the term “information relating to the environment”. ECJ in case *Mecklenburg* hold that scope of application of Article 2(a) of the EU secondary legislation<sup>56</sup> extends to acts “capable of adversely affecting or protecting the state of one of the sectors of the environment covered by the directive”<sup>57</sup>.

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<sup>53</sup> Tuula Kolari “Constructing Non-Compliance Systems into International Environmental Agreements-A Rise of Enforcement Doctrine with Credible Sanctions Needed”, *Finnish Yearbook of International Law*, 14 (2003):p.210.

<sup>54</sup> *Ibid.*

<sup>55</sup> *Supra* note 34.

<sup>56</sup> *Supra* note 14; Article 2(a).

<sup>57</sup> Judgment of 17 June 1998, *Wilhelm Mecklenburg v Kreis Pinneberg-Der Landrat*, C-321/96, ECLI:EU:C:1998:300,

In addition, ECJ in case *Mecklenburg* followed Advocate General La Pergola line of reasoning on the intent of EC legislator not to provide precise definition of information relating to the environment because of nefast effects restrictive interpretation and application of precise definition might cause<sup>58</sup>. The second time before accession of EU to Aarhus Convention ECJ was requested to provide interpretation on what constitutes information relating to the environment concerned adjudication of infringement procedure against EU Member State. The ECJ in case *Commission v. France* maintained consistent line of interpretation with case *Mecklenburg* holding that information relating to the environment “relates either to the state of the environment or to activities or measures which could affect it, or to activities or measures intended to protect the environment, without the list in that provision including any indication such as to restrict its scope”<sup>59</sup> and also asserting that legal relevance cannot be afforded to condition whether document in question issuing institution carries out a public service. It is reasonable to conclude that although some of legal scholars already within provisions of Aarhus Convention have criticized lack of precise definition of such terms as “environment” and “environmental”, a consistent interpretation by ECJ of term “information relating to the environment” in ECJ cases resolved problem of attempted narrow interpretation of environmental information and implicitly incoherent transposition of secondary EU law in legal systems of Member States which might have led to possible restrictions on access to information in environmental matters.<sup>60</sup>

Articles 3, 4 and 5 of Aarhus Convention constitutes its first pillar, namely access to information. In accordance with Article 3 any Party to Aarhus Convention is under obligation to adopt and enforce appropriate measures in order to grant and facilitate effective access to information as well as it might adopt more stringent provisions referring to broader access to information. Article 4 and 5 refers to Party’s obligation for enforcement of access to environmental information held by or for public authorities and characterizes specific requirements for collection, maintenance or dissemination of environmental information.

ECJ in case *Ville de Lyon* acknowledged within accession to Aarhus Convention EU binding obligation “to ensure, within the scope of EU law, a general principle of access to environmental information held by the public authorities”<sup>61</sup>. Additionally, it was clarified by ECJ that EU legislator aiming to implement the general principle of access to environmental information adopted Directive 2003/4/EC thus ensuring any natural or legal person in a Member State of the EU environmental participatory rights arising from one of the Aarhus pillars.<sup>62</sup> Referring to well-established case-law with regard to application of a general principle of access to environmental information held by or for public authorities ECJ in case *Fish Legal and Shirley* asserted importance of uniform interpretation of Directive 2003/4/EC in conformity with wording and aim of the Aarhus Convention. However, ECJ took a restrictive approach with regard to binding force of Aarhus Convention Implementation Guide drawing parallels with other explanatory documents which undoubtedly having legal significance provide for mere interpretation of international commitments without producing normative effect<sup>63</sup>.

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paragraph 21.

<sup>58</sup> Opinion of Advocate General La Pergola of 15 January 1998, *Wilhelm Mecklenburg v Kreis Pinneberg-Der Landrat*, C-321/96, ECLI:EU:C:1998:9, paragraph 14 and 15.

<sup>59</sup> Judgment of 26 June 2003, *Commission of the European Communities v French Republic*, C-233/00, ECLI:EU:C:2003:371, paragraph 44.

<sup>60</sup> Peter Oliver, “Access to Information and to Justice in EU Environmental Law: The Aarhus Convention”, *Fordham International Law Journal* 1423, (2013):p.1431.

<sup>61</sup> Judgment of 22 December 2010, *Ville de Lyon v Caisse des dépôts et consignations*, C-524/09, ECLI:EU:C:2010:371, paragraph 35.

<sup>62</sup> *Ibid*; Paragraph 36.

<sup>63</sup> Judgment of 19 December 2011, *Fish Legal and Emily Shirley v The Information Commissioner and United Utilities, Yorkshire Water and Southern Water*, C-279/12, ECLI:EU:C:2013:853, paragraph 38.



Having regard to the aforementioned and considering the current status and implications of findings and recommendations of the Compliance Committee under Aarhus Convention it might be argued that when considering how to hold Party concerned accountable for non-compliance with environmental participatory right of access to information the compliance-mechanism suggests being institutionally and substantially best placed to assess advanced questions of concern.

### **2.1.1. Disclosure of information held by the Union's Institutions and Bodies**

The Compliance Committee of the Aarhus Convention was requested in case ACCC/C/2007/21 to pronounce on EIB conduct whether non-disclosure of NGO's request of information were in compliance under Aarhus Convention. The communicant argued that EIB among other treaty based commitments had breached Article 4 of the Aarhus Convention by not providing in two occasions requested environmental information the Party concerned were in possession of<sup>64</sup>. The argument put forwards by the Party concerned to clarify grounds for refusal to disclose requested information by NGO concerned assumption that documents were confidential and that "almost none of the finance contract constitutes environmental information in the sense of the Convention"<sup>65</sup>. While not finding EC to be strictly in non-compliance with Aarhus Convention, the Compliance Committee concluded that it might consider reaching a finding of non-compliance with Article 4 if erroneous application and encountered shortcomings of handling of information requests cannot be submitted for available review procedures<sup>66</sup>. The Compliance Committee also clarified approach on interpretation of the definition of "environmental information" by rejecting its narrow interpretation and establishing with regard to particular compliance case that "if a financing agreement deals with specific measures concerning the environment, such as the protection of a natural site, it is to be seen as containing environmental information"<sup>67</sup>. Interestingly though, the Compliance Committee found also useful to make some general observations relating to filing an information request. Relying on factual description of the case whereby environmental information request did not made explicit references to public authority to provide an environmental information, the Compliance Committee concluded that better implementation of procedural provisions would be achieved if information request encompassed indications to Aarhus Convention, implementing national legislation or reference to environmental information in general<sup>68</sup>. This case seems to assume that Compliance Committee is not only willing to investigate and to issue findings and recommendations in alleged non-compliance cases but also to prevent incorrect application of Aarhus Convention by issuing interpretative guidelines on conduct of the public of identified non-compliance.

Alongside with a paramount obligation of public authorities to ensure the widest possible availability and dissemination of the environmental information under Aarhus Convention the case-law of ECJ appears to acknowledge the intent of EU legislator within the scope of two separate legal regimes, namely, general access to information regime and access to environmental information regime "to give the fullest possible effect to the right of public access to documents of the institutions" and "to ensure the widest possible systematic availability and dissemination of the environmental information held by the institutions and bodies of the European Union"<sup>69</sup>. In case

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<sup>64</sup> Aarhus Compliance Committee, *Albania*, ACCC/C/2007/21, ECE/MP.PP/C.1/2009/2/Add.1 dated 3 April 2009, paragraph 18. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf). Accessed 29 May 2020.

<sup>65</sup> *Ibid*; paragraph 30.

<sup>66</sup> *Ibid*; paragraph 33(b).

<sup>67</sup> *Ibid*.

<sup>68</sup> *Ibid*; paragraph 34 and 35.

<sup>69</sup> Judgment of 23 November 2016, *European Commission v Stichting Greenpeace Nederland and Pesticide Action*

*Commission v Stichting Greenpeace Nederland and PAN Europe* ECJ rejected European Commission's argument that concept of "information [which] relates to emissions into the environment"<sup>70</sup> within the meaning of the first sentence of Article 6 Paragraph 1 of Regulation 1367/2006/EC<sup>71</sup> must be interpreted restrictively. Furthermore, it was asserted by European Commission that concept must be restricted to information relating to emissions emanating from industrial installations such as factories and power stations and the concept should only refer to information relating to actual emissions into the environment<sup>72</sup>. ECJ observed that restrictive interpretation should be applied to those exceptions which precludes a broad access to information held by EU institutions. In addition, ECJ through interpretation of Aarhus Convention and Regulation No 1367/2006 held that approach to restrict inclusion of the information under concept "information [which] relates to emissions into the environment" if it emanates from certain industrial source does not have legal relevance<sup>73</sup>. In regard to limit of the concept of 'information [which] relates to emissions into the environment' to actual emissions into the environment, ECJ stressed that "concept cannot be limited to information concerning emissions actually released into the environment"<sup>74</sup> in order to reach final conclusion that "foreseeable emissions, under normal or realistic conditions of use, from the product in question, or from the substances which that product contains, into the environment are not hypothetical and are covered by the concept of 'emissions into the environment' within the meaning of the first sentence of Article 6(1) of Regulation No 1367/2006"<sup>75</sup>.

It appears that a procedural right for the public to access to environmental information which is produced and held by EU institutions have gained certain recognition due to findings and recommendations of the Compliance Committee and well-established case-law of ECJ. Broad interpretation of access to environmental information and recognition of overriding public interest of disclosure of environmental information relevant for the protection of the environment precludes to advance such summarised grounds for refusal to grant access to environmental information as follows: relevance of issuing authority of information, narrow interpretation of concepts referring to procedural rights and wording of provisions under Aarhus Convention and relevant EU legislation.

### **2.1.2. Disclosure of Information held by EU Member States and other Parties**

The access to environmental information provisions in Article 4 and 5 of Aarhus Convention refer to two separate approaches of disclosure of information. The obligations of the Parties to collect and disseminate environmental information are defined in Article 4 which implies also Parties capacity to respond to requests of environmental information requests, which constitutes the subject of Article 4. Provisions of Article 5 convey obligations on Parties for active disclosure of environmental information. In addition, Compliance Committee have observed that "while Article 4 of the Convention obliges the Parties to ensure that public authorities make environmental information available, and sets out a number of procedural requirements to that end, there is no express requirement in Article 4 for a specific procedure to be followed when assessing whether requested information is environmental information"<sup>76</sup>. The implementation of first pillar of Aarhus

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*Network Europe (PAN Europe)*, C-673/13P, ECLI:EU:C:2016:889, paragraph 52.

<sup>70</sup> *Ibid*; paragraph 53.

<sup>71</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, O.J. L 264, 25.9. 2006, p. 13-19; Article 1.

<sup>72</sup> *Supra*, note 69; paragraph 49.

<sup>73</sup> *Ibid*, paragraph 53 and 54.

<sup>74</sup> *Ibid*, paragraph 73.

<sup>75</sup> *Ibid*, paragraph 75.

<sup>76</sup> Aarhus Compliance Committee, *Norway*, ACCC/C/2013/93, ECE/MP.PP/C.1/2017/16 dated 19 June 2017, paragraph

Convention by the EU is ensured in EU secondary legislation – Directive 2003/4/EC. It is worth to note the importance of the case law of the ECJ in developing and ensuring the uniform application of an obligation to disseminate actively environmental information. ECJ in case *Stichting Natuur en Milieu* among other questions under prejudicial proceedings were requested to clarify material scope of Article 2 of Directive 2003/4/EC whether an information in question qualifies as environmental information which subsequently is a subject of disclosure of in accordance with EU secondary law and provisions of Aarhus Convention<sup>77</sup>. According to the ECJ the term “environmental information” refers to particular sector governing preparatory works (studies and reports) which constitutes outcomes of a procedure aiming at prevention of risks and hazards for humans, animals and the environment<sup>78</sup>. In her Opinion, Advocate General Kokott took the view that although Article 2 of Directive 2003/4/EC provides for broad definition of environmental information considering its linkages with relevant aspects of human life, “it only covers information on effects caused by elements of the environment, environmental factors or environment-related measures and activities”<sup>79</sup>. The ECJ did not follow proposed restricted approach of interpretation which arguably was substantiated with practical argument to prevent application of broad interpretation of concept “environmental information” which might had resulted in an obligation to disseminate large proportions of non-environmental information.

In contrast, the Compliance Committee in case ACCC/C/2013/93 was reluctant to establish the Party concerned non-compliance with article 4 of Aarhus Convention regarding disclosure of requested information which was necessary for communicant’s academic research purposes. The case before Compliance Committee can be summarised as follows. The communicant argued that by not giving access to information of legal assessment of draft national legislative acts which contains legal analyses rather than political statements and by not conducting proper assesment and not providing grounds for non-partial disclosure of requested information the Party had failed to comply with Article 4 of Aarhus Convention<sup>80</sup>. Furthermore, the communicant maintained that the Party concerned had breached Article 4 Paragraph 7 of Aarhus Convention by not providing grounds of refusal to disclose requested information<sup>81</sup>. Although findings of Compliance Committee with regard to interpretation of treaty based exceptions for non-disclosure of environmental information provide much needed guidance on what constitutes “internal communications of public authorities”, the considerations offered of alleged non-compliance with first Aarhus pillar includes references to insufficient documentation and lack of evidence to support alleged non-compliance. Furthermore, Compliance Committee when addressing alleged non-compliance provided ambiguous arguments to substantiate grounds for findings that Party concerned are in compliance with obligations of access to information. For instance, instead of submitting requests of information *ex officio* within proceedings of the case and developing legal reasoning on alleged unfounded refusal to disclose requested information, the Compliance Committee concluded without proceeding to assessment of factual circumstances of the case that the benchmark of non-compliance with Article 4 Paragraph 1 is evidence “that the public authorities routinely denied access to information, including assessments (legal, environmental, technical or otherwise), by referring to it as internal communication, thus denying access to assessments informing its internal decision-making relating to the environment”<sup>82</sup>.

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18. Available

on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf) . Accessed 29 May 2020.

<sup>77</sup> Judgment of 16 December 2010, *Stichting Natuur en Milieu and Others v College voor de toelating van gewasbeschermingsmiddelen en biociden*, C-266/09, ECLI:EU:C:2010:779, paragraph 25.

<sup>78</sup> *Ibid*, paragraph 43.

<sup>79</sup> Opinion of Advocate General Kokkott of 23 September 2010, *Stichting Natuur en Milieu and Others v College voor de toelating van gewasbeschermingsmiddelen en biociden*, C-266/09, ECLI:EU:C:2010:546, paragraph 48.

<sup>80</sup> *Supra*, note 76; paragraph 45.

<sup>81</sup> *Ibid*, paragraph 54.

<sup>82</sup> *Ibid*, paragraph 72.

The arguments of the Compliance Committee also call into question the clarity, transparency and consistency of administrative practice of public authorities of the Party concerned regarding disclosure of environmental information. It also worth to mention that prior to the findings of the case ACCC/C/2013/93 Compliance Committee in case ACCC/C/2012/69 regarding alleged non-compliance of disclosure of environmental information observed that “[f]ailing to provide reasons for the refusal to provide the requested information in their response to the request significantly limits transparency and accountability in the way the Party concerned implements the Convention and is thus not in keeping with the spirit of the Convention”<sup>83</sup>. Even if it had been established formally that the Party concerned was in-compliance with treaty provisions a fair balance should had been strucked between the interests of individual to recieve requested information in complete or separating and disclosing part of the information without prejudice to its possible confidentiality and in the meantime securing public interest “to give a public authority’s officials the possibility to exchange views freely”<sup>84</sup> thus outweighing the need for full disclosure.

The Compliance Committee have also identified through its findings and recommendations applied practices which without apparent breach of access to information provisions is aimed to circumvent correct and effective enforcement of obligations related to dissemination of information. In case ACCC/C/2009/36 Compliance Committee stated that an omission to provide a reply to submissions from the public regarding requests of environmental information cannot be “considered as “tacit agreement”<sup>85</sup> and therefore an acceptable legal methodology. The Compliance Committee also found that “the concept of “positive silence” cannot be applied in relation to access to information” emphasizing that “[t]he right to information can be fulfilled only if public authorities actively respond to the request and provide information within the time and form required.”<sup>86</sup>. In addition, the Compliance Committee observed that such administrative challenges as heavy workload does not constitute an exception under Aarhus Convention justifying decision not disseminate requested information, however such applied practices as “lack of any response at all to requests for information or providing it later than two months after the request”<sup>87</sup> constitutes an ultimate breach of Article 4 Paragraph 7 of Aarhus Convention.

The wording of Article 5 of Aarhus Convention stipulates not only obligation of active dissemination of environmental information but also imposes positive duty upon public authorities to establish and maintain practical arrangements for collection, maintenance and storage of updated information necessary for enforcement of delegated functions. In case ACCC/C/2010/54 Compliance Committee reiterated Parties obligations “to ensure that each public authority possesses the environmental information which is relevant to its functions”<sup>88</sup> and found a causal link between lack of regulatory framework relating to policy-making in environmental matters and incapacity of the Party concerned to disseminate requested information. Although in case ACCC/C/2012/68 Compliance Committee established that given its mandate it cannot pronounce on accuracy of provided information in question, it observed that Article 5 of Aarhus Convention implies for public

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<sup>83</sup> Aarhus Compliance Committee, *Romania*, ACCC/C/2012/69, ECE/MP.PP/C.1/2015/10 4 dated 26 June 2015, paragraph 72. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf) . Accessed 29 May 2020.

<sup>84</sup> *Supra*, note 76; paragraph 71.

<sup>85</sup> Aarhus Compliance Committee, *Spain*, ACCC/C/2009/36, ECE/MP.PP/C.1/2010/4/Add.2 dated 18 June 2010, paragraph 57. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf) . Accessed 29 May 2020.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, paragraph 56.

<sup>88</sup> Aarhus Compliance Committee, *European Union*, ACCC/C/2010/54, ECE/MP.PP/C.1/2012/12 dated 29 June 2012, paragraph 90. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf) . Accessed 29 May 2020.

authorities competent of policy-making in environmental matters to possess all relevant and updated information necessary for proper enforcement of delgated functions<sup>89</sup>.

Having regard to aforementioned, although findings and recommendations of Compliance Committee illustrate consistent approach in cases of alleged non-compliance to restrain itself from interpretation of substantive environmental law of the Party concerned, Compliance Committee has responded with a due diligence to concerns expressed by the public including NGOs concerning obstacles incurred to exercise their rights to access to information. The Compliance Committee have provided in multiple cases authoritative guidance on the scope of obligation to disclose environmental information identifying with precision measures to be adopted for consistent application of provisions of Aarhus Convention and has successfully determined applied prohibitory practices within environmental participatory rights which lead mostly not only to non-compliance with treaty provisions but also suggests possible breaches of binding international commitments in other areas of environmental law.

### **2.1.3. Grounds of refusal to provide requested environmental information**

The Compliance Committee's findings provides fixed and well-defined legal interpretation of provisions which constitute exceptions from general principle that all environmental information should be accessible. Compliance Committee in case ACCC/C/2012/69 observed that presumption of disclosure of information requires its dissemination every time it is established that requested information is "environmental information" under Article 2 Paragraph 3 of Aarhus Convention<sup>90</sup>. In addition, the case law characterizes scope of allegations regarding refusal to disclose requested information and provides guidance on compliance issues associated with an active duty to disseminate information and a passive duty to provide information unless a provision of law specifically exempts it from disclosure.

In case ACCC/C/2008/24 the Compliance Committee reiterated treaty based participatory right for the public to have access to information stating that Aarhus Convention requires public authorities in conformity with Article 4, Paragraph 1 and 2 to respond to requests of members of the public within time limit of one month which might be extended up to two months due to justified complexity of the information<sup>91</sup>. It is also worth to note that in this case the Compliance Committee also stressed that a refusal to provide requested environmental information should be justified as soon as possible and in written form<sup>92</sup>. In multiple cases dealing with an alleged refusal of environmental information by communicants Compliance Committee have ephasized importance to provide a refusal of a request in writing clarifying that "one of the purposes of the refusal in writing is to provide the basis for a member of the public to have access to justice under article 9, paragraph 1, and to ensure that the applicants can do so on an "effective" and "timely" basis, as required by article 9, paragraph 4"<sup>93</sup>. According to findings of Compliance Committee "providing a statement of reasons under article 4, paragraph 7, not only helps the administration and the public to understand the Convention, but also provides higher administrative authorities and the court with a

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<sup>89</sup> Aarhus Compliance Committee, *European Union and the United Kingdom of Great Britain and Northern Ireland*, ACCC/C/2012/68, ECE/MP.PP/C.1/2014/5 dated 24 September 2013, paragraph 88. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf). Accessed 29 May 2020.

<sup>90</sup> *Supra*, note 83; paragraph 52.

<sup>91</sup> Aarhus Compliance Committee, *Spain*, ACCC/C/2008/24, ECE/MP.PP/C.1/2009/8/Add.1, paragraph 72. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf). Accessed 29 May 2020.

<sup>92</sup> *Ibid*, paragraph 67, 68 and 72.

<sup>93</sup> Aarhus Compliance Committee, *Austria*, ACCC/C/2010/48, ECE/MP.PP/C.1/2012/4, paragraph 56. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf). Accessed 29 May 2020.

better basis to assess whether the officials have correctly implemented the law”<sup>94</sup>, therefore it might be argued that legal certainty and due process of the proceedings for the Party concerned depends on correct application of the wording and meaning of strictly procedural provisions. In contrast, although findings of Compliance Committee illustrates applied uniform doctrinal approach that unless a provision under Aarhus Convention specifically exempts requested environmental information from disclosure, a refusal to disclose it in most cases leads to adopt findings on identified non-compliance with provisions on access to information in general and non-compliance with provisions on exceptions of non-disclosure of information in particular.

Despite of Compliance Committees consistent practice to interpret restrictively extent to which exemptions from and exceptions to general principle of accessibility of environmental information might be found in conformity with provisions of Aarhus Convention thus justifying a refusal of its dissemination, in case ACCC/C/2009/38 Compliance Committee was requested to pronounce on alleged non-compliance case regarding governmental decisions to restrict the general public access to information on endangered animal species. The communicant invited Compliance Committee to acknowledge that the Party concerned had breached provisions of Aarhus Convention regarding access to information refusing to disseminate information on the state of the environment held by public authority<sup>95</sup>. It further argued that unless the access to information regarding protected and endangered species of animals is restored, the Party concerned fails to comply with Aarhus Convention. It was, on one hand, claimed that the communicant had not been in capacity to exercise its rights as a member of the public to participate in the proceedings of further decision making regarding adopted measures of public authority for the protection of endangered species, and on the other hand, the refusal to provide information on particular endangered species had led to non-compliance with Article 5 Paragraph 2(c) of Aarhus Convention which obliges a duty of active dissemination of information in the event to imminent threat to the environment thus enabling the public to adopt an approach to prevent or mitigate harm of the threat.<sup>96</sup>

Compliance Committee observed that if requested information had fallen under exceptions of disclosure of information provided in Article 4 Paragraph 4(h) with regard to “breeding sites of rare species” the grounds for a refusal to disseminate it should have been interpreted in a restrictive way therefore the communicant might have had access to them. Furthermore, it maintained that disclosure of requested information would lead to obligation to disclose information to other members of the public upon request thus widening access to information on locations of breedings sites of protected and endangered species. Considering communicant to be trustworthy to grant access to information on locations of protected and endangered species, Compliance Committee also established that risks for widely accessible environmental information on breeding sites of rare endangered species might create adverse effects to the state of environment therefore prevention of identified threat to natural habitats outweighs applied restriction on communicant’s exercise of environmental participatory rights – access to information and public participation in decision-making implicitly.<sup>97</sup>

The findings of Compliance Committee have also contributed on identification of prohibitory practices and development of interpretation of provisions under Aarhus Convention regarding accessibility of environmental information. As already indicated, the grounds in conformity with Article 4 Paragraph 3 and 4 justifying a refusal to disclose information are subject to restrictive interpretation therefore Compliance Committee have established further guidance on the application

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<sup>94</sup> *Supra*, note 83; paragraph 72.

<sup>95</sup> Aarhus Compliance Committee, *United Kingdom of Great Britain and Northern Ireland*, ACCC/C/2009/38, ECE/MP.PP/C.1/2011/2/Add.10 dated 25 February 2011, paragraph 46. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf) . Accessed 29 May 2020.

<sup>96</sup> *Ibid*, paragraph 45.

<sup>97</sup> *Ibid*, paragraph 77 and 78.

of treaty based exemptions which are brought to the attention as applied procedural deficiencies by Party concerned causing allegations of non-compliance. In case ACCC/C/2010/51 Compliance Committee in response to claims brought by communicat of unjustified refusal to disclose environmental information and direct applicability of Article 4 Paragraph 6 of Aarhus Convention due to lack of proper legal framework of the Party concerned, observed that Article 4 Paragraph 3(c) conveys rights to public authorities to “refuse to grant access to material which is in the course of completion only if this exemption is provided under national law or customary practice<sup>98</sup>”. The Compliance Committee again noted that as a principle of law exemptions are to be interpreted restrictively” taking into account “the public interest served by the disclosure and the aims and objectives of the Convention”<sup>99</sup>. The Compliance Committee stressed that Aarhus Convention “does not define the “material in the course of completion”” therefore ““material in the course of completion” relates to the process of preparation of information or a document and not to an entire decision-making process”<sup>100</sup>. Consequently, based on factual circumstances of alleged non-compliance Compliance Committee confirmed that environmental information commissioned and approved by public administration in environmental matters of the Party concerned does not constitute “material in the course of completion” nor as “internal communications”, but rather as a final document which could and should be publicly available.”<sup>101</sup>

The Compliance Committee confirmed that while applicable national legislation, on one hand, might declare as confidential working documents of meetings of public authorities, on the other hand the conduct, and measures adopted by public authorities as well as related information does not necessarily constitute confidential information. Therefore it might be concluded that essential justification offered by the Party concerned for the refusal of disclosure of requested environmental information constituted prohibitory practice insofar in the absence of applied coherent regulatory framework the requested information were subject to restricted access and all relevant practices undertaken by public authorities were classified as confidential without considerations of the public interest served by the disclosure and without further justification whether the confidentiality of operational and internal procedures of an authority applies without distinction in every case.

The ECJ have also established case-law dealing with substantial and procedural aspects of refusal of environmental information. Although in case *Stichting Natuur en Milieu* ECJ acknowledged that transposition and implementation of Article 4 of Directive 2003/4 which stipulates exceptions to EU Member States binding obligation for disclosure of environmental information allows to adopt criteria in legislation for such exceptions, the provision “also requires that such a ground for refusal must be interpreted in a restrictive way, taking into account the public interest served by disclosure, and that in every particular case the public interest served by disclosure must be weighed against the interest served by the refusal”<sup>102</sup>. It was also asserted that a criterion to take into account the public interest served by the disclosure is given broad interpretation which includes its applicability to obligation to disclose requested information on emissions into the environment.

Likewise, it might be argued that ECJ interpretation of EU secondary law obliging to consider “the public interest served by the disclosure of environmental information and the specific interest served by a refusal to disclose”<sup>103</sup> on case-by-case basis alongside with specific criteria on non-disclosure of information provided in national legislation is consistent with its case-law aiming to

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<sup>98</sup> Aarhus Compliance Committee, *Romania*, ACCC/C/2010/51, ECE/MP.PP/C.1/2014/12 dated 28 March 2014, paragraph 82. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf) . Accessed 29 May 2020.

<sup>99</sup> *Ibid*, paragraph 83.

<sup>100</sup> *Ibid*, paragraph 85.

<sup>101</sup> *Ibid*, paragraph 87.

<sup>102</sup> *Supra*, note 77; paragraph 48.

<sup>103</sup> *Ibid*, paragraph 59.

preserve the effectiveness of the provision. As to the exception to obligation to disclose information, ECJ in case *Križan and Others* held that although relevant provisions of EU secondary law and Aarhus Convention allows authorities to refuse access to commercial and industrial information, the refusal of the authorities to provide information cannot be justified on grounds of prohibition to disseminate confidential, commercial or industrial information if requested information was necessary for effective exercise of rights of public participation in administrative proceedings of territorial planning<sup>104</sup>.

Although ECJ in case *Križan and Others* noted the importance of the scope of the applicable exemptions of obligation to provide access to environmental information, of greater significance in relation to potential non-compliance with Aarhus pillar on access to information are conclusions made by ECJ in case *Bayer CropScience and Stichting De Bijenstichting* confirming that given the wording and aim of provisions of Directive 2003/4/EC and Aarhus Convention to grant broad availability and dissemination of environmental information confidentiality of commercial and industrial does not constitute in every case a valid ground for refusal to disseminate information relating to such concepts as “emissions into the environment” and “information on emissions into the environment”, especially when widest possible disclosure of environmental information serves to promote environmental awareness and environmental protection in the public.<sup>105</sup> ECJ also clarified that in securing also legitimate aim to restrict disclosure of environmental information due to risks of adverse effects its disclosure might cause to confidentiality of commercial or industrial information or other interests under Article 4 Paragraph 2 of Directive 2003/4/EC, a competent authority might consider the possibility of providing partial access to the information requested regarding disclosure of information on emissions into the environment.

It is reasonable to conclude that although case-law of ECJ and findings and recommendations of Compliance Committee are permissive to applicability of exceptions to obligation to disclose environmental information and allow challenges to interpret them broadly or restrictively, it is also worth to acknowledge that ECJ interpretative margine of manoeuvre is limited to exercise its competence for enabling consistent and coherent application of obligations relating to accessibility of environmental information only during preliminary reference procedure or when requested to adjudicate infringement proceedings against EU Member State. Therefore Compliance Committee plays a pivotal role for evaluating the completeness and potential need for further improvement of application of environmental participatory rights. Findings and recommendations provide a more nuanced approach towards measures adopted for enjoyment of environmental participatory rights or obstacles incurred of applied prohibitory practices as well as it might be argued that in practice alleged non-compliance claims brought by the public before Compliance Committee are reviewed and outcomes are delivered with such efficiency that compliance mechanism under Aarhus Convention might be compared to the effective proceedings before national judiciary.

## **2.2. Public participation in environmental decision-making**

### **2.2.1. Scope of requirements under public participation**

Legal scholars have observed that one of major success of Aarhus Convention “is providing a cause of action when a state fails to comply with its own environmental laws by giving affected populations the rights to obtain relevant environmental information, to voice an opinion on major projects, and to challenge the government when it fails to live up to its obligations.”<sup>106</sup> In addition,

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<sup>104</sup> Judgment of 15 January 2013, *Jozef Križan and Others v Slovenská inšpekcia životného prostredia*, C-416/10 ECLI:EU:C:2013:8, paragraph 91.

<sup>105</sup> Judgment of 23 November 2016, *Bayer CropScience SA-NV v College voor de toelating van gewasbeschermingsmiddelen en biociden*, C-442/14, ECLI:EU:C:2016:890, paragraph 99., 104. and 105.

<sup>106</sup> Charles M. Kersen “Rethinking Transboundary Environmental Impact Assessment”, *Yale Journal of International*



legal scholars have asserted that as three provisions under Aarhus Convention stipulates substantial and procedural obligations for conduct of public participation in decision-making, its is constructed on “the traditional threefold distinction of public participation in specific decision-making, in plan and policy-making, and in legislative drafting and rule-making”<sup>107</sup>. It has also been argued that Article 6 requires conduct for public participation to all decision-making procedures aimed at granting permission to proceed with activities which may have significant environmental impact, therefore “[s]uch a decision relates always to the “proposed activity” to be undertaken by an individual or entity-such as a developer if it relates to a brand new project or operator of an existing installations if the decision relates to the extension of such installation”<sup>108</sup>. From the standpoint of the public though provisions of Article 6 constitutes grounds for claims to have access to relevant proposed activity related environmental information, to be informed “early in the decision-making procedure and in an adequate, timely and effective manner” and to have reasonable timeframes for preparation and participation in environmental decision-making.

Observations of legal scholars suggests that given the similarities of threefold distinction of public participation in specific decision-making, plan and policy-making as well as legislative drafting and rule making to “ladder of public participation”<sup>109</sup> the relevance of comprehensive approach to public participation in environmental decision-making under Article 6 of Aarhus Convention prevails over uncertain wording of provisions of Article 7 and 8 which leaves under discretionary power of the Parties to determine their scope of application. In addition, the concept of “ladder of public participation” should be interpreted as threefold public participation “in which members of the public are given more power when they have a specific interest in matters directly affecting their lives and well-being and progressively less direct power and influence as matters become more abstract and general”. Although such assertion might be substantiated by observation that provisions under Article 6 create clear legally binding obligations regarding decisions plans and programmes to be adopted for proposed activities but Article 7 and 8 “in fact merely require practical arrangements to be made without an obligation to implement them”, cases of alleged non-compliance regarding obligations under second Aarhus pillar illustrate activism of the public to hold Parties accountable for correct implementation of requirements of public participation in policy-making and public participation in rule-making.

In regard to requirement to conduct “early public participation when all options are open” Compliance Committee has acknowledged discretionary power of Parties to determine range of subjects put forwards subsequently at each stage of decision-making in accordance with “a concept of tiered decision-making, whereby at each stage of decision-making certain options are discussed and selected with the participation of the public and each consecutive stage of decision-making addresses only the issues within the option already selected at the preceding stage”<sup>110</sup>. Compliance Committee also held that within tiered decision-making procedures public authorities might be requested to adopt under Article 7 such consecutive strategic documents as policies, plans and programmes as well as individual decisions on proposed activities under Article 6. The development of Compliance Commission’s findings and recommendations on applicability of Article 6 or 7 and compliance with provisions on public participation reveals comprehensive and consistent approach to reach conclusion that in absence of clear definition which treaty provision applies to actual scope of alleged on-compliant public participation, it was acknowledged that applicability of Article 6 or 7 “must be determined on a contextual basis, taking into account the legal effects of the act, while its

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*Law*, 34(1) (2003):p.204.

<sup>107</sup> *Supra* note 13, p.16.

<sup>108</sup> *Supra* note 18, p.85.

<sup>109</sup> *Supra* note 13, p.16.

<sup>110</sup> Aarhus Compliance Committee, *Lithuania*, ACCC/C/2006/16, ECE/MP.PP/2008/5/Add.6 dated March 2008, paragraph 71. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf) . Accessed 1 June 2020.

label under the domestic law of the Party concerned is not decisive”<sup>111</sup>. It is also worth to mention that Compliance Committee in most cases of alleged non-compliance with requirements under Aarhus second pillar have established articulate and nuanced approach how to interpret applicability of Article 6,7 and 8 to factual circumstances of the case taking into account particularities of applicable law of Party concerned. Legal scholars regarding application of treaty obligation have observed that its effective enforcement is dependent on clear-cut and definite content<sup>112</sup>. The notion of a provision’s clear-cut and definite content is applied also by Compliance Committee within interpretation of scope of application of Article 6, 7 and 8 of Aarhus Convention. It might be argued that Compliance Committee applies the notion of a provision’s clear-cut and definite content for interpretation of obligations of Party concerned whereby through findings and recommendations it has been established that “the public participation requirements for decision-making on an activity covered by article 7 are a subset of the public participation requirements for decision-making on an activity covered by article 6. Regardless of whether the decisions are considered to fall under article 6 or article 7, the requirements of paragraphs 3, 4 and 8 of article 6 apply”<sup>113</sup>. Therefore Compliance Committee when examining claims of non-compliance with provisions of public participation in environmental decision-making will apply on case-by case basis adopted treaty standard to factual circumstances and national legal framework of Party concerned.

In contrast to views of legal scholars that legal relevance might be attributed to those provisions under Aarhus Convention which constitutes “obligations to be implemented in the form of binding legal provisions”<sup>114</sup>, Compliance Committee through findings and recommendations have pronounced on importance of legal effects which might be caused by decisions adopted in environmental decision-making. Compliance Committee in case ACCC/C/2009/43 have acknowledged that “it is important to identify what the legal effects of an act are — whether an act constitutes a decision under article 7 or a first phase/intention for a planned activity under article 6, because only some of the public participation provisions of article 6 apply to decisions under article 7”<sup>115</sup>. Therefore it might be asserted that in contrary to the opinion that scope of application of Article 7 “merely require[s] practical arrangements”<sup>116</sup> Compliance Committee suggests not only that decisions adopted in environmental decision-making under Article 7 might cause legal effects but also that interpretation of Article 6 and 7 has led to clarification what treaty standard those provisions implies.

With respect to public participation during preparation of executive regulations and/or generally applicable legally binding normative instruments Compliance Committee have emphasized that compliance with Article 8 is achieved if Parties exercising their discretionary power to adopt practical arrangements for conduct of public participation applies three procedural participatory requirements<sup>117</sup>. Through findings and recommendations Compliance Committee has clarified that

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<sup>111</sup> Aarhus Compliance Committee, *Belgium*, ACCC/C/2005/11, ECE/MP.PP/C.1/2006/4/Add.2 dated 16 June 2006, paragraph 29; *European Community*, ACCC/C/2006/17, ECE/MP.PP/2008/5/Add., paragraph 42. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf). Accessed 1 June 2020.

<sup>112</sup> Peter G. G. Davies “Non-compliance – a Pivotal or Secondary Function of CoP Governance?”, *International Community Law Review*, 15(1) (2013):p.80.

<sup>113</sup> Aarhus Compliance Committee, *Albania*, ACCC/C/2005/12, ECE/MP.PP/2007/4/Add.1 dated June 2007, paragraph 70. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf). Accessed 1 June 2020.

<sup>114</sup> *Supra* note 13, p.17.

<sup>115</sup> Aarhus Compliance Committee, *Albania*, ACCC/C/2009/43, ECE/MP.PP/2011/11/Add.1 dated 17 December 2010, paragraph 52. Available

on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf). Accessed 1 June 2020.

<sup>116</sup> *Supra* note 13, p.17.

<sup>117</sup> Aarhus Compliance Committee, *United Kingdom of Great Britain and Northern Ireland*, ACCC/C/2010/53, ECE/MP.PP/C.1/2013/3 dated 28 September 2012, paragraph 84. Available

“scope of obligations under article 8 relate to any normative act that may have a significant effect on the environment, which should be considered as including acts dealing with procedural matters related to authorization of activities subject to environmental assessment, as well as to public participation in environmental matters”<sup>118</sup>. Therefore it is important to note that Compliance Committee has developed nuanced approach with an attempt to clarify the notion of effective, conscious and inclusive public participation under Article 8 stating that alongside application of three procedural participatory requirements Parties are to provide final normative act with explanatory document on outcomes of conduct of public participation “and how the results of the public participation were taken into account”<sup>119</sup>.

### 2.2.2. Public participation in transboundary context

Legal scholars have observed that current developments on application of Aarhus Convention, especially its Article 3 Paragraph 7, leads to assume that in matters relating to environment public participation in environmental decision-making its applicability expands also to international environmental decision-making procedures therefore causing to review scope of application of provisions of environmental participatory rights<sup>120</sup>. Regarding relevant stakeholders in environmental decision-making processes Compliance Committee through findings and recommendations has evaluated such concepts as “the public” and “the public concerned”. Compliance Committee in case ACCC/C/2010/50 dealing with NGO alleged non-compliance with requirements of public participation of Party concerned regarding “limited scope of public participation to “persons, whose property rights or some other rights in rem to neighbouring land or structures thereon are likely to be directly affected”<sup>121</sup>, stated that distinction of “the public concerned” and “the public” shows that the definition of “the public concerned” is narrower than the latter. With regard to abovementioned and provisions of public participation in environmental decision-making the public concerned is identified on the basis of the criteria of “affected or likely to be affected by”, or “having an interest in”. Furthermore, it was presumed that scope of application of “the public concerned” alongside with criteria also in practice depends on characteristics of proposed activity subject to public participation<sup>122</sup>.

In addition, it might be argued that not only Compliance Committee explored new avenues for extension of applicability of the concept “the public concerned” observing that “members of the public have an interest in the decision-making depends on whether their property and other related rights (in rem rights), social rights or other rights or interests relating to the environment may be impaired by the proposed activity”<sup>123</sup>, but also provided interpretation of Article 2, paragraph 5 of Aarhus Convention stressing that “this provision of the Convention does not require an environmental NGO as a member of the public to prove that it has a legal interest in order to be considered as a member of the public concerned”<sup>124</sup>. The findings on a broad scope of application

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<sup>118</sup> Aarhus Compliance Committee, *Belarus*, ACCC/C/2009/44, ECE/MP.PP/C.1/2011/6/Add.1 dated 21 June 2011, paragraph 61. Available

on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf) . Accessed 1 June 2020.

<sup>119</sup> *Supra*, note 117; paragraph 86.

<sup>120</sup> Svitlana Kravchenko “Procedural Rights as a Crucial Tool to Combat Climate Change”, *Georgia Journal of International and Comparative Law*, 38(3) (2010):p.637.

<sup>121</sup> Aarhus Compliance Committee, *Czech Republic*, ACCC/C/2010/50, ECE/MP.PP/C.1/2012/11 dated 29 June 2012, paragraph 65 and 66. Available

on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf) . Accessed 1 June 2020.

<sup>122</sup> *Ibid*, paragraph 66.

<sup>123</sup> *Ibid*, paragraph 66.

<sup>124</sup> *Ibid*, paragraph 66.

of the concept “the public concerned” coincides with academic thought that “[a]lthough the Aarhus Convention does not specifically require non-discriminatory transboundary application, its provisions apply in quite general terms to the public” or the “public concerned”, without distinguishing between those inside the state and others beyond its borders”<sup>125</sup>.

Having regard to aforementioned, the scope and extent of applicability afforded to provisions under second Aarhus pillar to trans-boundary communicants reflects Compliance Committees quasi-judicial activism to promote application of Aarhus Convention in international environmental decision-making which also implies in trans-boundary context creation of subset of environmental participatory rights individuals and NGOs might rely on when necessary to hold Parties concerned accountable for alleged failure to take due consideration of extra-territorial effects. In addition, the recognition of members of civil society entitlement to claim rights for effective public participation for proposed activities beyond borders of their origin is also in line with Compliance Committee’s conclusion that “compliance review is forward-looking and that its aim is to begin facilitating implementation and compliance at the national level once a need for such is established”<sup>126</sup>.

It might be argued that current use and application of compliance mechanism by individuals and NGOs under Aarhus Convention has assisted to the development of comprehensive approach to public participation in international - decision making in advancing applicability of environmental participatory rights in transboundary context thus expanding cause of actions for civil society to challenge governmental conduct in substantial and procedural environmental matters. Article 31 Paragraph 3(c) Article 18 of VCL stipulates obligation to interpret treaty by taking into account any relevant rules of international law applicable to the relations between the parties<sup>127</sup>. The International Law Commission has addressed the issue of applicability of particular provision under public international law in a broader context within system of international law in general by advising to apply “a principle of “systemic integration””<sup>128</sup> provided in Article 31 Paragraph 3(c) Article 18 of the VCLT. Due to risks of expansion of divergent approaches to particular issues and disparities in public international law International Law Commission has clarified rationale behind introduction of principle of systemic integration asserting that:

All treaty provisions receive their force and validity from general law, and set up rights and obligations that exist alongside rights and obligations established by other treaty provisions and rules of customary international law. None of such rights or obligations has any *intrinsic* priority against the others. The question of their relationship can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole.<sup>129</sup>

Furthermore, it should be acknowledged that alongside supporters for established approach on how to avoid dissonant interpretations of equal issues under different regimes of international law, legal scholars have also criticised general applicability of systemic integration. Legal scholars have observed that regardless of assertion that “systemic integration should be the proces whereby international treaty obligations are interpreted by reference to their normative environment, so that,

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<sup>125</sup> Alan Boyle “Human Rights or Environmental Rights – A Reassessment”, *Fordham Environmental Law Review*, 18(3) (2007):p.502.

<sup>126</sup> *Supra* note 113, paragraph 89.

<sup>127</sup> *Supra*, note 32.

<sup>128</sup> UN International Law Commission “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law”; Report of the Study Group of the International Law Commission; paragraph 412 and 413. Available on: [https://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) . Accessed 1 June 2020;

Sean D. Murphy “Deconstructing Fragmentation: Koskenniemi’s 2006 ILC Project”, *Temple International & Comparative Law Journal*, 27(2) (2010):p.295-296.

<sup>129</sup> UN International Law Commission “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law”; Report of the Study Group of the International Law Commission; paragraph 414. Available on: [https://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf) . Accessed 1 June 2020

as a consequence, treaties function as parts of a coherent and meaningful whole”<sup>130</sup>, the meaning and wording of Article 31 Paragraph 3(c) Article 18 of the VCLT cannot be considered equal to the principle itself. Likewise, it might be argued that Compliance Committee regarding obligations of public participation in environmental decision-making involving two or more relevant Parties concerned has already provided quasi-judicial guidance on trans-boundary application of Aarhus Convention. Also findings and recommendations of Compliance Committee in alleged non-compliance with public participation in environmental decision-making in trans-boundary context cases reflect recourse to systemic interpretation of Aarhus Convention within systemic integration with other multilateral environmental legal instrument, in most cases with Espoo Convention<sup>131</sup>.

Nevertheless, it should be stressed that findings and recommendations reflect systemic avoidance by Compliance Committee to “interpret one treaty by reference to another treaty”<sup>132</sup>. A purposive and interpretive guidance on applicability of Article 6 of Aarhus Convention regarding claims of insufficient and ineffective public participation in decision – making of proposed activity (ultrahazardous activity) beyond borders of Party concerned reveals Compliance Committee’s cautious approach not to engage into research of similar or identical provision of other treaty subject to interpretation. Compliance Committee in case ACCC/C/2012/71 concluded that “whether in a domestic or transboundary context, the ultimate responsibility for ensuring that the public participation procedure complies with the requirements of article 6 lies with the competent authorities of the Party of origin”<sup>133</sup>. The conclusions of Compliance Committee in case ACCC/C/2013/9 exemplify the development of the extent considerations are given to other treaty while still preserving purpose of Aarhus Convention and applying due diligences of contextual differences.

Acting as an interpreter of applicability of Article 6 of Aarhus Convention to proposed activities which might have trans-boundary implications beyond the public of Party concerned Compliance Committee has pronounced that treaty regime might provide for joint responsibility between affected Party and a Party of origin to reach compliance with provisions to conduct proper public-participation in environmental decision-making within territory of Party affected.<sup>134</sup> Nevertheless, Compliance Committee reiterated independence of obligations under Article 6 of Aarhus Convention from binding requirements under other multilateral environmental treaties and concluded that margin of discretion of Party concerned to refrain itself from application of requirements of public participation in environmental decision-making in favour of other provisions of environmental participatory rights is not sufficient reason to limit their application, neither it precludes entitlement of civil society to require their extra-territorial application<sup>135</sup>. In addition, in reply of allegations that Aarhus Convention does not confer rights to be informed of extra-territorial proposed activity from a neighbouring country apart from transboundary environmental impact assessment procedure Compliance Committee reaffirmed based on its previous findings duty of

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<sup>130</sup> Adamantia Rachovitsa “The Principle of Systemic Integration in Human Rights Law”, *International and Comparative Law Quarterly*, 66(3) (2017):p.559.

<sup>131</sup> Aarhus Compliance Committee, *Armenia*, ACCC/C/2009/43, ECE/MP.PP/C.1/2011/11/Add.1 dated 17 December 2010; *Belarus*, ACCC/C/2009/44, ECE/MP.PP/2011/6/Add.1; *Czechia*, ACCC/C/2012/71, ECE/MP.PP/C.1/2017/3/Add.1 dated 13 September 2016. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf) . Accessed 1 June 2020.

<sup>132</sup> *Supra*, note 128; paragraph 415 and 416.

<sup>133</sup> Aarhus Compliance Committee, *Czechia*, ACCC/C/2012/71, ECE/MP.PP/C.1/2017/3/Add.1 dated 13 September 2016, paragraph 69. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf) . Accessed 1 June 2020.

<sup>134</sup> Aarhus Compliance Committee, *United Kingdom of Great Britain and Northern Ireland*, ACCC/C/2013/91, ECE/MP.PP/C.1/2017/14 dated 19 June 2017, paragraph 70. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf) . Accessed 1 June 2020.

<sup>135</sup> *Ibid.*

Party concerned to disseminate information on envisaged proceedings of public participation, therefore affirming non-compliance of Party concerned<sup>136</sup>.

The conclusions of Compliance Committee points to a larger issue, which goes to the heart of the challenge: adoption of regulatory framework to oblige public authorities “when selecting means of notifying the public [...] would ensure that all those who potentially could be concerned, including the public outside its territory, have a reasonable chance to learn about the proposed activity”<sup>137</sup>.

Compliance Committee’s findings provide useful insights into the difficulties from application of provisions of public participation in environmental decision-making and recognition by recourse to Aarhus compliance-mechanism of civil society’s entitlement to rely on rights of public participation in trans-boundary context by. Progressive development of Compliance Committee’s quasi-judicial practice in interpreting applicability of provisions of public participation in environmental decision-making points out to three observations. Applicability of provisions of public participation in environmental decision-making extends to proposed activities, especially regarding ultrahazardous activities beyond territorial jurisdiction of Party of origin and presumably affected Party.

The synergies and links between Aarhus Convention and other provisions of multilateral environmental treaties are welcome and are attuned to enhance wide public-participation in environmental decision-making beyond strict territorial scope of application, however Compliance Committee while applying principle of systemic integration has followed academic thought that “principle of systemic integration should not be relied on as the legal tool for an unwarranted alignments of a treaty’s meaning with the content of other treaties.”<sup>138</sup> Despite the clear absence in most cases of established non-compliance by Compliance Committee of clear regulatory framework on conduct of public participation in environmental decision-meetings in trans-border context recourse to other other bodies under Aarhus Convention such as Task Force on Public Participation in Decision-Making<sup>139</sup> and Task Force on Access to Justice<sup>140</sup> for guidance and recommendations on alignment of application of environmental participatory rights.

## 2.3. Access to justice

### 2.3.1. Scope of EU’s considerations

Procedural equity and inclusiveness are components which constitute in accordance with academic thought procedural justice. In broader perspective legal scholars have recognized the concept of environmental justice not only as a social movement but also a framework within implications of national and international legal regimes affecting most vulnerable parts of civil society might be identified and assessed. The concept of environmental justice implies according to academic thought four subsets such as social justice, corrective justice, distributive justice and procedural justice<sup>141</sup>.

The jurisprudence of CJEU and its recent developments regarding application of provisions under Aarhus Convention have contributed to implement in practice such subsets of environmental

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<sup>136</sup> *Ibid*, paragraph 89.

<sup>137</sup> *Ibid*.

<sup>138</sup> *Supra*, note 130; p.568.

<sup>139</sup> Decision EMP.II/1 of MOP to Aarhus Convention (Extraordinary session 2010). Available on: [https://www.unece.org/fileadmin/DAM/env/pp/e-mop/ece\\_mp\\_pp\\_2010\\_2\\_add\\_1\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/pp/e-mop/ece_mp_pp_2010_2_add_1_e.pdf) . Accessed 6 June 2020.

<sup>140</sup> Decision I/5 of First MOP to Aarhus Convention.

<https://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.6.e.pdf> . Accessed 6 June 2020.

<sup>141</sup> Carmen G. Gonzalez and Sumundu Atapattu “International Environmental Law, Environmental Justice, and the Global South”, *Transnational Law and Contemporary Problems*, 26(2) (2017):p.233-234.

justice as procedural and corrective justice. In addition, legal scholars have asserted that procedural and corrective justice constitutes the concept of environmental justice to the extent as it is understood in the EU. Therefore, the scope of application of environmental justice refers to three interdependent and mutually reinforcing pillars under Aarhus Convention whereby “access to information is thus a necessary prerequisite for meaningful [public] participation, while access to justice is a means to enforce other two [environmental participatory] rights”<sup>142</sup>.

CJEU has developed extensive jurisprudence establishing various approaches to be followed by EU and its Member States to apply their national legislation and EU secondary law in conformity with provisions under Aarhus Convention. With regard to application to date of Article 9 Paragraph 1 of Aarhus Convention CJEU in case *East Sussex County Council* was requested to establish whether provisions under national legal system are in compliance with Directive 2003/4/EC. CJEU established that secondary EU law on access to information does not constitute a threshold to be met by Member States to ensure adequate and effective administrative and judicial review, therefore it concluded that it is up to margin of discretion of Member States to establish under national legal system the extent of administrative and judicial review in compliance with principles of equivalence and effectiveness<sup>143</sup>. Nevertheless, CJEU also stressed that compatibility of administrative and judicial review with EU law is established when “it enables the court or tribunal hearing an application for annulment of such a decision to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness of the decision”<sup>144</sup>. Academic thought asserts that Article 9 Paragraph 1 and 2 stipulates “availability of administrative and judicial remedies designed to enforce the rights granted to the public under the passive access to information provisions (Article 4) and the provisions relating to public participation in decision on specific activities (Article 6) [Aarhus Convention]”<sup>145</sup>. Therefore, considering CJEU conclusions and assertions of academia EU Member State should be aware that exercise of margin of discretion regarding adoption of legal framework on access to justice is subject to stringent requirements derived from applicable EU law.

With regard to scope of application of Member State’s margin of discretion concerning access to justice in environmental matters, CJEU in case *Gruber* observed that given almost identical wording of the proper provision under EU secondary law and Article 9 Paragraph 2 of Aarhus Convention admissibility of cause of action falls under two conditions<sup>146</sup>. CJEU clarified that “admissibility of an action may be conditional either on the existence of ‘a sufficient interest in bringing the action’, or on the applicant alleging ‘the impairment of a right’, depending on which of those conditions is adopted in the national legislation”<sup>147</sup>. In conclusion it was established that although Member States have a significant discretion to determine what constitutes ‘sufficient interest’ or ‘impairment of a right, nevertheless they are under obligation to promote and enhance wide access to judicial review of the public concerned<sup>148</sup>.

CJEU has drawn interpretive guidance to judiciary of EU Member States on applicability of provisions of third pillar under Aarhus recognizing rights of NGOs access to justice. In case *Djurgården* summarized preliminary question before CJEU was whether a NGO which promotes environmental protection can have access to a review procedure to challenge disputed decision if it does not satisfy requirements under national law establishing a concrete threshold of participant’s

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<sup>142</sup> Davor Petrić “Environmental Justice in the European Union: A Critical Reassessment”, *Croatian Yearbook of European Law and Policy*, 15 (2019):p.237.

<sup>143</sup> Judgment of 6 October 2015, *East Sussex County Council*, C-71/14, ECLI:EU:C:2015:656, paragraph 58.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Supra*, note 13; p.18.

<sup>146</sup> Judgment of 16 April 2015, *Karoline Gruber v Unabhängiger Verwaltungssenat für Kärnten and Others*, C-570/13, ECLI:EU:C:2015:231, paragraph 34. and 36.

<sup>147</sup> *Ibid.*, paragraph 33.

<sup>148</sup> *Ibid.*, paragraph 50.

number giving access to judicial review<sup>149</sup>. It is worth to note that CJEU partially followed Advocate General Sharpston line of reasoning whereby CJEU concluded that applicable relevant EU secondary law and regulatory framework on structure of judicial institutions of a Member State and their competences does not justify NGOs binding restrictions on access to review procedure<sup>150</sup>. The position of Advocate General Sharpston, in contrast to CJEU observations, was based on articulated analysis stating that although relevant provision under EU secondary law does not grant access to justice without restrictions, given NGOs promoting environmental protection “special supervisory role”<sup>151</sup> once they are in compliance with requirements of the concept of public concerned, it should have directly applicable access to justice. The conclusions of Advocate General Sharpston coincides of the academic assertion that “[t]he Convention also goes some way towards establishing general legal standing for environmental NGOs inasmuch as it essentially requires States to recognize that the purposes of an organization as stated in its charter or statute may establish a sufficient and recognizable legal interest”<sup>152</sup>.

In addition, CJEU in the latter case also pronounced on the exercise of environmental participatory rights stating that “participation in decision-making procedure has no effect on the conditions for access to the review procedure”<sup>153</sup> due to different purposes and also arguably different level of finality of proceedings. Likewise, CJEU in case *Trianel* observed that provisions under national legal system of EU Member State with regards to access to justice should be subject of alignment with the objectives of Aarhus Convention and should achieve the aim to grant the public concerned wide access to justice<sup>154</sup>. In addition, CJEU stressed that although legislator of EU Member State has a margin of discretion to determine scope of the the concept of impairment of a right, it cannot be derived from “conditions which only other physical or legal persons can fulfil, such as the condition of being a more or less close neighbour of an installation or of suffering in one way or another the effects of the installation’s operation”<sup>155</sup>. Therefore, CJEU concluded that incompatible with relevant provisions under EU secondary law which refer to decision-making procedures of projects which might with a high probability affect state of the environment are national provisions which preclude environmental protection organisations access to justice. Similar considerations related to recognition of legal standing for environmental NGOs and their access to justice were adressed by academic thought asserting that “the Convention states that environmental NGOs meeting the requirements of national law shall be deemed to have rights capable of being impaired, or sufficient legal interest in order to challenge the procedural and substantive legality of decision on specific activities.”<sup>156</sup>

In absence of relevant EU secondary law relating to access to justice in environmental matters ECJ readiness and preparadness to recognize direct effect of Article 9 Paragraph 3 of Aarhus Convention was tested in so-called *Slovak Bears* case<sup>157</sup>. Legal scholars have asserted that “[t]hrough its case-law, the Court has partly filled the gap left by the absence of EU legislation concerning Member States obligations under Article 9(3) of the Convention”<sup>158</sup>. CJEU were

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<sup>149</sup> Judgment of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening v. Stockholms kommun genom dess marknämnd*, C-263/08, ECLI:EU:C:2009:631, paragraph 39, 43 and 44.

<sup>150</sup> *Ibid.*, paragraph 48.

<sup>151</sup> Opinion of Advocate General Sharpston of 2 July 2009, *Wilhelm Mecklenburg v Kreis Pinneberg-Der Landrat*, C-263/08, ECLI:EU:C:2009:421, paragraph 50.

<sup>152</sup> *Supra*, note 13; p.18.

<sup>153</sup> *Supra*, note 150; paragraph 38.

<sup>154</sup> Judgment of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg, Trianel Kohlekraftwerk Lünen (intervening)*, C-115/09, ECLI:EU:C:2011:289, paragraph 22.

<sup>155</sup> *Ibid.*; paragraph 47.

<sup>156</sup> *Supra*, note 13; p.18.

<sup>157</sup> Judgment of 8 March 2011, *Lesoochránárske zoskupenie VLK v Ministersvo Životého prostedia Slovenskej republiky*, C-240/09, ECLI:EU:C:2011:125.

<sup>158</sup> *Supra*, note 49; p.13.



requested to provide interpretive guidance whether in absence of provisions relating to access to judicial review under EU secondary law on conservation of protected plant and animal species Article 9 Paragraph 3 of Aarhus Convention is directly applicable. CJEU replied in negative stating that based on established case-law relating to requirements which should be complied in order to establish direct applicability of binding provisions under international law “Article 9(3) of the Aarhus Convention do not contain any clear and precise obligation capable of directly regulating the legal position of individuals.”<sup>159</sup> In addition, CJEU noted that broad wording of Article 9 Paragraph 3 aims at ensuring effective environmental protection therefore legislator of Member States is mandated to adopt regulatory framework containing precise conditions how individuals might exercise their environmental participatory rights. However, CJEU also asserted that Member States’ margin of discretion relating to constitution of regulatory framework on access to justice must comply with the principle of equivalence and the principle of effectiveness “so as to enable an environmental protection organisation [...] to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.” Legal scholars have drawn conclusions from the latter case noting that provisions under Aarhus Convention are a benchmark and arguably standard for application of principle of effective judicial protection<sup>160</sup>.

Negation of “effective judicial protection of the rights conferred by EU environmental law”<sup>161</sup> occurs when national legislation relating to locus standi of individuals including environmental NGOs does not “meet the objectives pursued by Article 9(3) of the Aarhus Convention.”<sup>162</sup>, therefore “the principle of effective judicial protection and Article 9(3) of the Aarhus Convention are in a mutually reinforcing relationship.”<sup>163</sup> However, despite judicial-inspired academic thought that CJEU conclusions in *Slovak Bears* case aspires in absence of EU secondary law on access to justice to assist presumably environmental NGOs to obtain wider access to justice before judicial institutions of EU Member States, question whether CJEU has properly addressed the issue of *locus standi* of environmental NGOs remains. It is worth mentioning that approach adopted by CJEU to refer rather to such ambiguous criterion as “to the fullest extent possible”<sup>164</sup> than to provide referring national court with instructive guidance on how Article 9(3) of the Aarhus Convention should be incorporated into national legal system with conformity of EU law derived principle of effective judicial protection, rises questions on Member States’ margin of discretion in good faith and in conformity with objectives of Aarhus Convention to adopt relevant legislation. Nevertheless, EU Member States’ margin of discretion to implement third pillar under Aarhus Convention into their national legal system might enhance environmental NGOs recourse to such a treaty-based compliance mechanism as Aarhus. Considering incapacity of environmental NGOs to initiate preliminary proceedings before CJEU regarding review of Member State’s regulatory framework non-compliance with provisions relating to access to justice, access to Compliance Committee equal as to the Parties is the most appropriate international fora allowing not only to enhance awareness of particular issue of implementation, application or exercise of environmental participatory rights at international level but also implying inclusion of environmental NGOs into law-making procedures in transboundary context.

Scope of judicial review and legal standing for individuals to challenge EU legal acts before EU judicial institutions is provided in Article 263 Paragraph 4 TFEU which stipulates standing of natural and legal persons to submit a claim for annulment of a “regulatory act which is of direct

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<sup>159</sup> *Supra*, note 49; paragraph 45.

<sup>160</sup> Koen Lenaerts and Jose A. Gutierrez-Fons “To say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice”, *Columbia Journal of European Law*, 20(2) (2014):p.43.

<sup>161</sup> *Ibid.*

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

<sup>163</sup> *Ibid.*; p.44.

<sup>164</sup> *Supra*, note 49; paragraph 50.

concern to them and does not entail implementing measures”<sup>165</sup>. CJEU in case *Inuit* upheld ruling of the General Court and clarified that in accordance of Article 263 Paragraph 4 TFEU regulatory acts are constituted by acts of general application which are other than legislative acts, therefore it might be argued that CJEU agreed to findings of General Court stating that act in issue was a legislative act and it also implied for litigants in case seeking its annulment to prove that they are directly and individually concerned<sup>166</sup>. From environmental perspective and relating to environmental participatory rights CJEU in case *Vereniging Milieudefensie* set aside ruling of General Court concluding that annulment of EU secondary law might be substantiated by provisions of an international agreement if meaning of international agreement does not preclude such a conduct and if provisions under international agreement are “unconditional and sufficiently precise”<sup>167</sup>.

Furthermore, CJEU in line with reasoning in *Slovak Bears* case concluded that in the absence of “unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals” and since Article 9 Paragraph 3 of Aarhus Convention is subject to implementing measures, it cannot constitute a legal ground “to be properly relied on before EU judicature for the purposes of assessing the legality of Article 10(1) of Regulation No1367/2006”<sup>168</sup>. It is worth to note that although Articles 10 and 11 of the Aarhus Regulation provide for access to the administrative review procedure for NGOs, a submission for administrative review might be inadmissible if the submission does not comply with requirements of, for instance individual scope, legally binding and external effects, environmental law provided in Article 2 Paragraph 1 (f)(g) and Article 2 Paragraph 2<sup>169</sup>. Legal scholars and Compliance Committee under Aarhus Convention have expressed concerns regarding compatibility of “reduced circle of beneficiaries”<sup>170</sup> under Article 11 of Aarhus Regulation with Article 9 Paragraph 3 of Aarhus Convention. Although Article 9 Paragraph 3 of Aarhus Convention stipulates margin of discretion of Parties to establish civil society binding criteria for access to justice, restricted scope of application of Article 11 under Aarhus Regulation relating only to NGOs asserts its non-compliance with Aarhus Convention.

From the cases discussed, it follows that state practice of EU Member States and well-established case-law of CJEU leads towards establishing comprehensive approach on recognition and implementation of broad access to justice including conferral of participatory rights to members of the public to have opportunity to challenge procedural and substantive legality of decision on specific activities as well omissions. Nevertheless, reluctance of the EU institutions exercising their competence to resolve encountered divergencies of application of provisions under Aarhus Convention and relevant EU law circumvents implementation of the treaty obligations and arguably creates adverse effects on promotion of environmental justice, especially on procedural justice beyond the EU.

### 2.3.2. Scope of considerations by Compliance Committee

Legal scholars have asserted that “the Convention allows a great deal of flexibility in defining which members of the public have access to justice”<sup>171</sup>. Compliance Committee in case

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<sup>165</sup> Consolated version of the Treaty on the Functioning of the European Union OJ C 326, 26.10.2012. pp.47-390. Available on: [http://data.europa.eu/eli/treaty/tfeu\\_2012/oj](http://data.europa.eu/eli/treaty/tfeu_2012/oj). Accessed 4 May 2020.

<sup>166</sup> Judgment of 3 October 2013, *Inuit Tapiirit Kanatami and Others v European Parliament and Council of the European Union*, C-583/11P, ECLI:EU:C:2013:625, paragraph 73 and 75.

<sup>167</sup> Judgment of 13 January 2015, *Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, C-401/12P to C-403/12P, ECLI:EU:C:2015:4, paragraph 54.

<sup>168</sup> *Ibid.*; paragraph 55.

<sup>169</sup> *Supra*, note 72.

<sup>170</sup> Benedikt 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”, *Review of European, Comparative & International Environmental Law*, 25(1) (2016):p.86; footnote 51.

<sup>171</sup> *Supra*, note 50; p.8.

ACCC/C/2008/31 and ACCC/C/2005/11 clarified that application of Article 9 Paragraph 3 of Aarhus Convention should be examined in Articles 1 to 3 of the Convention, therefore granting any member of the public wide access to justice and asserting that application of Article 9 Paragraph 3 implies presumption that civil society has access to review procedures provided in national law in order to challenge acts and omissions violating environmental law<sup>172</sup>. In addition, it was also established that:

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.

In the context of CJEU ruling in *Slovak Bears* case stating that judicial institutions of Member States have a margin of discretion regarding implementation of EU environmental law therefore they are competent to interpret national law “to the fullest extent possible”<sup>173</sup> with requirements under Article 9 Paragraph 9 of Aarhus Convention, through findings and recommendations in the latter cases Compliance Committee provided clarification what should be understood by the highest threshold Parties could strive to achieve in implementing relevant provision.

The second sentence of Article 9 Paragraph 1 of Aarhus Convention stipulates that if the review under the first sentence of Article 9 Paragraph 1 is provided by a court of law, the unsuccessful applicant shall also have access to an expeditious procedure for “reconsidering by a public authority” or “review by an independent and impartial body other than a court of law”<sup>174</sup>. Compliance Committee in case ACCC/C/2013/93 relating to question whether such public authority as Parliamentary Ombudsmen vested with rights under national law to pronounce on conduct of public administration constitutes a competent authority to review refusal of public administration to disclose information. Compliance Committee in its findings replied in affirmative and concluded that “under the legal framework of the Party concerned, the Parliamentary Ombudsman is an inexpensive, independent and impartial body established by law through which members of the public can request review of an information request made under article 4 of the Convention.”<sup>175</sup>. It is worth to note that although Parliamentary Ombudsman issues unbinding recommendations to addressees they are mostly followed by public administration of the Party concerned therefore it might be asserted that the institution of the Ombudsmen constitutes a review mechanism under Article 9 Paragraph 1 of Aarhus Convention.

It might be reasonably asserted that due to recent developments of quasi-judicial practice of Compliance Committee regarding application of Article 9 Paragraph 1 it suffices for the Parties to have a system whereby the decision of information holding authority on refusal to disclose environmental information is reconsidered within the relevant public administration.

Civil society recourse to compliance mechanism under Aarhus Convention has initiated interlinkages between practice of Compliance Committee and CJEU jurisprudence. The interlinkages which also have implicitly triggered implications on implementation of provisions under Aarhus Convention by EU and its Member States have by integrated approach been reflected in findings and recommendations of Compliance Committee. In case ACCC/C/2008/31 the communicant requested Compliance Committee to establish the Party’s legal system’s non-

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<sup>172</sup> Aarhus Compliance Committee, *Germany*, ACCC/C/2008/31, ECE/MP.PP/C.1/2014/8 dated 20 December 2013, paragraph 92.; *Belgium*, ACCC/C/2005/11, ECE/MP.PP/C.1/2006/4/Add.2 dated 16 June 2006, paragraph 35. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf). Accessed 7 June 2020.

<sup>173</sup> *Supra*, note 49; paragraph 50

<sup>174</sup> *Supra* note 34; Article 9 Paragraph 1.

<sup>175</sup> *Supra*, note 76; paragraph 86.

compliance with Article 9 Paragraph 2 and 3 as well as with Article 9 Paragraph 3 in conjunction with Article 9 Paragraph 4 whereby established criteria for standing for environmental NGOs are unduly stringent; members of the public are deprived from procedural rights to challenge legality of any decision subject of Article 6. It was also alleged that national legislation does not provide for environmental NGOs which does not fulfill criterion of impairment of rights competence to challenge acts and omissions of private persons and public authorities<sup>176</sup>. Compliance Committee in reply of communicant's claim of identified deficiencies of improper incorporation into national legal system and incorrect application separately and cumulatively of Article 9 Paragraph 2, 3 and 4 of Aarhus Convention observed that it "pays attention to the general picture regarding access to justice in the Party concerned"<sup>177</sup> and "[t]he "general picture" includes both the legislative framework of the Party concerned concerning access to justice in environmental matters, and its application in practice by the courts"<sup>178</sup> therefore "the Committee does not only examine whether the Party concerned has literally transposed the wording of the Convention into national legislation, but also considers practice, as shown through relevant case law"<sup>179</sup>. It was also clarified that possibility that judicial institutions of the Party concerned may apply national provisions incompatible with requirements under Aarhus Convention on standing of environmental NGOs and their access to judicial review procedures without presentation of appropriate evidence to substantiate such allegations does not constitute sufficient grounds to identify Party's non-compliance<sup>180</sup>. Although Compliance Committee did not develop in-depth considerations on legal relevance of conclusions of CJEU in case *Trianel*, Compliance Committee adopted purposive approach to articulate its legal reasoning with assertions of CJEU avoiding unwarranted alignment of its applied quasi-judicial practice with case-law of EU judiciary.

In addition communicant's allegations of non-compliance of restrictions under national law on standing to challenge acts and omissions of private persons and public authorities in breach of environmental law granted only to the restricted scope of persons exemplifies Compliance Committee's considerations to use CJEU jurisprudence as interpretive reference in its findings. Compliance Committee in reply of alleged non-compliance of the Party concerned with article 9, paragraph 3, in conjunction with paragraph 4, of the Convention observed that given the particularities of applicable national law

access to justice is granted on the basis of whether the applicant claims infringement of his/her subjective rights. A strict application of this principle in matters of access to justice under the Convention would imply non-compliance with article 9, paragraph 3, of the Convention, since many contraventions by public authorities and private persons would not be challengeable unless it could be proven that the contravention infringes a subjective right. The requirement of infringement of subjective rights would in many cases rule out the opportunity for environmental NGOs to access review procedures, since they engage in public interest litigation.<sup>181</sup>

Furthermore, Compliance Committee considering recent amendments to applicable national law following CJEU ruling in *Slovak Bears* case reasonably assumed based that broad interpretation on standing of environmental NGOs to access review procedures subject to the criterion of impairment of a right might be due to mandatory requirement to comply with EU law. Compliance Committee regarding adopted legislative measures and jurisprudence of national judiciary aiming to implement relevant EU law also emphasized that "[it]does not imply that the same interpretation will be applied by the courts to those areas of national law relevant to the Aarhus Convention but not covered by EU law. Nor does it guarantee that this interpretation will be widely followed in

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<sup>176</sup> Aarhus Compliance Committee, *Germany*, ACCC/C/2008/31, ECE/MP.PP/C.1/2014/8 dated 20 December 2013, paragraph 2 and 3. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf). Accessed 7 June 2020.

<sup>177</sup> *Supra*, note 177; paragraph 64.

<sup>178</sup> *Ibid.*

<sup>179</sup> *Ibid.*; paragraph 65.

<sup>180</sup> *Supra*, note 177; paragraph 64.

<sup>181</sup> *Ibid.*; paragraph 95.

future decisions”<sup>182</sup>. Therefore not convinced with assertions of the Party concerned that in the matters relating to nature conservation NGOs have access to review procedures without requirement of infringement of subjective rights under amended national law which have been affirmed by subsequent jurisprudence of the court of justice, Compliance Committee concluded that it is necessary for Party concerned to adopt relevant legislative measures to ensure standing to environmental NGOs to access to review procedures.

From the cases discussed it follows that through findings and recommendations Compliance Committee have adopted comprehensive and flexible approach of implementation and application of Article 9 of Aarhus Convention whereby Parties ensures that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced”<sup>183</sup>. In contrast, recent developments under Aarhus compliance-mechanism exemplifies Compliance Committees practice to put the Party concerned under stringent scrutiny whenever scope of allegations of non-compliance extends to access to effective judicial protection for infringement of procedural rights under Article 6 of Aarhus Convention. Lastly, it might also be argued that latter compliance-case to certain extent might refer to communicant’s attempt to have recourse to Aarhus compliance-mechanism with an aim to measure possibility of introduction of concept of *actio popularis* into legal system of the Party concerned. Nevertheless, despite of findings of inconsistent national legal framework relating to environmental NGOs standing and access to judicial review, divergent practice of Party’s judiciary and disputed allegations of the Party concerned of direct applicability of Article 9 Paragraph 2, Compliance Committee’s interpretation of Article 9 articulating treaty objectives serves as the standard for assessing any Party obligations under Aarhus Convention.

### **3. Reflection on Compliance Case ACCC/C/2008/32 concerning EU and its Impact on Compliance Mechanism under Aarhus Convention**

#### **3.1. Legal appraisal of EU standing before Compliance Committee**

Compliance Committee has recently examined the application of alleged non-compliance of the Party concerned obligation under Article 7 of Aarhus Convention in the absence of “a regulatory framework that would comprehensively regulate public participation in relation to all plans and programmes relating to the environment prepared in its member States”<sup>184</sup>. Although Compliance Committee given its mandate avoided to examine whether “the provisions of the SEA Directive comprehensively implement all the procedural obligations contained in article 7 of the Convention or whether the Party’s legal framework to implement article 7 of the Convention covers all plans and programmes relating to the environment envisaged by its law”<sup>185</sup>, the Party’s concerned non-compliance with Article 7 was not affirmed. Compliance Committee by conducting comprehensive assessment of circumstances and taking account on arguments of legal relevance advanced by EU Member State as observer Party to the proceedings concluded that in the absence of relevant EU legislation on particular subset of plans of programmes subject to regulation under national law of EU Member state “Party concerned has no obligations to make appropriate practical

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<sup>182</sup> *Ibid.*; paragraph 98.

<sup>183</sup> Aarhus Compliance Committee, *Denmark*, ACCC/C/2006/18, ECE/MP.PP/2008/5/Add.4 dated March 2008, paragraph 29 and 30. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf). Accessed 7 June 2020.

<sup>184</sup> Aarhus Compliance Committee, *European Union*, ACCC/C/2014/101, ECE/MP.PP/C.1/2017/18 dated 18 June 2017, paragraph 47. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf). Accessed 7 June 2020.

<sup>185</sup> *Ibid.*; paragraph 46.; Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the assessment of the effects of certain plans and programmes on the environment, OJ L 197, 21.7.2001, p. 30–37.

and/or other provisions for the public to participate during the preparation of such plans and programmes”<sup>186</sup>.

It might be argued that efficient implementation of EU environmental law mostly refers to European Commission mandate to initiate in accordance with Article 258 infringement proceedings against EU Member States for failure to comply with EU environmental statutory obligations and to preliminary reference procedure before CJEU provided in Article 267 TFEU. Nevertheless, regarding efficiency of infringement proceedings founded doubts persists as to their relevance to promote enforcement of environmental participatory rights enshrined in Aarhus Convention as well as their procedural and resource-related constraints to rectify identified deficient application and implementation of EU in the short run. Although legal scholars have asserted that as the system of preliminary rulings constitute the cornerstone of EU legal order, the recourse to it by judiciary of EU Member States in order to secure consistent interpretation of EU law implies also a preclusion of civil society including environmental NGOs to challenge directly acts of EU law and omissions before courts of justice of EU Member States. Recourse to preliminary ruling procedure before CJEU for individuals and environmental NGOs in pursue of annulment in some EU Member states is one possible and practicable avenue to challenge implementing measure of EU law before national court of justice thus requesting national court to submit a preliminary reference before CJEU.<sup>187</sup> Although it have been acknowledged that recourse to CJEU for requests for preliminary rulings is a positive development in general for “ensuring in particular member state compliance with the Convention and the EU secondary legislation implementing the Convention into EU law”<sup>188</sup>, concerns regarding environmental NGOs access to administrative and judicial review before EU institutions are well-founded. Through findings and recommendations of Compliance Committee it has been established that allegations of EU non-respect and non-compliance with provisions of third Aarhus pillars concerning environmental NGOs standing requirements and access to independent legal review of acts and omissions are well-founded and bears legal relevance.

Although it was not cotested by the communicant (environmental NGO) and the Party concerned in case ACCC/C/2008/32 (I) and case ACCC/C/2008/32 (II) that structure of Aarhus Convention assumes procedural equality of civil society and Parties under Aarhus compliance mechanism, the major issue is still the scope and extent of EU binding commitments and performance of implementation of third Aarhus pillar. Legal scholars have observed that measuring compliance of international economic organization is subject also to assessment whether provisions under VCL, especially Article 26 which stipulates implementation of obligation under international treaty in good faith<sup>189</sup>, applies given the EU unclear status and self-declared autonomous legal order.<sup>190</sup> Nevertheless, Compliance Committee clarified adherence of the EU to commitments of Aarhus Convention in case CCC/C/2014/124 acknowledging regional economic integration organization status of EU and conferral of rights under Article 17 of Aarhus Convention<sup>191</sup>. In addition Compliance Committee emphasized that EU in compliance with Article 19 Paragraph 5 upon accession to Aarhus Convention had submitted a declaration assuming obligations to the extent that if “it has European Union law in force; member States remain responsible for the implementation of obligations that are not covered by European Union law in force”<sup>192</sup>. With regard to access to judicial review it is also worth mentioning that Compliance Committee in case

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<sup>186</sup> *Ibid.*; paragraph 56.

<sup>187</sup> *Supra* note 50, pp.12-13.

<sup>188</sup> *Supra* note 18, p.207.

<sup>189</sup> *Supra* note 33; Article 26.

<sup>190</sup> *Supra* note 54, p.206; Simon Marsden “Direct Public Access to EU Courts: Upholding Public International Law via the Aarhus Convention Compliance Committee”, *Nordic Journal of International Law*, 81(2) (2017):pp.202-203.

<sup>191</sup> Aarhus Compliance Committee, *European Union*, ACCC/C/2014/124, ECE/MP.PP/C.1/2017/21 dated 24 May 2017, paragraph 83 and 86. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf) . Accessed 10 June 2020.

<sup>192</sup> *Ibid.*; paragraph 89.

ACCC/C/2006/18 observed “that, in different ways European Community legislation does constitute a part of national law of the EU member states. It also notes that article 9, paragraph 3, applies to the European Community as a Party, and that the reference to “national law” therefore should be understood as the domestic law of the Party concerned.<sup>193</sup>” Academic thought has asserted high importance of the latter findings concluding “that the EU is not only a Party to the Convention but that its legal system is comparable to that of a state and that it should therefore comply with treaty obligations in a similar manner<sup>194</sup>.” Therefore, it might be concluded that regarding contextual obligations of international law, namely under Aarhus Convention and autonomous legal order of EU Compliance Committee have clarified the extent to which admissibility and legal relevance of submitted communications of alleged non-compliance might be granted.

### 3.2. Tackling EU’s non-compliance with legislative or non-legislative measures

Compliance Committee at its twenty-second meeting (17–19 December 2008) adopted a decision on admissibility of communicant’s (environmental NGO) submission claiming EU (the Party concerned) allegations of non-compliance of EU with Article 9 Paragraph 3 of Aarhus Convention referring to issue of Article 10 Paragraph 1 of Aarhus Regulation compatibility with the latter treaty provision which were substantiated by references of CJEU case-law.<sup>195</sup> In reply to communicant’s allegations based on ECJ interpretation of NGOs binding such standing criterion as “individual concern” established by ruling in case *Plaumann*<sup>196</sup> that the latter as applied by EU institutions restricts access to administrative and judicial review of individuals and environmental NGOs, the Party concerned asserted that access to justice of individuals and environmental NGOs is not restricted and implementing legislation, namely Aarhus Regulation, ensures access to administrative and judicial review of EU institutions for environmental NGOs.<sup>197</sup> Compliance Committee however established with regard to application of Article 9 to acts and omissions by European Union institutions that

according to the ECJ, the legal situation of the person must be affected because of a factual situation that differentiates him or her from all other persons. Thus, persons cannot be individually concerned if the decision or regulation takes effect by virtue of an objective legal or factual situation. The consequences of applying the *Plaumann* test to environmental and health issues is that in effect no member of the public is ever able to challenge a decision or a regulation in such case before the ECJ.<sup>198</sup>

In contrast to strong position of application of CJEU jurisprudence regarding standing and access to review procedures of civil society and refraining to pronounce on compatibility of provisions of Aarhus Regulation with requirements of access to justice, Compliance Committee did not established non-compliance of the EU. Nevertheless, due to approach of Compliance Committee to conduct assessment of circumstances of alleged non-compliance separately in two distinct sets, communicant’s assertions of CJEU avoidance to pronounce on incompatibility of Article 10 Paragraph 1 of the Aarhus Regulation with Article 9 Paragraph 3 of Aarhus Convention were analyzed in findings and recommendations of case ACCC/C/2008/32 (II).

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<sup>193</sup> *Supra* note 184, paragraph 27.

<sup>194</sup> *Supra* note 191, p.195.

<sup>195</sup> Aarhus Compliance Committee, *European Union*, ACCC/C/2008/32, ECE/MP.PP/C.1/2011/4/Add.1 dated 14 April 2011, paragraph 3 and 4. Available on: [https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece\\_mp\\_pp\\_2008\\_5\\_add\\_6\\_e.pdf](https://www.unece.org/fileadmin/DAM/env/documents/2008/pp/mop3/ece_mp_pp_2008_5_add_6_e.pdf) . Accessed 10 June 2020.

<sup>196</sup> Judgment of 15 July 1963, *Plaumann & Co. v Commission of the European Economic Community*, Case 25-62, ECLI:EU:C:1963:17.

<sup>197</sup> *Supra* note 196, paragraph 20, 34, 39.

<sup>198</sup> *Ibid.*, paragraph 86.

In response to communicant's four major allegations of Article 2 of Aarhus Regulation non-compliance with Article 9 Paragraph 3 of Aarhus Convention<sup>199</sup>, Compliance Committee identified legal irrelevance of mandatory requirements under Article 10 Paragraph 1 and Article 2 Paragraph 1(g) and incompatibility with provisions of access to justice. With regard to extension of scope of application to acts not adopted under environmental law, Compliance Committee concluded that requirement for issued act subject to administrative review before EU institutions to be administrative act adopted under environmental law narrows significantly down meaning of Article 9 Paragraph 3 of Aarhus Convention which requires its broad application to all acts and omissions of EU institutions.<sup>200</sup> With respect to extension of scope of application to acts not having legally binding and external effects, Compliance Committee observed that recourse to administrative review before EU institutions granted only to administrative acts and omissions to adopt them constitutes infringement of Article 9 Paragraph 3 of Aarhus Convention.<sup>201</sup> In addition, Compliance Committee suggested that on the whole without substantial evidence from jurisprudence of national judiciary of EU Member States on incurred inconsistencies of interpretation and application of Article 12 in conjunction with Article 10 Paragraph 1, 2 and 3 of Aarhus Convention administrative review mechanism provided in Article 10 by reasonable assumption is fair and equitable.<sup>202</sup>

Considering conclusions of Compliance Committee that given margin of discretion of EU to adopt legislative measures implementing Aarhus Convention and aligning provisions of EU legal order with treaty provisions applied jurisprudence of CJEU and Aarhus Regulation constitutes impediment to exercise conferred rights of civil society to access to administrative and judicial review, the identified issue is on the scope of possible legislative and non-legislative measures EU should adopt to meet requirements under Article 9 Paragraph 3.<sup>203</sup>

European Commission currently has identified and presented to EU Member States three avenues to be possibly explored in response to identified non-compliance of EU legal order. With respect of legal relevance on proposed five policy option on how to address identified EU non-compliance with Article 9 Paragraph 3 EU Member States are invited to reflect on adoption of legislative or non-legislative or conjoint legislative and non-legislative measures to reach compliance with provisions of access to justice in environmental matters.<sup>204</sup> EU Member States to date are informally as preliminary position to be adopted formally by governments expressed support for proposition to adopt at EU level legislative measures or with a greater flexibility combined legislative and non-legislative measures. In addition, common understanding reached currently among European Commission and Member States is that legislative measures implying amendments to Article 267 and Article 263 Paragraph 4 of TFEU due to lack of political willingness would most probable not provide expected outcomes. With respect to recourse for amendments of secondary EU law relating to environmental participatory rights EU Member States have duly noticed environmental NGOs concerns that "[i]n the absence of a change of jurisprudence [of CJEU] in the interpretation of the standing requirements of Article 263 TFEU, environmental organisations /NGOs call for the Aarhus Regulation to be amended in order to broaden its scope and admissibility requirements. In particular, [...] the requirements of 'individual scope' and 'external effects' be eliminated and that instead of acts adopted 'under environmental law' reference be made to acts which 'contravene environmental law'".<sup>205</sup>

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<sup>199</sup> *Ibid.*, paragraph 17 and 20-24.

<sup>200</sup> *Ibid.*, paragraph 95-99.

<sup>201</sup> *Ibid.*, paragraph 102-104.

<sup>202</sup> *Ibid.*, paragraph 112, 113 and 119.

<sup>203</sup> *Ibid.*, paragraph 123.

<sup>204</sup> European Commission "Study on EU implementation of Aarhus Convention in the area of access to justice in environmental matters", *Final Report September, 07.203/2018/786407/SER/ENV.4E*:pp.12-14. Available on: [https://ec.europa.eu/environment/aarhus/pdf/Final\\_study\\_EU\\_implementation\\_environmental\\_matters\\_2019.pdf](https://ec.europa.eu/environment/aarhus/pdf/Final_study_EU_implementation_environmental_matters_2019.pdf).

Accessed 10 June 2020.

<sup>205</sup> *Ibid.*, p.368.



In support to initiate discussion at EU level to tackle identified EU non-compliance with provisions of Aarhus Convention by adoption of additional legislative implementing measures amending relevant EU secondary law, it is also worth to note that already within CJEU unbinding, however respected guidance on scope of margin of discretion of Party's to Aarhus Convention to conduct review of legality has been provided. Advocate General Jääskinen in his opinion in case *Vereniging Milieudefensie* observed that given the broad wording Article 9 which equally provides itself detailed procedural provisions and also enables margin of discretion to adopt regulatory framework for implementation of the objectives provided in Article 1 of Aarhus Convention it leads to assert mixed nature of Article 9 Paragraph 3. Furthermore, it was reasonably assumed that serving greater purpose to avoid occurrence of area free from any judicial review the lack of direct effect of a treaty provision should not restrict examination of EU act with reference to provisions of the treaty unless the latter precludes it.<sup>206</sup> In addition, it was affirmed that treaty provision itself might be unconditional and precise subject to broad discretion of the Parties for its implementation, therefore due to its precision and unconditionality it might be applied for review of legality.<sup>207</sup> Although Advocate General Jääskinen concluded that provision of Article 9 Paragraph 3 stipulates requirements to adopt implementing legislation therefore implying lack of direct effect for individuals to rely on it, Parties are bound to comply with such clearly identified obligation as to grant access to justice.<sup>208</sup> Lastly, it is worth to mention that with regard to interpretation of Aarhus Regulation academic thought has asserted that "having regard to its objective and its broad logic, Article 9(3) of the Aarhus Convention is in part a sufficiently clear rule that is capable of serving as the basis of a legality review of the Aarhus Regulation."<sup>209</sup>

Having regard to aforementioned the main reasons to advocate legislative measures as appropriate response to findings and recommendations of Compliance Committee in case ACCC/C/2008/32 are identified wide spectrum of politically and institutionally grounded challenges EU institutions and EU Member States are reluctant to acknowledge. Since there is not general agreement among European Commission and EU Member States on amendments of EU primary law and without adopted common position whether and to what extent inclusion of CJEU into interinstitutional dialogue would be beneficial to secure EU compliance with provisions of Aarhus Convention introduction of amendments to Aarhus Regulation constitutes the most appropriate response for further consideration of EU legislator.

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<sup>206</sup> Opinion of Advocate General Jääskinen of 8 May 2014, *Council of the European Union and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, C-401/12P to C-403/12P, ECLI:EU:C:2014:310, paragraph 78, 79 and 93.

<sup>207</sup> *Ibid.*, paragraph 80.

<sup>208</sup> *Ibid.*, paragraph 93 and 94.

<sup>209</sup> Hendrik Schoukens "Access to Justice in Environmental Cases after the Rulings of the Court of Justice of 13 January 2015: Kafka Revisited?", *Utrecht Journal of International and European Law*, 31(81) (2015):p.60.

## 4. CONCLUSION

The current thesis has attempted to consider whether compliance mechanism under Aarhus Convention serves for effective enforcement of international environmental law. In this regard, quasi-judicial practice of Compliance Committee was analysed and compared with established case law of CJEU, considering legal framework of environmental procedural rights enshrined in Aarhus Convention and briefly discussing relevance of historical background of international environmental law as well as relevance of advanced theories by legal on Party's compliance with binding obligations under multilateral environmental agreements.

As could be observed in Chapter 1 conjointly with Chapter 2 systematic recourse to compliance mechanism under Aarhus Convention by civil society including especially environmental NGOs has contributed to the development of quasi-judicial practice on environmental participatory rights which by general consent of the Parties in most cases is perceived as equal to jurisprudence of the court of justice of the Party concerned. Detailed overview of findings and recommendations of Compliance Committee suggests its proactive and also careful approach to explore new avenues of applicability environmental participatory rights in accordance with objectives under Aarhus Convention for greater inclusiveness of civil society in decision-making and implicitly law-making beyond territorial and jurisdictional borders of the Parties. In contrast, analysis of jurisprudence of CJEU on applicability of international agreements and scope of conferral of rights under EU legal system to any individual including environmental NGOs suggests CJEU reluctance to acknowledge systemic issues on the compatibility of autonomous EU legal order with implementation and application of obligations under Aarhus Convention. Accordingly, good practices developed by Compliance Committee on implementation and application of "three Aarhus pillars" were analysed and assertion can be made that, for instance CJEU jurisprudence in access to administrative and judicial review regarding submissions by civil society seeking for annulment of acts and omissions of EU institutions, are nearly impossible to reconcile with the requirements for effective and timely judicial protection in environmental cases.

Chapter 3 concluded discussion by considering implications findings recommendations of Compliance Committee in case ACCC/C/2008/32 pending for approval supposedly in next MOP regarding EU non-compliance with Article 9 Paragraph 3 and 4 of Article. The chapter briefly discussed circumstances of the case and main allegations of the communicant as well as findings of the Compliance Committee. Finally, the analysis on possible legislative measures in response to non-compliance by EU was presented to conclude that due to various challenges EU institutions and EU Member States are faced the amendments of Aarhus Regulation would be the most appropriate measure to ensure EU compliance with provisions on access to justice.

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#### **5.1.2.2. Case law of Compliance Committee under Aarhus Convention**

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