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Internal Review of EU Environmental Measures

It's True: Baron van Munchausen Doesn't Exist! Some Remarks on the Application of the So-Called Aarhus Regulation

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Abstract

This contribution discusses, critically, the application of the so called Aarhus Regulation. This regulation enables environmental NGOs to request an internal review under environmental law of acts adopted, or omissions, by EU institutions and bodies. It emerges that this internal review procedure does not function adequately at all. It can be concluded from the small number of requests that have been lodged since the entry into force of the regulation, that the procedure is not very popular. It appears that in the few cases in which a request for internal review has been lodged, this, leaving aside one single case, did not lead to a substantive assessment of the request. The vast majority of the requests were declared inadmissible. The authors propose that the conditions in the Regulation for admissibility should be interpreted and applied more in conformity with the Aarhus Convention. And that only 'legislative acts' within the meaning of Articles 289-292 TFEU should be excluded from the internal review procedure of the Regulation.

1 Introduction

The readers of this journal will be familiar with the problematic position of environmental organizations with regard to judicial protection in European environmental law.[1] Environmental organizations often do not have access to EU courts in relation to acts of EU institutions, as they fail to meet the requirement that they are '*directly and individually concerned*' (Article 263, fourth paragraph TFEU; ex Article 230, fourth

[1] We refer, for the sake of brevity, to the following cases: Case T-585/93 *Greenpeace et al./Commission;* Case T-219/95 R *Danielsson et al./Commission*; Case T-142/03 *Fost Plus/Commission*; Case T-94/04 *European Environmental Bureau (EEB) et al./Commission*; Case C-503/7 *SCGD*; Case C-355/08 P, *WWF-UK Ltd/Council* and Case C-362/06 P *Sahlstedt/Commission*. This case law is also known as the '*Plaumann* doctrine', after Case 25/62 *Plaumann/Commission* ECR 1963, 205.

paragraph EC Treaty).[2] The requirement of being '*individually concerned*' has proved, in particular, to be an almost insuperable obstacle – at least as usually interpreted by the Court of Justice. The criticism of this case law increasingly includes the argument that it is contrary to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of the United Nations Economic Commission for Europe (the Aarhus Convention).[3] According to Article 216(2) of the Treaty on the Functioning of the EU (TFEU), agreements entered into by the EU are legally binding upon the institutions of the EU and its Member States. Also, it is well known that provisions of European Union law must be interpreted as far as possible in conformity with international agreements entered into by the EU.[4]

The EU legislature was apparently not convinced that the existing European law *acquis* was in accordance with the Aarhus Convention, and in 2006 adopted Regulation (EC) 1367/2006 (the 'Aarhus Regulation').[5] According to Article 1 of this Regulation, its objective is '*to contribute to the implementation of the obligations arising under the* [...] *Aarhus Convention*'.[6] The present contribution will be limited to the question of access to justice; the remaining aspects (participation and transparency) will not be discussed.

With regard to access to justice, Article 10(1) of the Aarhus Regulation grants environmental organizations which meet certain requirements,[7] the right to make a request for internal review of an administrative act under environmental law. It follows from Article 12 of the Regulation, that in the event the review does not produce results, the organization can initiate proceedings before the Court of Justice '*in accordance with the relevant provisions of the Treaty*'. The focus here will be on the procedure for internal

[2] See in general Hans Roland Schwensfeier, *Individuals' Access to Justice Under Community Law* (diss. Groningen University 2009).

[3] See for instance M. Pallemaerts, *Compliance by the European Community with its Obligations on Access to Justice as a Party to the Aarhus Convention*, IEEP Report, June 2009.

[4] See for instance Case C-53/96 *Hermès* ECR 1998, I-3603, para 28 and Case C-284/95 *Safety Hi-Tech* ECR 1998, I-4301.

[5] Published in OJ 2006 L 264/13. The full title of the Regulation is: 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.

[6] See also recital 4 of the preamble: 'Provision *should* be made to apply the requirements of the Convention to Community institutions and bodies.' Italics added by authors.

[7] According to Article 11, it must concern environmental organizations which are non-profit-making and have existed for more than 2 years and have the primary stated objective of promoting environmental protection in the context of environmental law. Also, the subject matter in respect of which the request for internal review is made must be covered by its objective and activities.

review; the procedure for appeal to the Court of Justice will not be further discussed.[8]

The Regulation met with criticism in the academic legal literature.[9] It was claimed that it hardly brought any improvements to the legal protection of environmental organizations. In particular, the scope of the Regulation was claimed to be too restricted. The scope is seriously limited by the fact that the procedure for internal review is only applicable to so-called '*administrative acts*', a concept defined in the Regulation as '*any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects*'. Thus, in order to have access to this procedure for internal review, measures involved must be:

1. of individual scope;
2. legally binding and
3. have external effects.

These are cumulative criteria, which means that each and every one of these conditions must be met for the measures to be amenable to internal review.

The application of the procedure for internal review in practice is becoming more and more clear. At present, the first decisions of European institutions applying the Regulation have been published. These publications are sufficient ground for us to make a preliminary analysis of the application of the Regulation and to establish whether the Regulation has led to any improvements in the legal protection of environmental organizations.

2 The First Examples of Application of the Aarhus Regulation[10]

The table below indicates that, up until now, a request for internal review has led to a final decision in only eight cases. In no less than seven of these cases, the request was declared inadmissible. In only one case

[8] See J.H. Jans & H.H.B. Vedder, *European Environmental Law*, Groningen 2008, at 217-218, A.M. Keessen, *European Administrative Decisions; How the EU Regulates Products on the Internal Market*, European Administrative Law Series (2), Groningen 2009, at 152-153.

[9] See A.M. Keessen, *European Administrative Decisions; How the EU Regulates Products on the Internal Market*, European Administrative Law Series (2), Groningen 2009, at 151-153, and J.H. Jans, 'Did Baron von Munchausen ever visit Århus? Some Critical Remarks on the Proposal For A Regulation on the Application of the Provisions of the Aarhus Convention to EC Institutions and Bodies' In: *Reflections on 30 Years of EU Environmental Law; A High Level of Protection?*, Prof. Richard Macrory (ed.). Groningen 2006, 475-490.

[10] The requests for internal review lodged before the European Commission and the resulting decisions can be found on the website of the European Commission, <http://ec.europa.eu/environment/aarhus/internal_review.htm>. The decisions on internal review are, as far as we know, not published in the Official Journal of the EU.

did the relevant European institution come to the material examination of the request. This request, however, did not lead to an actual internal review, but was declared unfounded.

Date	Institution	Inadmissible, unfounded or founded	Core content
12-12-07	European Commission	Inadmissible	Request for review of the decision adopting a list of candidates for the appointment of executive director of the European Chemicals Agency (ECHA). The request is inadmissible for lack of external effect of the decision as required under Art. 10(1) and Art. 2(1)(g) of the Regulation. The decision lacks external effect since it forms an integral part of the procedure of the ECHA for appointing a director.
26-05-08	European Commission	Unfounded	Request for review of decisions authorizing genetically modified maize to be placed on the market. The request is unfounded because the decisions are not contrary to environmental legislation.
06-08-08	European Commission	Inadmissible	Request for review of decision regarding approval of 'Operational Programme Transport 2007-2013' for the Czech Republic. The decision has no legal consequences and no external effect.
01-07-08	European Commission	Inadmissible	Request for review of decision establishing maximum residue levels for pesticides applicable to all food companies. The decision cannot be considered an act of individual scope.
23-10-08	European Commission	Inadmissible	Request for review of decision to end the infringement procedure with regard to a dam project in Portugal. The request is inadmissible since the Regulation does not apply to administrative acts of institutions in their capacity of administrative review bodies.
21-04-09	European Commission	Inadmissible	Request for review of Directive 2008/116/EC of the EC. The request is inadmissible since it concerns an act with general effect (and is not of individual scope).
27-04-09	European Commission	Inadmissible	Request for review of the opinion of the EC regarding Directive 2003/87/EC (scheme for greenhouse gas emission allowance trading). The request is inadmissible as it does not concern an administrative act under Art. 10 of the Regulation.
07-05-09 (draft)	Council	Inadmissible	Request for review of Regulation (EC) No. 43/2009 (fishing operations) regarding the quota of certain fish species. The request is inadmissible as the Regulation does not constitute a measure of individual scope.
28-07-09	European Commission	Inadmissible	Request for review of the decision on the notification by the Netherlands of the postponement for attaining the deadline for the limit values for NO_2. The request is inadmissible as the decision cannot be considered an act of individual scope.

Now, of course, it is tempting to conclude, based solely on this information, that the critics of the Aarhus Regulation were correct. It appears that only a small number of requests for internal review are lodged, which is quite remarkable in itself as the requirements of Article 11 of the Regulation are not very burdensome.[11] Furthermore, the requests that are lodged are not substantively examined and are declared inadmissible. However, before we come to this conclusion, the eight cases mentioned above must be further examined. This examination will be carried out in the light of the three requirements 'individual scope', 'legally binding' and 'external effect' as mentioned above.

2.1 Individual Scope

In two decisions of 1 July 2008, the European Commission declared the requests of the 'Stichting Natuur en Milieu' and 'Pesticide Action Network Europe' (PAN) for review of Regulation (EC) No. 149/2008, inadmissible. This Regulation determines maximum residue levels for pesticides. These levels are applicable to all food companies within the EU. For this reason the Commission establishes that the Regulation cannot be considered an act of individual scope. Neither does the Commission accept the interpretation that the Regulation can be considered as a bundle of decisions concerning the residues of all the individual products and substances, as claimed by the applicant.

In its decision of 21 April 2009, the Commission considers the request of the 'Stichting Natuur en Milieu' (the Netherlands Society for Nature and Environment) to be inadmissible. The request concerned the internal review of Directive 2008/116/EC, which authorizes amongst other things the use of the pesticide imidacloprid in plant protection products. 'Stichting Natuur en Milieu' claimed that the Directive and the use of imidacloprid as an active substance is not justified given the unacceptable negative impact it will have on the environment. The Commission does not come to a material examination of the request, as Directive 2008/116/EC is addressed to Member States. Member States must apply the provisions laid down in the Directive to all operators in the area of plant protection products wishing to place plant protection products containing imidacloprid on the market. Therefore, according to the Commission, the Directive must be regarded as an act of general scope and it cannot be considered an administrative act within the meaning of the Aarhus Regulation.

In its decision of 28 July 2009, the Commission rejected the request of the 'Vereniging Milieudefensie en Stop Luchtverontreiniging Utrecht' for internal review of a decision. In the decision, the Commission granted the Netherlands permission to postpone the deadline for attaining the limit values for NO2 and an exemption from the obligation to apply the

[11] See footnote 8.

limit values for PM10. The decision was adopted on the basis of Directive 2008/50/EC. This Directive allows Member States under certain conditions, to postpone the deadlines for attaining certain limit values and to be exempted from the obligation to apply certain limit values, unless the Commission raises objections against the postponement and exemption. By the above-mentioned decision, the Commission decided not to raise objections against the postponement by the Netherlands. However, according to the applicants, the Netherlands did not meet the conditions of the Directive and the Commission should have raised objections against the postponement and exemption. The Commission considers the request inadmissible on the grounds that the decision is addressed to a specific Member State and is of general scope. As a further justification the Commission refers to specific case law[12] from which it concludes 'that derogations from a given general regime which are constituted by confirmatory decisions adopted by the Commission under a given directive partake of the general nature of that directive, insofar as they are addressed in abstract terms to undefined classes of persons and apply to objectively defined situations; in such cases, the said decisions (even though they are 'beschikkingen') must be regarded as acts of general application.' [13]

So far, only one (published) request for internal review under the Aarhus Regulation has been lodged at the Council.[14] In this case, Greenpeace requested the Council to review Regulation (EC) No. 43/2009. This Regulation establishes quotas for certain species of fish and a closure date for the fishing season. Greenpeace requested the Council to amend the quotas for bluefin tuna, since this species is endangered, and in some places it is even extinct. Greenpeace states that the contested Regulation constitutes an administrative act within the meaning of the Aarhus Regulation, as it can be considered as a bundle of legally binding decisions of individual scope addressed to specific Member States. In a preliminary decision, the Council considers the request inadmissible as it cannot be considered a measure of individual scope. Regulation (EC) No. 43/2009 determines quotas applicable to certain geographical areas and addressed to Member States. Thus, the Regulation applies to an undetermined number of fishing companies, since it is up to the Member States to determine quotas for individual fishing companies. As such, the measures in the Regulation cannot be considered an act of individual scope.[15]

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[12] Case T-142/03 *Fost Plus VZW/Commission* ECR 2005, II-589.

[13] 'Milieudefensie en Stop Luchtverontreiniging' lodged appeal against the Commission decision with the Court of First Instance (now General Court) (Case T-396/09). At the time of publication of this article the proceedings were pending.

[14] See the register of Council documents on the website of the Council, <http://www.consilium.europa.eu/>.

[15] This case should be seen in the light of the judgment of the Court of Justice in Case C-355/08 P *WWF-UK Ltd/Council*, where the court ruled that environmental organizations

2.2 External Effect

In four separate decisions of 12 December 2007, the Commission rejected three requests for internal review on identical grounds. Friends of the Earth Europe (FEE), Women in Europe for a Common Future (WECF), European Environmental Bureau (EEB) and Health and Environment Alliance (HEAL) all had similar reasons to request the internal review of the Decision of 12 September 2007. In this Decision, the Commission, under Article 84(1) of Regulation No. 1907/2006,[16] adopted a list of candidates to be proposed to the Management Board of the European Chemicals Agency (ECHA)[17] for the appointment of the executive director. The applicants were concerned that in the circumstances that only two candidates were proposed to the management board, this would not provide a reasonable spectrum of choice for the management board. The applicants were also concerned that suitable candidates were arbitrarily eliminated in the course of the selection procedure. For these two reasons, the organizations requested the Commission to review its decision and adopt a list with a broader range of eligible candidates. The Commission did not reach a substantive analysis of the requests and considered the requests inadmissible. According to the Commission, the contested Decision did not have external effect, since adopting a list of candidates forms an integral part of the procedure whereby the executive director is appointed by the management board of the ECHA. According to the Commission, such staff related decisions are by their very nature to be regarded as internal to the institution or body concerned and thus incapable of having external effects within the meaning of the Aarhus Regulation.

The Commission decision of 6 August 2008 concerns the request of Ekologicky Pravni Service for internal review of the decision approving the operational programme Transport 2007-2013 for the Czech Republic. The Commission considers the request inadmissible on the ground that the decision whose review is requested does not have external effect and is not legally binding. Decisions approving operational programmes are addressed

were not considered interested parties in an action against an EC regulation fixing for 2007 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks.

[16] Regulation (EC) No. 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC. See on this Regulation M. Bronckers & Y. van Gerven, 'Legal remedies under the EC's new chemicals legislation REACH: Testing a new model of European governance', *CMLRev* 2009, 1823-1871.

[17] See on the tasks and competences: <http://echa.europa.eu/home_nl.asp>.

to the Member State, but, according to the Commission, such decisions do not approve any project to be co-funded under that programme. The implementation of the programmes is under the responsibility and competence of the national authorities.

It is noteworthy that, in its decision declaring the request inadmissible, the Commission states that: 'Unfortunately my services do still not have ultimate certainty on all issues linked to the correct interpretation of Article 10 of Regulation (EC) No 1367/2006.' Given this statement, the grounds on which the Commission concludes that its decision did not fall within the scope of Article 10 of the Regulation are not easily comprehensible.

2.3 Legally Binding

On 27 April 2009, the Commission adopted a decision considering a request by ClientEarth for it to review its statement concerning the proposal for amendment of Directive 2003/87/EC (establishing a scheme for greenhouse gas emission allowance trading) as inadmissible.[18] The Commission considers that its statement is of political character. Therefore, the Commission concludes that the statement cannot be considered to be legally binding and it also cannot be considered to have external effect.

In its Decision of 23 October 2008, the Commission considered the request of 'Liga para a Protecção da Natureza' (LPN) to review a decision, as inadmissible. The request concerned a decision to close the infringement procedure regarding the violation of European legislation with regard to a dam project in Portugal. Article 2(2)(b) of the Aarhus Regulation expressly provides that decisions taken within the ambit of infringement proceedings (Articles 258-260 TFEU; ex Articles 258 and 228 of the EC Treaty) constitute acts adopted by the Commission in the capacity of an administrative review body. The Aarhus Regulation is not applicable to decisions adopted in the capacity of an administrative review body (Art. 2(2) of the Regulation).

3 Scope of Definitions; the Convention, Case Law and Literature

3.1 Back to Basics: the Aarhus Convention

As mentioned before, the decisions of the European Commission and the Council show that only one single request for review overcame the first hurdle of admissibility. This raises questions regarding the interpretation of the definitions 'individual scope', 'external effect' and 'legally binding' and its compatibility with the Aarhus Convention. In this context, we make the following remarks.

[18] See COD/2008/0013(COD) of 17 December 2008.

The fact that the Aarhus Convention and the EU provisions implementing the Convention, have the aim of enabling a *broad* access to justice is not seriously contested in either the case law or the literature.[19] In addition, the Compliance Committee, the enforcement mechanism of the Aarhus Convention,[20] emphasizes that a broad interpretation of the Convention should be the rule, not the exception. However, this does not mean that the Aarhus Convention safeguards access for *any individual* regarding *any act of a public authority*. Limitations are certainly possible with regard to the persons and bodies who seek access to justice. This follows from the words of Article 9(3) of the Aarhus Convention, in so far as it expressly refers to the national law of contracting States: 'where *they* meet the criteria, if any, laid down in its national[21] law' (emphasis added).[22]

It is remarkable that the barriers to access contained in the Aarhus Regulation ('individual scope', 'external effect' and 'legally binding') particularly concern the *type* of act against which proceedings can be brought. It follows from the use of the word 'they', that the sentence in Article 9(3) of the Aarhus Convention as mentioned above, cannot concern limitations with regard to the *type* of act.

Let us therefore look more closely at the question *which* acts of public authorities the Aarhus Convention requires legal protection against. Firstly, Article 9(1) of the Aarhus Convention provides for access to a court for any person who considers that his or her request for environmental information is refused. Such decisions fall within the scope of Regulation (EC) No. 1049/2001[23] and will not be further discussed here. Article 9(2) of the Aarhus Convention requires legal protection against 'any decision, act or omission' subject to Article 6 of the Aarhus Convention (public participation in decisions on some specific[24] activities). Finally, Article 9(3) of the

[19] See for instance C. Schall, 'Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?', *Journal of Environmental Law* 2008, 417-453.

[20] See on the Compliance Committee for instance V. Koester, 'The Compliance Committee of the Aarhus Convention; An Overview of Procedures and Jurisprudence', *Environmental Policy And Law,* 37/2–3 (2007) 83-96. See as a source of information on the 'case law' of the Compliance Committee, A. Andrusevych, T. Alge, C. Clemens (eds), *Case Law of the Aarhus Convention Compliance Committee (2004-2008)*, (RACSE, Lviv 2008), available at <http://doku.cac.at/case_law_accc.pdf.>.

[21] Of course, 'national' must in the context of legal protection against European institutions be read as 'EU'.

[22] The freedom granted to national legislatures to establish certain requirements for access to justice, is subject to limits, as follows from the judgment of the Court of Justice in Case C-263/08 *DLV*. The primary objective of the Convention (and the EU implementing measures) to establish a broad access to justice must be guaranteed.

[23] OJ 2001 L 145 of 31/43.

[24] The list of activities is laid down in Annex I of the Aarhus Convention.

Aarhus Convention requires access to 'administrative or judicial procedures' with regard to 'acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment'. It seems to us that every request for internal review as mentioned above falls within the scope of Article 9(3) of the Aarhus Convention. Thus, our analysis and comments will be limited to this provision.

The first thing to be noticed is that the restrictions of the Aarhus Regulation (individual scope, legally binding, external effect) are not as such mentioned in Article 9(3) of the Convention. Article 9(3) mentions 'acts and omissions' in general, and does not limit these to individual acts or legal acts (with or without external effect). However, this in itself does not automatically lead to the conclusion that the restrictions of the Aarhus Regulation and the manner in which they are applied by the European institutions, are contrary to the Aarhus Convention. We should therefore examine these three limitations further.

Individual scope

First of all, it should be noted that the term 'individual scope' was added to the Regulation at a later stage in the course of the European legislative procedure. Not until after the first reading of the Council, were the words 'individual scope' added.[25] Although no basis can be found in Article 9(3) of the Aarhus Convention to limit access to justice to *individual* measures, it does appear from Article 2(2) of the Convention that it is not applicable to a public authority acting in a 'legislative capacity'. The explanation for this 'exception' can be found in the Aarhus Convention Implementation Guide which states: 'This is due to the fundamentally different character of decision making [...] in a legislative capacity, where elected representatives are more directly accountable to the public through the election process [...]'.[26]

The next question is whether every European general measure (which is excluded from the internal review procedure of the Aarhus Regulation) can be considered as 'legislation' in the true meaning of the word. It is true that all legislation in itself has a general character, yet is it also true that all general measures can be considered as 'legislative acts'? The use of the notion of 'individual scope' in the Aarhus Regulation could lead to the situation that too many measures are excluded from the internal review procedure.[27] As argued by Wennerås, this is particularly the case when the concept 'individual scope' is interpreted and applied in the same manner as the concept of 'individual concern' under Article 263, fourth paragraph TFEU. In this regard, it should be noted, albeit cynically, that it is quite

[25] See P.E. Wennerås, *The Enforcement of EC Environmental Law*, Oxford: Oxford University Press 2007, at 235.

[26] Available at <http://www.unece.org/env/pp/acig.pdf>. This document does not, however, have any special legal status.

[27] See also Wennerås, at 234.

remarkable that the Aarhus Regulation, of which it can be said that its objective is to make up for the limitations of Article 263, fourth paragraph TFEU, is interpreted in the same manner as this provision![28]

We propose, therefore, to interpret the notion 'individual scope' of the Aarhus Regulation in an 'Aarhus-consistent manner', and therefore consider it limited to the exclusion of 'true' legislative acts, such as basic or framework regulations and directives. What is to be understood by this has become much clearer since the entry into force of the Lisbon Treaty. For the first time, both the EU Treaty and the Treaty on the Functioning of the EU make a distinction between legislative acts and non-legislative acts (see in particular Articles 289-292 TFEU). The core of this distinction is that current EU law does not consider either administrative measures to implement legislation (even if they are considered general measures), or the exercise of delegated legislative powers as 'legislative acts'. In this context, one should also take into account that Article 263, fourth paragraph TFEU provides interested parties with the possibility to institute proceedings before the European court against 'a regulatory act which is of direct concern to them and does not entail implementing measures'. Although the literature does not agree on the precise interpretation of the definition 'regulatory acts',[29] it is clear that it does not include 'legislative acts' and that Article 263, fourth paragraph TFEU creates the possibility for a direct action for annulment against at least some EU acts of general application, without the applicant having to be 'individually concerned'. Against the background of this primary EU law, there is no good reason to cling on blindly to the concept of 'individual concern' under the *Plaumann* doctrine for the interpretation of 'individual scope' under the Aarhus Regulation.

Even without a thorough analysis of the decisions mentioned in section 2 of this article, it is possible to state that it is highly questionable whether any of these decisions concern requests for internal review of what currently must be considered a 'legislative act'. It can also be concluded that the Aarhus Regulation categorically excludes certain measures from the internal review procedure which, according to EU law itself, cannot be considered 'legislative acts'.

Legally binding

No indication can be found in the wording of Article 9(3) of the Aarhus Convention for the conclusion that this provision only concerns 'legal measures' and *a fortiori* that these legal measures should have 'external effect'. Therefore, there is no reason to assume that *factual* infringements of environmental law are excluded from the scope of Article 9(3). The Imple-

[28] See also Wennerås, at 235.

[29] See on this, with reference to further literature, Hans Roland Schwensfeier, *Individuals' Access to Justice Under Community Law,* (diss. RUG 2009), at 330 et seq.

mentation Guide even notes that the public plays an important role in the enforcement by the competent authorities:

> 'The provision potentially covers a wide range of administrative and judicial procedures, including the 'citizen enforcement' concept, in which members of the public are given standing to directly enforce environmental law in court.'[30]

In other words: decisions to tolerate certain (possibly illegal) behaviour, fall within the scope of Article 9(3), and can therefore also be contested. This is of particular importance with regard to Commission decisions in Treaty infringement proceedings (Articles 258-260 TFEU; ex Articles 226 and 228 EC Treaty). It is established case law of the Court of Justice that decisions taken in the course of such proceedings do not have legally binding effect.[31] In our opinion, categorically excluding Commission decisions regarding Treaty infringements by Member States from the internal review procedure, is not in line with Article 9(3) of the Aarhus Convention. Moreover, in light of the statements in the Implementation Guide, the argument that such decisions are taken by the Commission in its 'judicial capacity' and should thus be excluded under Article 2(2) of the Aarhus Convention and Article 2(2) of the Aarhus Regulation (concerning decisions taken in the capacity of administrative review body) cannot be sustained.

4 Conclusion

According to the preamble of the Aarhus Regulation, provision *should* be made to apply the requirements of the Aarhus Convention to Community institutions and bodies. In order to compensate for the unsatisfactory position of environmental organizations as regards legal protection, an 'internal review procedure' was created, in which environmental organizations can institute proceedings against Community decisions.

In practice, this internal review procedure does not function adequately at all. It can be concluded from the small number of requests that have been lodged since the entry into force of the Regulation, that the procedure is not very popular. It appears that in the few cases in which a request for internal review has been lodged, this, leaving aside one single case, did not lead to a substantive assessment of the request. The vast majority of the requests were declared inadmissible. The requirements of the Aarhus Regulation that the request must concern a decision of 'individual scope', or a legal measure

[30] See also B. Dette, 'Access to Justice in Environmental Matters; A Fundamental Democratic Right', in: M. Onida (ed.), *Europe and the Environment. Legal Essays in Honour of Ludwig Krämer*, Groningen: Europa Law Publishing 2004, at 7 writing: 'By that, it aims to overcome the fact that the environment has no legal interest defender'.

[31] Eg. Case 48/65 *Lütticke* ECR 1966, 19.

with external effect, were in particular grounds for inadmissibility. We are of the opinion that the conditions for admissibility of the Aarhus Regulation and the (broad) application thereof by the EU institutions, cannot be based on the Aarhus Convention itself. Therefore, we plead that the conditions for admissibility should be interpreted and applied in conformity with the Aarhus Convention. It should be firmly stated in the proceedings currently pending before the Court of Justice, that the requirement of 'individual scope' should be interpreted restrictively. Only 'legislative acts' within the meaning of Articles 289-292 TFEU should fall within the scope of this requirement. The distinction between 'legislative acts' and 'non-legislative acts' in the Lisbon Treaty, enables the Court of Justice to positively amend its restrictive case law. However, if the Court of Justice upholds the rigid interpretation by the Community institutions of the Aarhus Regulation, the question needs to be raised whether the continued existence of the Regulation makes any sense. What use is a procedure which is, or can be, hardly ever used...?