INTRODUCTION

On 30 October 2001, the Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (the Convention) entered into force. Kofi Annan, the Secretary-General of the United Nations, has called it ‘the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations’ and hailed its adoption as ‘a remarkable step forward in the development of international law as it relates to participatory democracy and citizens’ environmental rights’. The Convention is one of several regional initiatives for enhancing environmental governance and goes a long way in breathing life into Principle 10 of the 1992 Rio Declaration on Environment and Development. Confined to the United Nations Economic Commission for Europe (UN/ECE) region, the Convention obliges its parties to grant members of the public rights on access to information, public participation and access to justice in environmental matters within their own territory, regardless of whether these matters have any transboundary relevance. The Convention thereby combines elements of human rights instruments with elements from multilateral environmental agreements (MEAs) in a novel fashion. This approach also reflects the growing concern of international law with issues once thought to be part of a State’s domaine réservé. Public participation, transparency, legal procedure, public administration, secrecy, and the notion of democracy itself, have up to now only been regulated in such detail at national levels. They are still deemed genuinely national issues and their regulation is considered an essential attribute of State sovereignty.

As with all recent MEAs, the European Community (EC) and its Member States have signed the Convention as a mixed agreement. However, unlike any other MEA, the Aarhus Convention obliges the EC to ensure compliance not only within its Member States, but also within its own ‘institutions’, as they are by definition public authorities for the purposes of the Convention. At the EC level, information and participatory rights have up to now only been granted restrictively, if at all. The transposition of the Convention, and its application, thus represents a great leap in being held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

1 Printed in 38 ILM (1999), 517 (the ‘Convention’ or ‘Aarhus Convention’). The Convention, as well as relevant general information and official UN/ECE documents, can be accessed via the UN/ECE Aarhus website, available at <http://www.unece.org/env/pp/>. All references to websites date from 30 May 2002 and this article also reflects developments up to that date.


4 Printed in 31 ILM (1992), 874 (the Rio Declaration). Principle 10 of the Rio Declaration reads: ‘Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that

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forward. While the Convention will introduce legally binding obligations and corresponding rights only with regard to matters relevant to the environment, the cross-sectoral nature of environmental law and the integration principle8 will ensure that its ambit will not remain restricted to environmental policy.9

Against this background, the first part of this article gives an overview of the Convention, in particular the substantive provisions in its three so-called pillars on access to information, public participation and access to justice in environmental matters. The second part of the article focuses on the implications of the Convention for EC ‘institutions’. It begins by determining which EC ‘institutions’ must comply with the obligations set out in the Convention and then assesses to what extent existing EC law already conforms to the Convention and, in particular, which issues need to be addressed before the EC ratifies and can become a party to the Convention.

THE AARHUS CONVENTION: AN OVERVIEW

GENERAL PROVISIONS OF THE CONVENTION

The first three Articles of the Convention include its objectives, definitions and general provisions. Article 1 sets out the objective of the Convention:

Each party shall guarantee the rights of access to information, public participation in decision making, and access to justice in environmental matters in accordance with the provisions of this Convention.

Article 1 goes on to stipulate clearly that these procedural rights shall be guaranteed:

[i]n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.

To date, this is one of the clearest statements of a right to a healthy environment of present and future generations in international environmental law. Principle 1 of the 1992 Rio Declaration asserts that human beings ‘are entitled to a healthy and productive life in harmony with nature’, but fails to give explicit emphasis to a right to a decent, healthy or viable environment.10 References to such a human right have appeared in global or regional human rights instruments11 and in declarations and resolutions of international organizations,12 but none of them are as explicit as the Aarhus Convention.

Article 2 contains the definitions of the terms used in the Convention. The term ‘public’ is of paramount importance for the Convention. The bearers of the rights to access to information, public participation and access to justice are the ‘public’ and its members. Outside the ambit of the Convention, the word ‘public’ is defined in various ways. It can refer to a specific characteristic as being open and available to all or to the opposite of ‘private’. The term also has a sociological and political meaning as the general sociological forum or ‘network’ for communication.13 The ‘public’ in this latter sense represents one of the elements in the process of decision making and an organizing principle of the political order in modern democratic societies.14 For the purposes of the Convention, the term ‘the public’ is not used in the sense of public sphere or forum, but rather as the sum total of all of society’s potential actors. Two types of ‘public’ are distinguished: the ‘public’ and the ‘public concerned’. The former is defined in Article 2(4) as:

one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups.

8 See J. Habermas, Faktizität und Geltung (Suhrkamp, 1990), at 436; J. Habermas, Strukturwandel der Öffentlichkeit (Suhrkamp, 1990), at 56.
12 See J. Habermas, Faktizität und Geltung (Suhrkamp, 1990), at 56.
‘Public concerned’ is defined in Article 2(5) as:

the public affected or likely to be affected by, or having an interest in, the environmental decision making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

This distinction is of particular relevance, as it determines who is entitled to the rights set out in the three pillars of the Aarhus Convention. The definition of ‘public concerned’ ensures and underlines the special role accorded to environmental non-government organizations (NGOs) in the framework of the Convention.15

The addressees of the Convention’s rights are ‘public authorities’. These are broadly defined in Article 2(2). They include government bodies,16 persons having public responsibilities or functions under national law,17 as well as persons performing functions or providing public services in relation to the environment under the control of the aforementioned bodies.18

According to Article 2(2)(d), ‘institutions of any regional economic integration organization which can become party to the Convention in accordance with its Article 17 (like the EC) are also ‘public authorities’ for the purposes of the Convention. However, bodies or ‘institutions’ acting in a judicial or legislative capacity are excluded.

The general provisions of the Convention are set out in Article 3. They inform the Convention’s other provisions and provide guidance for their interpretation. Among other things, Article 3 stresses the importance of environmental education and of providing support for NGOs protecting the environment. It also allows parties to introduce broader measures in all three areas covered by the Convention and to maintain existing regulations that promote the Convention’s goals beyond the requirements of the Convention.

Article 3(9) states that the public shall have access to information, participation in decision making, and access to justice in environmental matters ‘without discrimination as to citizenship, nationality or domicile’.19 The ‘public’ referred to and defined in the Convention is thus a regional public,20 which does not constitute itself along national boundaries, but instead via the common concern for the environment.21

Of particular relevance for international law generally is Article 3(7), according to which the parties:

shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment.

It is the clearest statement in the Convention in relation to global environmental governance and hitherto unprecedented in international environmental law. Article 3(7) could have potentially far-reaching implications for decision-making processes not only in the UN/ECE context, but also in other fora and organizations such as the World Trade Organization (WTO) and the World Bank.

THE FIRST PILLAR OF THE CONVENTION: ACCESS TO INFORMATION

Access to information is the prerequisite for environmental democracy and governance. Without it, neither public participation in decision making nor the enforcement of environmental regulations through private law litigation would be possible.22 Transparency and (possible) public pressure resulting from improved access to information may also lead private and public actors to choose less environmentally harmful options and to go beyond legal minimum standards.

The access to information pillar has two articles: Articles 4 and 5. Article 4 deals with the right of the public for access to information and the public authorities’ obligation to provide this information upon request ‘without an interest having to be stated’ and ‘as soon as possible’.23 It introduces at the international level what has up to now only been found at national and

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15 In this context, it is also noteworthy that the drafting and negotiating of the Convention witnessed a hitherto unprecedented level of participation of civil society represented by non-government organizations. S. Stec and S. Casey-Lefkowitz (eds), The Aarhus Convention: An Implementation Guide (UN/ECE, 2000). 2. Also see, UN/ECE Doc. ECE/CEP/72, available at <http://www.unece.org/env/pp/acig.htm>.
16 Convention, Article 2(2)(a).
17 Ibid., Article 2(2)(b).
18 Ibid., Article 2(2)(c).
19 Ibid., Article 3(9).
20 Since the non-discrimination obligation in Article 3(9) is not limited to the UN/ECE region, the public is a potentially global public, albeit partial in its limitation to the areas covered by the Convention.
21 The Convention, in referring to such a public, already assumes, and at the same time, creates a ‘transnational “space” where citizens from different countries can discuss what they perceive as being... important’, as alluded to in the Commission’s White Paper, although the ‘space’ charted by the Convention goes beyond EU limits in territorial terms. See White Paper, n. 9 above, at 11.
23 Article 4 is generally referred to as the ‘passive’ obligation since the parties respond to a request.
EC level. Indeed, it is modelled on EC Council Directive 90/313/EEC on the Freedom of Access to Information on the Environment (the Information Directive) to the extent that it employs identical wording. However, access to information provided for by the Convention goes beyond access to information under the Information Directive. The Convention sets out time frames and regulates the formalities of the provision or refusal of requested information. A refusal is only possible on the grounds listed in Article 4(3) and (4) – such as international relations, national defence, commercial confidentiality, intellectual property rights and personal privacy. (However, in the case of disclosure of information on emissions, information must be disclosed even if it is protected by national law as commercially confidential.) Article 4(4) states:

[The] grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure, and, also whether the information requested relates to emissions into the environment.

Article 5 requires parties to ensure that their public authorities collect, update and actively disseminate environmental information. It thus lays the necessary foundations for access to environmental information provided for by Article 4. Public authorities must actively engage in collecting the information ‘relevant to their functions’ and, for this purpose, systems must be established that warrant an adequate flow of information to public authorities. In the event of an imminent threat to public health or the environment, all information that could help the affected public prevent or mitigate the effects must immediately be disseminated. Article 5(2)–(9) stipulates specific obligations pertaining to the promotion of public access to environmental information in a transparent and effective manner. Special reference is made to electronic means and the Internet. The Convention also requires its parties to establish national pollution inventories or registers, ‘taking into account international processes’.

THE SECOND PILLAR: PUBLIC PARTICIPATION IN DECISION MAKING

Since the 1992 United Nations Conference on Environment and Development (UNCED), public participation has been endorsed as a means for implementing sustainable development. Agenda 21 has heralded broad public participation in decision making as one of the fundamental prerequisites for the achievement of sustainable development. Participation in decision making improves the quality and acceptance of environmental decisions and allows decision makers to profit from the public’s knowledge, expertise and innovation. The local public frequently knows the issues at stake more intimately than the officials charged with making the decision. The public, particularly public interest groups or the scientific community, often have valuable specialist knowledge. The effect of decisions or activities on the environment cannot be measured in purely objective terms, but it depends on the context and the perception of all the actors involved. Public participation provides the possibility to introduce this contextual or ‘subjective’ element into decision making. Furthermore, providing the public with an opportunity to be heard can help broker a consensus on contentious projects and ultimately lead to public support for a decision.

24 While some MEAs, such as the 1993 Convention on Civil Liability for Damage resulting from Activities Dangerous to the Environment, printed in 32 ILM (1993), 1228 and the 1992 United Nations Framework Convention on Climate Change, printed in 31 ILM (1992), 1330, already include information elements, none of these are as detailed as those in the Aarhus Convention. For other examples of international conventions including provisions concerning information of the public see S. Stec and S. Casey-Lefkowitz, n. 15 above, at 50.


26 Already the definition of ‘environmental information’ itself is much broader under the Convention. ‘Environmental information’ as defined for the purposes of the Convention also includes information on the ‘state of human health and safety, conditions of human life, cultural sites and built structures, in as much as they are or may be affected’ by environmental influences (Article 2(3)(c)). Whereas the Information Directive only pertains to the ‘state of water, air, soil, fauna, flora, land and natural sites, and on activities or measures adversely affecting, or likely so to affect these, and on activities or measures designed to protect these’ (Article 2(a)). Equally, ‘public authority’ is defined more broadly in the Convention (compare Article 2(2) of the Convention with Article 2(b) of the Information Directive), while its grounds for refusal are narrower than in the Information Directive (Article 4(3) and (4) of the Convention compared with Article 3(2) and (3) of the Information Directive).

27 Convention, Article 4(4)(d).

28 Ibid., Article 4(4), last sentence.

29 Ibid., Article 5(1)(a).

30 Ibid., Article 5(1)(b).

31 Ibid., Article 5(1)(c).

32 Ibid., Article 5(9). A Working Group on PRTR (Pollutant Release and Transport Register) is charged with developing further a PRTR system as required by the Convention in Article 10(2)(j) and Article 5(9). For this purpose, the Working Group has recommended that a PRTR instrument should be drafted as a protocol to the Convention and that it should be open for accession by non-UN/ECE countries and non-parties to the Convention. See UN/ECE Docs. CEP/WG.5/AC.2/2001/3, CEP/WG.5/AC.2/2001/6 and CEP/WG.5/AC.2/2001/7, all available at <http://www.unece.org/env/pp/prtr.htm>. Further documents and background information on the Working Group are also available on this website. The EC has already established a European Pollutant Emission Register (EPER) under Article 15 of Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control (IPPC Directive), [1996] OJ 2000 L192/36.


34 See J. Ebbeson, n. 5 above, at 58.

35 See Bruch, n. 3 above, at 8.
information, public participation elements are already covered by numerous MEAs. Yet none of these MEAs contain as detailed and as far-reaching public participation obligations as the Aarhus Convention. The Convention provides for different types of public participation: participation in decisions on specific activities; participation concerning plans, programmes, and policies; and participation during the preparation of regulatory and generally applicable legally binding normative instruments.

Public Participation in Decisions on Specific Activities Article 6 requires that the ‘public concerned’ as defined in Article 2(5) shall have the right to participate in decisions on specific activities falling under Article 6. These are, first of all, decisions regarding the permission of activities listed in Annex I of the Convention, which are per se assumed to have significant effects on the environment. The list is largely reminiscent of Annex I of EC Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment and of the EC Directive 96/61/EEC concerning integrated pollution prevention and control. Indeed, both Directives served as models for Article 6.

Article 6 also applies to decisions on proposed activities not listed in Annex I which may have a significant effect on the environment. The term ‘proposed activity’ is not defined in the Convention and parties have discretion in assessing the relevant activities. However, they are bound by rules and principles of international environmental law, and, where relevant, EC environmental law. Under certain conditions, Article 6(1)(c) allows on a case-by-case basis the exemption from the public participation requirement of proposed activities serving national defence purposes. Article 6(10) explicitly extends the scope of the Article mutatis mutandis to decisions pertaining to updates or reconsiderations of operating conditions for activities referred to in Article 6(1). Provisions for public participation in decisions on the deliberate release of genetically modified organisms (GMOs) into the environment are currently being explored by a working group on GMOs in accordance with Article 6(11).

Article 6 contains detailed requirements for public participation in respect of proposed activities falling under its scope. It stipulates that the public has to be informed of the proposed activity ‘in an adequate, timely and effective manner’ and lists the minimum content of this information. In contrast to access to information under the first pillar of the Convention, information relevant to the decision making has to be made available to the public entirely free of charge. The Convention sets out minimum criteria for the participation procedure. Among other things, it requires public participation to occur early in the decision-making process, allowing for reasonable time frames for the different phases of participation and ensuring that the public gets involved when options are still open. This allows public input to be incorporated into the final decision and, indeed, parties are required to ‘ensure that in the decision due account is taken of the outcome of the public participation’. The Convention further seeks to secure meaningful participation by requiring public authorities to promptly inform the public of the decision and to make available its text, as well as its reasons and considerations, in writing.

Public Participation concerning Plans, Programmes and Policies Article 7 covers public participation concerning plans, programmes and policies relating to the environment. The terms ‘plans’,

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34. See, for example, the 1991 UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context, printed in 31 ILM (1992), 89 (the 1991 Espoo Convention), Article 2(2) and (6) and Article 4(2); 1992 UN Framework Convention on Climate Change, printed in 31 ILM (1992), 849, Article 6(a)(iii); 1992 UN/ECE Convention on the Transboundary Effects of Industrial Accidents, printed in 31 ILM (1992), 1330, Article 9(2); 1992 Convention on Biological Diversity, printed in 31 ILM (1992), 822, Article 14(a); 1999 Cartagena Protocol on Biosafety to the Convention on Biological Diversity, printed in 39 ILM (2000), 1027, Article 23.

35. For the public participation aspect of the Convention in particular see J. Ebbeson, n. 5 above.


37. Ibid., Article 7, sentences 1–3.

38. Ibid., Article 7, sentence 4.

39. Ibid., Article 8.

40. Ibid., Article 6(1)(a).


42. See IPPC Directive, n. 32 above.

43. S. Stec and S. Casey-Lefkowitz, n. 15 above, at 92.

44. Convention, Article 6(1)(b).

45. The 1991 Espoo Convention also uses this term and defines it as ‘any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure. See 1991 Espoo Convention, Article 1(v).

46. Convention, Article 6(1)(c).


48. Convention, Article 6(2).

49. Ibid., Article 6(2)(a)–(e).

50. Ibid., Article 4(8) allows public authorities to levy a ‘reasonable charge’ for supplying information.

51. Ibid., Article 6(6).

52. Ibid., Article 6(3) and (4).

53. Ibid., Article 6(8).

54. Ibid., Article 6(9).
'programmes' and 'policies' are not defined in the Convention and thus leave room for interpretation. The object and purpose of the Convention combined with the scope of its Articles 6 and 8 suggest that Article 7 covers all political planning instruments not already covered by Articles 6 and 8, such as planning instruments with internal functions, which are binding only for the administration itself.57

Sentences 1–3 of Article 7 address public participation in the preparation of plans and programmes by public authorities. In this regard, parties are required to:

make appropriate practical and/or other provisions for the public to participate . . . within a transparent and fair framework, having provided the necessary information . . .58

and within ‘this framework Article 6(3), (4) and (8) shall be applied’.59 Thus, early participation of the public during the preparation of plans and programmes within reasonable timeframes and when all options are still open is required. Furthermore, parties shall ensure that due account is taken of the outcome of the public participation. The provisions concerning public participation in the preparation of policies in sentence 4 of Article 7 contain no such mandatory requirements. Rather, parties ‘shall endeavour’ to provide opportunities for public participation in the preparation of policies relating to the environment ‘to the extent appropriate’.60

Public Participation during the Preparation of Generally Applicable Legally Binding Normative Instruments Article 8 generally encourages the parties to promote effective public participation:

. . . during the preparation by the public authorities of executive regulations and other generally applicable legally binding rules that may have a significant effect on the environment.

Like the other public participation provisions, Article 8 only covers acts of the executive branch of government. As a guideline, it suggests three factors for effective participation: the fixing of time frames sufficient for public participation; ensuring the public availability of draft rules by publishing or other means; and giving the public the opportunity to comment on the draft rules, either directly or through representative bodies.51

THE THIRD PILLAR: ACCESS TO JUSTICE

It is the third pillar on access to justice which lends the Convention its teeth. Its provisions are set out in Article 9. Access to justice under the Convention applies primarily to the rights to access to information (Article 4) and to participation in decision making (Article 6). However, Article 9, ‘where so provided for under national law’, also applies to other relevant provisions and even recommends access to justice with regard to national provisions relating to the environment. Generally, judicial and administrative review procedures under Article 9 must be effective, timely and not prohibitively expensive.62 Injunctive relief shall be available where appropriate to provide an effective remedy63 and decisions must be in writing and publicly accessible. Furthermore, parties are encouraged to consider mechanisms for removing or reducing financial and other barriers to access to information.64

Access to Justice relating to Access to Environmental Information Article 9(1) requires parties to ensure access to a review procedure with regard to ‘any person’ who considers that their information request has not been handled in accordance with Article 4. Since any member of the public is entitled to make a request for environmental information in accordance with Article 4 without having to state an interest, standing to ensure access to environmental information is broad.

The review procedure has to take place before ‘a court of law or another independent and impartial body established by law’.65 In most EC Member States the review body will be a court. However, it can be any body which is ‘independent and impartial’ and ‘established by law’. This wording is the same as in the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)66 and the Universal Declaration of Human Rights,67 and as such can be construed similarly. In particular, ‘established

58 Convention, Article 7, sentence 1.
59 Ibid., Article 7, sentence 2.
60 Ibid., Article 7, sentence 4.
61 Ibid., Article 8(a)–(c).
62 Article 10 of the Universal Declaration of Human Rights reads: ‘Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal established by law’. See UNGA Res.217 (III), 10 December 1948.
63 Article 6 of the ECHR reads: ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. See ECHR, [1950] 213 UNTS 221.
64 Article 9. Access to justice under the Convention its teeth. Its provisions are set out in Article 9. Access to justice under the Convention applies primarily to the rights to access to information (Article 4) and to participation in decision making (Article 6). However, Article 9, ‘where so provided for under national law’, also applies to other relevant provisions and even recommends access to justice with regard to national provisions relating to the environment. Generally, judicial and administrative review procedures under Article 9 must be effective, timely and not prohibitively expensive. Injunctive relief shall be available where appropriate to provide an effective remedy and decisions must be in writing and publicly accessible. Furthermore, parties are encouraged to consider mechanisms for removing or reducing financial and other barriers to access to information.
65 Article 6 of the ECHR reads: ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. See UNGA Res.217 (III), 10 December 1948.
by law’ relates – as in the ECHR – not only to the establishment of the body itself, but also to its proceedings and its responsibilities.68 ‘The body needs to be quasi-judicial with safeguards to guarantee due process69 and independence from any branch of government or other influence. Criteria for independence are the process of nomination of the members, the duration of their terms of office, as well as safeguards against outside influences, notably a sufficient salary to reduce the risk of corruptibility.’70

Final decisions issued by the review body under paragraph 1 must be binding on the public authority holding the requested information. Where a court is in charge of the review procedure, parties must ensure a preliminary review procedure by a ‘public authority’ or another independent and impartial body. The latter has to be ‘expeditious’ and ‘free of charge or inexpensive’.71 In the EU, as in several countries of the UN/ECE region,72 an ‘ombudsman’ (or ‘ombudsperson’73 functions as a review body. If the ombudsman fulfils the above-mentioned criteria, he or she can be considered a review body in line with Article 9. If, however, the ombudsman’s decisions will be merely advisory – which, as with the Ombudsman of the EU, is almost always the case – the ombudsman cannot be considered a final review body within the meaning of Article 9(1).74

Access to Justice concerning Public Participation Article 9(2) provides a right to review with regard to public participation. The access to justice provisions in this regard are just as differentiated as the public participation provisions to which they relate,75 ranging from hard binding obligations to soft hortatory statements.

Subparagraph 1, alternative 1 of Article 9(2) provides for an obligatory review procedure for decisions made on projects or activities addressed by Article 6. Standing is granted to:

- members of the public concerned (a) having a sufficient interest or, alternatively, (b) maintaining impairment of a right where the administrative procedural law of a party requires this as a precondition.76

Both NGOs and other legal or natural persons form part of the ‘public concerned’. NGOs promoting environmental protection are deemed to have a sufficient interest or right capable of being impaired for the purposes of the above-mentioned standing requirements.77 With regard to all other potential applicants, the parties can determine within their national laws what constitutes a sufficient interest right. These requirements must be consistent ‘with the objective of giving the public concerned wide access to justice’.78 Appellants can challenge the substantive and the procedural legality of any ‘decision, act, or omission subject to the provisions of Article 6’. Access to justice with regard to ‘other relevant provisions of this Convention’, namely public participation in plans, programmes and policies (Article 7), public participation in the preparation of executive regulations and other generally applicable legally binding normative instruments (Article 8), is dealt with in subparagraph 1, alternative 2 of Article 9(2). Here, the parties have discretion – access to justice is only granted ‘where so provided for under national law’.

Access to Justice with regard to National (or Supra-National) Environmental Law Generally Article 9(3) contains the ‘soft’ recommendation that parties ensure that the public can challenge:

- acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

At first glance, this provision seems to imply that the public should be able to enforce any environmental law against both government and private entities. However, the direct enforcement of environmental norms in citizen actions is a concept quite alien to the UN/ECE region. It also stands out from the rest of the Convention. All other provisions of the Convention cover the relationship between members of the public and public authorities within the meaning of Article 2(2). None deal with relations between private entities. With regard to the object and purpose of the Convention, Article 9(3) must be interpreted as referring to the enforcement of environmental law through the public authority. It obliges the parties to – as a minimum – enable the members of the public (‘where they meet the criteria, if any, laid down in its national law’79) to challenge a public authority’s omission to act upon the information of another private entity’s violation of environmental laws.

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68 See for the interpretation of Article 6 of the ECHR: J. Frowein and W. Peukert, Europäische Menschenrechtskonvention (Engel Verlag, 1996), at 250.
69 S. Stec and S. Casey-Lefkowitz, n. 15 above, at 126.
70 J. Frowein and W. Peukert, n. 68 above, at 250.
71 Convention, Article 9(2), subpara. 2.
72 ‘Ombudsmen’ can be found particularly in the Nordic countries such as Denmark, Estonia, Finland, Norway and Sweden, but also in other countries like the Czech Republic and Hungary, Moldova and Spain.
73 In most cases this is an ‘ombuds-office’ rather than one single ombudsperson.
74 Convention, Article 9(2), subpara. 2, alternative 1. Also see discussion below.
75 Ibid., Articles 6–8.
THE AARHUS CONVENTION’S IMPLICATION FOR THE EC ‘INSTITUTIONS’

THE ‘INSTITUTIONS’ COVERED BY THE CONVENTION

Upon signature of the Convention, the EC made a statement underlining its commitment, declaring that:

[its] institutions will apply the Convention within the framework of their existing and future rules . . . in the field covered by the Convention.80

As already mentioned, the EC’s ‘institutions’ are by definition81 ‘public authorities’ for the purposes of the Convention and thus the addressees of most of its rights. But which are the ‘institutions’ referred to in the Convention and the EC declaration? Does the definition in Article 2(2)(d) refer to the term ‘institutions’ as it is used in the EC or is it a term in its own right? And which ‘institutions’ are exempt by the last sentence of Article 2(2) due to their ‘acting in a judicial or legislative capacity’?

For the purposes of the Convention, the term ‘public authorities’ is defined in Article 2(a)–(d). Article 2(a)–(c) contains a functional definition with regard to public authorities in the States that are parties to the Convention. Government bodies and other natural or legal persons qualify as public authorities if they have public administrative functions or responsibilities in relation to the environment. Article 2(d) defines ‘public authorities’ with regard to regional economic integration organizations that are parties to the Convention. Here, all of the ‘institutions’ of the regional economic integration organization – such as the EC – are deemed public authorities for the purposes of the Convention. The EC has several bodies82 which could qualify as ‘institutions’ for the purposes of Article 2(2)(d) and thus as ‘public authorities’. First of all, there are the five ‘institutions’ listed in Article 7(1) of the EC Treaty, namely the European Parliament, the Council, the Commission, the European Court of Justice (ECJ) and the Court of Auditors. Then there are the Economic and Social Committee,83 the Committee of the Regions,84 the European Investment Bank (EIB),85 and the European Central Bank (ECB).86

Furthermore, there is an ever-increasing plethora of other bodies, such as the – at present – 12 bodies or ‘European agencies’, inter alia, the European Environment Agency (EEA)87 in Copenhagen, with ‘public’ technical, scientific or managerial functions, and the European Police Office (EUROPOL),88 which could also qualify as ‘institutions’ for the purposes of the Convention.89

The term ‘institutions’ is not used consistently in the EC system. Sometimes it refers only to the five bodies listed in Article 7(1) of the EC Treaty and sometimes its usage includes all or varying numbers of the above-mentioned bodies or ‘institutions’. This inconsistency is prevalent in everyday language,90 as well as in the EC Treaty itself. The five ‘institutions’ listed in Article 7(1) of the EC Treaty are established under Chapter 1 (‘The Institutions’), of Title I (‘Provisions governing the Institutions’) of Part 5. The entire Part 5 of the EC Treaty carries the heading ‘Institutions of the Community’. Yet this heading also comprises chapters on the Economic and Social Committee (Chapter 3), the Committee of the Regions (Chapter 4) and the EIB (Chapter 5) of the EC Treaty. The same incoherence appears in other language versions of the EC Treaty, for example the French, the Spanish and the German versions. The ECB differs from the other bodies in that it is not established under Title I of Part 5, but under Title VII of Part 3 of the EC Treaty, dealing with economic and monetary policy. Yet, like the EIB, the ECB has a distinct legal personality. The main difference with regard to the European agencies is that they are not established by the EC Treaty but by secondary legislation, while EUROPOL is established by a Treaty between the EC Member States.91

80 For the full text of the declaration see the website available at <http://www.unece.org/env/pp/ctreaty.htm>
81 Convention, Article 2(2)(d).
82 The term ‘body’ is used in this chapter as the header for all EC bodies and institutions.
83 EC Treaty, Articles 257–262.
84 Ibid., Articles 263–265.
85 Ibid., Articles 266–267.
86 Ibid., Article 107.
89 The White Paper proposed the establishment of a European Food Authority, a maritime Safety Agency and an Air Safety Agency. See White paper, n. 9 above, at 24.
90 See, for example, the website of the EU available at <http://europa.eu.int/index_en.htm>. Under the heading ‘Institutions, Agencies and other bodies’, the website lists the European Parliament, the Commission, the Council, the ECJ, the Court of Auditors, the Economic and Social Committees, the Committee of the Regions, the EIB, the ECB, the Ombudsman, and even the European Investment Fund (EIF) under the subheading ‘Institutions’. At another EU website, available at <http://europa.eu.int/news-en.htm>, all of the above except for the EIF are listed as ‘institutions’. However, instead of the EIF, the latter website lists the ‘EU Presidency’ as an additional ‘institution’.
91 See, 1995 EUROPOL Convention, n. 88 above.
The term ‘institutions’ in Article 2(2)(d) has a functional meaning. It does not refer to the term ‘institutions’ in EC terminology. One obvious reason for this is that there is no fixed meaning of the term in EC terminology. Another argument for Article 2(2)(d) containing a functional definition is that it is informed by the preceding Article 2(2)(a)–(c). Since the EC system differs from State systems, and, in particular, does not feature a ‘government’, an equivalent term had to be found which would nonetheless ensure that the regional economic integration organizations that are parties to the Convention fulfil the same obligations as the individual States that are parties to the Convention. Also, while the EC is the only regional economic integration organization that has signed the Convention – and indeed at present the only regional economic integration organization that could become a party to it\textsuperscript{93} – other regional economic integration organizations fulfilling the criteria for accession\textsuperscript{94} could constitute themselves in the UN/ECE region in the future. Only a functional definition of the term ‘institutions’, and thereby of the term ‘public authorities’ in Article 2(2)(d), can account for this accession possibility. The term ‘institutions’ thus refers to all bodies in a regional economic integration organization – and thus in the EC – fulfilling public administrative functions. However, ‘institutions’ or bodies ‘acting in a judicial or legislative capacity’ are excluded as ‘public authorities’.\textsuperscript{95} The ECJ can therefore a priori not be considered a ‘public authority’. With regard to other EC ‘institutions’ it is more difficult to ascertain due to the lack of a clear legislative–executive dichotomy within the EC. While the Council, the Committee of Regions, and the Economic and Social Committee frequently act as legislators, this is not always the case.\textsuperscript{96} Here again, a functional approach has to be taken, ascertaining on a case-by-case basis which function the body in question is carrying out with regard to the issue at hand. The Council, the Committee of the Regions, and the Economic and Social Committee, as well as any other ‘institutions’ within the meaning of Article 2(2)(d), thus qualify as ‘public authorities’ for the purposes of the Convention when they are not acting in a legislative capacity (along with the Commission and the European agencies, which are the most obvious candidates for the role of ‘public authority’).

\textbf{ACCESS TO ENVIRONMENTAL INFORMATION}

In EC Member States, access to environmental information is regulated through the Information Directive and ensuing legislation. The principle of transparency within the EC, which includes access to information to the documents of the European Parliament, the Council and the Commission, is regulated through Article 255 of the EC Treaty.\textsuperscript{97} The concrete legal obligations derived from this principle are set out in the EC Regulation regarding Public Access to European Parliament, Council and Commission Documents of 30 May 2001 (the Transparency Regulation).\textsuperscript{98} The Transparency Regulation covers information from all policy areas held by the Commission, the Council and the Parliament.\textsuperscript{99} With regard to this information, it stipulates a right to access to information, provides for exceptions and contains obligations concerning the active dissemination of information. The main difference between the Transparency Regulation and the Convention is that the Regulation covers only documents held by the Commission, the Council and the Parliament.\textsuperscript{100} Other bodies that qualify as ‘institutions’ under the Aarhus Convention are not covered by the Transparency Regulation. Neither is there, at present, any other legal obligation in EC law to guarantee access to environmental information held by these ‘institutions’.\textsuperscript{101} Other bodies and institutions

\textsuperscript{92} Convention, Article 2(2)(a).
\textsuperscript{93} According to Article 17, the Convention was open for signature only to ‘regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their Member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters’, and according to Article 19 the Convention, is ‘open for accession from 22 December 1998 by the States and regional economic integration organizations referred to in Article 17’.
\textsuperscript{94} Ibid., Article 2(2).
\textsuperscript{95} For example, the Council acts in a legislative capacity when it makes regulations and issues directives in accordance with the procedure foreseen by the EC Treaty. Yet, it increasingly exercises executive functions and, Article 202 of the EC Treaty foresees these executive powers explicitly (Article 202 states: ‘The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself’).
accord access to information on a merely discretionary basis, and the EEA does so on a regular basis, as it is indeed part of its mandate. The Convention is also slightly broader in scope than the Transparency Regulation as far as the beneficiaries of the information rights are concerned. It grants access to information regardless of a person’s nationality or place of residence, whereas under the Transparency Regulation only EU citizens or natural or legal persons residing or registered in a Member State are entitled to information. Persons who do not fulfil these requirements may be granted access to information, but have no such right under the Transparency Regulation.

Both instruments contain similar exceptions regarding public interests, including military and defence matters and international relations, the privacy and integrity of individuals, and commercial interests. However, the Transparency Regulation also excludes the entire sector of ‘financial, monetary or economic policy of the Community or a Member State’. This exception is incompatible with the Convention insofar as such information is relevant to the environment. With regard to third party documents, the Transparency Regulation contains a general obligation to consult the third party unless it is clear that the information ‘shall or shall not be disclosed’. Third parties are defined as ‘Member States, other Community or non-Community institutions and bodies and third countries’. Under the Transparency Regulation, a Member State may also request not to disclose a document originating from that Member State without its prior agreement. Article 9 of the Transparency Regulation provides for special treatment for information requests pertaining to so-called ‘sensitive documents’ to ensure the confidentiality of information which falls under the already listed exceptions. The special treatment might lead to delays in submitting the requested information, but not to more restrictive access to environmental information than under the Convention.

Overall, the existing Community legislation concerning access to information already corresponds to the requirements of the Convention. Still, in order to comply fully with the Convention’s requirements, some changes are necessary. In particular, access to environmental information needs to be granted by all Community bodies qualifying as ‘institutions’ under the Convention and the general exception for the financial, monetary and economic policy sector needs to be amended as far as environmental information is concerned.

PUBLIC PARTICIPATION

Public Participation in Decisions on Specific Activities Implementing the Convention’s public participation requirements into EC law is one of the biggest challenges in fulfilling the requirements of the Convention. At the outset, it is far from obvious to what extent Article 6 is applicable at the EC level at all. This depends on whether decisions on ‘proposed activities’ covered by Article 6 are made at the EC level. Decisions permitting activities covered by Article 6(1)(a) and Annex I, where public participation is mandatory, such as granting consent for constructing thermal power stations, are not made at the EC level. Rather, these decisions are made at the Member State level. Nonetheless, many decisions at the EC level permitting activities, such as granting funding for Annex I activities, may be significant and, in some cases, even decisive. Yet, the wording of Article 6(1)(a) ‘to permit’ does not cover public participation relating to decisions relevant to, but not directly permitting, these activities.

Decisions at the EC level which influence the granting of permission for Annex I activities indirectly and which are not covered by Article 6(1)(a) might, like numerous other decisions made by EC ‘institutions’ that have a significant effect on the environment, be covered by Article 6(1)(b). The latter provision doubtlessly applies to decisions occurring in the sphere of environmental policy, such as decisions authorizing the EC-wide marketing of a genetically modified product or fixing criteria for product groups under the eco-labelling scheme. A broad interpretation of Article 6(1)(b) would imply that any decision relating to a proposed activity which may have a significant effect on the environment should be subject to the requirements of Article 6, regardless of whether the proposed activity is directly or indirectly influenced by the decision. Such an interpretation would follow primarily from the omission of

102 EEA Regulation, Article 2(xii).
103 Transparency Regulation, Article 2(1).
104 Ibid., Article 2(2).
105 Ibid., Article 4(1)(a).
106 Ibid., Article 4(1)(b).
107 Ibid., Article 4(1)(a).
108 Ibid., Article 4(1)(a), fourth indent.
109 Ibid., Article 4(1)(a).
110 Ibid., Article 3(b).
111 Ibid., Article 4(5).
112 According to Article 9(1) of the Transparency Regulation these are ‘documents originating from the institutions or the agencies established by them, from Member States, third countries or International Organizations, classified as “très secret/top secret”, “secret” or “confidential”… which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defence and military matters’.

the words ‘to permit’ in Article 6(1)(b), which were included in Article 6(1)(a) and the object and purpose of the Convention providing for broad public participation. It could cover all types of activities not listed in Annex I, including decisions to set up advisory committees, or decisions under the EC Treaty’s competition provisions relating to state aid, and might even cover activities relevant to the permission of activities listed in Annex I of the Convention, like the granting of funding. A more restrictive interpretation would only cover decisions permitting proposed activities similar to those in Annex I, such as projects not listed there. It would also exclude decisions in the decision-making chain that refer to proposed activities covered by Annex I and thus already dealt with under Article 6(1)(a). The EIA Directive, which served as a model by Annex I and thus already dealt with under Article 6(1)(a) and the object and purpose of the Convention and a practicable solution to permit proposed activities which may have a significant effect on the environment takes such a narrow approach. It includes an Annex II, which lists projects for which an EIA must be carried out on a case-by-case basis ‘where Member States consider that their characteristics so require’. This Annex II of the EIA Directive, like Annex I of the Convention, includes only specific projects and not other types of activities which may have significant effects on the environment. However, the wording of the EIA Directive refers to ‘projects’ instead of ‘activities’. The latter wording is used in the Convention.

A viable interpretation must strike a balance between broad public participation in line with the object and purpose of the Convention and a practicable solution taking account of the plethora of decisions affecting environmentally relevant activities. This difficulty is particularly apparent when applying the Convention’s requirements to the EC ‘institutions’. Unlike the decisions of any other signatory or party to the Convention, the effects of decisions made by EC ‘institutions’ will always manifest themselves in the environment of one or more Member States. Equally, most EC decisions will relate to activities for which another decision will be made by a Member State. In the EU, the proposed activity and its effects on the environment will almost always be the product of a process involving two or more parties to the Convention at different levels in decision-making hierarchies. An interpretation should thus avoid duplication of public participation while at the same time ensure that all relevant activities are covered and that public participation does not become a mere formality. Excluding decisions relating to the ‘proposed activity’ will only indirectly provide a viable solution in most cases. Still, the criteria for determining which decision influences the proposed activity most directly in case of a decision-making hierarchy should not be limited to the decision ‘closest’ to the activity in the decision-making chain. In some cases the influence of a decision on the proposed activity may be so overwhelming that it should be taken into account – especially when the ‘closest’ or ‘most direct’ decision on the proposed activity amounts to nothing but a formality and is therefore no ‘real’ decision. This approach is not new. In relation to plans and programmes at the Member State level, Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (the SEA Directive) stipulates in Article 3(4) that:

[w]here plans and programmes form part of a hierarchy, Member States shall, with a view to avoiding duplication of the assessment, take into account the fact that the assessment will be carried out, in accordance with this Directive, at different levels of the hierarchy.

This principle could also be applied to decisions relating to particular activities and encompassing the EC and the Member State levels. It should, therefore, be possible to develop a formula including all levels without circumventing the Convention’s obligations, but also without duplicating public participation to an extent that blocks decision making.

Public Participation in the Preparation of Plans and Programmes Sentences 1–3 of Article 7 introduce a legally binding public participation requirement for a substantive number of plans and programmes, including the EC environmental action programmes. However, Article 7 covers not only plans and programmes in the environmental sector, but also those in other sectors such as transport, energy, industry, fisheries and tourism, as long as the particular plan or programme relates to the environment. The problem, once again, lies in developing criteria for selecting, first of all, which activities qualify as a ‘plan’ or ‘programme’, and subsequently which of these plans and programmes relate to the environment. The words ‘plan’ and ‘programme’ provide a first indication. Yet, all activities which fulfil the same functions as plans and programmes are covered by Article 7. With regard to whether plans and programmes relate to the environment, the SEA Directive, again, may provide some guidance. The Directive covers plans and programmes prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism,

114 EC Treaty, Article 87.
115 EIA Directive, Article 4(1).
116 Ibid., Article 4(2).
117 Ibid., Article 4(2).
118 Convention, Article 6(1)(b) and (c).

town and country planning or land use if they set the framework for future development consent of projects which are listed in Annexes I and II to the EIA Directive, as well as plans which require an assessment due to their likely effect on areas designated as special conservation areas pursuant to EC Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora. Its scope is thus not restricted to plans and programmes drafted in the environmental sector, but is determined by the effects of plans or programmes on the environment.

As illustrated above, the SEA Directive has taken account of the problem of decision-making hierarchies regarding plans and programmes at the Member State level. Since the same problems apply in the decision-making hierarchies involving the EC and its Member States, the same approach should be taken at this level (as was proposed for decisions concerning specific activities relating to the environment).

Public Participation in the Preparation of Policies and Generally Applicable Legally Binding Normative Instruments

The Convention does not set out obligations with regard to environmental policies and generally applicable legally binding normative instruments. Instead, it proposes guidelines for effective public participation in their preparation. There is thus no immediate necessity to introduce new legislation in order to comply with the Convention in this respect. The non-binding instruments and activities proposed in the Commission's White Paper on Governance, which aims to enhance openness, participation, accountability, effectiveness and coherence, would suffice to fulfil the obligations of the Convention set out in sentence 3 of Article 7 and in Article 8. The Commission's White Paper proposes to intensify the pursuit of public and expert views through consultation and public hearings and, generally, to reinforce consultation and dialogue on EU policies. For this purpose, it suggests, inter alia, that codes of conduct containing minimum standards for consultation, which focus on the topics and modalities of consultation (‘when, whom and how to consult’), should be drawn up. The guidelines set out in the Convention with regard to time frames, publicity and commenting opportunity could provide some guidance.

ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

There are several possibilities for members of the public to challenge EC measures. They can bring the case to the ECJ, send a petition to the European Parliament or complain to the EC Ombudsman. However, neither the European Parliament nor the Ombudsman can issue binding decisions. They therefore do not qualify as review bodies under the Convention. The prime responsibility for ensuring the legality of EC measures lies with the ECJ (including its court of first instance). The ECJ is also the only review body which can issue binding decisions for other EC ‘institutions’. According to Article 230 of the EC Treaty the ECJ can review the legality of acts by the Council, the European Parliament, the Commission and the ECB which have binding force or produce binding effect. Members of the public can challenge these acts as non-privileged actors if they fulfil the requirements of Article 230(4) of the EC Treaty. The conformity of the present EC law with the Convention depends on whether Article 230(4) of the EC Treaty allows for standing of natural and legal persons, in particular NGOs that meet the minimum requirements of Article 9.

Access to Justice to Challenge Decisions concerning Requests for Environmental Information

The ECJ is already competent for actions challenging a negative decision, such as a total or partial refusal of the Commission, the Council, or the European Parliament to grant access to environmental information. This follows immediately from Article 230(4) of the EC Treaty since such a decision will be addressed directly to the applicant requesting the information. The right to institute court proceedings against negative decisions by the Commission, the Council, or the European Parliament regarding requests for environmental information is also stipulated in Article 8 of the Transparency Regulation along with the possibility to complain to the Ombudsman.

121 Convention, Article 8.
122 See White Paper, n. 9 above.
123 Ibid., at 5 and 16.
124 Ibid.
125 Convention, Article 8(a)–(c).
126 The court of first instance decides over actions of natural or legal persons in accordance with Article 230(4) of the EC Treaty.
127 EC Treaty, Article 21.
128 Ibid., Article 195.
129 Nonetheless, during the negotiation of the Convention, Denmark, Finland, Norway and Sweden made an ‘interpretative statement’ about the ombudsman institution to the effect that it corresponds with the requirements of the Convention. See S. Stec and S. Casey-Lefkowitz, n. 15 above, at 127.
130 Article 230(4) of the EC Treaty reads: ‘Any natural or legal person may . . . institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or decision addressed to that person or against a decision, which, although in the form of a regulation or decision addressed to another person, is of direct and individual concern to the former’. 

negative request by any other EC institution or body, which qualifies as a public authority under the Aarhus Convention, can also be challenged before the ECJ. The ECB is listed explicitly by Article 230 of the EC Treaty as one of the institutions against whose decisions an action is possible under Article 230(4). Other EC institutions or bodies are not listed in Article 230(4); however, the ECJ has ruled in the past that the list in Article 230 of the EC Treaty is not exhaustive and that an action against other EC institutions and bodies is not excluded under the EC Treaty.\footnote{See ECJ 23 April 1986, Case 294/83, Partie écologistes ‘Les Verts’ v. European Parliament (hereinafter the Les Verts Case), \citeyear{ECR 1339}, where the ECJ decided – at a time when the European Parliament was not yet listed in Article 230(1) of the EC Treaty – that the list in Article 230(1) of the EC Treaty was not exclusive and that the Court, in accordance with the principle of the rule of law, must be competent to consider actions brought against institutions not listed in Article 230 of the EC Treaty.} Also, regulations can stipulate that actions against decisions by agencies and other bodies can be brought before the ECJ.\footnote{For example, Article 63 of Council Regulation 40/94/EC of 20 December 1993 on the Community trademark, \citeyear{OJ L11/1}, provides for an action against decisions of the Office of the Community Trademark.} In view of its past jurisprudence\footnote{For example, the cases of Firma Plaumann & Co KG v. Commission, \citeyear{ECR 1853}; ECJ 16 May 1991, Case 358/89, Les Verts v. European Parliament \citeyear{ECR 1339}, where the ECJ decided – at a time when the European Parliament was not yet listed in Article 230(1) of the EC Treaty – that the list in Article 230(1) of the EC Treaty was not exclusive and that the Court, in accordance with the principle of the rule of law, must be competent to consider actions brought against institutions not listed in Article 230 of the EC Treaty.} and the principle of the rule of law, the ECJ is likely to grant standing for all actions challenging decisions of EC ‘institutions’ to deny access to environmental information – even if these ‘institutions’, like, for example, the EEA, are not listed in Article 230(4) of the EC Treaty. Still, the safest and most transparent way to guarantee standing would be to explicitly stipulate the possibility of such actions in a specific regulation concerning all aspects of access to environmental information.

**Access to Justice concerning Public Participation in Environmental Matters as well as Other Acts and Omissions relating to the Environment** Subparagraph 1, alternative 1 of Article 9(2) provides a legally binding obligation on parties to introduce review procedure for decisions on projects or activities addressed by Article 6.\footnote{For example, Article 63 of Council Regulation 40/94/EC of 20 December 1993 on the Community trademark, \citeyear{OJ L11/1}, provides for an action against decisions of the Office of the Community Trademark (hereinafter the Internal Market (OHIM) before the European Court of Justice.} The conformity of EC law with this obligation depends mainly on the interpretation of Article 6 and its implementation in the EC. The ECJ has in the past allowed standing under Article 230(4) of the EC Treaty where applicants claimed that procedural rights granted under the EC Treaty or secondary legislation had been violated.\footnote{For example, the Les Verts Case, n. 131 above.} Associations have been accorded standing by the Court in cases where their members were concerned, the association’s rights were disturbed, or the associations have been granted procedural rights.\footnote{See ECJ 24 October 1983, Case 191/82, EEC Seed Crushers’ and Oil Processors’ Federation (Fedil) v. Commission, \citeyear{ECR 2913} (hereinafter Fedil) and ECJ 20 March 1985, Case 264/82, Timex Corporation v. Council and Commission, \citeyear{ECR 849} (hereinafter Timex).} Businesses are granted procedural rights by the EC Treaty and EC regulations, such as in the areas of anti-dumping,\footnote{See, for example, ECJ 15 July 1963, Case 52/62, Firma Plaumann & Co., Hamburg v. Commission, \citeyear{ECR 1853}; ECJ 16 May 1994, Case 309/93, Cordoniu, \citeyear{ECR 1875}, which also provides an overview to the ECJ’s jurisprudence in this area at paras. 160.} competition,\footnote{See, for example, ECJ 25 October 1977, Case 267/76, Metro-SB-Großmärkte GmbH & Co KG v. Commission, \citeyear{ECR 1875}.} and state aids.\footnote{See, for example, ECJ 28 January 1986, Case 169/84, Compagnie Francaise de l’Azote (COFAZ) SA v. Commission, \citeyear{ECR 391}.} At present no such procedural rights exist for environmental associations or citizens with regard to environmental matters. The introduction of procedural rights, which are in conformity with Article 6 of the Convention, into EC law thus may lead to the ECJ according standing in environmental matters in cases where these procedural rights are violated. Currently, the public, as a general rule, would not have standing to challenge the above-mentioned EC decisions before the ECJ. Members of the public, be they individuals or associations, will regularly not be the addressees of decisions (or other measures) with environmental relevance and would, therefore, have to be directly and individually concerned by them (Article 230(4) of the EC Treaty). The ECJ has developed an extensive jurisprudence for the test of direct and individual concern. A decision concerns the applicant directly in cases where it has an immediate effect on his legal situation. Decisions by Member States to implement an EC decision or other measure regularly lead to EC decisions not directly concerning an applicant. The only exception to this rule is if the Member States have no discretion in making their decision. Since many EC decisions relating to environmental matters form part of a decision-making hierarchy, they regularly do not concern the applicants directly.

According to the ECJ’s current interpretation, the second test of Article 230(4) relating to individual concern requires that the decision affect the applicants:

by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are different from all other persons and by virtue of these factors...
distinguishes them individually just as in the case of the person addressed [so-called Plaumann formula].141

In particular, it does not suffice if the persons concerned can be identified by abstract, objective criteria or circumstances. In the Greenpeace Case142 where the applicants challenged the Commission’s decision to fund two thermal power stations in Spain for which no sufficient environmental impact assessment had been carried out, the ECJ’s court of first instance stated in this respect that:

the existence of harm suffered or to be suffered cannot alone suffice to confer locus standi on an applicant, since such harm may affect, generally and in the abstract, a large number of persons who cannot be determined in advance in a way which distinguishes them individually in the same way as the addressee of a decision.143

This interpretation was confirmed by the ECJ upon the appeal of the Greenpeace Case.144 However, the ECJ might be on the brink of changing its restrictive attitude towards individual concern. In the recent Opinion in Union de Pequenos Agricultores, Advocate General Jacobs pointed to the paradoxical consequences of the ECJ’s interpretation of individual concern, namely that the greater the number of persons affected by an EC measure, the less likely it is that access to justice under Article 230(4) of the EC Treaty is available.145 Advocate General Jacobs proposed a new interpretation of the notion of individual concern, dependent on whether a measure has or is likely to have substantial adverse effects on the applicant’s interests.146 In a different case,147 which is, at present, still subject to appeal before the ECJ, the court of first instance takes a similar approach.148 It thus remains to be seen whether the ECJ will broaden its approach to individual concern under Article 230(4) of the EC Treaty.

Concerning the review of public participation in the preparation of plans and programmes, policies, and legally binding normative instruments (Articles 7 and 8) the Convention merely stipulates that parties shall ensure access to justice for members of the public concerned ‘where so provided for under national law’.149 In addition, Article 9(3) provides that members of the public shall have the possibility to ‘challenge acts and omissions’150 contravening general (EC) environmental law; however, this only applies where they meet the criteria, if any, laid down in EC law. It is thus up to the EC to decide whether it wishes to provide access to justice in these areas and under which criteria this access should be granted to members of the public. In case it does decide to provide access in these areas, the above-mentioned concerns regarding the interpretation of Article 230(4) of the EC Treaty are even more relevant. However, it is hardly conceivable that such access to justice to the ECJ is likely under the ECJ’s current interpretation of Article 230(4) of the EC Treaty.

CONCLUSION

The application of the Aarhus Convention to the EC ‘institutions’ will prove an ambitious venture. While existing EC legislation relating to access to information is largely in conformity with the Convention and the remaining adjustments can be achieved relatively easily, complying with the second and third pillars of the Convention will prove more challenging. Implementing the Convention’s obligations concerning public participation and access to justice in a multi-level system such as the EC requires taking account of the intricate interplay of the different levels in the decision-making process. For this purpose, the relevance of decisions made at every level (local, national, supranational) has to be assessed not only with regard to the level at which the decision is made, but also with regard to the multi-level system as a whole. Only then can public participation be granted where it is most valuable and effective, and judicial review carried out where it is most appropriate. Unfortunately, this approach is more easily set out in theory than carried out in practice. The field of application of these obligations exacerbates the complexity of the task. The environment is a cross-sectoral field, while both the Convention and the EC Treaty take integrative

141 Plaumann, ibid., at para. 9.
142 See Case T-585/93 Greenpeace and Others v. Commission, n. 113 above; and see Case C-321/95P Greenpeace and Others v. Commission, n. 113 above.
143 Case T-585/93 Greenpeace and Others v. Commission, ibid., at 2228.
144 Case C-321/95P. Greenpeace and Others v. Commission, n. 113 above.
146 Ibid., at para. 60, where the Advocate General states that ‘a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has or is liable to have a substantial adverse effect on his interests’.
149 Convention, Article 9(2), subpara. 2, alternative 2.
150 Convention, Article 9(3),
approaches. The implementation of the Convention's obligations will have to be 'integrative' in two ways. First, it has to – vertically – take account of the different levels of the decision-making process and how each of them affects the final outcome of the decision. Second, it must – horizontally – take account of how decisions and activities in different sectors affect the environment. It remains to be seen, how the EC will master this challenge.