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The European Union and environmental democracy: the Aarhus Convention in EU law

Abstract

The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which the EU ratified in 2005, is arguably the most prominent international legal instrument in the field of environmental democracy. This paper explores the transposition of the Aarhus Convention rules to the EU plane, examining the modalities in which such transposition has occurred as well as the legal nature of and the legal repercussions stemming from this transposition which at the present moment still remains far from complete. The paper looks in turn at the three foundational pillars of the Aarhus Convention (access to information, public participation in decision-making and access to justice in environmental matters), inquiring into the corresponding expression the obligations foreseen under each of these pillars have found within the Union legal framework.

As a result of the pressing global environmental protection concerns, the political and legal discourse in the international community has been increasingly involved with the notions of 'environmental democracy' and 'environmental justice'. As both a regional and global actor in the sphere of environmental protection, the European Union (EU) has been up to par with these developments, having established its own regulatory framework in the field of environmental (procedural) democracy, primarily governed by the standards and principles set out under the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, which the EU ratified in 2005. This paper explores the transposition of the Aarhus Convention rules to the EU plane, examining the modalities in which such transposition has occurred as well as the legal nature of and the legal repercussions stemming from this transposition which – at the present moment – still remains far from complete. The discussion that follows looks in turn at the three foundational pillars of the Aarhus Convention (access to information, public participation in decision-making and access to justice in environmental matters), inquiring into the corresponding expression that the obligations foreseen under each of these pillars have found within the Union legal framework.

The Aarhus Convention represents one of the greatest enterprises in the budding field of environmental democracy to date, aiming to bring the citizens closer to environmental decision-

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making. It was adopted at the United Nations Economic Commission for Europe's Fourth Ministerial Conference "Environment for Europe" in Aarhus, Denmark, on 25 June 1998. At present there are 46 Parties to the Convention, 29 Parties to the Convention Protocol on Pollutant Release and Transfer Registers (PRTRs) and 27 Parties to the Amendment on public participation in decisions on the deliberate release into the environment and placing on the market of genetically modified organisms (GMOs)[2].

The Aarhus Convention is, arguably, the most prominent international legal instrument of environmental democracy[3] representing a successful accomplishment of linking together two different sets of rights - human rights and environmental rights[4]. The adoption of the Convention constitutes a crucial step forward in the nascent field of 'information governance' in environmental matters understood as the kind of governance where information, information technologies and information processes play a central role[5]. Albeit a rather novel term, 'environmental democracy' signifies the balance between representative and participatory decision-making, reflecting the will of those with an essential stake in the outcome and factoring the environmental values into the policy-making process[6]. The notion of environmental democracy can further be described as the accomplished level of a transparent, inclusive and accountable decision-making process galvanised by the provision of access to information, public participation and access to justice[7].

As regards the rights espoused under the Aarhus Convention, the Convention does not intend to introduce a substantive right to a clean environment and is, thus, strictly concerned with the procedural aspects of the realization of this right. The procedural aspect to the right to a clean environment covered by the Convention is considered as instrumental in the attainment of the substantive goal of "(…) *protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being*, [whereby] each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of [the] Convention"[8]. Effectively, the procedural rights established under the Convention equally serve

[2]For an overview of the parties to the Convention, consult the following UNECE webpage: http://www.unece.org/env/pp/ratification.html.

[3] See J. Wates, The Aarhus Convention: A Driving Force for Environmental Democracy, Journal of European Environmental and Planning Law, 2005 Issue 1, p.2.

[4] See L. Lavrysen, The Aarhus Convention: Between Environmental Protection and Human Rights, in, Liège, Strasbourg, Bruxelles: parcours des droits de l'homme. Liber amicorium Michel Melchior, 2010, Anthemis, p.653. The article provides a general overview of and explanatory commentary on the Aarhus Convention.

[5] Mason, M., Information Disclosure and Environmental Rights: the Aarhus Convention, Global Environmental Politics, Vol 10 Issue 3 August 2010, p.13.

[6] J. Foti et al., Voice and Choice: Opening the Door to Environmental Democracy, 2008, World Resources Institute (available at http://pdf.wri.org/voice_and_choice.pdf), p.4.

[7] J. Foti et al., supra, p.X.

[8] Art.1 of the Aarhus Convention (Emphasis added). The Convention espouses a clear anthropo-centric approach to the right to clean environment as it deals with the concept of environment only to the extent that the former concerns the human beings.

to reinforce the substantive aspect of the right to clean and healthy environment[9] so that these procedural rights act as a cross-section between procedural entitlements and substantive environmental quality requirements[10], representing an added value to the principles laid down in the 1972 Stockholm Declaration and the 1992 Rio Declaration [11] as international environmental soft law instruments that have majorly contributed to developing and reinforcing the right of humans to a clean and decent environment adequate to their needs.

In this regard, the Aarhus Convention closely follows Principle 10 of the Rio Declaration[12] which has set a milestone in the development of procedural rights in the environmental context, enouncing the three key aspects of environmental democracy that were subsequently elevated to the level of procedural rights (and separate 'pillars') under the Aarhus Convention – that is, the access to information, the public participation, and the access to justice in environmental matters[13].

1. The pillars of the Aarhus Convention - main features

The Aarhus Convention establishes three main categories of obligations for the State Parties grouped into three 'pillars': *access to information*, *participation in decision-making* and *access to justice* by citizens. Before going into a more in-depth analysis of the Aarhus Convention's provisions, several clarifications need to be made regarding the nature and scope of the procedural standards endorsed by the Convention. These procedural standards represent a *floor*, rather than a ceiling in the sense that Parties may introduce stricter standards by granting wider access to information and participation in decision-making procedures as well as access to

[9] O. W. Pedersen, European Environmental Human Rights and Environmental Rights: A Long Time Coming?, Georgetown International Environmental Law Review, 2008 Vol. 21 No. 1, p.35.

[10] Mason, supra, p.17. Mason holds that the absence of substantive environmental standards in the Convention poses a certain restriction on the enjoyment of human rights since it allows that information disclosure and public participation become more of a means to legitimize rather than scrutinize the national institutions (p.26 of article).

[11] Principle 1 of the Rio Declaration: "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature (…)";
Principle 10 of the Stockholm Declaration:" Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.";

[12] Principle 1 of the Rio Declaration: "(…) Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.";

[13] The Aarhus Convention: An Implementation Guide , p.13.

courts to their citizens[14], thus unhinging a process of so-called 'upward harmonization'[15]. The Convention introduces rights for '*the public*' and '*the public concerned*'[16] where the definition of the '*public*' follows the 'any person' principle according to which a particular member of the public need not meet any pre-requisite criteria in order to avail themselves of a particular right under the Convention (for ex., such as that of 'being affected' or 'having an interest')[17].

> Article 2 – Definitions
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> "(…) 4. "The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups. (…)";

The term '*public concerned*' is less broad in scope and only covers the public which is affected or likely to be affected by environmental decision-making, *or*, the public having either a factual or a legal interest therein[18]. Moreover, in keeping with the overall tenor of the Convention of promoting a more advantageous treatment to non-governmental organizations (NGOs)[19], the NGOs active in the field of environmental protection which satisfy the national law requirements have an *a priori*, presumed interest under the Convention. However, it has been argued that while it enhances the participatory rights of NGOs, the Convention does not, by the same token, extend participation outside of the NGO sphere to other interest groups belonging to the civil society by entitling them to a facilitated access to public participation in environmental matters[20]. This point is especially valid being that certain NGOs could be reputed to only act within their own specific agendas and interests rather than the interests of the public in general[21].

> Article 2- Definitions
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> "(…) 5. "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.(…)";

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[14] United Nations Economic Commission for Europe (UN ECE), The Aarhus Convention: An Implementation Guide, ECE/CEP/72 (prepared by S. Stec and S. Casey- Lefkowitz in collaboration with J. Jendroska (Editorial Adviser)), December 2000 (available at http://www.unece.org/fileadmin/DAM/env/pp/acig.pdf), p.5.
[15] The Aarhus Convention: An Implementation Guide , p.31.
[16] The Aarhus Convention: An Implementation Guide, p.5.
[17] Idem, p.39.
[18] Idem, p.40.
[19] Idem, p.39.
[20] Pedersen, supra, p.99; Similarly, see, M. Lee and C. Abbot, The Usual Suspects? Public Participation Under the Aarhus Convention, Modern Law Review 2003 Vol 66 Issue 1 2003, p.108.
[21] Lee and Abbot, supra, p.86,87.

The obligations introduced by the Aarhus Convention are directed at the State Parties' *public authorities***,** to the exclusion of bodies and institutions that perform a judicial or legislative function[22]. This exception further extends to the executive branch authorities acting in a legislative or judicial capacity[23]. According to Art.2, for the purposes of the Convention, "public authority" denotes:

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

The scope of the Convention obligations does not cover the legislative process, but nonetheless, in the name of promoting greater transparency in all branches of government, legislative bodies are *invited* to implement the principles of the Convention in their work[24]. To the extent the EU is concerned, the Union's institutions are considered covered under the definition of 'public authority' of Art.2.2 (d) of the Convention[25]. The former is not to be taken to mean that the Convention provisions bear solely on those EU organs enjoying the status of 'institutions'. Namely, the term 'institutions' used in the context of the application of the Convention is considered to encompass *all* the Union bodies and agencies[26].

Similarly to the EU legal framework where the duty of non-discrimination has acquired the form of a general principle of non-discrimination, a strong non-discrimination tone characterises the Convention legal regime. Article 3(9) stipulates that:

> "Within the scope of the relevant provisions of this Convention, the public shall have access to information, have the possibility to participate in decision- making and have access to justice in environmental matters *without discrimination as to citizenship, nationality or domicile* and, in the case of a legal person, without

[22] Art.2 of the Conventon.
[23] The Aarhus Convention: An Implementation Guide, p.35.
[24] Para. 11 of the Preamble.
[25] "(…) (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention (…)";
[26] The Aarhus Convention: An Implementation Guide, p.34. See also, Art.1 of 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.

discrimination as to where it has its registered seat or an effective centre of its activities.";[27]

The non-discrimination clause provides that citizens and non-citizens of the State Parties enjoy equal rights under the Convention, irrespective of their citizenship, nationality or domicile. With respect to legal persons, any sort of discrimination based on their place of registration or their effective centre of activities is prohibited. This clause has served to delineate the scope of both the notions of '*public*' and '*public concerned*' of the Convention and thus safeguard the rights belonging to the persons who are not citizens of the State Parties, to counteract the tendency of public authorities to sometimes disregard the legitimate interests of non-citizens when applying the Convention principles[28].

The language of the Aarhus Convention is not prescriptive as to laying down precise and unconditional obligations as such, thus leaving generous room for action to be further taken at national level via the adoption of national measures intended to give effect to the Convention's provisions. It must be noted that the text of the Convention abounds with terms like '*within the framework of national legislation' and 'in accordance with national legislation*'[29] which have not been defined anywhere in the Convention. Such lack of stringency of the provisions of the Convention can be justified by the need for flexibility in accommodating the variety of approaches embedded in national legal systems. Flexibility is mainly introduced regarding the means that a State has at its disposal in meeting the obligations flowing from the Convention, mirroring the obligation of the State to refrain from adopting new or keeping in force national rules that contradict the Convention obligations[30]. The extent of the Convention's flexibility has been considered by some to comprise both the *choice* of the means used to implement the obligations and a discretion regarding interpreting the scope and/or content of the obligations[31]. The former can potentially have the effect of undermining the uniformity of the procedural protection system that the Aarhus Convention aims to establish. At the same time, however, it is this very flexibility which is imminent to the intrinsic value of the Convention as an instrument that regulates a cross-cutting domain joining aspects of administrative and governmental practice together with environment protection and procedural aspects[32].

2. The Aarhus Convention in the EU legal order

[27] Emphasis added.
[28] The Aarhus Convention: An Implementation Guide, p.48.
[29] Found in Arts.2, 4,5,6 and 9.
[30] The Aarhus Convention: An Implementation Guide, p.30.
[31] Idem, p.30,31.
[32] Idem, p.31.

Presently, both the EU and all of its Member States[33] are parties to the Aarhus Convention: the EU ratified the Convention in 2005 through the adoption of a Council decision[34] and it is in force in the EU as of 18 May 2005, with a large majority of Member States having already acceded to the Convention by that date. As part of the EU legal order, the Convention appears as a mixed agreement given that both the EU and the Member States appear as signatories (in function to their respective competences in the matter covered by the Convention).

Within the EU legal order, the Aarhus Convention enjoys the status of a mixed international agreement binding on both the EU institutions and the Member States, which in the hierarchical order of norms takes precedence over secondary legislation[35], but nevertheless qualifies lower than the primary law of the Union. The modalities in which the Conventions' provisions become binding national law for the Member States as Contracting Parties are determined by the particularities of their domestic legal systems (monist v. dualist approach). In most of the Western European countries national implementing legislation must be passed in order for the Convention to become part of the domestic *droit positif* (dualist approach), while in most East European countries international legal instruments as sources of law are presumed to be directly applicable and do not require any transposing legislation (monist approach)[36]. However, the former standard is not always fully applicable vis-à-vis the Aarhus Convention, primarily due to the manner in which the Convention provisions have been drafted[37]. A predominant number of the articles of the Convention entrust the States with a duty to legislate in order to conform to the Convention rules which points to the fact that the Aarhus Convention was not conceived to be a self-executing treaty, at least not to a full extent.

In a recent judgment[38], the EU Court of Justice granted the potential for the Convention provisions to produce direct effect upon the condition that the criteria for establishing the direct effect of international agreements concluded by the Union have been satisfied. More precisely, the provision the direct effect of which is being appraised must be put into the context of the purpose and the nature of the international agreement and thus must contain a clear and precise

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[33] Ireland was the last one to ratify the Convention as late as in June 2012. (http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en); Ireland officials have been sketchy in revealing the factors that accounted for the late ratification http://www.environ.ie/en/Environment/News/MainBody,30480,en.htm.

[34] Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters *OJ L 124, 17.5.2005, pp. 1–3.*

[35] Compliance Committee, ACCC/C/17 (European Community), para.35.

[36] Wates, supra, p.9.

[37] See, also, Wates, supra, p.9. Furthermore, take not of the permissive language of: Art. 3.1 ("Each Party shall take the necessary […] measures' (…)"), Art 3.2 ("Each Party shall endeavour to ensure that (…)"), Art.5 ("Each Party shall ensure that (…)"), Art.6 ("Each party shall (…)"), etc.

[38] C-240/09 Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, ECR *2011 Page 00000.*

obligation which is not further subject to the adoption of any subsequent implementing measure[39].

For the purposes of an adequate implementation of the Aarhus Convention, in order to eliminate any arising discrepancies between the Union and the domestic legal systems of the Member States, it was essential that a secondary legal framework be established to enable for the Aarhus Convention's provisions to take uniform effect at the EU and the Member State level[40]. The Union legislators adopted the implementing legislation prior to the ratification of the Convention thus ensuring a uniform application of the Convention standards throughout the Union. Two directives covering a large part of the subject matter of the Convention (one on access to information[41] and the other one on public participation in decision-making[42]) had already been in existence when the EU concluded the Convention. Therefore, throughout the drafting process for the Convention, the Member States saw the accession thereto - for the most part – as a transposition of already existing EU legal rules into an international legal instrument[43].

However, in light of the strengthened procedural regime introduced by the Convention, it was necessary to match this improved level of procedural protection by amending or replacing the existent rules. Thus, in anticipation of the upcoming conclusion of the Aarhus Convention by

[39] Para.44 of the judgment. Namely, the Court examined the direct applicability of Art.9(3) of the Aarhus Convention regarding the possibility for access to justice by members of the public in breaches of national environmental laws. The provisions the direct effect of which the Court was called upon to appraise had not previously been subject to EU regulation, but were nevertheless considered as relative to a field covered by EU law to large extent thus falling within the scope of the former (paras. 40, 42 of the case). The criteria to be applied in the appraisal are the following: "(…)[A] provision in an agreement concluded by the European Union with a non-member country must be regarded as being directly applicable when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure (…)" (para.44); For more on the on the direct effect of the Aarhus Convention, see, J. Jendroska, Public Information and Participation in EC Environmental Law: Origins, Milestones and Trends, in R. Macrory (ed.), Reflections on 30 Years of European Environmental Law: A High Level of Protection, The Avosetta Series: Proceedings of the Avosetta Group of European Environmental Lawyers, 2006, Europa Law Publishing, Part IV.2.
The former attempt for inclusiveness toward the legal standing of applicants is difficult to be reconciled with the governing national practices in Member States such as France. The French Conseil D'Etat rejected the claims made by French environmental NGOs attacking the validity of the Decree licensing the construction of the nuclear installation "Flamanville 3'' purporting that the former violates Art.6(4) and Art.8 of the Aarhus Convention considering that the Convention did not have direct effect in the domestic legal system (Case-law Digest: France, Nuclear Law Bulletin, Vol. 2009/1, p.92,93).

[40] J. Jendroska, Aarhus Convention and Community Law: the Interplay, Journal of European Environmental and Planning Law, 2005 Issue 1 p.19,20.

[41] Council Directive 90/313/EEC on the freedom of access to information on the environment OJ L 158, 23.6.1990, p. 56.

[42] 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.*

[43] J. Jendroska, Public Information and Participation in EC Environmental Law: Origins, Milestones and Trends**,** in R. Macrory (ed.), Reflections on 30 Years of European Environmental Law: A High Level of Protection, The Avosetta Series: Proceedings of the Avosetta Group of European Environmental Lawyers, 2006, Europa Law Publishing, Part IV.2.

the EU[44], two new directives were adopted aligning Union law with the first two pillars of the Convention in 2003: *Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC*[45] and *Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC*[46].

Nevertheless, the initial 'package deal' proposed by the Commission in October 2003 contained three legislative proposals: proposal for a regulation on the application of the Aarhus obligations with relation to the Union institutions[47], proposal for a directive implementing the requirements under the Convention 'access to justice' pillar[48], and a proposal for a Council decision for the ratification of the Convention[49]. It was only the first and the third proposal of the package deal that were successful, while the second proposal fell through, the reasons for which will be further elaborated in the last section of this article.

The process of transposing the Aarhus Convention's provisions into the domestic legal orders of the Member States effectively involves a two-fold legal harmonization process, occurring at two levels: harmonization occurring at the *EU level* (the EU transposes the Aarhus obligations into EU law by adopting implementing legislation), followed by harmonization at the *national level* (Member States transposing EU implementing legislation into national law). In the event of absence of relevant EU implementing legislation, the Member States are free to legislate independently and directly transpose the Convention rules into national law, without a requisite intermediary EU law instrument. Although the former inevitably creates certain discrepancies in the legal systems, such a phenomenon is intrinsic to the EU legal system and cannot be

[44] Both the Union (then, Community) and the Member States signed the Convention in 1998, whereas the ratification occurred at different dates/years for different MS (See, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en).

[45] OJ L 41, 14.2.2003, p. 26–32.

[46] OJ L 156, 25.6.2003, p. 17–25 (referred to as the Public Participation Directive).
Provisions on public participation in environmental matters can also be found in Directive 2001/42/EC of 27 June 2001 on the assessment of certain plans and programmes on the environment (OJ L 197, 21.7.2001, p. 30–37), also known as the Strategic Environmental Assessment directive. The former directive complements the 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) (known as the Environmental Impact Assessment Directive). The codified version of the EIA directive is Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) OJ L 26 p.1-21;

[47] Subsequently adopted as Regulation (EC) N° 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.9.2006 p.13).

[48] Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters COM(2003) 624 final.

[49] Subsequently adopted by the Council on 17 February 2005 as Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters OJ L 124, 17.5.2005, p. 1–3.

circumvented[50]. For this reason, a definite answer cannot be offered on whether all matters which are subject to the binding provisions of the Convention must also have a corresponding EU law provision to that effect[51]. An important shortcoming that arises in the process of transposing the Convention provisions to the EU level stems from the unique nature of directives as instruments and the minimum requirement that 'essential aspects' of the provisions of the Convention are transposed via directives in this respect - the exact distinction between 'essential' as opposed to 'detailed' aspects having remained unclear[52]. While it is not necessary for the directives to *fully* transpose *all* the provisions of the Convention, the former remain to act as the main frame of reference for the Member States in their adoption of national implementing rules: thus, if a certain aspect of the Convention is not sufficiently or clearly regulated in the transposing directives, national implementing laws will follow suit[53]. Member States are however free to adopt more stringent standards for the fulfilment of the Convention obligations than those set out in the directives, whereas in the absence of Union implementing measures, they can either opt to adopt national implementing legislation or indeed resort to directly apply the Convention provisions[54]. This inherent deficiency of the process of transposition has been viewed by certain commentators as means for making up for the somewhat weak effect of the obligations set out in the Convention[55].

3. The access-to-information pillar transposed in EU law

The Aarhus Convention access-to-information obligations have been translated to the EU level via *Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC*[56], which establishes the legal regime for access to information regarding environmental matters in the EU. The Directive's predecessor, *Directive 90/313/EC on*

[50] See on this, J. Jendroska, Citizen's Rights in European Environmental Law: Stock-Taking of Key Challenges and Current Developments in Relation to Public Access to Information, Participation and Access to Justice, Journal of European Environmental and Planning Law, 2012 Vol 9 Issue 1, p.79.
[51] J. Jendroska, Public Participation in Environmental Decision-making, Interactions Between the Convention and EU Law and Other Key Legal Issues in its Implementation in the Light of the Opinions of the Aarhus Convention Compliance Committee, in, M. Pallemaerts (ed.), The Aarhus Convention at Ten: Interactions and Tensions between Convenional International Law and EU Environmental Law, 2011, Europa Law Publishing, p.112.
[52] Jendroska, Aarhus Convention at Ten, supra, p.112.
[53] Jendroska, Aarhus Convention at Ten, supra, p.146.
[54] See on this J. Jendroska, Citizen's Rights in European Environmental Law..., supra, p.79;
Peter Faross (ex-Head of Commission Department General for Transport and Energy) had indicated that in the absence of EU implementing legislation Member States have resorted to direct application which in some cases has proven to be more stringent than application performed via the directives (Proceedings of the European workshop on practical implementation of the Aarhus Convention in the nuclear field (24-25 June 2009, Luxembourg) http://www.sckcen.be/en/Events/AARHUS organized by the Belgian Nuclear Research Center, p.19).
[55] Lee and Abbot, supra, p.82;
[56] *OJ L 41, 14.2.2003, p. 26–32.*

freedom of access to information on the environment[57] which was already in place at the time of signature of the Convention on the part of the European Community, provided the starting ground for the Convention's negotiations on the 'access to information' regime[58]. The 1990 Directive was, understandably, somewhat more restrictive in scope than the subsequent access to information provisions of the Convention[59]. In order to cater to the reinforced procedural protection regime of the Convention, it was imminent that a new directive be adopted, improving the regime on access to information in the environmental domain.

While the 2003 Directive lays down access-to-information obligations incumbent on the Member States' public authorities, as concerns the environmental information obtainable from the EU institutions and/or bodies what appears to a certain extent to be a dual legal regime is represented by, on the one hand, *Regulation No 1367/2006 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*, and, *Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents*, on the other[60]. The former instrument is specific to the access to environmental information obtainable by private and legal persons from the EU institutions and bodies, while the second is a general 'access to information' bill for the EU institutions and bodies, irrespective of the type of information requested. The duality of applicable legal regimes has resulted in certain inconsistencies concerning their respective scope of application[61]. In this regard, in so far as the environmental information requested from the EU institutions is concerned, Regulation 1367/2006 acts (to a certain extent) as a *lex specialis* with respect to the 2001 Regulation[62]. Equally, a number of the provisions of the former regulation are aimed at

[57] *OJ L 158, 23.6.1990, p. 56–58.*
[58] The Aarhus Convention: An Implementation Guide, p.65.
[59] See, The Aarhus Convention: An Implementation Guide, p.65, for a comparison of the texts of the Convention and the Directive, especially regarding the definition of the terms 'environmental information' and 'public authority' (which appears to be broader in the Convention) and the requirement for the applicant to state their interest (which is absent from the Directive which does not foresee any requirement for the applicant to prove the existence of an interest).
[60] OJ L 145/43, 31.5.2001.
[61] J. Jendroska, Citizen's Rights in European Environmental Law…, supra, p. 81.
[62] Article 3 of the 2006 Regulation determines the scope of application of Regulation (EC) No 1049/2001 with respect to access to information:
"Application of Regulation (EC) No 1049/2001
Regulation (EC) No 1049/2001 shall apply to any request by an applicant for access to environmental information held by Community institutions and bodies without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.
For the purposes of this Regulation, the word "institution" in Regulation (EC) No 1049/2001 shall be read as "Community institution or body. (…)";[Emphasis added][62]
On the other hand, the 2006 regulation espouses the following definition for environmental information in Art. 2.1(d):
"(...) (d) "environmental information" means any information in written, visual, aural, electronic or any other material form on:

evening out the potential conflict of norms arising between the two regulations[63]. In fact, a revision of the 2001 regulation has been urged with the aim of its complete alignment with the Aarhus Convention[64].

The provisions of the 2006 Regulation regarding access to information have a direct bearing on the Euratom field as the scope of the environmental information covered by the Regulation, extends to, *inter alia*, factors (such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment) that affect or are likely to affect the elements of the environment (comprising of air and atmosphere, water, soil, land, biological diversity and its components etc.)[65]. The former inclusion of 'radiation' and 'radioactive waste' aligns with the definition for 'environmental information' of the Access-to-information Directive *supra* which makes both of these acts applicable to access to information on the state of the environment affected or likely to be affected by radiation and/or radioactive waste. The Regulation does not only adopt an inclusive approach towards the subject matter covered, it is equally progressive in terms of the subjects of the obligations provided therein. Namely, the Regulation applies equally to both the EU institutions and bodies acting in an administrative capacity and a legislative capacity[66] which seems to be a revolutionary legal enterprise for the Union legislators having in mind the optional character of the former requirement set in the Aarhus Convention[67]. Lastly, the 2006 regulation adopts the 'any person' principle both in the context of submission of requests for information and the collection and dissemination of environmental information[68]. The former progressive features of the Regulation are a sign of deference on the part of the Union legislators towards the general tenor of inclusiveness of the Preamble of the Aarhus Convention.

Further enhancing the former regime are the transparency and access-to-information principles applicable to the work of EU institutions that were initially introduced in the

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(i) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
(ii) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i);"[Emphasis added];

[63] Points 7,8,12,13,15 of the Preamble; Arts. 3,4,6 of the 2006 Regulation. Particularly noteworthy is the language of para.7 of the Preamble which urges that "(…) for reasons of consistency with Regulation (EC) No 1049/2001 (..), the provisions on access to environmental information should apply to Community institutions and bodies acting in a legislative capacity.";

[64] R. Hallo, Access to Environmental Information: The Reciprocal Influences of EU Law and the Aarhus Convention, in, M. Pallemaerts (ed.), The Aarhus Convention at Ten: Interactions and Tensions between Convenional International Law and EU Environmental Law, 2011, Europa Law Publishing, p.57.

[65] Emphasis added; Art. 2.1(d) of the 2006 Regulation.

[66] Art.2.1.c.

[67] Para.11 of the Preamble to the Aarhus Convention; The Convention aims to accomplish a greater degree of transparency by demanding of the Contracting Parties to make the necessary provisions for the legislative branch to abide by the principles set out in the Convention.

[68] Arts.3 and 4.

Amsterdam Treaty and extended to the sphere of application to the Euratom Treaty by way of *Declaration no. 41 on the provisions relating to transparency, access to documents and the fight against fraud (attached to the Treaty of Amsterdam)*[69]. The former principles have been translated into Art.15 TFEU which makes a clear reference to the duty of transparency and good governance on the part of the institutions, guaranteeing a right of access to documents to every citizen of the Union[70]. By virtue of this article, all citizens of the Union and all natural or legal person residing or having its registered office in a Member State are granted a right of access to documents of the Union's institutions, bodies, offices and agencies whereby the general principles that govern this right of access to documents are to be determined by the European Parliament and the Council[71]. As a corollary to the former right, a duty is established for each institution, body, office or agency to ensure that their proceedings are transparent, the details for the execution of which duty being additionally devised in the former organs' respective Rules of Procedure with the inclusion of specific provisions regarding access to documents [72].

Being that all the EU Member States are simultaneously Council of Europe members, the former access to information regime has been further made more complex by the adoption on 27 November 2008 of the Convention on Access to Official Documents (Tromsø Convention)[73]. In certain respects, the Tromsø Convention signifies a progressive step forward from the Aarhus Convention regime. The Tromsø Convention has not yet taken effect as it has not reached the

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[69] Indicated by P. Faross, Practical implementation of the Aarhus Convention in the nuclear field…, supra, p.19.
The text of the Declaration no.41 on the provisions relating to transparency, access to documents and the fight against fraud (OJ C 340, 10 November 1997) reads:
"The Conference considers that the European Parliament, the Council and the Commission, when they act in pursuance of the Treaty establishing the European Coal and Steel Community and the Treaty establishing the European Atomic Energy Community, should draw guidance from the provisions relating to transparency, access to documents and the fight against fraud in force within the framework of the Treaty establishing the European Community, Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related acts.";

[70] Art.15 TFEU (ex Article 255 TEC) :
"1. In order to promote good governance and ensure the participation of civil society, the Union's institutions, bodies, offices and agencies shall conduct their work as openly as possible.
2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act.
3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union's institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.
Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph.";

[71] Art.15(3) TFEU.

[72] Art.15(3) TFEU.

[73] For more on the Tromso Convention and how it relates to the Union's legal regime on access to information, see, Jendroska (2012), supra, pp.80-82; Also, F. Schram, From a General Right of Access to Environmental Information in the Aarhus Convention to a General Right of Access to All Information in Official Documents: The Council of Europe's Tromsø Convention, in, M. Pallemaerts (ed.), The Aarhus Convention at Ten: Interactions and Tensions between Convenional International Law and EU Environmental Law, 2011, Europa Law Publishing.

ratification threshold of minimum ten Council of Europe Member States[74]. Under Art.1(a)(i) of the Tromsø Convention, the notion of public authority comprises: i) the government and administration bodies (at national, regional and local level); ii) legislative bodies and judicial authorities insofar as they perform administrative functions according to national law; as well as iii) natural or legal persons insofar as they exercise administrative authority. By comparison, Art.2.2 of the Aarhus Convention explicitly excludes bodies or institutions acting in a *judicial or legislative capacity*, failing to specify whether such an exemption applies to legislative and judicial bodies with relation to their entire activity or solely to the exercise of their legislative or judicial functions. In addition, the Tromsø Convention invites the Convention parties to extend, on their own motion, the definition of "public authorities" so as to complementarily cover legislative bodies when in performance of their *other*, non-legislative activities; and/or judicial authorities regarding their *other* activities (primarily, adjudicatory functions)[75].

The future ratification of the Tromsø Convention on the part of all or the majority of EU Member States as Council of Europe States (in collusion with the EU itself possibly becoming a member of the Council of Europe) would produce a multiplicity of legal frameworks potentially covering the field of access to environmental information in the EU. The former consideration would, *per extensiam*, apply to the *general* access to documents, not only that pertaining to environmental information. In the event of such a development, the potential applicants, having the choice of multiple legal avenues for their legal claims, would most probably rely on the more favorable legal regime.

4. The participation-in-decision-making pillar transposed in EU law

The present section surveys the relevant EU measures that have translated the Aarhus Convention participation-in-decision-making requirements into binding EU law. Namely, the relevant provisions covering participation in the decision-making in the environmental domain have been transposed into EU law via the Environmental Impact Assessment Directive 85/337/EEC[76] (codified by Directive 2011/92/EU[77]; concerning specific projects), Directive 2001/42/EC[78] known as the Strategic Environmental Assessment (SEA) Directive (concerning

[74]Pursuant to Art.16(3). The text of the Convention can be found at http://conventions.coe.int/Treaty/EN/Treaties/Html/205.htm.
[75] Art.1(a)(ii).
[76] 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. The Directive has been amended three times, in 1997, 2003 and 2009.
[77] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) OJ L 26, pp. 1-21.
[78] 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

public plans and programmes that are likely to have a significant effect on the environment)[79] and the 2003 Public Participation Directive 2003/35/EC[80] (with respect to the drawing up of certain plans and programmes relating to the environment).

In view of the comprehensive set of EU rules that have turned Arts. 6 and 7 of the Aarhus Convention into binding EU law, it is evident that only the Convention provisions covering participation in the preparation of plans and programmes are mirrored by corresponding EU rules while the provisions regarding involvement in the policy-making as well as the adoption of executive regulations and generally applicable legally binding measures have not been covered by EU implementing rules. Thus, EU legislators are not under an obligation to adopt the former implementing rules given that the Convention provisions in question merely require legal or policy adjustments at the domestic level[81] and do not intend to institute any strict regulatory regime given the pervasively dispositive character of the prescribed obligations.

The *EIA Directive* applies to the assessment of the environmental effects of public and private projects which have a significant impact on the environment, under which the term 'project' presupposes the execution of construction works, installations, schemes and other interventions in the natural surroundings and landscape[82]. Member States bear the responsibility to adopt all necessary measures to ensure that prior to giving a consent on a proposed project likely to have significant impact on the environment, such a project is made subject to an assessment with respect to its potential effects on the environment (by taking account of the nature, size and location of the project as well as other determinative characteristics etc.)[83]. Employing the mechanism of environmental impact assessment (EIA) involves the identification, description and assessment of the direct and indirect effects of a project on the following factors of environment: (a) human beings, fauna and flora; (b) soil, water, air, climate and the landscape; (c) material assets and the cultural heritage; and, (d) the interaction between the factors referred to in points (a), (b) and (c)[84].

The Directive covers two types of projects: projects that are subject to an EIA *ipso jure* (listed in Annex I) and projects which can be optionally included for an EIA upon the decision of Member States (listed in Annex II)[85]. With respect to the latter, Member States make their decision based on a case-by-case examination or by laying down various applicable thresholds or criteria[86]. Thus, while the Directive follows the enumeration included in Annex I of the Aarhus Convention, it further allows for an extension of the scope of the public participation obligations

[79] See http://ec.europa.eu/environment/eia/home.htm;
[80] Directive 2003/35/EC of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment, *OJ L 156 , 25/06/2003 P. 0017 – 0025.*
[81] Jendroska, The Aarhus Convention at Ten, supra, p.102.
[82] Art.1.1 and 1.2.
[83] Art.2.1.
[84] Art.3.
[85] Art.4.
[86] Art.4.1 and 4.2; On how the process develops from the application stage to the adoption of the development consent, see Arts.5-10;

by additionally selecting projects with respect to which the Member States enjoy the discretion in deciding on their inclusion under the Directive's public participation procedures.

The Directive prescribes different responsibilities towards the 'public' and the 'public concerned', defining the 'public concerned' as the "public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures [dealt with under the Directive]"[87]. Under Art.6.2, early in the environmental decision-making procedures or, at the latest, as soon as information can reasonably be provided, *the public* is to be informed *inter alia* of the following : (a) the existence of the request for development consent; (b) the fact that the project is subject to an environmental impact assessment procedure; (c) the public authorities responsible for taking the decision (those from which relevant information can be obtained, those to which comments or questions can be submitted, as well as details on the time schedule for delivering comments or questions); (d) the nature of the possible decisions or the draft decision; (f) an indication of the times and places at which, and the means by which, the relevant information will be made available; etc.

On the other hand, Member States should undertake to ensure that within reasonable time-frames the *public concerned* is granted access to any information gathered from the developer in the process and (in accordance with national legislation) the main reports and advice issued to the competent authorities[88]. The public concerned is to be given early and effective opportunities to participate in the environmental decision-making procedures and is for that purpose entitled to give comments and opinions before the decision on the request for development consent is taken[89].

The practical arrangements for making the information available to the public (usually by bill posting within a certain radius or via publications in local newspapers) and for consulting the public concerned (e.g., by written submissions or by launching a public inquiry), are to be determined by the Member States along with the requirement for reasonable time-frames for the different stages of the procedure allowing sufficient time for the public to have access to the relevant information and for the public concerned to prepare and effectively participate in the decision-making[90]. The development consent procedure is to take stock of the results of the public consultations[91] with the duty that once a decision to grant or refuse development consent has been taken by the authorities, the latter shall inform the public of the existence of such a decision and provide the public with the following information: (a) the content of the decision; (b) the main reasons and considerations on which the decision is based (including information

[87] Art.1.2(e). Further on, in Art.1.2(e): "(…) For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.";
[88] Art. 6.3(a) and (b).
[89] Art.6.4.
[90] Art.6(5) and (6).
[91] Art.8.

about the public participation process); (c) a description (where necessary) of the main measures to be used to avoid, reduce and, if possible, counteract the major adverse effects[92].

The *Strategic Environmental Assessment* Directive covers plans and programmes that are in the process of preparation and/or adoption by a national, regional or local authority or which are prepared by an authority for the subsequent adoption, through a legislative procedure, by Parliament or Government[93]. Under the Directive, the environmental assessment is understood as the process comprising the preparation of an environmental report, the carrying out of consultations, the taking into account of the environmental report and the results of the consultations in the decision-making and the provision of information on the final decision[94]. The environmental assessment is to be conducted during the preparation of a plan or programme, prior to the adoption of the latter or its submission to the legislative procedure[95]. The environmental report to be prepared within the scope of the assessment should identify, describe and evaluate the likely significant effects that the implementation of the plan or programme may inflict on the environment, coupled with a choice of reasonable alternatives and taking the objectives and the geographical scope of the plan or programme into consideration[96].

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[92] Art.9.1.
[93] Art.2(a).
[94] Art.2(b).
[95] Art.4.1.
[96] Art.5.1. Annex I outlines the type of information the environmental report is expected to contain, pursuant to the reference in Art.5.1.:
ANNEX I
Information referred to in Article 5(1)
The information to be provided under Article 5(1), subject to Article 5(2) and (3), is the following:
(a) an outline of the contents, main objectives of the plan or programme and relationship with other relevant plans and programmes;
(b) the relevant aspects of the current state of the environment and the likely evolution thereof without implementation of the plan or programme;
(c) the environmental characteristics of areas likely to be significantly affected;
(d) any existing environmental problems which are relevant to the plan or programme including, in particular, those relating to any areas of a particular environmental importance, such as areas designated pursuant to Directives 79/409/EEC and 92/43/EEC;
(e) the environmental protection objectives, established at international, Community or Member State level, which are relevant to the plan or programme and the way those objectives and any environmental considerations have been taken into account during its preparation;
(f) the likely significant effects(1) on the environment, including on issues such as biodiversity, population, human health, fauna, flora, soil, water, air, climatic factors, material assets, cultural heritage including architectural and archaeological heritage, landscape and the interrelationship between the above factors;
(g) the measures envisaged to prevent, reduce and as fully as possible offset any significant adverse effects on the environment of implementing the plan or programme;
(h) an outline of the reasons for selecting the alternatives dealt with, and a description of how the assessment was undertaken including any difficulties (such as technical deficiencies or lack of know-how) encountered in compiling the required information;
(i) a description of the measures envisaged concerning monitoring in accordance with Article 10;
(j) a non-technical summary of the information provided under the above headings.(…)";

The environmental assessment is specific to plans and programmes that are likely to have significant environmental effects[97], namely those prepared in the fields of agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use, which "set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC" [98].

The *Public Participation Directive* was exclusively directed at transposing the Aarhus Convention requirements on participation in decision-making in environmental matters to the EU legal framework[99]. The Directive lays down the procedural arrangements for Member States to allow the public to early and effectively participate in the preparation and modification or review of plans and programmes relating to the environment, falling within the scope of six pre-existing environmental directives[100]. There has been doubt expressed as to whether the Directive effectively covers all the relevant plans and programmes relating to the environment since the scope of the six directives it makes express reference to is fairly narrow - the reasons for such a restrictive approach on the part of the Union legislators remaining unclear[101]. On the plus side, there is a possibility for this impending *lacuna* to be offset by way of including provisions on public participation in environmental decision-making in all future Union legislative proposals that relate to environmental plans and programmes, which as a general intention has been expressed by the relevant EU institutions[102]. Importantly, plans and programmes for which a public participation procedure is carried out under the SEA Directive are excluded from the scope of the Public Participation Directive[103].

The discrepancy is further reflected in the existent inconsistencies in the relationship between the SEA Directive and the Public Participation Directive primarily due to the fact that

[97] Art.3.1.
[98] Art.3.2(a).
[99] Jendroska explains why the 2003 Directive has not supplemented the pre-existing regime on plans and programmes in any substantial manner (See, Jendroska, The Aarhus Convention at Ten, supra, pp.99-105).
In addition, the Directive restricts the right to participate in environmental decision-making to those "affected by or with an interest in the decision" (i.e. "the public concerned"), rather than "any member of the public" (as foreseen in the Aarhus Convention) (see, also, Mason, supra, p.22). Jendroska has observed that the difference in scope will have significant consequences since it restricts the range of subjects enjoying rights prescribed under the Convention which is a failure on the part of the EU legislature which has not been addressed - in spite of the fact that it concerns only one aspect of public participation which is the Art. 6 possibility to submit comments and opinions (see, Jendroska, The Aarhus Convention at Ten, supra, p.132).
[100] Art.2.2. The Directives have been listed in Annex I of the Public Participation: Council Directive 75/442/EEC of 15 July 1975 on waste, Council Directive 91/157/EEC of 18 March 1991 on batteries and accumulators containing certain dangerous substances, Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources, Council Directive 91/689/EEC of 12 December 1991 on hazardous waste, Directive 94/62/EC of the European Parliament and of the Council of 20 December 1994 on packaging and packaging waste; and Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management;
[101] Jendroska, The Aarhus Convention at Ten, supra, p.104.
[102] Jendroska, The Aarhus Convention at Ten, supra, p.103.
[103] Art.2.5.

the remit of the former is manifestly narrower as it only applies to plans and programmes that are 'likely to have a significant effect on the environment' while the latter covers plans and programmes 'relating to the environment' (in keeping with the letter of Art.7 of the Aarhus Convention)[104]. Such a shortcoming eliminates the possibility to apply the more inclusive obligations of Art.8 of the Convention (translated in the Public Participation Directive) to the plans and programmes already covered by the remit of the SEA Directive, given that the two regimes are mutually exclusive.

In this vein, it is also important to remark on the responsibilities borne by the EU institutions and bodies in the participation-in-decision-making domain. In comparison to the language of the directives *supra* in this section, the corresponding duties that devolve on the EU institutions and bodies under the 2006 Aarhus Regulation are not as prescriptive and detailed, but the core principles have nevertheless been preserved. The institutions are entrusted with the task of providing early and effective opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment at a time when all the options are still open[105]. Although the Regulation does not provide a list of the particular plans and programmes it applies to, it is implicit that since it transposes the Aarhus Convention provisions in the matter, the silence of the Regulation's text should be read as covering the identical scope of plans and programmes as prescribed by the Convention.

Under the Aarhus Regulation, the Commission is under the duty to ensure public participation in the preparatory stage for a proposal on a plan or programme relating to the environment which it subsequently submits to other institutions or bodies for decision[106]. The institutions and bodies are obligated to take due account of the outcome of the public participation and inform the public of the plan or programme that has been adopted by providing the former with the text of the plan or programme together along with a statement of reasons for the adoption thereof[107]. It is significant to note that, unlike the access-to-information provisions of the Aarhus Regulation, the provisions on participation in decision making only apply to the Union institutions and bodies when in performance of an executive or administrative function, thereby excluding the legislative process.

5. The Aarhus Convention access-to-justice pillar in EU law

[104] See, also, Jendroska, The Aarhus Convention at Ten, supra, p.100.
[105] Art.9.1
[106] Art.9.1.
[107] Art.9.5.

As mentioned above, the Aarhus Convention obligations have not been fully transposed to the EU plane with the access-to-justice regime specific to environmental matters being conspicuously missing from the Union legislative framework. Namely, the attempt for the adoption of an Access-to-Justice Directive in 2003 was unsuccessful and the Directive remained at the proposal stage[108], leaving the Member States to align their legal systems with the Convention's provisions independently and to the extent achievable. The former setback has only marginally been redeemed by the insertion of access-to justice provisions in the current EU directives corresponding to the first and the second pillar of the Aarhus Convention (the Public Information Directive and the EIA Directive).

According to Art.9(1) of the Convention, in granting the access to information each Party is to ensure that *any person* who considers that their request for information made pursuant to Art.4 of the Convention has been ignored, wrongfully refused (in part or in full), inadequately answered, or in any other way not dealt with in accordance with the provisions of Art.4, is entitled to a review procedure *before a court of law* (or another independent and impartial body established by law)[109]. The former requirement has been mirrored in Art.6 of the 2003 Access-to-information Directive with the access-to-justice provisions of the Directive owning an added value thereto by having extended the breadth of the procedural protection espoused under Art.9(1) and (2) as to include the Art.5 and Art.6 access-to-information requirements in addition to the Art.4 requirements which the Convention foresees as the 'minimum standard' that Parties are to observe[110]. The 'enhanced' scope of the judicial protection under the 2003 Directive evidences an implementation effort which has exceeded the minimum standard by setting a higher threshold of protection.

As regards participation in decision-making, only the participatory rights under Art.6 of the Convention have been endorsed as a kind of 'minimum standard', allowing for national legislators to further extend the scope of judicial protection to additionally cover, *inter alia*, Arts. 7 and 8, or, even Art. 5[111]. Effectively, each Party should, within the framework of its national

[108] Commission Proposal for a Directive if the European Parliament and the Council on access to justice in environmental matters, Brussels, 24.10.2003, COM(2003) 624 final, 2003/0246 (COD).
[109] Art.9.1.
[110] Art.6.1 (Access to justice) of Directive 2003/4/EC on public access to environmental information: **"**Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.";
[111] Art.9.2 of the Convention reads:
"Each Party shall, within the framework of its national legislation, ensure that members of the public concerned
(a) Having a sufficient interest or, alternatively,
(b) Maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition,

legislation, ensure that members of the *public concerned* that have a sufficient interest or, alternatively, maintain the impairment of a right, have access to a review procedure before a court of law (and/or another independent and impartial body established by law) to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Art.6 or, *where provided by national law* – other relevant provisions of the Convention[112]. The frame of reference used for appraising 'sufficient interest' and 'impairment of a right' is to be foreseen by national law, in line with the general objective of providing wider access to justice to the public concerned[113]. Furthermore, any non-governmental organization that meets the requirements referred to in Art. 2.5 of the Convention is presumed as having 'sufficient interest'[114].

The foregoing requirements have found their expression in the EIA Directive (more particularly, through the amendments introduced via the 2003 Public Participation Directive[115]). While a satisfactory judicial review regime has been established with respect to public participation in *specific projects on the environment*, an analogous regime has not been envisaged in the context of public participation in the drafting of *plans and programmes* relating to the environment. In this sense, failing to extend the application of the access-to-justice provisions to the process of preparation of plans and programmes relating to the environment represents a serious drawback to the Union's public participation regime that has not been sufficiently well addressed[116].

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have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.";

For further reading, see, *The Aarhus Convention: An Implementation Guide*, p.128; In the context of the application Art.9(3) there does exist a possibility for the provisions of Arts. 7 and 8 of the Convention to be justiciable. However, being that Art.9(2) and (3) of the Convention contain certain provisions which are to be implemented only at the discretion of national legislators, it cannot be claimed that Arts. 7 and 8 create legally binding obligations (see, Jendroska, *Aarhus Convention at Ten*, *supra*, p.96).

[112] Art.9.2.

[113] Art.9.2.

[114] Under Art.2.5 of the Convention, " (…)"the public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest." [Emphasis added];

[115] Article 1

Objective

"The objective of this Directive is to contribute to the implementation of the obligations arising under the Århus Convention, in particular by:

(a) providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment;

(b) improving the public participation and providing for provisions on access to justice within Council Directives 85/337/EEC and 96/61/EC (…)";

[116] A reclusive approach is to be observed in the instance of implementing the second paragraph of Art.9, as it was decided that all the relevant amendments to the already existing directives would suffice. Namely, Directive 2003/35 did not provide options for access to justice in the instance of impairment of the right to participate in the preparation of plans and programmes, let alone that regarding policies and legislations. In fact, the decision to

With respect to the justiciability of the administrative acts and omissions of the Union institutions and bodies regarding environmental matters, the former are (to a certain extent) reviewable under Art.10 of the 2006 Aarhus Regulation. Nonetheless, the scope of persons entitled to require the judicial review is highly restrictive, if not poor. More particularly, under the Regulation only non-governmental organizations have the legal standing to challenge the administrative acts and omissions of the Union institutions and bodies, by lodging a request for internal review before the concerned EU institution or body allegedly at fault followed by the option to further initiate a procedure before the CJEU[117]. The generous procedural entitlement given to non-governmental organizations closely follows the language of Art.9.2(2) of the Aarhus Convention whereby non-governmental organizations are presumed to have sufficient interest to initiate proceedings before courts or other relevant bodies. All the while, the Regulation makes a clear retreat from the Convention's liberal approach in establishing the 'any person' requirement in cases of denied or unsatisfactory access to environmental information (Art.9.1) - including the provision of legal standing to 'members of the public concerned having a sufficient interest' or 'maintaining impairment of a right' by reason of their Art.6 entitlements (pursuant to Art.9.2(1)).

The restrictive approach exhibited by the EU legislator in the 2006 Aarhus Regulation can be explained with the caution as to not trample upon the established legal standing rules of the TFEU and the settled case law of the EU Court of Justice in the matter combined with the fear of potentially opening the 'floodgates' for natural or legal persons (other than NGOs) to challenge all administrative acts and omissions of EU institutions coming within the scope of the Regulation (certainly, provided the concerned persons are at the outset able to prove direct and individual concern)[118].

The Union's restrictive rules on legal standing in matters related to the environment, which have the effect of denying the NGOs and the individuals full access to justice in challenging the decisions of EU institutions have also been addressed by the Aarhus Convention Compliance Committee in the Committee findings adopted pursuant to a communication that brought attention to EU's failure to comply with Art.9(2) of the Aarhus Convention.[119]. The Compliance Committee remarked on the need for a new direction in the jurisprudence of the EU Courts to be established in order to ensure compliance with the Convention, by recommending that "(…) all relevant EU institutions within their competences take the steps to overcome the

maintain such a restrictive approach was not preceded by any significant debate within the EU (see, Jendroska (2006), supra, Part VII. 1).

[117] Art.12 of the Regulation.

[118] See, on the criteria regarding legal standing, Art.263(4) TFEU.

[119] Compliance Committee, Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, Adopted on 14 April 2011 ECE/MP.PP/C.1/2011/4/Add.1.

shortcomings reflected in the jurisprudence of the EU Courts in providing the public concerned with access to justice in environmental matters''[120].

Conclusion

As ambitious as the Union's hard-line stance to profess itself as one of the global pioneers of environmental democracy may be, the former sits in stark contrast to the Union's internal situation which reveals the absence of a comprehensive Union legal framework transposing the Aarhus Convention access-to-justice obligations. Under the present state of affairs, Member States are left to their own devices i.e. Member States have the choice to either directly apply the Convention's access-to-justice provisions (when possible) or adopt corresponding national measures aimed at transposing the Convention's access-to-justice requirements. The Union legislator's inconsistency in approach regarding the Convention's first and second pillar requirements, on the one hand, and the third pillar requirements, on the other, seriously jeopardizes the uniformity of legal effect of the Convention at Union level allowing for different national courts to potentially give diverse interpretations and therefore distinctly apply the Convention's access-to-justice provisions.

Due to the persistent discrepancy among the national access-to-justice regimes of different the Member States, Union regulatory action is imperative, if not highly desirable – also, on account of the resulting shortcomings involved in the control of the application of Union environmental law and the applicable standards for the enforcement of environmental legal rules [121]. Furthermore, such disparities in the application of environmental law may generate conflicts among Member States, especially in the areas of international watercourse and air quality protection, and cross border emissions of polluting substances which contributes to the weakening of the overall impact of the Aarhus Convention[122]. The obvious lack of urgency for regulation demonstrated by the Union legislators can be accounted for by the fact that at the time the Aarhus Convention was negotiated by the EU, most Member States had already well-established legal traditions in the application of the Art.9(3) requirements regarding breaches of national environmental laws, some of which were much more liberal than those envisaged by the proposed Directive[123]. Alternatively, a reverse argument may also be offered as a possible justification as to why the Union is in no hurry to legislate – namely, an important number of Member States (even a critical majority thereof) consider that their respective domestic regimes offer a sufficiently high access-to-justice standard in the environmental field and therefore do not feel a compelling need to have one established at Union level. The former argument largely

[120] Paras.97 and 98 of the Findings.
[121] p.6.
[122] p.6.
[123] M. Bar, Towards Implementation of the Aarhus Convention Third Pillar: Draft EU Access directive Compared with the Situation in Poland, *Environmental Liability* 2004 Vol. 12 Issue 2, p.68.

applies to the Western European countries – while for a dominant number of the Union's newly acceding Member States of 2004, 2007 and 2013, who themselves do not have a satisfactory track record in environmental protection (let alone environmental democracy), the lack of Union regulation in this respect leaves much to be desired and taints EU's overall image as an actor in the field of environmental democracy.

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