7 Defining the Role of the Aarhus Convention as Part of National, International and EU Law

Conclusions of a Case-Law Analysis

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Keywords
Aarhus Convention, principle of public participation, protection of the environment, environmental issues before national (constitutional) courts, direct applicability

Abstract
As a basic point of reference in international law the Aarhus Convention has a considerable impact on the framework of public participation in environmental matters. The fact that the Convention forms part of national legal orders of EU Member States both as part of international and EU law, the proper enforcement of its provisions makes it inevitable to draw up certain principles of interpretation. The current paper aims to analyze how the Aarhus Convention appears at the level of legal argumentation in the case-law of the CJEU and selected national constitutional courts or high courts of EU Member States, namely, Germany, France and Hungary. Those decisions are examined that refer directly and explicitly to the Aarhus Convention. The case-law analysis is completed by the reference to the relevant secondary literature. The findings can provide a synthesis about the role of the Aarhus Convention, thematic milestones can be drawn up concerning the interpretation of the obligations stemming from the Convention and they can give useful insights into the relationship of national laws, EU law and international law. Meanwhile, they contribute to the analysis of the role of civil participation in the protection of the environment. This way, the conclusions can support the emergence of a (more) general approach in EU Member States as far as public participation in environmental matters is concerned.

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7.1 Introduction

> "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 is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

The goals[1] defined in Principle 10 of the Rio Declaration[2] have been further elaborated on in the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998 (Aarhus Convention or Convention).[3] It is, however, only one of the references to the importance of public participation in environmental matters at the level of international law. Further relevant phenomena are the following: *(i)* On 4 March 2018, the countries of the Latin American and Caribbean region adopted the Escazú Convention as a regional agreement on public participation in environmental matters.[4] *(ii)* In the Budva Declaration, on 15 September 2017, parties to the Aarhus Convention confirmed that the participation by stakeholders may considerably contribute to achieving the aims of sustainable develop-

1 "Parties shall cooperate in taking measures, as appropriate, to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement." The wording of Article 12 of the Paris Agreement and the document as a whole proves the same approach. *See* the Paris Agreement adopted at the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, at https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf.

2 Rio Declaration on Environment and Development (1992), at www.unesco.org/education/pdf/RIO_E.PDF.

3 United Nations Economic Commission for Europe (UNECE), *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* done at Aarhus, Denmark, on 25 June 1998, at www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf.

4 Economic Commission for Latin America and the Caribbean, *Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean.* Adopted at Escazú, Costa Rica, on 4 March 2018, at https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf.

ment.[5] *(iii)* The Strategic Plan of the Aarhus Convention[6] foresees as a primary goal to work towards full implementation of the Convention by each Party where this has not already been achieved, to encourage and support its use by the public and to increase the impact of the Convention by increasing the number of Parties. *(iv)* The CJEU interpreted several times[7] the access to justice rights of stakeholders and these decisions obtained a high level of media attention in cases related to the protection of the environment.[8] *(v)* Recognizing these problems the European Commission issued a Notice on access to justice in environmental matters in summer 2017.[9] *(vi)* Legal standpoints of the Council of the European Union and the Compliance Committee of the Aarhus Convention show certain ruptures as regards the implementation of the Aarhus Convention in EU law.[10] Furthermore,

5 *Budva Declaration on Environmental Democracy for Our Sustainable Future, ECE/MP.PP/2017/ CRP.3--ECE/MP.PRTR/2017/CRP.1*, at www.unece.org/fileadmin/DAM/env/pp/mop6/in-session_docs/ECE.MP.PP.2017.CRP.3-ECE.MP.PRTR.2017.CRP.1_EN.pdf. *Governments and stakeholders strengthen commitment to environmental democracy as driver of sustainable development at Budva meetings*, at www.unece.org/info/media/presscurrent-press-h/environment/2017/governments-and-stakeholders-strengthen-commitment-to-environmental-democracy-as-driver-of-sustainable-development-at-budva-meetings/doc.html.

6 '*The current Strategic Plan of the Aarhus Convention was adopted by the Meeting of the Parties at its fifth session, held in Maastricht, Netherlands on 30 June – 1 July 2014, through Decision V/5 on the Strategic Plan for 2015-2020*', at www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/areas-of-work/current-work-programme-and-strategic-plan/strategic-plan-2015-2020.html, *see* the Strategic Plan at www.unece.org/fileadmin/DAM/env/pp/mop5/Documents/Post_session_docs/Decision_excerpts_in_English/Decision_V_5_on_the_Strategic_Plan_for_2015%E2%80%932020.pdf.

7 *E.g.* Judgment of 19 December 2013, *Case C-279/12, Fish Legal and Emily Shirley v. Information Commissioner and Others*, ECLI:EU:C:2013:853; Judgment of 11 April 2013, *Case C-260/11, The Queen, on the application of David Edwards and Lilian Pallikaropoulos v. Environment Agency and Others*, ECLI:EU:C:2013:221; Judgment of 13 January 2015, *Joined Cases C-404/12 P and C-405/12 P, Council of the European Union and European Commission v. Stichting Natuur en Milieu and Pesticide Action Network Europe,* ECLI:EU:C:2015:5.

8 *E.g.* concerning the judgment of the CJEU in joined cases C-404/12 P and C-405/12 P: '*ECJ rulings a setback for environmental democracy*' at www.clientearth.org/press-release-ecj-rulings-setback-environmental-democracy/; '*European Court of Justice blocks NGOs' access to court*' at https://gmwatch.org/en/news/archive/2015-articles/15896-european-court-of-justice-blocks-ngos-access-to-court.

9 Commission Notice on Access to Justice in Environmental Matters, C (2017) 2616 final.

10 The Compliance Committee concluded in the case ACCC/C/2008/32 that EU law does not comply with the requirement of access to justice of the public; neither the relevant legal provisions, nor the case-law of the CJEU ensure the implementation of the relevant provisions of EU law. *See* the findings and recommendations of the Compliance Committee at www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/Findings/C32_EU_Findings_as_adopted_advance_unedited_version.pdf, para. 123. On contrary, the Council stressed the specific features of EU law. In the explanatory memorandum to the Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention regarding compliance case ACCC/C/2008/32 [Brussels, 29 June 2017, COM(2017) 366 final, 2017/0151 (NLE)] contained a statement that "[t]he findings of the Compliance Committee case (ACCC/C/2008/32) are problematic for the EU because the findings do not recognize the EU's special legal order." However, the adopted version contains a softer formulation as follows: "The Union should explore ways and means to comply with the Aarhus Convention in a way that is compatible with the fundamental principles of the Union legal order and with its system of judicial review." At the same time, it stressed that the Council cannot give instructions or make recommendations to the Court of Justice of the European concerning its judicial activities. [Council Decision (EU) 2017/1346 of 17 July

the evaluation of the situation demonstrates the different approach from the side of both the Council and the European Commission.[11] Therefore, the interpretation of the Aarhus Convention has become a significant topic affecting both EU law, international law and their relation to national laws as well.

As these examples show, the question of public participation in environmental matters, with special regard to the provisions of the Aarhus Convention, are equally substantial questions at the level of legal regulation and political cooperation.

Instead of providing a description of the Aarhus Convention or an overall analysis of its implementation,[12] the current paper aims to analyze how the Aarhus Convention appears at the level of legal argumentation in the case-law of the CJEU and selected national constitutional courts or high courts of EU Member States, namely, Germany, France and Hungary.[13] Those decisions are examined that refer directly and explicitly to the Aarhus Convention. The countries examined and the EU are parties to the Convention; therefore, the findings can provide a synthesis about the role of the Aarhus Convention at the level of EU law and national laws, thematic milestones can be drawn up concerning the interpretation of the obligations stemming from the Convention and they can give useful insights into the relationship of national laws, EU law and international law. Meanwhile, they contribute to the analysis of the role of social responsibility in the protection of the

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2017 on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention as regards compliance case ACCC/C/2008/32.].

11 Statement by the Commission: Draft Council Decision on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention regarding compliance case ACCC/C/2008/32, Brussels, 17 July 2017, 2017/0151 (NLE) at http://data.consilium.europa.eu/doc/document/ST-11194-2017-ADD-1-REV-1/en/pdf.

12 Suzanne Kingston (ed.), *European Perspectives on Environmental Law and Governance*, Routledge, Abingdon, 2013; Jane Holder & Maria Lee, *Environmental Protection, Law and Policy: Text and Materials*, Cambridge University Press, Cambridge, 2007, pp. 85-134; Maria Lee, *EU Environmental Law, Governance and Decision-Making*, Hart Publishing, Oxford-Portland, 2014, pp. 182-202; Gyula Bándi (ed.), *Environmental Democracy and Law*, Europa Law Publishing, Amsterdam, 2014; Joana Mendes, *Participation in EU Rule-making: A Rights-Based Approach*. Oxford University Press, Oxford, 2011; Carol Harlow *et al., Research Handbook on EU Administrative Law*, Edward Elgar Publishing, Cheltenham, 2017, pp. 551-557; Attila Pánovics, *Az Aarhusi egyezmény és az Európai Unió*, IDResearch Kft. – Publikon, Pécs, 2015; Gyula Bándi *et al., Az Európai Bíróság környezetjogi ítélkezési gyakorlata*, Szent István Társulat, Budapest, 2008.

13 The Compliance Committee of the Aarhus Convention analyzed besides the EU, certain aspects of the implementation of the Aarhus Convention in Germany (Decision V/9h on compliance by Germany with its obligations under the Convention, ECE/MP.PP/2014/2/Add.1; Compliance by Germany with its obligations under the Convention, ECE/MP.PP/2017/40, 2 August 2017), France (Findings with regard to communication ACCC/C/2007/22 concerning compliance by France, ECE/MP.PP/C.1/2009/4/Add.1, 8 February 2011) and Hungary (Findings and recommendations with respect to compliance by specific parties, Hungary, ECE/MP.PP/2005/13/Add.4, 11 March 2005). However, both the scope and the date of these analyses are different; they do not go into details concerning the specific situation of national law obligations with respect to EU law. Furthermore, the main focus of the current paper is the case-law of the CJEU and national courts; therefore, the conclusions of the Compliance Committee will not be elaborated on in detail in the following.

environment. This way, the conclusions can support the emergence of a (more) general approach at the levels of national law, EU law and international law as far as public participation in environmental matters is concerned.

7.2 Theoretical Framework

The general starting point of this analysis is the role of public participation in environmental matters, since it provides for the most general interpretative framework of the Convention. This concept is inherently linked to the requirement of public involvement in legislative processes, which has become a general principle of a democratic state governed by law.[14] Firstly, because it is corollary to the right of every citizen to take part in the conduct of public affairs (safeguarded among others by Article 25 ICCPR). As the Human Rights Committee stated,

> "the conduct of public affairs […] is a broad concept which relates to the exercise of political power, in particular the exercise of legislative, executive and administrative powers. It covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels."[15]

Secondly, by virtue of being a central element of transparency, public consultations support accountability, sustain confidence in the legal environment make regulations more secure and accessible, less influenced by special interests.[16]

The significant role of public consultations in enhancing civil control over governmental policies and establishing a higher legitimacy of legislative processes can also be perceived at EU level. The TEU stipulates in its Article 11(1) a general basis for civil participation in decision-making processes in all fields of EU law: "The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action." Article 11(3) TEU gives further

14 Cristina Fraenkel-Haeberle *et al., Citizen Participation in Multi-level Democracies*, Brill Nijhoff, Leiden-Boston, 2015.

15 UN Human Rights Committee, *CCPR General Comment No. 25 on the Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), CCPR/C/21/Rev.1/Add.7*. 1996, para. 5; similarly: Office of the United Nations High Commissioner for Human Rights (OHCHR), *Rule-of-Law Tools for Post-Conflict States. National Consultations on Transitional Justice (HR/PUB/09/2)*, UN, New York-Geneva, 2009, p. 4.

16 OECD, *Better Regulation in Europe: Finland 2010. Chapter 3: Transparency Through Consultation and Communication*, 2010, at www.oecd-ilibrary.org/governance/better-regulation-in-europe_20790368, p. 71; similarly: Open Government Partnership (OGP), *Open Government Declaration. September 2011*, at www.opengovpartnership.org/open-government-declaration.

guidance: "The European Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent."

From these statements a very specific aim of public consultations can be derived, namely the inclusion of the needs and interests of the public concerned and the special knowledge of specialized groups and organizations in order to ensure the transparency and coherence of the legislative process.

While the Treaties – as foundations of EU law – offer a clearly defined legal basis for public participation, such points of reference cannot be found in the constitutions – themselves the foundations of national legal orders – of the examined Member States.

In Germany the types and detailed rules of public consultation are regulated as procedural issues. For instance, concerning the drafting of laws, the Joint Rules of Procedure of the Federal Ministries (GGO) establishes the possibility of involving central and umbrella associations and an expert community at federal level if their interests are affected.[17] The constitutional provision on the protection of the environment[18] stipulates the responsibility for the protection of the natural foundations of life and animals. However, as far as the detailed provisions are concerned, it refers to legislation, executive and judicial actions. Since this constitutional formulation leaves a rather broad margin of appreciation for the legislator, the examination of compliance with the constitution is limited to obvious violations.[19]

In France, although a general right of public participation in decision-making procedures does not follow from the Constitution,[20] the right of public participation as regards environmental matters is laid down as a constitutional obligation in Article 7 of the Charter for the environment:

> "Everyone has the right, in the conditions and to the extent provided for by law, to have access to information pertaining to the environment in the possession of public bodies and to participate in the public decision-taking process likely to affect the environment."

17 "The timing, scope and selection will be left to the discretion of the lead Federal Ministry, unless specific rules stipulate otherwise", Section 47 GGO at www.bmi.bund.de/SharedDocs/downloads/DE/veroeffentlichungen/themen/ministerium/ggo.pdf;jsessionid=E2FCCC425AE1B97B68F64D7CAD32699B.2_cid295?__blob=publicationFile&v=2.

18 Article 20a of the *Grundgesetz*.

19 Andreas Glaser, *Nachhaltige Entwicklung und Demokratie*, Mohr Siebeck, Tübingen, 2006, pp. 236-237.

20 Article 39 of the Constitution only refers to the fact that "[t]he presentation of Government Bills tabled before the National Assembly or the Senate, shall follow the conditions determined by an Institutional Act". A separate piece of legislation implementing this obligation contains detailed provisions on these criteria including a report on the consultations carried out: Loi organique n° 2009-403 du 15 avril 2009 relative à l'application des articles 34-1, 39 et 44 de la Constitution, at www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000020521873.

These rights are safeguarded through several formalized procedures laid down in *e.g.* the Code on the environment, the Code on municipalities, however, these rules are mostly related to specific projects or plans.[21]

In Hungary, Article P(1) of the Fundamental Law guarantees a similarly high-level of protection for the environment as in the two above mentioned countries:

> "Natural resources, in particular arable land, forests and the reserves of water; biodiversity, in particular native plant and animal species; and cultural artefacts, shall form the common heritage of the nation, it shall be the obligation of the State and everyone to protect and maintain them, and to preserve them for future generations."

Nevertheless, public participation – similarly to the German model – cannot be directly derived from the constitution. This statement has been confirmed by the Constitutional Court of Hungary in its Decision No. 1146/B/2005. AB in respect of the former Constitution. As the adoption of the Fundamental Law did not cause significant changes in this context, these statements can be seen even currently as points of reference.

These examples show that national constitutions reflect different ways of approaching the question of public participation in environmental matters; as such, they do not offer a solid, uniform background for public involvement. However, it is apparent from the text of the TEU that public participation is particularly important in case of environmental matters, where the social discussion is strongly linked to scientific questions, economic interests and legal regulation. The Aarhus Convention is of great importance, since it offers a specific regime for public participation in environmental matters.

7.3 The Role of the Aarhus Convention

According to Article 191(1) TFEU

> "Union policy on the environment shall contribute to pursuit of the following objectives: preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilization of natural resources, promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change."

21 OECD, *Better Regulation in Europe Better Regulation in Europe: France 2010*, at www.oecd.org/gov/regulatory-policy/45706677.pdf, pp. 69-86; Susan Rose-Ackerman & Thomas Perroud, 'Policymaking and Public Law in France: Public Participation, Agency Independence and Impact Assessment', *Columbia Journal of European Law*, Vol. 19, Issue 2, 2013, pp. 225-312.

Recognizing that the

> "improvement of the public's access to information and a broader participation of the public in decision-making processes and access to justice are essential tools to ensure public awareness on environmental issues and to promote a better implementation and enforcement of environmental legislation",

thus, "it contributes to strengthen and make more effective environmental protection policies", the European Community approved the Aarhus Convention.[22] This way, the Aarhus Convention has become part of the environmental policy of the EU.

> "By becoming a party to the Aarhus Convention, the European Union undertook to ensure, within the scope of European Union law, a general principle of access to environmental information held by the public authorities."[23]

Furthermore, it made the right of the public to participate in decision-making processes affecting the environment and the access to justice in environmental matters a part of EU law. At the time of approving the Aarhus Convention, the EU – in line with the goals of the Aarhus Convention and in shared competence with its Member States –

> "has already adopted a comprehensive set of legislation which is evolving and contributes to the achievement of the objective of the Convention, not only by its own institutions, but also by public authorities in its Member States"[24]

According to Article 216(2) TFEU "[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States." As such agreements – like the Aarhus Convention – form an integral part of EU law,[25] the CJEU undoubtedly has the competence to interpret them in preliminary ruling procedures.[26]

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22 Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters.

23 Judgment of 14 February 2012, *Case C-204/09, Flachglas Torgau GmbH v. Bundesrepublik Deutschland*, ECLI:EU:C:2012:71, para. 30.

24 Recital (7) of Council Decision 2005/370/EC.

25 Judgment of 8 November 2016, *Case C-243/15, Lesoochranárske zoskupenie VLK v. Obvodný úrad Trenčín*, ECLI:EU:C:2016:838, para. 45; similarly: Judgment of 10 January 2006 *Case C-344/04, The Queen, on the application of International Air Transport Association and European Low Fares Airline Association v. Department for Transport*, ECLI:EU:C:2006:10, para. 36.

26 Judgment of 8 March 2011, *Case C-240/09, Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, ECLI:EU:C:2011:125, para. 30.

The general formulation of Article 1 of the Convention makes it possible to consider the Aarhus Convention as a basic point of reference in all cases where the procedure is related to environmental legislation.[27] Nevertheless, according to the case-law of CJEU, such an obligation exists only with regards to environmental laws in a strict sense. Therefore, the interpretation of EU norms cannot be changed by invoking the Aarhus Convention solely on the basis that their application is related to environmental matters.[28] Furthermore, in certain decisions the CJEU denied the reference to the Convention even in cases where the EU legislator established *sui generis* rules in a certain sector of public participation in environmental matters.[29] Finally, from a specific judgment of the CJEU it is also evident that the indirect correlation to environmental matters cannot lead to an extensive interpretation of the scope of EU law either.[30] In summary, EU law falling within this scope shall be interpreted in a way that in is in line with the Aarhus Convention, and EU law shall be properly aligned with the Convention.[31]

As far as national laws are concerned, a special double-character of the Aarhus Convention may be observed. On the one hand, as an international treaty it is referred to as a part of national laws. The French Constitution stipulates in its Article 55 that "treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament." In Germany, the relationship of international law and national law is primarily determined by the principle of *'völkerrechtsfreundliche Auslegung'*, which includes the requirement of preventing or remediating violations of international law through national legislation or its application.[32] In Hungary, in turn, it is a rule of competence that clarifies the prevalence of international law over national law, since Article 24(2)(f) stipulates that the Constitutional Court "shall examine any law for conflict with any international treaties."[33]

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27 Opinion of Advocate General Eleanor Sharpston (12 October 2017) in *Case C-664/15. Protect Natur-, Arten- und Landschaftschutz Umweltorganisation v. Bezirkshauptmannschaft Gmünd*, ECLI:EU:C:2017:760, para. 5.

28 Judgment of 16 July 2015, *Case C-612/13 P, Client Earth v. European Commission*, ECLI:EU:C:2015:486, para. 37.

29 Judgment of 22 December 2010, *Case C-524/09, Ville de Lyon v. Caisse des dépôts et consignations*, ECLI:EU:C:2010:822, para. 38.

30 Judgment of 6 March 2014, *Case C-206/13, Cruciano Siragusa v. Regione Sicilia -- Soprintendenza Beni Culturali e Ambientali di Palermo*, ECLI:EU:C:2014:126, paras. 26-30.

31 Judgment of 12 May 2011, *Case C-115/09, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg*, ECLI:EU:C:2011:289, para. 41.

32 Rüdiger Wolfrum *et al.*, 'The Reception of International Law in the German Legal Order: An Introduction', *in* Erika de Wet *et al.* (eds.), *The Implementation of International Law in Germany and South Africa*, Pretoria University Law Press, Pretoria, 2015, p. 19; *BVerfG*, judgment of 23 June 1981, *Case 2 BvR 1107/77*; *BVerwG*, judgment of 29 June 2016, *Case 7 C 32.15*, para. 14.

33 At this point it should be stressed that the current paper does not aim to address the complex question of the relationship between national and international law. This question is referred to only to the extent as it is necessary to demonstrate the special position of the Convention in the legal order of the Member States.

On the other hand, it is an international treaty, which derives its binding force from being a part of EU law – and by virtue of the Member States' implementation obligation of the relevant directives transposing the Convention in EU law. In this regard, the principle of the primacy of EU law[34] ensures the enforcement of the Convention.

Based on the above, the major question is whether the Convention should be referenced by national courts as an international treaty to which the given State is party to or as an international treaty that is part of EU law as transposed by the EU legislator and interpreted by the CJEU. The first area, where this question is of decisive importance, is the problem of direct applicability.

7.4 The Question of Direct Applicability

At this point, the question arises, what is the role of the Convention, if the above-mentioned proper legal alignment is lacking? Can the Convention be applied directly? Generally, it would not be contrary to EU law to apply an international treaty directly to which the EU is party, but the provisions of the given treaty must comply with the general requirements of direct applicability even in this case.[35] However, the CJEU generally excludes this possibility regarding the Convention on the basis of two factors. Firstly, because several provisions of the Convention need positive, implementing actions, such as Article 9(3) of the Convention. This provision ensures the right that, where they meet the criteria, if any, laid down in national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions of private persons and public authorities which contravene provisions of their national law relating to the environment. Thus, these provisions "do not contain any clear and precise obligation capable of directly regulating the legal position of individuals",[36] thereby excluding direct applicability.[37]

Direct applicability is denied, secondly, as the wording of the Convention make the extensive consideration of the specificities of the single legal orders possible. Since the Convention addresses an issue having legal, economic and social relevance from several points of view, the wording usually ensures a broad margin of appreciation to the parties [*e.g.* Article 9(5) of the Convention]. In this context, the CJEU concluded that

34 Bruno de Witte, 'Direct Effect, Primacy and the Nature of the Legal Order', *in* Paul Craig & Gráinne de Búrca (eds.), *The Evolution of EU Law*, Oxford University Press, Oxford, 2011, pp. 343-346.

35 Judgment of 13 January 2015, *Joined Cases C-401/12 P, C-402/12 P and C-403/12 P, Council of the European Union and Others v. Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, ECLI:EU:C:2015:4, para. 54.

36 *Case C-240/09, Lesoochranárske zoskupenie VLK*, para. 45.

37 Order of the General Court of 28 September 2016, *Case T-600/15, Pesticide Action Network Europe (PAN Europe) and Others v. European Commission*, ECLI:EU:T:2016:601, paras. 53-61.

> "it follows from that provision, under which each party to the Convention is obliged to 'consider' the establishment of 'appropriate assistance mechanisms' to remove or reduce financial and other barriers to access to justice, that it does not include an unconditional and sufficiently precise obligation and that it is subject, in its implementation or effects, to the adoption of a subsequent measure."[38]

From these conclusions it also follows that – although the Convention makes the accession of regional economic communities possible – its structures and institutions are more tailored to the national legal systems of single states.[39] CJEU case-law seems to be clear on the point that the provisions of the Convention cannot be applied directly in EU law.

Within the national laws, however, different conclusions can have been drawn. There are only four judgments of the Hungarian Constitutional Court that refer expressis verbis to the Convention. In one of these, Decision No. 3068/2013. (III. 14.) AB, the Constitutional Court examined whether the relevant Hungarian legislation is contrary to the Convention as an international treaty. In this context the lack of reference to EU law can be a consequence of the fact that the Hungarian Constitutional Court traditionally refrains from interpreting and applying EU law,[40] while its competence as regards the compliance of national law with international law follows directly from the Fundamental Law. In one case, however, it also referred to the Act promulgating the Convention, stating that the legislator did not fail to regulate public participation in connection to road construction affecting the environment.[41] Thus, in this single case the Constitutional Court seems to have considered the Convention to be a direct point of reference. This line of thought can be confirmed on the basis of a relevant judgment of the Hungarian Supreme Court: in case BH 2010.261. it ruled that the right of access to justice based on the Convention results in the obligation of the court to analyze the claim in detail; otherwise the court would violate international law binding the State. No further judgments containing direct references to the Aarhus Convention resort to a detailed interpretation of its provisions.[42]

A case with direct reference to the Aarhus Convention cannot be found in the case-law of the German Constitutional Court. However, the Federal Administrative Court, *Bundesverwaltungsgericht (BVerwG)*, relies on an approach where it applies the standards

38 Judgment of 28 July 2016, *Case C-543/14, Ordre des barreaux francophones et germanophone and Others v. Conseil des ministers*, ECLI:EU:C:2016:605, para. 55.

39 Judgment of 16 July 2015, *Case C-612/13 P, ClientEarth v. European Commission*, ECLI:EU:C:2015:486, para. 40.

40 *See* Decision No. 2/2019. (III. 5.) AB, Reasoning [20] and [35].

41 Decision No. 1418/E/1997. AB, ABH 2007, 1174.

42 Hungarian Supreme Court, Judgment of 24 June 2009, *Case Kfv.IV.37.448/2008/6;* Curia of Hungary, Judgment of 12 April 2017, *Case Pfv.IV.22.344/2016/4*.

elaborated by the CJEU with reference to the EU legal framework parallel to the indication of the relevant provisions of the Convention. However, instead of an autonomous interpretation of the Convention as a part of international law, the *BVerwG* seems to prioritize and emphasize the enforcement of an interpretation in conformity with EU law.[43] In a specific case, the *BVerwG* explicitly referred to the Convention as a background norm to the relevant EU law,[44] in another case it stressed the EU law nature of the public participation scheme in environmental matters.[45] The synthesis of these statements is offered by a judgment, in which the *BVerwG* ruled that it is clear from jurisprudence that the provisions of the Aarhus Convention do not have direct effect. National courts, however, are obliged to interpret their national laws of administrative procedure and administrative court procedure in a way that they comply with the goals set by the Convention and the principle of efficient judicial protection in a field covered by EU law.[46]

Although there is a direct constitutional link between environmental matters and public participation, the case-law of the French *Conseil Constitutionnel* does not contain an explicit reference to the Aarhus Convention. In certain cases, the *Conseil d'État* seems to refer to it when evaluating the compatibility of an administrative act with the Convention as an international treaty.[47] Furthermore, to a certain, limited extent the *Conseil d'État* has confirmed the direct applicability of the Convention as well.[48] However, in recent jurisprudence this kind of argumentation seems to be declining, with the parallel rise of the continuously broadening case-law of the CJEU. Therefore, the main doctrine of the *Conseil d'État* is that there are no rights stemming from the Convention itself which could be invoked directly;[49] the case-law rather argues for a parallel application of both implementing EU law and the Convention.[50]

It follows from these conclusions that the CJEU case-law on the lack of direct applicability of the Convention essentially defines interpretation by national courts with the result that the Convention is primarily considered as a background norm of EU law implementing

43 *BVerwG*, Order of 25 April 2018, *Case 9 A 16.16*, para. 60; Judgment of 19 December 2017, *Case 7 A 10.17*, paras. 29-30.

44 *BVerwG*, Judgment of 2 November 2017, *Case 7 C 25.15*, para. 19; similarly: Order of 10 October 2017, *Case 7 B 4.17*, para. 9.

45 *BVerwG*, Judgment of 1 June 2017, *Case 9 C 2.16*, paras. 17-18.

46 *BVerwG*, Judgment of 18 December 2014, *Case 4 C 35.13*, para. 61.

47 *Conseil d'État*, Judgment of 12 April 2013, *Case 342409*, para. 15.

48 *Conseil d'État*, Judgment of 9 May 2006, *Case 292398;* Judgment of 14 June 2006, *Case 293317*; for a detailed analysis *see* Julien Bétaille, 'The Direct Effect of the Aarhus Convention as Seen by the French 'Conseil d'État', *Environmental Law Network International*, Issue 2, 2009, pp. 63-73.

49 *Conseil d'État*, Judgment of 25 September 2013, *Case 352660*, para. 25; Judgment of 23 March 2011, *Case 329642*; Judgment of 23 April 2009, *Case 306242;* similarly: Judgment of 13 March 2019, *Case 414930;* Judgment of 16 October 2017, *Case 397606*.

50 *Conseil d'État*, Judgment of 28 September 2016, *Case 390111*; similarly: Judgment of 27 January 2016, *Case 386869*; Judgment of 28 March 2011, *Case 330256*.

the Aarhus Convention. As such, it is the relevant EU laws – primarily directives – and their autonomous interpretation by the CJEU that define the enforcement of the provisions on public participation in national laws.

7.5 Principles of Interpretation

As far as the specific interpretation principles of the Aarhus Convention are concerned, the following cornerstones can be identified.

7.5.1 General Principles

Firstly, also in connection to the Convention as an international agreement the principle applies that it shall be interpreted on the basis of its wording and goals. These principles of international law appear in the case-law of CJEU as well,[51] thus affecting the interpretation of the EU law implementing the provisions of the Convention:

> "[i]t follows that, for the purposes of interpreting Directive 2003/4, account is to be taken of the wording and aim of the Aarhus Convention, which that directive is designed to implement in EU law."[52]

Secondly, it also apparent that the general principles of interpretation in EU law[53] – such as the autonomous interpretation of EU law, the principles of efficiency and effectiveness,[54] the requirement of uniform interpretation in the EU[55] – are to be applied accordingly by

51 Judgment of the General Court of 14 June 2012, *Case T-338/08, Stichting Natuur en Milieu and Pesticide Action Network Europe v. European Commission*, ECLI:EU:T:2012:300, para. 72; similarly: *Case C-344/04, International Air Transport Association*, para. 40.

52 Judgment of 23 November 2016, *Case C-442/14, Bayer CropScience SA-NV and Stichting De Bijenstichting v. College voor de toelating van gewasbeschermingsmiddelen en biocide*, ECLI:EU:C:2016:890, para. 54.

53 De Witte 2011, pp. 323-362; Lorenzo Mellado Ruiz: 'Los principios comunitarios de eficacia directa y primacía frente a la funcionalidad del principio de autonomía procedimental: proceso de convergencia y estatuto de ciudadanía', *in* Fernando Fernández Marín & Ángel Fornieles Gil (eds.), *Derecho Comunitario Y Procedimiento Tributario*, Atelier, Barcelona, 2010, pp. 24-51; Damian Chalmers *et al., European Union Law: Cases and Materials*, Cambridge University Press, Cambridge, 2010.

54 Judgment of 18 October 2011, *Joined Cases C-128/09-131/09, C-134/09 and C-135/09, Antoine Boxus and Willy Roua, Guido Durlet and Others, Paul Fastrez and Henriette Fastrez, Philippe Daras, Association des riverains et habitants des communes proches de l'aéroport BSCA (Brussels South Charleroi Airport) (ARACh), Bernard Page and Léon L'Hoir and Nadine Dartois v. Région wallonne*, ECLI:EU:C:2011:667, para. 52; similarly: Judgment of 16 February 2012, *Case C-182/10, Marie-Noëlle Solvay and Others v. Région wallonne*, ECLI:EU:C:2012:82, paras. 46-49.

55 Judgment of 18 July 2013, *Case C-515/11, Deutsche Umwelthilfe eV v. Bundesrepublik Deutschland*, ECLI:EU:C:2013:523, para. 21.

the EU and the Member States.[56] This interpretation has been confirmed – from among the examined national high courts[57] – in the case-law of *BVerwG* in relation to questions falling into the scope of application of the Aarhus Convention. At the same time, it sets the limits of the margin of appreciation in national law, as it stated that the national legislator has a room for maneuver in implementing the Convention, giving due consideration to the principles of efficiency and effectiveness.[58] In this context, *'völkerrechtsfreundliche Auslegung'* means that EU-law, to be transposed into national law shall be interpreted in light of the aims of the Convention.[59] This statement can be seen – in a more general sense – as a confirmation of the fact that the implementation obligation stemming from EU law takes priority to the enforcement of the Convention as an international agreement. In a concrete case, the Hungarian Constitutional Court used a similar formulation as regards the Convention on the Rights of Persons with Disabilities, to which both Hungary and the EU are parties.[60] Therefore, it is highly possible that the Hungarian Constitutional Court would follow a similar approach as that of the *BVerwG* in relation to the Aarhus Convention as well. Consequently, the principle elaborated by the CJEU[61] as regards the role of EU law implementing international law seems to have become an integral part of national jurisprudence, even in cases – like that of the Hungarian Constitutional Court – where the application or interpretation of EU law is not a direct obligation.

At this point, an important digression shall be made concerning the role of general principles of EU law in connection to the third pillar of the Aarhus Convention. Namely, at the time of joining the Convention, the European Community made a reservation, stating that the Member States have the primary obligation to fulfil the obligations arising from Article 9(3) of the Convention until the Community decides to adopt "provisions of Community law covering the implementation of these obligations" (Council Decision 2005/370/EC). In lack of a common regulation in the field of access to justice, the Member

56 *Case C-204/09, Flachglas Torgau*, para. 37.

57 The available decisions of the Hungarian Supreme Court (Curia of Hungary) do not contain substantial argumentation as regards the relationship of national, international and EU law; they refer usually to the promulgating act and seem to examine the question as the application of internal laws.

58 *BVerwG*, Judgment of 28 July 2016, *Case 7 C 7.14*, paras. 35-37; Judgment of 24 October 2013, *Case 7 C 36.11*, para. 27.

59 *BVerwG*, Judgment of 29 June 2016, *Case 7 C 32.15*, paras. 14-20; similarly: Judgment of 30 March 2017, *Case 7 C 17.15*, para. 27; Judgment of 23 February 2017, *Case 7 C 31.15*, para. 35. *See* Christoph Görisch, 'Effective Legal Protection in the European Legal Order', *in* Zoltán Szente & Konrad Lachmayer (eds.), *The Principle of Effective Legal Protection in Administrative Law*, Routledge, Abingdon, 2017, p. 37; Anna Katharina Mangold, 'The Persistence of National Peculiarities: Translating Representative Environmental Action from Transnational into German Law', *Indiana Journal of Global Legal Studies*, Vol. 21, Issue 1, 2014, pp. 223-261.

60 Decision No. 21/2018. (XI. 14.) AB, Reasoning [27].

61 Judgment of 11 April 2013, *Joined Cases C-335/11 and C-337/11, HK Danmark, acting on behalf of Jette Ring v. Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v. Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, ECLI:EU:C:2013:222, paras. 28-30.

States should bear significant responsibility for the implementation of the third pillar of the Convention and fulfil their obligations stemming from the Convention not only as individual parties to the Convention but as members of the EU as well. This dual character of the implementation of the third pillar, especially with regard to the *locus standi* of non-governmental organizations promoting the protection of the environment, means that considerable differences remain with respect to the individual evaluation of the Member States; however, also general standards should be defined and enforced as part of EU law. The CJEU seems to promote this by stressing the EU law aspects of litigation, mostly by referring to a background EU norm, such as the Habitats Directive[62] or the Environmental Impact Assessment Directive.[63] Nevertheless, strive for *actio popularis* in environmental matters cannot be gleaned from the case-law of the CJEU;[64] it would result in interpretation problems concerning Article 263(4) TFEU. Rather, the extensive interpretation of the general principles of EU law is a way of encouraging the establishment of a uniform minimum of access to justice in the Member States. This case also confirms the conclusion that the general obligations stemming from EU law define the framework of implementation of the Convention even in situations, where the major responsibility is placed on the Member States by EU law itself.

7.5.2 Specific Principles

Furthermore, there are principles that shall be taken into consideration specifically regarding the interpretation of the Convention. One such principle is related to the role of the Implementation Guide of the Convention.[65] In this respect, the CJEU stressed that

62 Judgment of 12 May 2011, *Case C-115/09, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v. Bezirksregierung Arnsberg*, ECLI:EU:C:2011:289.

63 Judgment of 7 November 2013, *Case C-72/12, Gemeinde Altrip, Gebrüder Hört GbR, Willi Schneider v. Land Rheinland-Pfalz*, ECLI:EU:C:2013:712; Judgment of 15 October 2015, *Case C-137/14, European Commission v. Federal Republic of Germany*, ECLI:EU:C:2015:683.

64 Moritz Reese *et al.*, 'The Courts as Guardians of the Environment – New Developments in Access to Justice and Environmental Litigation', *in ICLG TO: Environment & Climate Change Law 2019*, Global Legal Group, London, 2019; European Parliament, 'Implementing the Aarhus Convention Access to Justice in Environmental Matters', Briefing October 2017, at www.europarl.europa.eu/RegData/etudes/BRIE/2017/608753/EPRS_BRI(2017)608753_EN.pdf; Astrid Epiney & Benedikt Pirker, 'The Case-law of the European Court of Justice on Access to Justice in the Aarhus Convention and Its Implications for Switzerland', *Journal for European Environmental & Planning Law*, 2014/4, pp. 348-366; Ágnes Váradi, 'Facilitating the Persecution of Rights in the European Union: New Tendencies for a Better Access to Justice', *in* András Lőrincz (ed.), *Prospects for the European Union: Borderless Europe?* Institute for Cultural Relations Policy, Budapest, 2014, pp. 160-169.

65 *The Aarhus Convention: An Implementation Guide (second edition 2014)*, at www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf.

> "while the Aarhus Convention Implementation Guide may be regarded as an explanatory document, capable of being taken into consideration, if appropriate, among other relevant material for the purpose of interpreting the convention, the observations in the guide have no binding force and do not have the normative effect of the provisions of the Aarhus Convention."[66]

The *BVerwG* interpreted the role of the implementation guide similarly,[67] but at the same time it stressed that the practice of the Compliance Committee may have a significant effect on national laws. Consequently, it takes these recommendations into account when evaluating whether the margin of appreciation of national law was in accordance with the principles of the Convention.[68] However, according to the case-law of CJEU the Implementation Guide of the Convention cannot be generally invoked when evaluating the legality of EU acts implementing the Aarhus Convention.[69] Compared to the restrictions following from the CJEU case-law, the approach of the *BVerwG* seems to take another stance, referring to the Convention as an international treaty.

The other, very important principle of interpretation is the presumption for public participation,[70] which is strongly related to the aims of the Convention, namely to the efficient protection of the environment.[71] Consequently, the provisions restricting public participation shall be interpreted narrowly, while other provisions ensuring the right of public involvement cannot be interpreted in a restrictive way.

> "Therefore, although the national legislature is entitled, inter alia, to confine the rights whose infringement may be relied on by an individual in legal proceedings contesting one of the decisions, acts or omissions referred to in Article 11 of Directive 2011/92 to individual public-law rights, that is to say, individual rights which, under national law, can be categorized as individual public-law rights (see, to that effect, judgment in *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, C-115/09, EU:C:2011:289, paragraphs 36 and 45), the provisions of that article relating to the rights to

66 *Case C-279/12, Fish Legal*, para. 38; similarly: *Case C-204/09, Flachglas Torgau*, para. 36; *Case C-182/10, Marie-Noëlle Solvay*, para. 28; Judgment of 23 November 2016, *Case C-673/13 P, European Commission v. Stichting Greenpeace Nederland and PAN Europe*, ECLI:EU:C:2016:889, para. 59.

67 *BVerwG*, Judgment of 5 September 2013, *Case 7 C 21.12*, paras. 33-34.

68 *BVerwG*, Judgment of 29 June 2017, *Case 3 A 1.16*, para. 28.

69 *Joined Cases C-404/12 P and C-405/12 P, Stichting Natuur en Milieu*, paras. 46 and 53.

70 For a detailed analysis of this aspect in relation to the single pillars of the Aarhus Convention *see* Ágnes Váradi, 'Az Aarhusi Egyezmény értelmezésének egyes kérdései az Európai Unió Bíróságának gyakorlatában', *Állam- és Jogtudomány*, Vol. 59, Issue 2, 2018, pp. 97-114.

71 Judgment of 15 March 2018, *Case C-470/16, North East Pylon Pressure Campaign Limited and Maura Sheehy v. An Bord Pleanála and Others*, ECLI:EU:C:2018:185, para. 53.

> bring actions of members of the public concerned by the decisions, acts or omissions which fall within that directive's scope cannot be interpreted restrictively."[72]

Hence, it can be confirmed that the CJEU interprets the provisions of the Convention in light of the general principles of EU law, with regard to the EU environmental policy and the specificities of environmental matters, in an autonomous way.

This principle is confirmed in the jurisdiction of the *BVerwG* as well. However, in a concrete case it gave an important addition to this principle: the presumption for public participation and the teleological interpretation of the Convention cannot result in the broadening of the scope of application of the EU law – and thus, national law – implementing the Convention.[73] These conclusions lead back to the statements of the CJEU referred to in Part 3, namely, that indirect correlation with environmental matters cannot lead to the extensive interpretation of the scope of EU law. At the same time, they confirm the conclusion that following the EU's accession, the European law nature of the Convention has taken precedence over its role as an international treaty in the law of the Member States.

7.6 Final Thoughts

On the basis of the analysis above, it can be concluded that the interpretation of the Aarhus Convention has become an integral part of CJEU case-law as well as the jurisprudence of national courts. The case-law of the CJEU gives considerable guidance for national courts through the interpretation of EU norms transposing the Convention into the common legal order. The conclusions stemming from CJEU case-law also demonstrate that while becoming an integral part of EU law, the Convention has gained a specific interpretation, which may under certain circumstances differ from its general, original interpretation based on its nature of being an international agreement. This phenomenon can be traced back to the fact that EU environmental policy and the general principles of EU law provide a specific framework for the Convention, and these are interpreted by the CJEU in an autonomous manner, affecting the interpretation of the Convention in the national judicial practice as well.

The case-law of the national high courts of the examined countries has also expanded in the past few years. The decisions, however, show diverging attitudes of the judicial fora:

72 Judgment of 16 April 2015, *Case C-570/13, Karoline Gruber v. Unabhängiger Verwaltungssenat für Kärnten and Others*, ECLI:EU:C:2015:231, para. 40.

73 *BVerwG*, Judgment of 12 November 2014, *Case 4 C 34.13*, para. 18; similarly: Judgment of 19 December 2013, *Case 4 C 14.12*, para. 20.

in two of the examined countries – Germany and France – the Aarhus Convention has not been analyzed from a constitutional point of view, while the Hungarian Constitutional Court treated the question as a matter of compliance between national law and international law. The case-law of the *BVerwG* and the *Conseil d'État* demonstrates that while applying the Convention, the obligation of national courts is complex: complying with EU law standards, principles and fulfilling the aims of the Convention.[74] In this context, the requirements stemming from EU law prevail, while divergence may be detected in the context of the methods of interpretation (*e.g.* the role of the Implementation Guide in certain judgments of the *BVerwG*).

These insights into the relationship of national laws, EU law and the Convention can support the proper application of the Convention, strengthening thereby the public participation in environmental matters, thereby promoting the protection of common social interests. Furthermore, a well-elaborated interpretation of the Convention in EU law can contribute to the success of the whole Convention, as

> "[r]egional arrangements of less heterogeneous groups of States can be a way to more effectively advance in the implementation of universally recognized principles by providing for a closer, systematic cooperation in the enforcement of those principles at a decentralized level."[75]

74 Jan Darpö, 'Pulling the Trigger', *in* Sanja Bogojevic & Rosemary Rayfuse (eds.), *Environmental Rights in Europe and Beyond*, Hart, Oxford-London, 2018, pp. 257-258.

75 Karl-Peter Sommerman, 'Transformative Effects of the Aarhus Convention in Europe', *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, Vol. 77, 2017, p. 337.