The Rights of Access to Justice in Environmental Matters in the EU – The Third Pillar of the Aarhus Convention

Validity and Scope of the Review Procedures under Regulation (EC) No 1367/2006

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The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed at Aarhus in 1998, has strengthened the rights of the public to receive information and to request review of acts in the field of the environment. It is laid down in the third pillar of the Convention that members of the public shall have access to administrative or judicial procedures to challenge measures by public authorities that contravene provisions of environmental law. Environmental law is understood to include legislation protecting human health insofar as it is potentially affected by environmental elements. This means that acts or omissions in the area of food law may be challenged under the specific review procedures, in particular if the contamination of the food chain is concerned. The scope and limits of such rights to request review is the subject matter of appeals lodged by several EU institutions with the Court of Justice of the European Union (CJEU). They are related to the establishment of EU maximum residue levels of pesticides in or on food and feed. This article analyses this case as well as the underlying questions of law. In essence, the questions are whether the EU legislator was entitled to limit the review procedure under the EU legislation to the review of administrative acts and which measures qualify for administrative acts under the EU Aarhus legislation.

I. The EU Legal Framework under the Third Pillar of the Aarhus Convention

1. Access to Justice according to the Aarhus Convention

The United Nations Economic Commission for Europe (UNECE)'s Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[1] (the "Aarhus Convention") is an international treaty signed on 25 June 1998 in Aarhus, Denmark. The Aarhus Convention was concluded by the European Community and its Member States[2] and is, according to Art. 216(2) TFEU (at the time of signature: Art. 300(7) of the EC Treaty), binding upon its

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1 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed at Aarhus, Denmark on 25 June 1998. It can be found at http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention.html.

2 Ireland was the last EU Member State to ratify the Aarhus Convention in 2012, with entry into force on 18 September 2012 (IE (Ryall), p. 1).

institutions. According to established case law,[3] it is thus part of EU law.

The Aarhus Convention has three pillars that set forth certain rights of the public in environmental matters. The third pillar concerns access to justice in environmental matters. It has only one article: Article 9. Article 9 of the Aarhus Convention provides in Art. 9(1) to (3) for a number of review procedures, whilst Art. 9(4) and (5) contain additional provisions regarding the requirements of review and remedies in general. According to Art. 9(1), the review procedure shall enable any person to enforce his or her rights of access to information under Art. 4 of the Aarhus Convention. Art. 9(2) concerns the review of decisions, acts or omissions subject to the provisions of public participation under Art. 6 of the Aarhus Convention. According to Art. 9(3) of the Aarhus Convention, each Party to the Convention shall ensure that members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Details for such procedures are not provided in Art. 9(3), nor is it specified which requirements the members of the public have to meet in order to access such procedures. It is only stated in Art. 9(3) that the members of the public, where they meet the criteria, if any, laid down in the national law of the Parties to the Convention, shall enjoy such access rights. The Parties to the Convention therefore retain broad discretion regarding the implementation of their obligations under Art. 9(3).[4] Art. 9(3) is not more than a provision setting forth the general requirement for the Parties to the Convention to have administrative or judicial procedures in place that allow the challenge of acts or omissions which contravene the provisions of their laws relating to the environment. Following this, the Parties are free to define in their national laws the conditions for access to such procedures. This includes the definition of the requirements for admissibility to such procedures.

As regards the review procedure under Art. 9(2) of the Aarhus Convention, it is expressly defined that the interest of non-governmental organizations ("NGOs") meeting the requirements referred to in Art. 2(5) of the Aarhus Convention shall be deemed sufficient for the purpose of allowing access to the procedure covered by that Article. The requirements for NGOs set forth in Art. 2(5) of the Aarhus Convention are the promotion of environmental protection and the fulfilment of any requirements under national law. It can be concluded that such NGOs should also enjoy the access rights under Art. 9(3), but, as expressly stated in Art. 2(5) of the Aarhus Convention, such access is subject to compliance by the NGO with the conditions set by national law.[5] This again shows that the Parties to the Convention retain broad discretion regarding the admissibility of NGO requests for review and access to justice.

2. Internal Review and Access to Justice under Regulation (EC) No 1367/2006

a. The Provisions of Art. 10 to 12 of Regulation (EC) No 1367/2006

In order to be consistent with the Aarhus Convention, the Convention had to be integrated into Community law and into the laws of the Member States. It took the Community until February 2005 to approve the Aarhus Convention.[6] Thereafter, a regulation was adopted by the European Parliament and the Council that made the provisions of the Aarhus Convention applicable to Community insti-

3 Case C-61/94, Commission v Germany, judgment of 10 September 1996, ECR I-3989, paragraph 52; Case C-334/04, IATA and ELFAA v Department for Transport, judgment of 10 January 2006, ECR I-403, paragraph 34; Case C-311/04, Algemene Scheeps Agentuur Dordrecht v Inspecteur der Belastingdienst – Douanedistrict Rotterdam, judgment of 12 January 2006, ECR I-609, paragraph 25.

4 See *Epiney*, in *Fluck/Theuer* (eds.), *Informationsfreiheitsrecht*, F II.1, Aarhus-Konvention Kommentierung, Art. 9 at para. 21; *Epiney,* Zur Rechtsprechung des EuGH im Umweltrecht im Jahr 2011, EurUP 2012, p. 88 (89).

5 *Epiney*, in *Fluck/Theuer* (eds.), *Informationsfreiheitsrecht*, note 4, states that the discretion the Parties to the Convention retain for the definition of the admissibility for persons under the specific review procedure set forth in Art. 9(2) must even more apply under Art. 9(3) of the Aarhus Convention, which is drafted in a much more general manner.

6 See Council Decision 2005 (370) EC of 17 February 2005, OJ L 124, 17.5.2005, p. 1.

tutions and bodies[7] (the "Aarhus Regulation"). Administrative and judicial procedures mentioned in Art. 9(3) of the Aarhus Convention can be found in two provisions of the Aarhus Regulation: the internal review procedure according to Art. 10 of the Aarhus Regulation, and access to justice according to Art. 12 of the Aarhus Regulation.

Art. 10(1) of the Aarhus Regulation states that NGOs that meet the criteria set out in Art. 11 of the Aarhus Regulation are entitled to make a request for internal review to the Community institution or body that adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act. Reference to Art. 9(3) of the Aarhus Convention, however, is not made in Art. 10 of the Aarhus Regulation. Only recital (18) of the preamble to the Aarhus Regulation refers to this Convention provision.

It is considered appropriate that the Aarhus Regulation only addresses acts and omissions by public authorities.[8] On the other hand, the Aarhus Regulation applies to acts and omissions by all EU institutions or bodies, not only by specific institutions.[9] Requests for internal review may be filed by those NGOs that fulfil the criteria for admissibility listed in Art. 11(1) of the Aarhus Regulation. This list is exhaustive. The NGO must (a) be an independent non-profit-making legal person in accordance with a Member State's national law or practice, (b) have the primary stated objective of promoting environmental protection in the context of environmental law, (c) have existed for more than two years and is actively pursuing environmental protection, and (d) cover in its objectives and activities the subject matter in respect of which the request for internal review is made.

As far as access to judicial procedures is concerned, it is provided in Art. 12(1) of the Aarhus Regulation that the NGO that made the request for internal review pursuant to Art. 10 of the Aarhus Regulation may institute proceedings before the Court of Justice in accordance with the relevant provisions of the TFEU. Access to justice regarding alleged administrative omissions is addressed in Art. 12(2) of the Aarhus Regulation: where the EU institution or body fails to act in accordance with Art. 10 of the Aarhus Regulation, the NGO may institute proceedings before the Court of Justice in accordance with the relevant provisions of the TFEU. Accordingly, recital (18) of the Aarhus Regulation refers to the provisions of the TFEU regarding access to justice.

b. The Term "Administrative Act" under Regulation (EC) No 1367/2006

aa. General Overview

Art. 10 gives the EU institution or body which adopted an administrative act alleged to contravene laws relating to the environment (or which allegedly failed to adopt an administrative act under environmental law) the opportunity to reconsider its former decision. The term "administrative act" is defined in Art. 2(1)(g) of the Aarhus Regulation. It means any measure of individual scope under environmental law, taken by an EU institution or body, and having legally binding and external effects. Accordingly, an administrative omission means any failure of an EU institution or body to adopt an administrative act defined in Art. 2(1)(g) of the Aarhus Regulation (see Art. 2(1)(h) of the Aarhus Regulation).

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7 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, p. 13. For the Member State level, the Community adopted in 2003 the Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41, 14.2.2003, p. 26. This directive, however, only implements the first pillar of the Aarhus Convention (i.e. the rights of access to information). As regards the implementation of Art. 9(3) and (4) of the Aarhus Convention in the Member States, the Commission proposed an Access to Justice Directive: Commission's Proposal for a directive of the European Parliament and of the Council on access to justice in environmental matters, COM(2003)624 final of 24 October 2003. This proposal received strong opposition from a number of EU Member States and thus had no chance of being adopted. Following the entry into force of the Lisbon Treaty and the CJEU case law, the discussion of the pending proposal, but also of alternative solutions to improve access to justice in environmental matters, was revitalized.

8 See recital (8), third sentence, of the preamble to the Aarhus Regulation.

9 See recital (12), forth sentence, of the preamble to the Aarhus Regulation. In contrast, the so-called "Transparency Regulation" (Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145, 31.5.2001, p. 43) only applies to access to information held by the European Parliament, the Council and the Commission. The legislative procedure regarding a recast of the Transparency Regulation is ongoing. The recast shall, inter alia, extend the scope of the Transparency Regulation to all Union institutions and bodies, as required according to Art. 15(2) of the TFEU.

The concept of internal review of administrative acts under Art. 10(1) of the Aarhus Regulation has been the subject matter of various legal actions by NGOs filed with the General Court.[10] They use this tool to challenge approvals for making chemicals available on the EU market, adopted by way of Commission regulations or directives. Recently, a several appeals have been lodged with the Court of Justice of the European Union (CJEU) which concern the validity and the scope of the internal review procedure under Art. 10 of the Aarhus Regulation. The questions of law in particular relate to the interpretation of the term "administrative acts" as well as to the limitation of the internal review procedure to such administrative acts. It is requested by the Council, the Commission and the European Parliament[11] that the CJEU sets aside certain judgments of the General Court.[12] Both cases decided by the General Court (Case T-396/09 and Case T-388/08) relate to NGO requests for internal review of certain Commission measures under Art. 10 of the Aarhus Regulation that were declared inadmissible by the Commission. The background to the dispute in the two cases, however, is completely different.

bb. The Specific Questions of Law in Cases C-401/12 P to C-405/12 P

Cases C-401/12 P to C-403/12 P reIate to an internal review request of the two NGOs Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht. The NGOs had requested internal review of a Commission decision[13] that granted the Kingdom of the Netherlands a temporary exemption from the obligations on ambient air quality and cleaner air for Europe, as laid down in Directive 2008/50/EC[14] (the "Air Quality Decision"). The Commission argued that the Air Quality Decision was a measure of general application, even though it was only addressed to one single Member State, and thus was not an administrative act and not subject to internal review under Art. 10(1) of the Aarhus Regulation. By Commission Decision,[15] the request for internal review of the Air Quality Decision was rejected. The NGOs challenged the Commission's interpretation by filing with the General Court an action of annulment of the Commission decision. In a second plea, the NGOs questioned the legality of Art. 10(1) of the Aarhus Regulation. Cases C-401/12 P to C-403/12 P are hereinafter together referred to as the "Air Quality-Case".

The background in Cases C-404/12 P and C-405/12 P was a request for internal review filed by the NGOs Stichting Natuur en Milieu and PAN Europe regarding a regulation establishing EU maximum residue levels ("MRLs") of pesticides in or on food and feed of plant and animal origin (Regulation (EC) No 149/2008,[16] the "MRL Establishing Regulation"). The adoption of the MRL Establishing Regulation was a condition for the application of several chapters of the basic Regulation (EC) No 396/2005[17] (the "MRL Regulation"). In the Commission's view, the internal review request of the two NGOs was inadmissible because the MRL Establishing Regula-

10 See for example Case T-232/11, Stichting Greenpeace Nederland and PAN Europe v Commission, OJ C 194, 2.7.2011, p.19; Case T-192/12, PAN Europe v Commission, OJ C 194, 30.6.2012, p. 26.

11 Case C-401/12 P, appeal brought on 3 September 2012 by the Council against the judgment of the General Court delivered on 14 June 2012 in Case T-396/09, Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v Commission, OJ C 9, 12.1.2013, P 25; Case C-402 /12 P, appeal brought on 24 August 2012 by the European Parliament against the judgment of the General Court delivered on 14 June 2012 in Case T-396/09, Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v Commission, OJ C 9, 12.1.2013, p. 26; Case C-403/12 P, appeal brought on 27 August 2012 by the Commission against the judgment of the General Court delivered on 14 June 2012 in Case T-396/09, Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v Commission, OJ C 9, 12.1.2013, p.26; Case 404/12 P, appeal brought on 3 September 2012 by the Council against the judgment of the General Court delivered on 14 June 2012 in Case T-338/08 Stichting Natuur en Milieu and Pesticide Action Network Europe v Commission, OJ C 9, 12.1.2013, p. 27; Case C-405/12 P, appeal brought on 27 August 2012 by the Commission against the judgment of the General Court delivered on 14 June 2012 in Case T-338/08 Stichting Natuur en Milieu and Pesticide Action Network Europe v Commission, OJ C 9, 12.1.2013, p. 28.

12 Case T-338/08, Stichting Natuur en Milieu and PAN Europe v European Commission, judgment of 14 June 2012; Case T-396/09, Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht, judgment of 14 June 2012; see also the analysis of *Garçon*, The Aarhus Rights in the EU: Internal Review and Access to Justice, Analysis of the General Court's Findings of 14 June 2012 in Cases T-338/08 and T-396/09, StoffR 2012, p. 34 ff.

13 Commission Decision C(2009) 2560 final of 7 April 2009.

14 Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L 152, 11.6.2008, p. 1.

15 Commission Decision C(2009) 6121 of 28 July 2009.

16 Commission Regulation (EC) No 149/2008 of 29 January 2008 amending Regulation (EC) No 396/2005 of the European Parliament and of the Council by establishing Annexes II, III and IV setting maximum residue levels for products covered by Annex I thereto, OJ L 58, 1.3.2008, p. 1.

17 Regulation (EC) No 396/2005 of the European Parliament and of the Council of 23 February 2005 on maximum residue levels of pesticides in or on food and feed of plant and animal origin and amending Council Directive 91/414/EEC, OJ L 70, 16.3.2005, p. 1.

tion did not fall under the definition of administrative acts given in Art. 2(1)(g) of the Aarhus Regulation. By Commission Decision,[18] the request for internal review was rejected as inadmissible. Like in the Air Quality-Case, the NGOs challenged this interpretation by filing with the General Court an action of annulment of the decision taken by the Commission regarding the inadmissibility of the request for internal review. In a later submission, the NGOs put forward a second plea questioning the validity of Art. 10(1) of the Aarhus Regulation. Cases C-404/12 P and C-405/12 P are hereinafter together referred to as the "MRL-Case".

Despite the different background of the Air Quality-Case and the MRL-Case, the questions of law are the same. In each case, the main plea was that the Commission's decision to reject as inadmissible an internal review of the contested measures that (the Air Quality Decision and the MRL Establishing Regulation, respectively) infringed Art. 10(1) of the Aarhus Regulation. According to the NGOs' views, the respective measures were acts of individual scope and thus administrative acts within the meaning of Art. 2(1)(g) of the Aarhus Regulation. The second plea of the NGOs was raised in the alternative only, i.e. if the first plea was to be rejected. The NGOs claimed that the General Court would then have to find that Art. 10(1) of the Aarhus Regulation contravenes Art. 9(3) of the Aarhus Convention, in so far as it limits the concept of "acts" for the purposes of Art. 9(3) of the Aarhus Convention to administrative acts.

II. The Findings of the General Court regarding the Validity and Scope of Art. 10 of Regulation (EC) No 1367/2006

1. The Definition of Administrative Acts as set forth in Art. 10(1) in conjunction with Art. 2(1) of Regulation (EC) No 1367/2006

a. The Air Quality Decision

In the Air Quality-Case, the NGOs which filed the legal action against the Commission intended to challenge under the internal review procedure a Commission Decision which allowed a temporary derogation from the obligation to comply with the limit values for nitrogen dioxide and PM_{10} as set forth in Directive 2008/50 in particular zones or agglomerations, provided that an air quality plan is established. The applicants argued that, being addressed to a single Member State only, the Air Quality Decision constituted a measure of individual scope.

The General Court pointed out that the official name of the measure is not decisive. The Court referred to settled case law stating that in order to determine the scope of a measure, not the official name of that measure, but its purpose and content shall first be taken into account.[19] Accordingly, a measure is considered as being of general application if it applies to objectively determined situations and entails legal effects for categories of persons envisaged generally and in the abstract.[20] Following this, the General Court held that a decision which is addressed to a Member State can nonetheless be of general application, provided that it applies to objectively determined situations and entails legal effects for categories of persons envisaged generally and in the abstract.[21]

The General Court furthermore noted that the Air Quality Decision was a derogation from the general rules established by Directive 2008/50. Directive 2008/50 itself was a measure of general application, establishing in abstract and objective terms the rules for assessing and limiting pollutant emissions. The Court then referred to the case law[22] regarding the legal nature of derogations from general acts and concluded that the derogations from the general rules of Directive 2008/50, as set forth in the Air Quality Decision, partake of the general nature of that directive, given that they were addressed in abstract terms to undefined classes of persons and applied to objectively defined situations. The Air Quality Decision allowed the King-

18 Commission Decisions D/530585 and D/530686 of 1 July 2008.

19 See Joined Cases 16/62 and 17/62, Confédération nationale des producteurs de fruits et légumes and others v Council, judgment of 14 December 1962, ECR 471.

20 See Case C-244/88, Usines cooperatives de déshydratation du Vexin and Others v Commission, Judgment of 21 November 1989, ECR 3811, paragraph 13; Case C-171/00 P, Alain Libéros v Commission, judgment of 15 January 2002, ECR I-451, paragraph 28; Case T-37/04, Região autónoma dos Açores v Council, judgment of 1 July 2008, ECR II-103, paragraph 33.

21 See also Case C-503/07 P, Saint-Gobain Glass Deutschland v Commission, order of 8 April 2008, ECR I-2217, paragraph 71.

22 Case T-142/03, Fost Plus v Commission, order of 16 February 2005, ECR II-589, paragraph 47, and further case law cited therein.

dom of the Netherlands to adopt acts of general application that apply to all persons residing or engaged in the Netherlands' zones and agglomerations covered by the Air Quality Decision.

As a result, the General Court held that the Air Quality Decision did not constitute a measure of individual scope and could be categorised as an administrative act for the purposes of Art. 2(1)(g) of the Aarhus Regulation. The Court concluded that the NGOs were therefore not entitled to request internal review of the Air Quality Decision under Art. 10(1) of the Aarhus Regulation and rejected the main plea.

b. The MRL Establishing Regulation

By its Annex II, the MRL Establishing Regulation incorporated MRLs formerly defined under Directives 86/362/EEC,[23] 86/363/EEC[24] and 90/642/EEC,[25] taking into account the criteria mentioned in Art. 14(2) of the MRL Regulation. Annex III of the MRL Establishing Regulation sets out a list of temporary MRLs, in particular those for active substances of plant protection products for which a decision on the inclusion in Annex I to Directive 91/414[26] was not taken at the time of adoption of the MRL Establishing Regulation. The MRL Establishing Regulation also contains a list of active substances of plant protection products evaluated under Directive 91/414 for which no MRLs are required (Annex IV).

The General Court found that even though the MRL Establishing Regulation constituted a specific application of the general standards laid down in the MRL Regulation, the MRL Establishing Regulation applied to objectively determined situations and entailed legal effects for categories of persons envisaged generally and in the abstract. The Court adhered to the same case law as referred to in the Air Quality-Case.[27] The Court held that the persons affected by the MRL Establishing Regulation are all economic operators who are manufacturers, growers, importers or producers of plant protection products and holders of authorisations for plant protection products containing active substances covered by its Annexes. All of them were, according to the General Court, only envisaged generally and in the abstract.

Consequently, the Court held that the MRL Establishing Regulation was a measure of general application and could not be categorised as an administrative act for the purposes of Art. 2(1)(g) of the Aarhus Regulation. The General Court also rejected the NGOs' arguments that the MRL Establishing Regulation constituted a bundle of individual decisions. The Court took into consideration that the MRLs incorporated by the MRL Establishing Regulation were not adopted in response to individual claims nor were they intended to amend individual marketing authorisations for specific plant protection products under Directive 91/414. In conclusion, the General Court rejected the NGOs' main pleas regarding their request for internal review under Art. 10(1) of the Aarhus Regulation.

2. The Validity of Art. 10(1) of Regulation (EC) No 1367/2006 in the light of Art. 9(3) of the Aarhus Convention

Following the rejection of the NGOs' main pleas in the Air Quality-Case and in the MRL-Case, respectively, the General Court had to decide on the NGOs' second plea, raised in the alternative. The NGOs claimed that Art. 10(1) of the Aarhus Regulation contravened Art. 9(3) of the Aarhus Convention in so far as it limits the concept of "acts" in Art. 9(3) of the Aarhus Convention to administrative acts.

In its findings, the General Court referred to Art. 300(7) of the EC Treaty (now: Art. 216(2) of the TFEU), stating that international treaties concluded by the Community are binding upon Community institutions. The Court also referred to established case law according to which the provisions of international treaties prevail over secondary Community legislation.[28] The Court found that the validity of the Aarhus Regulation thus may be affected by being incompatible with the Aarhus Convention, but that the ability of EU Courts to examine the

23 Council Directive 86/362/EEC of 24 July 1986 on the fixing of maximum residue levels for pesticide residues in and on cereals, OJ L 221, 7.8. 1986, p. 37.

24 Council Directive 86/363/EEC of 24 July 1986 on the fixing of maximum residue levels for pesticide residues in and on foodstuffs of animal origin, OJ L 221, 7.8.1986, p. 43.

25 Council Directive 90/642/EEC of 27 November 1990 on the fixing of maximum residue levels for pesticide residues in and on certain products of plant origin, including fruit and vegetables, OJ L 350, 14.12.1990, p. 71.

26 Council Directive 91/414/EEC of 15 July 1991 concerning the placing plant protection products on the market, OJ L 230, 19.8.1991, p.1.

27 See note 19 to 21 above.

28 See note 3 above.

validity of secondary legislation in the light of an international treaty is limited. Whereas, according to the case law[29], it would first need to be determined whether the provisions of that treaty appear to be unconditional and sufficiently precise, the General Court, however, found that it did not have to assess in the cases at stake whether the relevant provisions of the Aarhus Convention are unconditional and sufficiently precise. The Court referred to case law[30] which states that where a regulation is intended to implement an obligation imposed on Community institutions under an international treaty, the Courts must be able to review the legality of that regulation in the light of the international treaty without first having to determine whether the treaty provisions appear to be unconditional and sufficiently precise. The General Court found that it was apparent from the provisions of the Aarhus Regulation and from the case law of the CJEU that the Aarhus Regulation was adopted to meet the Community's obligations under the Aarhus Convention.[31] The Court concluded that it had to examine the validity of Art. 10(1) of the Aarhus Regulation in the light of Art. 9(3) of the Aarhus Convention.

In the MRL-Case, however, another argument was brought by the Commission that the Court dealt with first. The Commission had contended in its defence that Art. 9(3) of the Aarhus Convention did not apply at all. The Commission argued that Art. 9(3) of the Aarhus Convention covers the acts of public authorities excluding institutions acting in a judicial or legislative capacity, as set forth in the definition of public authorities in Art. 2(2) of the Aarhus Convention. According to the Commission's view, it acted in its legislative capacity when adopting the MRL Establishing Regulation. The General Court did not follow this interpretation. The Court held that the MRL Establishing Regulation amended the MRL Regulation by adding certain annexes to the MRL Regulation and that the MRL Establishing Regulation was adopted by the Commission on the basis of Art. 5(1), 16(1), 21(1) and 22(1) of the MRL Regulation which laid down the relevant procedure for establishing such annexes. The Court concluded that the referenced provisions of the MRL Regulation showed that the Commission acted in the exercise of its implementing powers, also taking into account that the adoption had to follow the procedure set forth in Arts. 5 and 7 of Council Decision 1999/468/EC.[32] It is also worth noting that the Court referred to the Aarhus Convention Implementation Guide which indicates that the Commission should not be considered as acting in a legislative capacity within the meaning of Art. 2(2) of the Aarhus Convention.[33]

For both cases, the Air Quality-Case and the MRL-Case, the General Court examined whether the limitation of the concept of internal review to "administrative acts", as defined in Art. 2(1)(g) of the Aarhus Regulation, contravened the Aarhus Convention.

The Court noted that the term "acts", as used in Art. 9(3) of the Aarhus Convention, is not defined in the Aarhus Convention and that this required interpretation of the Convention. The Court referred to established case law according to which a treaty is to be interpreted in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.[34] Following this, the Court looked at the objectives of the Aarhus Convention, as set forth Art. 1 and in the recitals of the preamble to the Aarhus Convention. In particular, the Court pointed out the Convention's objectives to give the public the opportunity to express its concerns regarding environmental

29 Case C-308/06, Intertanko and Others, judgment of 3 June 2008, ECR I-4057, paragraph 45; Joined Cases C-120/06 P and C-121/06 P, FIAMM and Others v Council and Commission, judgment of 9 September 2008, ECR I-6513, paragraph 110.

30 See with regard to the WTO Agreement: Case C-149/96, Portugal v Council, judgment of 23 November 1999, ECR I-8395, paragraph 49; Case C-93/02 P, Biret International v Council, judgment of 30 September 2003, ECR I-10497, paragraph 53; Case C-377/02, Van Parys, judgment of 1 March 2005, ECR I-1465, paragraph 40; see also with regard to the GATT: Case C-69/89, Nakajima v Council, judgment of 7 May 1991, ECR I-2169, paragraph 31.

31 See paragraph 58 of the judgment in the MRL-Case: the General Court referred to Art. 1(1) of the Aarhus Regulation which states that the objective of the Aarhus Regulation is to contribute to the implementation of the obligations arising under the Aarhus Convention by granting, inter alia "access to justice in environmental matters at European Union level under the conditions laid down" by the Aarhus Regulation. In addition, the General Court referred to recital (18) of the preamble to the Aarhus Regulation where Art. 9(3) of the Aarhus Convention is expressly mentioned. For the case law, see Case C 240/09, Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky. VLK v Ministerstvo životného prostredia Slovenskej republiky. judgment of 8 March 2011, ECR I-1255, paragraphs 39 and 41.

32 Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission, OJ L 184, 17.7.1999, p. 23.

33 See page 34 of the Implementation Guide for the Aarhus Convention. The Guide can be found at http://www.unece.org/env/pp/acig.pdf.

34 See Case C-344/04, IATA and ELFAA v Department for Transport, note 3, paragraph 40 and the case law cited.

issues, and to enable public authorities to take due account of such concerns, considering that to be able to assert their rights, citizens must have access to justice in environmental matters. The Court concluded that an internal review procedure which covered only measures of individual scope would be very limited, since acts adopted in the field of the environment were often acts of general application and that such limitation was not justified in the light of the objectives and purpose of the Aarhus Convention.

The General Court also held that the discretion retained by the Parties to the Aarhus Convention under Art. 9(3) of the Convention ("where they meet the criteria, if any, laid by national law") is limited to the definition of the persons having the right of recourse to administrative or judicial procedures, but that this would not include the definition of the concept of "acts". Moreover, the Court found that the exclusion of institutions acting in a judicial or legislative capacity from the definition of public authorities under Art. 2(2) of the Aarhus Convention did not show that measures of general application were not subject to review according to Art. 9(3) of the Aarhus Convention. The Court did not see any correlation between measures taken by public authorities acting in their individual or legislative capacity and the concept of "acts" in Art. 9(3) of the Aarhus Convention. The Court found that Art. 9(3) of the Aarhus Convention could not be construed as referring only to measures of individual scope.

As a result, the Court decided that the plea of illegality raised in respect of Art. 10(1) of the Aarhus Regulation, read in conjunction with Art. 2(1)(g) of the Aarhus Regulation, must be upheld and that the contested decisions of the Commission rejecting internal review of the Air Quality Decision and the MRL Establishing Regulation, respectively, must therefore be annulled.

3. The Pleas in Law and main Arguments brought by the Appellants

Appeal against the General Court's judgment in the Air Quality-Case was brought by the European Parliament on 24 August 2012, whereas appeal against the General Court's judgments in the Air Quality-Case and in the MRL-Case was lodged by the Commission on 27 August 2012 and by the Council on 3 September 2012.[35]

The appellants' pleas and main legal arguments are fairly similar. They take the view that the General Court was wrong in finding that it could review the validity of the Aarhus Regulation in relation to Art. 9(3) of the Aarhus Convention even though this provision does not have direct effect. In the appellants' view, the case law regarding the possibility for individuals to rely on provisions of international treaties with the aim of challenging the validity of an act of an European institution was not interpreted correctly by the General Court. In particular, the appellants point out that such case law can be applied only by way of exception and under very specific conditions. They highlight that the General Court failed to examine whether such requirements were actually met in the Air Quality-Case and in the MRL-Case, and that the General Court in particular failed to take into account the exceptional nature of that case law.

The appellants also submit, in the alternative, that the General Court misinterpreted Art. 9(3) of the Aarhus Convention in finding that Art. 10(1) of the Aarhus Regulation was contrary to Art. 9(3) of the Aarhus Convention for the reason that the internal review procedure provided for in Art. 10(1) of the Aarhus Regulation is limited to acts of individual scope. In the appellants' view, the General Court would have needed to examine whether sufficient implementation was given to Art. 9(3) of the Aarhus Convention through all procedures available to individuals to challenge acts under environmental law at the EU and Member State level.

The cases are pending.

III. Assessment of the Questions of Law

1. The Scope and Validity of the EU Internal Review Concept

a. The term "administrative acts"

In its judgments concerning the Air-Quality-Case and the MRL-Case, the General Court correctly stated that the official name of the measure is not decisive in determining its scope. Accordingly, neither could the MRL Establishing Regulation necessarily be considered as an act of general application

35 See note 11 above.

nor could the Air Quality Decision necessarily be considered as an act of individual scope. It is the purpose and the content of the measure that needs to be taken into account first. It is established case law[36] that an act is a measure of general application, and not an administrative act, if it applies to objectively determined situations and entails legal effects for categories of persons envisaged generally and in the abstract. This applies to the MRL Establishing Regulation as well as to the Air Quality Decision, as explained by the General Court. The General Court's conclusion that both acts were no measures of individual scope was correct.

This result is also important for the sector of chemicals and in particular for those chemicals which contain dangerous substances like agrochemicals or biocides and which cannot be brought onto the EU market without prior approval granted by the Commission or other institutions or competent authorities. Following the General Court's findings regarding the qualification of measures as acts of individual scope or not, also approvals of active substances contained in chemicals, which are implemented by a Commission regulation or directive, are measures of general application.[37] Under the applicable EU regulatory regime, the respective approval regulation or directive for an active substance amends the underlying EU legislation setting forth the general requirements for approval. The individual substances that have been approved are listed in an annex attached to that particular underlying EU legislative act.

The approval measure partakes of the general nature of that piece of EU legislation, given that it is addressed in abstract terms to undefined classes of persons. The approval regulation or directive affects all operators in the area of products containing the substances concerned. This includes approval regulations for active substances used in crop protection products[38] and approval acts passed under the similar regime applicable to active substances used in biocidal products.[39] Also, the Commission regulations establishing the harmonised classification and labelling of particular substances as provided for in Art. 37(5) of the CLP-Regulation[40] are measures of general scope in the area of placing chemicals on the market. They apply to all operators like manufacturers, importers and suppliers that make available on the market the substances concerned. Therefore, such regulations are not administrative acts.

b. Limitation of the Internal Review to Administrative Acts

aa. No direct effect of Art. 9(3) of the Aarhus Convention in EU law

In the judgments in the Air Quality-Case and in the MRL-Case, the General Court found that the limitation of the internal review concept under Art. 10(1) of the Aarhus Regulation to the review of administrative acts, i.e. of acts of individual scope as defined in Art. 2(1)(g) of the Aarhus Regulation, contravened Art. 9(3) of the Aarhus Convention. The General Court, however, was not correct in reviewing the legality of Art. 10(1) of the Aarhus Regulation in the light of Art. 9(3) of the Aarhus Convention. Art. 9(3) of the Aarhus Convention has no direct effect in EU law. Like other international treaties concluded by the the Union, such as the General Agreement on Tariffs and Trade (GATT) or the Agreement establishing the World Trade Organisation (WTO Agreement),[41] the Aarhus Convention does not confer

36 See the case law in note 19 to 21 above.

37 *Rehbinder*, Die Aarhus-Rechtsprechung des europäischen Gerichtshofs und die Verbandsklage gegen Rechtsakte der Europäischen Union, EurUP 2012, p. 23 (25) points out that at least such approval measures which are delegated acts within the meaning of Art. 290 of the TFEU are likely to be measures of general application.

38 The approval procedure for the active substances used in crop protection products is laid down in Art. 7 et seqq. of Regulation 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC, OJ L 309, 24.11.2009, p.1. According to Art. 13 of Regulation 1107/2009, the approval of an active substance is granted by adoption of a Commission regulation. Under Directive 91/414 (which was in place until the date it was repealed by Regulation 1107/2009), following a successful assessment of an active substance, the substance was included in Annex I to Directive 91/414 by way of a directive amending Annex I to Directive 91/414.

39 See Directive 98/8/EC of the European Parliament and of the Council of 16 February 1998 concerning the placing of biocidal products on the market, OJ L 123, 24.4.1998, p. 1. As of 1 September 2013, Directive 98/8/EC is repealed by Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products, OJ L 167, 27.6.2012, p.1.

40 Regulation (EC) No 1272/2008 of the European Parliament and of the Council of 16 December 2008 on classification, labelling and packaging of substances and mixtures, amending and repealing Directives 67/548/EEC and 1999/45/EC, and amending Regulation (EC) No 1907/2006, OJ L 353, 31.12.2008, p.1.

41 For the GATT, see Case 70/87, Fediol v. Commission, judgment of 22 June 1989, ECR 1989, p. 1825, paragraph 19 and further case law cited therein; Case C-69/89, Nakajima v. Council, note 30, paragraph 27; Case C-280/93, Germany v Council, judgment of 5 October 1994, ECR p. I-4973, paragraph 110 to 112; for the WTO Agreement, see Case C-149/96, Portugal v. Council, note 30, paragraphs 47 to 48.

individual rights which may be relied on before the EU Courts. In the so-called "Brown bear"-case, the CJEU expressly confirmed that the provisions of Art. 9(3) of the Aarhus Convention do not contain any clear and precise obligations capable of directly regulating the legal position of individuals.[42] As a general rule, there is no direct effect and no direct application of the provisions of such an international treaty within the EU.

The "Brown bear"-judgment is often misinterpreted and applied incorrectly, as done by the General Court in the Air Quality-Case and in the MRL-Case. In its "Brown bear"-judgment, the CJEU held that national law is to be interpreted in a way that, to the fullest extent possible, is consistent with the objectives laid down in Art. 9(3) of the Aarhus Convention.[43] However, the CJEU made clear that only where the Union intended to implement a particular obligation assumed in the context of an international treaty or where the Union measure refers expressly to precise provisions of that treaty, would it, according to case law,[44] then be for the Union Courts to review the legality of the EU measure in question in the light of the rules of that international treaty. This case law established an exception to the general rule that international treaties do not have any direct effect. Such exceptions have been applied in the area of commercial policy,[45] but these exceptions need to be interpreted in a strict manner.

Following this, one must examine whether the provisions of Art. 10(1) of the Aarhus Regulation and of Art. 9(3) of the Aarhus Convention meet those strict requirements. The Aarhus Regulation was adopted to contribute to the implementation of the obligations under the Aarhus Convention. This was a basic objective of the Aarhus Regulation, as set forth in Art. 1(1) of the Aarhus Regulation. However, in Art. 10(1) of the Aarhus Regulation no reference is made to the Aarhus Convention, and in particular not to Art. 9(3). Nor is it clear that by Art. 10(1) of the Aarhus Regulation, the Community aimed to implement a particular obligation assumed in the context of the Aarhus Convention. The reference to Art. 9(3) of the Aarhus Convention in recital (18) of the preamble to the Aarhus Regulation does not allow any such conclusion. This would have required an explicit reference in Art. 10(1) of the Aarhus Regulation.

Moreover, the provisions of Art. 9(3) of the Aarhus Convention are not unconditional and sufficiently precise. As explained in this analysis under I.1 above, under Art. 9(3) the Parties to the Convention retain broad discretion regarding the definition of the conditions or the review procedures in their national laws. Any obligation to recognize the provisions of Art. 9(3) of the Aarhus Convention as rules of international law that are directly applicable in the EU legal system cannot be based on the terms and spirit of Art. 9(3) of the Aarhus Convention. Therefore, Art. 9(3) of the Aarhus Convention cannot be invoked to challenge the lawfulness of Art. 10(1) of the Aarhus Regulation.

For the sake of completeness, however, the arguments brought by the NGOs in their main plea of law in the Air-Quality-Case and in the MRL-Case should also be discussed in this analysis. The provisions of Art. 9(3) of the Aarhus Convention are therefore interpreted below, although, based on the conclusion under III.1.b)aa) above, this would not be required.

bb. Interpretation of Art. 9(3) of the Aarhus Convention

The main plea in law brought by the NGOs in the Air Quality-Case and in the MRL-Case was related to the limitation of the internal review procedure under Art. 10(1) of the Aarhus Regulation to review administrative acts only. The NGOs argued that this was an insufficient implementation of Art. 9(3) of the Aarhus Convention.

It can, however, not be concluded from the wording of Art. 9(3) of the Aarhus Convention that any and all acts of institutions, except if acting in a judicial or legislative capacity, shall be subject to administrative or judicial review. The objective of the Aarhus Convention is to provide environmental NGOs with a general right to challenge acts under environmental law. The Aarhus Convention thus aims to contribute to the adequate protection of the environment.[46] The scope of this right is not defined in

42 Case C-240/09, Lesoochranárske zoskupenie, note 31, paragraph 45.

43 See paragraphs 50 to 52 of the judgment in the "Brown bear"-case, note 31.

44 Case 70/87, Fediol v. Commission, note 41, paragraphs 19 to 21; Case C-69/89, Nakajima v. Commission, note 30, paragraph 31; Case C-280/93, Germany v Council, note 41, paragraph 111; Case C-149/96, Portugal v. Council, note 30, paragraph 49.

45 See, again, Case 70/87, Fediol v. Commission, note 41, paragraphs 19 to 21; Case C-69/89, Nakajima v. Commission, note 30, paragraphs 27 to 31.

46 This aim is expressly recognized in Art. 1 and in the sixth recital of the preamble to the Aarhus Convention.

the Aarhus Convention. As shown in this analysis under I.1 above, the Aarhus Convention provides the Parties to the Convention with broad discretion how to implement such right.

Moreover, and in contrast to Art. 9(2) of the Aarhus Convention, which states that "any decision, act or omission" can be challenged, Art. 9(3) of the Aarhus Convention is drafted differently. Under Art. 9(3), members of the public shall have the possibility to contest certain measures, in addition to the rights of access to review set forth in Art. 9(1) and (2) of the Aarhus Convention. Art. 9(3) of the Convention does not specify which acts and omissions contravening any provisions of national law relating to the environment can be challenged by members of the public. Would a review of any and all acts and omissions in the field of environmental law have been the aim of the Parties to the Aarhus Convention, the Parties would have implemented respective clear language in Art. 9(3), as done in Art. 9(2) of the Convention. Also, the General Court's view that an internal review procedure covering only measures of individual scope was not justified as internal review would then be very limited and is not based on a compelling argument. There is no indication in the Aarhus Convention that the Parties to the Convention intended to establish a full and comprehensive administrative and judicial review procedure.[47] It follows from Art. 9(3) of the Aarhus Convention that the Parties to the Convention wanted to ensure that there is a review procedure in place in the national law of each Party which would allow a challenge of measures in the field of environmental law. Under EU law, such administrative and judicial review is set forth in Arts. 10 and 12 of the Aarhus Regulation. This means that the EU fulfilled its obligations under the Aarhus Convention. The limitation of the internal review procedure to administrative acts under Art. 10(1) of the Aarhus Regulation, read in conjunction with Art. 2(1)(g) of the Aarhus Regulation, does therefore is no insufficient implementation of the provisions of Art. 9(3) of the Aarhus Convention.

In any case, it should again be noted that in this analysis, the provisions of Art. 9(3) of the Aarhus Convention are only interpreted in the alternative. As explained under III.1.b) aa) above, the Aarhus Convention does not have direct effect in EU law.

2. The use of the Aarhus Convention Implementation Guide

The Aarhus Convention Implementation Guide was prepared in 2000 for the Regional Environmental Center for Central and Eastern Europe. It was intended to provide guidance to legislators and public authority officials for the implementation of the provisions of the Aarhus Convention, in particular in case they contain abstract terms. The Guide was moreover set up to help NGOs and individual citizens to engage more actively in environmental matters.[48] Also, before the EU courts, reference to the Aarhus Convention Implementation Guide has been made. In its findings regarding the force and effect of the Aarhus Convention Implementation Guide, the CJEU[49] held that the Guide may be regarded as an explanatory document capable of being taken into consideration if appropriate among other relevant materials for the purpose of interpreting the Aarhus Convention. However, the CJEU also stated that the Aarhus Convention Implementation Guide has no binding force and does not have the normative effect of the provisions of the Aarhus Convention.

When interpreting the provisions of the Aarhus Convention in the MRL-Case, the General Court expressly referred to the Aarhus Convention Implementation Guide. In accordance with the CJEU's findings, the General Court noted in the MRL-Case that the Aarhus Convention Implementation Guide has no legal force. However, the General Court also held that there is no reason why it should not use the Guide as a basis for construing Art. 2(2) of the Aarhus Convention.[50] The General Court thus made clear that it considers the Aarhus Convention Implementation Guide to be much more than just a

47 *Epiney,* EurUP 2012, note 4, P. 88(89), expressly notes that under Art. 9(3) of the Aarhus Convention, the Contracting Parties to the Convention retain broad discretion as to how to implement its provisions in their national laws. Examining the judgment of the Court of Justice in the "Brown bear"-case, *Epiney* points out that the Court did not come to any other conclusion.

48 Both aims are mentioned in the foreword to the Aarhus Convention Implementation Guide written by the Secretary General of the United Nations, Kofi Annan. The source for the Guide can be found in note 33 above.

49 See Case C-182/10, Marie-Noëlle Solvay and Others v Région wallonne, judgment of 16 February 2012, paragraph 27.

50 See the General Court's findings in paragraph 68 of the judgment in the MRL-Case.

means amongst other sources available for the interpretation of the Aarhus Convention. The Court considered the Guide to be the basis for interpreting the Aarhus Convention.

The General Court is absolutely right in its view. There is no document other than the Aarhus Convention Implementation Guide that can provide such detailed clarification as to the interpretation of the Aarhus Convention. This does not mean that the Aarhus Convention Implementation Guide may be regarded as a legally binding source. This is also made clear in the foreword to the Guide written by the Secretary General of the United Nations: The Guide does not purport to be an official interpretation of the Aarhus Convention, but it can serve as an invaluable tool in the hands of governments and parliaments engaged in that task. It is further highlighted in that foreword that public authority officials involved in the day-to-day task of applying the provisions arising from the Aarhus Convention will find important guidance on how to use such discretion as is available to them.

In conclusion, answers to any questions regarding the interpretation of terms contained in the provisions of the Aarhus Convention can be found in the Aarhus Convention Implementation Guide, supposing that the Guide provides a clear and detailed clarification as to how they are construed. This, for example, applies to the uncertainty regarding the interpretation of the term "emissions into the environment" set forth in Art. 4(4) of the Aarhus Convention. To that end, the Aarhus Convention Implementation Guide refers to the IPPC Directive.[51] It is clarified in the Guide that only direct or indirect releases of substances, vibrations, heat or noise originating from installations qualify as "emissions into the environment" under the Aarhus Convention.[52] In essence, this means that "emissions into the environment" according to Art. 4(4) of the Aarhus Convention are limited to emissions originating from installations.

3. Standing of NGOs under Art. 12 of Regulation (EC) No 1367/2006

Art. 12(1) of the Aarhus Regulation provides that a NGO that has made a request for internal review pursuant to Art. 10 of the Aarhus Regulation may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty. Against a decision taken by a EU institution to refuse internal review, the NGO may seek action for annulment of that decision according to Art. 263 of the TFEU (formerly Art. 230 of the EC Treaty). Such legal actions were filed with the General Court in the Air Quality-Case and in the MRL-Case. The General Court held that regardless of the scope of the measure covered by an internal review as provided for in Art. 10 of the Aarhus Regulation, the conditions for admissibility laid down in Art. 230 of the EC Treaty must always be satisfied.[53] It follows from the General Court's findings that Art. 12 of the Aarhus Regulation cannot be interpreted in a way that any NGO that requested internal review automatically enjoys standing in court, even though the NGO may fulfil the criteria of Art. 11 of the Aarhus Regulation. NGOs are not exempted from the obligation to show that they meet the requirements for the admissibility of their legal actions set by the TFEU. Secondary law like the Aarhus Regulation cannot amend the provisions of primary law, nor can the provisions of international treaties like the Aarhus Convention.

Consequently, the General Court held that in case a NGO challenges a measure under Art. 10 of the Aarhus Regulation and initiates the internal review procedure, this does not necessarily mean that the conditions of Art. 230 of the EC-Treaty are also satisfied. Under Art. 230 of the EC-Treaty, the measure must be of direct and individual concern to such NGO.[54]

The General Court's findings are in line with the case law[55] regarding standing in court of environmental associations that seek to file legal actions with the Union courts. The purpose of an environ-

51 The term "emission" is defined on p. 72 of the Aarhus Convention Implementation Guide, note 33 above.

52 In particular, this does not cover the information on the scientific assessment of products like agrochemicals; see also *Kaus*, The term "Emission" in the Domain of Freedom of Access to Information, EurUP 2011, p. 293 (294); *Garçon*, Aarhus and Agrochemicals: The Scope and Limitations of Access Rights in Europe, EurUP 2012, p. 72 (76).

53 See the General Court's findings in paragraph 80 of the judgment in the MRL-Case and in paragraph 71 of the Air Quality-Case.

54 See the General Court's findings in paragraph 81 of the judgment in the MRL-Case and in paragraph 72 of the Air Quality-Case.

55 See Case C-321/95 P, Greenpeace v Commission, judgment of 2 April 1998, ECR I-1651, paragraph 27 et seqq.; Case T-585/93, Greenpeace v Commission, judgment of 9 August 1995, ECR II-2205, paragraph 59 et seqq.; Joined Cases T-236/04 and 241/04, EEB and Stichting Natuur en Milieu v Commission, judgment of 28 November 2005, ECR II-4945, paragraph 54 et seqq.

mental NGO, i.e. the promotion of the protection of the environment, is as such not sufficient to show that the NGO meets the requirements of being individually and/or directly concerned with a contested measure under environmental law.

In the so-called "Trianel"-Case,[56] the CJEU clarified the requirements for standing in national courts of environmental NGOs challenging actions in the field of the laws implementing an environmental impact assessment. The CJEU held that a provision of national law, which requires the applicants to show that their individual public law rights are affected, infringes the EU legislation regarding the assessment of public and private projects on the environment.[57]

However, the CJEU came up with this interpretation in a preliminary ruling regarding a very specific piece of legislation in environmental matters,[58] implementing the rights of public participation in decision-making provided under the Aarhus Convention and, in particular, the procedure of environmental impact assessment. The case did not concern the requirements set forth in the TFEU for admissibility of actions for annulment of acts by EU institutions.

IV. Conclusion

By reference to the case law of the Union courts, the provisions of the Aarhus Convention and their effects in EU law are often interpreted in a broad manner. The recent findings of the General Court in the cases regarding the scope and limits of the internal review procedure under Art. 10(1) of the Aarhus Regulation partly support this observation. In particular, this holds true for the General Court's findings that the limitation of the internal review procedure under the Aarhus Regulation for the review of administrative acts would contravene Art. 9(3) of the Aarhus Convention. As the Aarhus Convention has no direct effect in EU law, individuals are not entitled to rely on its provisions. Moreover, it cannot be concluded from the provisions of the Aarhus Convention that the Parties pursued a comprehensive administrative and judicial review of all measures under environmental law. The internal review procedure of the Aarhus Regulation could therefore limit the review of administrative acts under environmental law, i.e. of acts of individual scope as defined in the Aarhus Regulation.

Consequently, the Commission, the Council and the European Parliament were absolutely right to lodge an appeal with the CJEU against the respective judgments of the General Court. It needs to be clarified by the CJEU that the Aarhus Convention has no direct effect in EU law. In that respect, the CJEU can refer to the case law regarding the effect of other international treaties in EU law. Only in exceptional and very limited cases of a clear intention of the EU legislator to implement a specific provision of the international treaty or of a clear reference in a provision of EU secondary law to a specific provision of the international treaty, may an individual rely on that provision of the international treaty. However, the international treaty provision must be clear and sufficiently precise.

As regards the definition of administrative acts, it has been confirmed by the General Court that a measure of a Union institution, which entails legal effects for categories of persons envisaged generally and in the abstract, is not an administrative act. This consequently also applies to the concept of EU regulatory approvals that require to make available on the EU market chemical substances like active substances contained in plant protection products or biocides. NGO requests for an internal review of such measures under Art. 10 of the Aarhus Regulation are inadmissible.

Moreover, for any legal actions brought before the Union courts by environmental NGOs challenging a measure under Art. 10 of the Aarhus Regulation, such NGOs have to meet the requirements for admissibility of their legal actions according to the TFEU. This means that the contested measure of individual scope must at the same time be of direct and individual concern to the NGO.

56 Case C-15/09, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg, judgment of 12 May 2011, NuR 211, p.423.

57 Case C-15/09, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg, note 56, paragraph 35 et seqq.

58 See *Epiney*, EurUP 2012, note 4, p. 88(90); *Meitz*, Entscheidung des EuGH zum deutschen Umweltrechtsbehelfsgesetz, NuR 2011, p. 420(421); *Appel*, Umweltverbände im Ferrari des Deutschen Umweltrechtsschutzes – Anmerkung zur Trainel-Entscheidung des EuGH, NuR 2011, p. 414; see also *Durner/Paus*, Nichtregierungsorganisation darf gegen die Verletzung von Eu-Vorschriften klagen, DVBl 2011, p. 757 (762).