Monograph

25 years of the Aarhus Convention in South Eastern Europe

...

University of Belgrade Faculty of Law - Jean Monnet Chair in European Environmental and Climate Change Law

OSCE Mission to Serbia

Prof. Dr. Ilina Cenevska *

The Aarhus Convention and the Courts of the European Union: The opportunities and limitations of access to justice in climate matters

Abstract: This paper weighs in on the obligations arising for the EU as a contracting party to the Aarhus Convention with regard to granting broader possibilities to private parties (individuals and non-governmental organizations) to appear before the EU Courts (the Court of Justice and the General Court) in matters pertaining to the climate domain. This relates to those cases where, by virtue of claiming a breach of their Aarhus Convention rights, private applicants consider themselves "directly" and "individually" concerned by a specific climate legal act adopted by the EU institutions.

In this vein, the paper explores the relevance of Article 9(3) of the Convention for the EU climate litigation context, including whether and how this provision can trigger the duty of the EU Courts to make access to justice more widely available to private applicants launching climate lawsuits before them. Article 9(3) requires each contracting party to ensure that, where they meet the criteria laid down in its national law, members of the public have access to administrative or judicial procedures to appeal against "acts and omissions by (...) public authorities which contravene provisions of its national law relating to the environment." Applied with respect to the EU as a party to the Convention, this provision can be interpreted as creating an obligation for the EU institutions which extends beyond strictly the "environmental matters" realm to equally cover the climate one.

• • •

* Associate Professor, Faculty of Law, Ss. Cyril and Methodius University, Skopje, North Macedonia, i.cenevska@pf.ukim.edu.mk.

To test this hypothesis, the paper takes a critical view on two cases brought before the EU Courts – *Carvalho et al. v Parliament and Council* and *Sabo et al. v. Parliament and Council*, scrutinizing the legal options available for private applicants to seek a full or partial annulment of EU legislative acts which they allege hinder the EU's climate ambitions as well as "directly" and "individually" affect them as applicants. In this sense, the EU Courts' hitherto missed opportunities for extending the Aarhus Convention obligations to the climate arena will be discussed, including the yet untapped potential of these courts to act as fora for climate litigation at the EU supranational level.

Keywords: Aarhus Convention – Article 9(3) – access to justice – climate litigation – EU Court of Justice – legal standing

1. Introduction

The present paper aims to question the scope of obligations arising for the European Union as a result of its participation in the Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention),[1] with regard to granting broader access to private parties (individuals and non-governmental organizations) before the EU Courts (the Court of Justice and the General Court), in matters involving the climate domain. Unarguably, the access-to-justice principles and standards inaugurated by the Aarhus Convention serve as a benchmark for the protection of the procedural environmental rights of natural and legal persons, before the courts of the Member States and the EU Courts alike. What this paper sets out to investigate is the possibility for extending the reach of the Aarhus Convention's access-to-justice rules beyond strictly the environmental domain to equally cover matters pertaining to the climate. The point of departure for this analysis is Article 9(3) of the Aarhus Convention and relates to cases where, by virtue of claiming a breach of their Convention rights, private applicants consider themselves 'directly' and 'individually' concerned by a specific legal act adopted by the EU institutions in the pursuit of the Union's climate policy objectives.

Making a clear shift in perspectives (from the environmental towards the climate domain), this analysis reviews the possibilities for the application of the Convention's access-to-justice rules to the EU's climate litigation context specifically. It zooms in on the EU Courts' evolving jurisprudence in climate matters by assessing the extent of the Aarhus Convention's relevance and (by consequence) applicability to climate cases before the EU Courts. Thus, the signifi-

• • •

1 The EU officially acceded to the Aarhus Convention in February 2005 (https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27).

cance of Article 9(3) of the Convention to the EU's supranational climate litigation is examined in relation to whether and how this provision can be said to trigger the duty of the EU Courts to make access to justice more widely available to the private applicants launching climate lawsuits before them. Namely, Article 9(3) requires each Convention Party to ensure that, where they meet the criteria laid down in its national law, members of the public have access to administrative or judicial procedures to appeal against "acts and omissions by (...) public authorities which contravene provisions of its national law relating to the environment." Since the EU is a party to the Convention alongside its Member States, yet is not itself a nation-state, this provision can be interpreted by analogy, so as to create access-to-justice obligations for the EU's administrative and judicial bodies that extend beyond just the environmental realm and also cover the climate one.

To test the foregoing hypothesis, the paper takes a critical view on two cases decided by the EU Courts – *Carvalho et al. v Parliament and Council* and *Sabo et al. v. Parliament and Council*. These cases draw on the options available to private applicants under the current EU system of legal remedies to seek a full or partial annulment of EU legislative acts that they consider 'directly' and 'individually' affect them and which they claim hinder the EU's climate ambitions. The paper is organized as follows. The first part provides an overview of the legal bases from which flows from the EU Courts' duty to provide broader access to justice for private litigants involved in environmental and climate disputes before the EU Courts. The second part inspects the commonalities between *Carvalho*[2] and *Sabo*[3] as cases representative of the EU courts' budding climate jurisprudence, followed in the third part by a commentary on the EU Courts' consistently rigid approach towards the legal standing of natural and legal persons appearing before them and probing the extent to which this approach can indeed be considered as an 'inherent' limitation of the EU system of judicial remedies. The fourth and concluding part discusses the various implications that result from the EU Courts' refusal to relax the rigid standing criteria in order to accommodate broader access to justice in climate matters at the EU level. It is argued that such a restrictive stance, in effect, precludes extending the Aarhus Convention obligations to the climate sphere and subverts the EU Courts' potential to act as fora for climate litigation at the supranational level.

• • •

2 T-330/18 Armando Carvalho and Others v European Parliament and Council of the European Union, ECLI:EU:T:2019:324; C-565/19 P Armando Carvalho and Others v European Parliament and Council of the European Union, ECLI:EU:C:2021:252.

3 T-141/19 Peter Sabo and Others v European Parliament and Council of the European Union, ECLI:EU:T:2020:179; C-297/20 P Peter Sabo and Others v European Parliament and Council of the European Union, ECLI:EU:C:2021:24.

2. The legal bases from which the EU's duty to provide broader access to justice for private litigants in the climate domain can be derived

2.1. Article 263(4) of the Treaty on the Functioning of the European Union

This analysis will start by looking at the specific legal base from which the EU Courts' duty to strive to guarantee broader access for private parties in the environmental and climate domain flow from. Therefore, an overview of the relevant (international and EU) legal framework will be provided, starting with the principal EU law provision in this regard, *Article 263(4) TFEU* which states that any natural or legal person may institute proceedings i) against an act addressed to them *or* which is of direct and individual concern to them; or ii) against a regulatory act which is of direct concern to them *and does not entail implementing measures.* While none of the Union Treaties provide a definition of the terms 'direct concern' and 'individual concern', over the years, the Court of Justice of the EU (CJEU)[4] assumed the task of fleshing out these notions through case law. In 1963, the CJEU introduced the famous *Plaumann* doctrine which accompanies the TFEU provisions on legal standing and which it has unwaveringly upheld ever since. According to the *Plaumann* doctrine, natural or legal persons satisfy the condition of "individual concern" only if the contested Union act affects them due to certain attributes that are *peculiar to them* or by reason of *circumstances in which they are differentiated from all other persons*, meaning that as a result of these factors the contested act *distinguishes them individually* just as in the case of the addressee.[5] Next, for a person to be deemed "directly concerned" by a Union measure, the latter must *directly affect their legal situation* and leave *no discretion to the addressees* of that measure who are entrusted with the task of implementing it, "such implementation being purely automatic and resulting from [Union] rules without the application of other intermediate rules."[6] It follows that, save for Union regulatory acts which do not entail implementing measures and which are of direct concern

• • •

4 The terms 'European Union (EU) courts and 'Court of Justice of the European Union (CJEU)' will be used interchangeably throughout the article to refer to actions and statements of either the Court of Justice or the General Court of the European Union. Pursuant to Art. 19(1) TEU, the Court of Justice of the European Union includes the Court of Justice (CJ), the General Court (GC) and specialized courts.

5 C-25/62 *Plaumann* v *Commission*, EU:C:1963:17, p. 223; of 3 October 2013 (part 1 of judgment); C583/11 P *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, EU:C:2013:625, para.72; C132/12 P *Stichting Woonpunt and Others* v *Commission*, EU:C:2014:100, para.57; C133/12 P *Stichting Woonlinie and Others* v *Commission*, EU:C:2014:105, para.44.

6 See, to that effect, a number of CJEU judgments, in particular, C-92/78 Simmenthal v Commission [1979] ECR 777, paras. 25,26; C-113/77 NTN Toyo Bearing Company and Others v Council [1979] ECR 1185, paras. 11, 12; C-118/77 ISO v Council [1979] ECR 1277, para. 26; C-119/77 Nippon Seiko and Others v Council and Commission [1979] ECR 1303, para.14; C-55/86 Arposol v Council [1988] ECR 13, paras. 11-13; C-207/86 Apesco v Commission [1988] ECR 2151, para.12; C-152/88 Sofrimport v Commission [1990] ECR I-2477, para.9; C-386/96 P Société Louis Dreyfus v Commission [1998] ECR I-2309, para.43.

to the applicants, the conditions of direct and individual concern for private applicants are cumulative and must be considered jointly.[7] Ever since its *Plaumann* ruling, in examining the foregoing standing criteria, the way the CJEU typically proceeds is by first assessing whether the condition of individual concern has been satisfied; should the applicant be found not to be individually concerned by the contested measure, it then becomes unnecessary to establish whether they are directly concerned.[8]

A contentious aspect concerning the application of Article 263(4) TFEU is the absence of a definition for the term "regulatory act", which by consequence creates confusion as to the relevant criteria to be employed to determine whether a particular regulatory act entails implementing measures (Vedder 2010, 297; Barents 2010, 722). It has been argued that the restrictive scope of the type of act open to challenge under Article 263(4) TFEU presumably only leaves the delegated or implementing acts adopted pursuant to Articles 290 and 291(2) TFEU to be considered amenable to direct judicial review, making it doubtful whether Article 263(4) TFEU could indeed be extended to Union legislative acts (Poncelet 2012, 301). For example, in *Carvalho* and *Sabo*, which will be considered in greater detail below, direct judicial review was sought for EU legislative acts and therefore, given that such acts require implementing measures, it was necessary for the applicants to demonstrate direct and individual concern as they were not themselves addressees of the contested acts.

2.2. Article 9(3) of the Aarhus Convention

In following, reference will be made to those international and EU legal provisions, which, read in conjunction with Article 263(4) TFEU, can be regarded as establishing a legal duty for the EU Courts, to strive to provide to the optimal extent possible, in legal disputes relating to the climate, broad(er) access to private litigants affected by specific Union climate measures. Starting with the international level, a particularly important provision is *Article 9(3) of the Aarhus Convention.* As concerns the access to justice rights that private parties enjoy under the Convention, Article 9(3) requires each contracting party to ensure that, where they meet the criteria laid down in its national law, members of the public have access to administrative or judicial procedures to appeal against "acts and omissions by (...) public authorities which contravene provisions of its national law relating to the environment." With the EU being a party to the Aarhus Convention alongside its Member States, this provision can arguably be

• • •

7 See e.g., C583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:625, para.76.

8 See to that effect, C-25/62 *Plaumann* v *Commission*, EU:C:1963:17, Part I of judgment; C583/11 P *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, EU:C:2013:625, para.76; See to that effect, T-330/18 Armando Carvalho and Others v European Parliament and Council of the European Union, ECLI:EU:T:2019:324, para.44.

seen as creating an obligation for the EU institutions that pertains not only to environmental but also, by extension, to climate matters.[9] In so far as the EU is concerned, seeing as it itself is not a nation-state, the requirements flowing from this provision should be considered as binding on the EU institutions *per extensiam*. Regarding the option for private applicants to challenge EU legislative acts adopted in the climate domain, it is important to underline that bodies and institutions acting in a legislative capacity are excluded from the Aarhus Convention definition of "public authority", but at the same time, in the spirit of achieving greater transparency and accountability, the Convention's preamble nevertheless *invites* legislative bodies to implement the Convention principles in their proceedings.

2.3. Regulation (EC) 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 Union institutions and bodies (Aarhus Regulation)

Coming to the EU level, of equal importance is the (now amended) *Regulation (EC) 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 Union institutions and bodies (Aarhus Regulation)*,[10] originally adopted in 2006 as one of a set of Union legislative measures enacted to transpose the obligations arising from the Aarhus Convention to the EU legal order, applying exclusively to the Union institutions and bodies. The amending Regulation (EU) 2021/1767[11] modifies the original Aarhus Regulation (EC) No 1367/2006 in limited respects. Guided by the importance of taking decisi-

• • •

9 In relation to this, it is important to recall the Declaration issued by the European Community in 2005, upon the approval of the Aarhus Convention, which specifies that the Community legal instruments in force (at the time) "*do not cover fully the implementation of the obligations resulting from Article 9 (3) of the Convention* as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community" and that, consequently, the EU Member States "are responsible for the performance of these obligations *at the time of approval of the Convention by the [then] European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations.*" As a result, the European Community is considered "responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force. *The exercise of Community competence is, by its nature, subject to continuous development.*" (United Nations Economic Commission for Europe, The Aarhus Convention: An Implementation Guide, 2014 (second edition), ECE/CEP/72/Rev.1, p.248 [emphasis added]).

10 Regulation (EC) 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, L 264/18 EN Official Journal of the European Union, 25.9.2006.

11 Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) 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, OJ L 356, 8.10.2021, p. 1–7.

ons relating to the environment closer to the citizens, the amendments introduced (in force since October 2021) have the objective of expanding the legal opportunities for private parties to challenge the acts of EU institutions and bodies that contravene EU environmental law.[12] Importantly, Article 2(1)(f) of the Aarhus Regulation defines "EU environmental law" as encompassing "[Union] legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of [the Union] policy on the environment set out in Article 191(1) TFEU," among which is the promotion of "measures at the international level to deal with regional or worldwide environmental problems, *and in particular combatting climate change*".[13] It follows that rules enacted for the purpose of combatting should also be understood as included in this definition.[14] This approach of binding the environmental objectives together with the climate objective of Article 191(1) TFEU is especially significant seeing as the Union Treaties do not presently provide a separate chapter dedicated to the EU's climate policy and therefore do not offer an autonomous legal basis for the formulation and development of this policy as one that is independent from the EU's environmental policy.

In its *Explanatory Memorandum* to the Proposal for an amending Aarhus Regulation, the Commission acknowledges the consensus among the key EU institutional actors over the need to engage with members of the public for the purpose of achieving the goals outlined in the European Green Deal.[15] [16] For this to be accomplished, the public as the driving force for the transition to a more sustainable and climate neutral EU should be able to have at its disposal the means to get actively involved in developing and implementing new policies.[17] Engaging with the public is understood as not only engaging with individuals but also engaging with civil society, and, notably, environmental non-governmental organisations (ENGOs) who play "a crucial advocacy role regarding the environment."[18] In addition, the Commission has emphasised that by adopting the amending Aarhus Regulation, the EU endeavours to address the concerns expressed by the Aarhus Convention Compliance Committee (ACCC)[19] regarding

• • •

12 Explanatory Memorandum to the Proposal for a Regulation of the European Parliament and of the Council on amending 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, Brussels, 14.10.2020 COM (2020) 642 final 2020/0289 (COD), p.1.

13 Emphasis added.

14 Explanatory Memorandum, p.6, at footnote 17.

15 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM/2019/640 final.

16 Explanatory Memorandum, p.1.

17 Ibid.

18 Ibid.

19 The Compliance Committee is the Aarhus Convention body charged with reviewing the Convention Parties' compliance with the Convention rules.

steps to be taken by the EU to ensure full compliance with its Convention obligations, which is to be carried out in a manner "compatible with the fundamental principles of the EU legal order and the system of judicial review under EU law."[20]

What are the changes that the amending Regulation introduces? By virtue of the 2021 amendments, members of the public and ENGOs are now entitled to submit a request for internal review to the Union institution or body that adopted an administrative act or, in the case of an alleged administrative omission, should have adopted such an act, on the grounds that such an act or omission contravenes EU environmental law within the meaning of Article 2(1)(f) of the Aarhus Regulation.[21] In other words, the amending Regulation increases the options available to private parties to seek administrative review of administrative acts of 'individual scope' (acts directly addressed to a person or where the person affected can be distinguished individually) and administrative acts of 'general scope,' adopted by the Union institutions and bodies.[22] The newly inserted Article 2(1) defines 'administrative act' as *any non-legislative act adopted by a Union institution or body*, which has legal and external effects and contains provisions that may contravene EU environmental law – meaning that acts of both general and individual scope are covered.[23] Under the previous version of the Aarhus Regulation, administrative review could only be requested *for acts of individual scope*.[24] Likewise, 'administrative omission' relates to any failure of a Union institution or body to adopt a non-legislative act which has legal and external effects, where such failure may contravene EU environmental law.[25]

In terms of the *conditions* that NGOs and members of the public need to fulfil in order to be able to make an internal review request, a *certain degree of interest* (individual or general) in the matter needs to be established.[26] As one of the mandatory criteria for NGOs, Article 11 requires that the subject matter in respect of which the request for internal review is made is covered by the organization's objectives and activities. For members of the public making such

20 Explanatory Memorandum, p.1.
21 Ibid.
22 Ibid.
23 Explanatory Memorandum, p.1,2.
24 Ibid.
25 Ibid.
26 Concerning how environmental NGOs have recently been making use of the standing options available under the amended Aarhus Regulation, e.g., the ENGO ClientEarth has filed an internal review request to the European Commission for unlawfully labelling bioenergy, bio-based plastics and chemicals used to make plastics as "sustainable" in the EU's sustainable finance taxonomy, a list outlining economic activities to be considered as "green" investments (https://www.clientearth.org/latest/press-office/press/environmental-lawyers-take-first-step-to-challenge-eu-taxonomy-in-court/?utm_source=twitter&utm_medium=social&utm_campaign=taxonomy).

a request, Article 11 requires that they are able to either i) demonstrate impairment of their rights caused by the alleged contravention of Union environmental law by the Union institution or body and that they *themselves have been affected* by such impairment in comparison to the public at large; or, ii) demonstrate a *sufficient public interest* and prove that their request is supported by at least 4 000 members of the public residing or established in at least five Member States, with at least 250 members of the public coming from each of those Member States. Concerning the time period for processing such requests, Article 10(2) provides that the Union institution or body must consider the request for internal review, unless it is manifestly unfounded or clearly unsubstantiated, and is obligated to state its reasons in a written reply no later than 12 weeks after receiving the request. Furthermore, Article 12 stipulates that, where the Union institution or body fails to act in accordance with these obligations, the NGO or other members of the public that made the request for internal review may institute proceedings before the Court of Justice.

2.4. Article 47 of the EU Charter of Fundamental Rights

Seeing as climate change is equally (and especially) a human rights issue (see Peel, Osofsky 2018; Wewerinke-Singh 2019; Parihar, Dooley 2018), another key provision of EU law that serves as grounds for establishing a duty of EU institutions to aim at affording broader access to justice for private parties is Article 47 of the EU Charter of Fundamental Rights (CFREU). Pursuant to Article 47 CFREU, a horizontal provision of EU primary law, everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before an independent and impartial tribunal – the Union courts, inter alia, being such courts. For example, the applicants in *Carvalho* and *Sabo* relied on this provision to reinforce their claims for direct access to the Union courts.[27] The requirements of Article 9(3) of the Aarhus Convention and Article 47 CFREU clearly complement each other: the applicants in *Sabo* relied on the interplay between these two provisions to justify demanding a more flexible reading of the Art 263(4) TFEU standing criteria.

In its 2020 *Communication on improving access to justice in environmental matters in the EU and its Member States*,[28] the Commission highlighted the relevance of Article 47 CFREU to the access of justice in environmental matters, asserting that being entitled to an effective remedy and a fair trial is a fundamental right of the EU legal order and that effective judi-

27 The applicants in *Carvalho* and *Sabo* relied on Art.47 CFREU and Article 9(3) of the Aarhus Convention as some of the legal bases supporting their claim for standing before the Union courts.

28 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "Improving access to justice in environmental matters in the EU and its Member States", Brussels, 14.10.2020 COM(2020) 643 final.

cial systems play a crucial role in safeguarding the rule of law as a fundamental value of the EU.[29] However, as concerns the stakeholders on whom rests the primary obligation to make the EU's system of access to justice in environmental (and, arguably, by extension, climate matters) more consistent with the rules of the Aarhus Convention, the Commission stressed that the chief responsibility of improving the implementation of the relevant EU rules is carried by Member States[30] – a nod to what can be described as a "judicial subsidiarity" approach (Bogojević 2015, 6), which, for the most part, absolves the EU Courts from bearing the primary responsibility themselves in this regard.

3. The commonalities between *Carvalho* and *Sabo* as cases representative of the emerging climate litigation in the EU Courts

The analysis will now turn to the options relative to the access of justice in climate matters for private litigants appearing before the EU Courts, examined in the light of the *Carvalho* and *Sabo* judgments, delivered by the General Court (GC) in the first instance and the Court of Justice (CJ) in the second and final instance. The Court of Justice's conclusions in both cases confirmed those made by the General Court in the first instance. It is important to mention that *Carvalho* and *Sabo* are cases which are representative of the emerging trend of climate litigation taking place in the Union courts.[31] The two cases share many common elements and, taken together, can be considered as reflective of the CJEU's stance regarding the possibilities for private applicants to bring climate claims before the Union courts. Namely, the applicants in both cases were individuals and NGOs seeking full or partial annulment of Union legislative acts, claiming to be directly and individually concerned with the contested EU acts and demanding that the EU Courts reconsider the *Plaumann* doctrine and provide a more extensive interpretation of the restrictive standing requirements for private applicants prescribed under EU law.

More precisely, the applicants in *Carvalho* and *Sabo* challenged before the EU Courts the validity of a number of EU legislative acts enacted to meet the climate change goals pledged by

• • •

29 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Improving access to justice in environmental matters in the EU and its Member States*, Brussels, 14.10.2020 COM(2020) 643 final, p.2.

30 Ibid.

31 Aside from the two cases in focus, see, inter alia, C-5/16 Republic of Poland v European Parliament and Council of the European Union, ECLI:EU:C:2018:483; T-9/19 ClientEarth v European Investment Bank, ECLI:EU:T:2021:42.

the EU under the Paris Agreement.[32] The actions for annulment brought by the applicants were declared inadmissible as neither the GC nor the CJ deemed that the applicants had standing to bring the actions in question as it was found that the applicants could not prove to be individually concerned with the contested acts and therefore did not meet the *Plaumann* criteria. While empathizing (to a certain degree) with the applicants' situation and the adverse conditions suffered by them as a result of climate change, the GC and the CJ were not convinced that the effects of climate change being different from one person to another was sufficient grounds to grant standing for bringing an action before them to challenge EU measures of general application.[33] Any approach different than this one, would, in CJEU's opinion, have the result of rendering the requirements of Article 263(4) TFEU meaningless and would create *locus standi* for all without the criterion of individual concern, within the meaning of the *Plaumann* line of case law.[34]

In spite of the urgent nature of the climate change predicament and the increasingly devastating consequences resulting from it, as well as the well-substantiated claims made by the applicants, the CJEU could not be swayed to modify the *Plaumann* formula. Quite the opposite, the CJEU was satisfied that the Union has in place a comprehensive system of legal remedies and procedures designed to ensure that the EU courts provide effective judicial review of the legality of the acts of the EU institutions.[35] Nevertheless, the CJEU was prepared to offer guidance to the applicants in both cases on how they can avail themselves of the legal remedies currently available under EU law, applicable to such instances where they, as natural and legal persons, do not meet the Article 263(4) TFEU conditions and are therefore unable to directly challenge Union legislative acts.[36] The CJEU essentially proposed two main routes.

The *first route* concerns the possibility to plead the invalidity of Union acts indirectly before the EU Courts, pursuant to Article 277 TFEU.[37] This provision allows any party involved in CJEU proceedings in which an EU act of general application is at issue, to plead the inapplicability of that act before the CJEU. This would mean that, in order for the applicants to be entitled to bring a direct action before the EU Courts, under the conditions set out in Article 263(4) TFEU, they would have to challenge the implementing measures adopted by the Union institutions in relation to the legislative act concerned, only to thereupon rely on

• • •

32 Council Decision (EU) 2016/1841 of 5 October 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, OJ 2016 L 282, p.1.
33 Carvalho (General Court), para.50.
34 Carvalho (General Court), para.50.
35 Carvalho (General Court), para.53.
36 Carvalho (General Court), para.53.
37 Carvalho (General Court), para.53.

Article 277 TFEU by pleading, in support of that action, the illegality of the legislative act in question.[38] The *second route* is for the applicants to bring an action before their national courts, which themselves have no jurisdiction to declare Union acts invalid, and ask of them to request a preliminary ruling from the Court of Justice under Article 267 TFEU.[39] By being employed by the applicants in this way, the preliminary ruling procedure as a judicial remedy becomes, just like the actions for annulment, a means for reviewing the legality of EU acts.[40] Presumably, this second route would only apply to instances where the responsibility for the implementation of a Union legislative act falls on the Member States.[41] Having proposed the preliminary ruling option to the applicants, the CJEU adheres to the "judicial subsidiary" approach, now with respect to climate disputes, encouraging private litigants to avail themselves of the judicial protection provided by their national courts rather than obtain direct judicial review by the Union courts (See Bogojević 2015, 6).

Curiously, the applicants in *Carvalho* had anticipated the suggestion of the second route and in their statements made during the court proceedings repudiated the effectiveness of the preliminary ruling procedure as an option for challenging the legality of EU legislative measures. To them, any such action to be initiated before the national courts would be unfeasible given that the result that they are seeking to obtain is a *collective* one (reduction of the EU's total GHG emissions).[42] Taking into account the diverse composition of applicants coming from different Member States, they argued that to accomplish the desired result through the preliminary ruling procedure would require each of them to bring proceedings before the courts of all of the Member States.[43] The applicants identified an additional limiting factor which is the patchwork of different national procedural rules and judicial remedies of the Member States which itself fails to guarantee an effective legal remedy and a timely resolution – an argument that goes to the core of the (un)suitability of the preliminary ruling procedure as a means for legally challenging an EU legislative act.[44]

The EU Courts were not receptive to the applicants' arguments encouraging a more flexible reading of the standing criteria, borne out, among other things, by the devastating and irre-

• • •

38 Sabo (General Court), para.43.
39 Carvalho (General Court), para.53; The Court refers, to that effect, to: Order in case C64/14 P von Storch and Others v ECB, EU:C:2015:300, para.50; C-50/00 P Unión de Pequeños Agricultores v Council, EU:C:2002:462, para.40; C-263/02 P Commission v. JégoQuéré, EU:C:2004:210, para.30).
40 Sabo (General Court), para.43; See also C583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council, EU:C:2013:625, para.95.
41 Sabo (General Court), para.43; See also C583/11 P Inuit Tapiriit Kanatami and Others v Parliament and Council, EU:C:2013:625, para.93.
42 Carvalho (General Court), para.32.
43 Carvalho (General Court), para.32.
44 See, Carvalho (General Court), para.32.

versible effects of climate change and the urgent need for the EU to adopt more appropriate legislative measures that accord better with the EU's climate objectives. Its refusal to offer a climate-friendly interpretation of the *Plaumann* test in *Carvalho* and *Sabo* signifies a missed chance for the CJEU as it charts out the limits of CJEU's influence on EU climate policy-making (see Stoczkiewicz 2023, 133).

4. Is the narrow approach to standing an inherent limitation of the EU system of judicial remedies?

The *Carvalho* and *Sabo* rulings confirm the EU Courts' unwavering reliance on the rigid *Plaumann* test, undeterred by the distinctive nature of the climate change phenomenon (see Fisher et al. 2017) and the urgency that goes along tackling it. As regards the pertinence of the legal avenues recommended to the applicants in *Carvalho* and *Sabo*, namely that the applicants have at their disposal the preliminary reference procedure as an adequate route for resolving their claims concerning the legality of EU legislative acts that affect their legal situation. Surrounding the suitability of the suggested avenue, it is worth recalling ACCC's assertion that, with respect to decisions, acts and omissions by EU institutions and bodies, the EU's system of preliminary ruling "neither in itself meets the requirements of access to justice in Article 9 of the [Aarhus] Convention, nor compensates for the strict jurisprudence of the EU Courts regarding access to justice."[45] Conversely, the EU side has always refuted such type of arguments, referring to the "special nature" and "very characteristics of the European Union legal order"[46] as elements that preclude the EU Courts from reconsidering their approach to Article 9(3) of the Aarhus Convention (Schoukens 2019, 116). Further, in its assessment of the EU's compliance with the Convention, the ACCC declared that the CJEU's access-to-justice case law "could not give the legal community a coherent system of interpretation" of all the relevant issues of access to justice. The EU's response was that a statement to that effect ignores "the very purpose and effect of the [CJEU] rulings and the very characteristics of the European Union legal order."[47] In this vein, the EU has consistently maintained that its judicial system is a complete system of legal remedies and procedures designed to ensure review of the legality of the acts of the Union institutions.[48]

• • •

45 Findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union1 Adopted on 14 April 2011, point 90.

46 Findings and recommendations with regard to communication ACCC/C/2014/123 concerning compliance by the European Union Adopted by the Compliance Committee on 24 May 2017, point 71,72.

47 Ibid, point 71.

48 Ibid, point 72.

Still, over the past years, the EU has endeavoured to address some of the inconsistencies noted by the ACCC regarding its compliance with the obligations arising from the Aarhus Convention. In the Explanatory Memorandum to the Proposal for the amending Aarhus Regulation, the Commission expressed the EU's willingness to improve its compliance with the Aarhus Convention – however, the former can only be done in a manner consistent with the fundamental principles of the EU legal order and the system of judicial review under EU law.[49] Recalling the limitations of the EU's system of judicial remedies with respect to access to justice in environmental matters, the Commission has reiterated that judicial and administrative procedures concerning access to justice in environmental law "currently fall primarily within the scope of national law".[50] In this way, national courts are seen as those bearing the primary responsibility, when implementing EU environmental law, to guarantee the principles and standards of access to justice in environmental matters as these flow from Articles 9(2) and 9(3) of the Convention,[51] which makes any improvements regarding access to administrative and judicial review done at EU level *complementary* to the access-to-justice mechanisms in environmental matters available before the national courts of the Member States.[52]

The claim could be made that, in spite of the EU's best efforts, the Union's approach in the matter continues to disregard the *substance* of the ACCC's findings and recommendations relating to the comprehensiveness of the EU system of legal remedies applicable to the environmental (and, by extension, the climate) domain. CJEU's continuous refusal to offer a less stringent reading of the standing criteria for private applicants – in matters pertaining to the environment and the climate alike – shows that the Court's *Plaumann* doctrine is still very much 'good law', in spite of repeated calls for a change in approach coming from various quarters: international bodies such as the ACCC, ENGOs and legal academia (see, among others, Schoukens 2019; Poncelet 2012). It is certain that, as concerns environmental and climate issues, there currently exists an inherent limitation in the Union system of legal remedies preventing EU citizens and NGOs from enjoying comprehensive judicial protection within the scope of EU law. Somewhat ironically, this limitation finds its origins in the very constitutional principles that underpin the EU legal order and is the product of the special nature and unique characteristics of said legal order (see Schoukens 2019).

• • •

49 Explanatory Memorandum, p.1.
50 Ibid, p.2.
51 Ibid.
52 Ibid; With respect to EU administrative acts, in the existence of national implementing measures concerning an EU administrative act, the Commission directs the NGOs concerned to first seek redress before the competent national court of the Member State that adopted the implementing measure. It is only in this way that they will be able to thereupon have access to the CJEU following the preliminary reference procedure of Article 267 TFEU (Explanatory Memorandum, p.2).

5. Conclusion: The implications of failing to broaden the private applicants' access to EU Courts in matters relating to the climate

To a certain extent, judgments like *Carvalho* and *Sabo* paint a pessimistic picture about the comprehensiveness and effectiveness of the judicial protection afforded to private applicants appearing before the EU Courts in cases involving climate issues. In *Carvalho* and *Sabo*, the EU Court of Justice affirmed its deference to Member States' courts as the more appropriate forum for private applicants to initiate the judicial review of EU climate legislative acts they consider themselves affected by. Such an approach sits uneasy with the urgency of tackling climate change and fails to take into account the complex nature of the climate change phenomenon as one that transcends geographical borders and affects the many rather than the few. As a consequence, climate issues arising at the EU level cannot be adequately resolved by resorting to employing a restrictive approach to EU law's standing criteria. In fact, in matters pertaining to the climate, Article 263(4) TFEU should be interpreted and applied in a less restrictive fashion since the climate legislative acts being challenged are, presumably, by their very nature, likely to be of concern to a large number of persons.[53]As things presently stand, the paradoxical result arising from the CJEU's excessively stringent interpretation of Article 263(4) TFEU is the more widespread the detrimental effects of an EU act are, the more restricted the access to the EU Courts becomes.[54] Absent the standing hurdles, *Carvalho* and *Sabo* would have likely had the potential of becoming the CJEU's "constitutional" climate cases, an EU equivalent to the US Supreme Court's *Massachusetts v EPA*.

In addition, it has been proposed that hindering the EU Courts from attempting to influence the making of effective climate policy choices at the EU level are the constitutional and jurisdictional limits imposed by EU law, which are in turn a distinctive characteristic of the EU legal culture (Bogojević 2013, 189) and represent a limitation inherent to the EU's system of judicial remedies. While the argument surrounding this 'inherent limitation' certainly holds significant merit, this paper has underscored the need for reforming the CJEU's rigid approach to standing, which will over time become increasingly untenable and disconnected from the pressing realities of climate change. Already in 2019, the European Parliament adopted a Resolution declaring a climate and environmental emergency[55] and calling on the Commission, the Member States and all global actors to urgently take concrete action to fight and contain the climate threat. The foregoing further reinforces the need for the EU Courts' approach

• • •

53 Carvalho (Court of Justice), para.57.

54 See Carvalho (General Court), para.32.

55 European Parliament Resolution of 28 November 2019 on the climate and environment emergency, 2019/2930(RSP).

regarding the standing of private applicants bringing climate claims before them to be brought fully in line with the Aarhus Convention's access-to-justice rules – most especially, Article 9(3) and, in the case of climate legislative acts, the Convention preamble's encouragement to legislative bodies to implement its principles in their proceedings. Undoubtedly, a reformed approach which takes cognizance of the unique nature of the climate change challenge would steer the EU Courts towards becoming fora for activist climate jurisprudence at the supranational level.

References

[1] Barents, René. 3/2010. The Court of Justice After the Treaty of Lisbon. *Common Market Law Review* 47: 709-728.

[2] Bogojević, Sanja. 1/2015. Judicial Protection of Individual Applicants Revisited: Access to Justice through the Prism of Judicial Subsidiarity. *Yearbook of European Law* 34: 5-25.

[3] Bogojević, Sanja. 3/2013. EU Climate Change Litigation, the Role of the European Courts, and the Importance of Legal Culture. *Law and Policy* 35: 184-207.

[4] Fisher, Elizabeth, Scotford, Eloise, and Barritt, Emily. 2/2017. The Legally Disruptive Nature of Climate Change. *The Modern Law Review* 80: 173-201.

[5] Parihar, Gita and Dooley, Kate. 2018. Human Rights, Differentiated Responsibilities? Advancing Equity and Human Rights in the Climate Change Regime. 266-279 in *Routledge Handbook of Human Rights and Climate Governance*, edited by Sébastien Duyck, Sébastien Jodoin and Alyssa Johl. Abingdon-on-Thames: Routledge.

[6] Peel, Jacqueline and Osofsky, Hari M. 1/2018. A Rights Turn in Climate Change Litigation?. *Transnational Environmental Law* 7: 37–67.

[7] Poncelet, Charles. 2/2012. Access to Justice in Environmental Matters: Does the European Union Comply with its Obligations?. *Journal of Environmental Law* 24: 287-309.

[8] Schoukens, Hendrik. 2019. Access to Justice before EU Courts in Environmental Cases against the Backdrop of the Aarhus Convention: Balancing Pathological Stubbornness and Cognitive Dissonance?. 74-118 in *International Judicial Practice on the Environment: Questions of Legitimacy*, edited by Christina Voigt. Cambridge: Cambridge University Press.

[9] Stoczkiewicz, Marcin. 2023. The role of the courts in EU climate policy. 129-142 in *Handbook on European Union climate change policy and politics*, edited by Tim Rayner, Kacper Szulecki, Andrew J. Jordan, and Sebastian Oberthür. Cheltenham: Edward Elgar Publishing.

[10] Vedder, Hans. 2/2010. The Treaty of Lisbon and European Environmental Law. *Journal of Environmental Law* 22: 285-299.

[11] Wewerinke-Singh, Margaretha. 2019. *State Responsibility, Climate Change and Human Rights under International Law*. London: Hart Publishing.