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OVERCOMING PLAUMANN IN EU ENVIRONMENTAL LITIGATION AN ANALYSIS OF ENGOS LEGAL ARGUMENTS IN ACTIONS FOR ANNULMENT

Abstract: This article focuses on the judicial means used by environmental non-governmental organisations (ENGOs) to overcome the *Plaumann test*, the particularly narrow scrutiny used by the Court of Justice of the EU (CJEU) to grant direct access in actions for annulment to private applicants. In spite of the major changes that have occurred in the EU legal order in the last decades (e.g. the adhesion of the EU to the Aarhus Convention, the adoption of the EU Charter of Fundamental Rights and the entry into force of the Lisbon Treaty), the Court has never amended its test. Therefore, the ultimate goal of this contribution is to highlight the arguments that ENGOs have generally used to mobilise to CJEU with regard to *Plaumann* and to reflect on how these arguments have evolved on the basis of an equally evolving EU legal system.

1. — *Introduction.*

This article will consider four case studies representing four distinct 'key

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periods'[1] in the legal history of the Court's environmental jurisprudence on *Plaumann*. These periods can be explained as follows.

1. *The 'pre-Aarhus' period*: the first period considered runs from 1996 to 2012. The case study that I chose to shed light on this timeframe is *Greenpeace*, the very first environmental direct action brought by a civil society organisation before the EU judiciary. I chose this case because all the main arguments used by *Greenpeace*'s lawyers have basically been replicated to a large extent in the subsequent case law occurring during the same period. In this sense, *Greenpeace* can be considered as a 'case model' for what I called the 'pre-Aarhus period'.

2. *The 'post-Aarhus (I)' period*: the second period considered runs from 2012 to 2018 and sees the entry into force of the Aarhus Regulation (AR) as a first major change impacting environmental litigation before EU Courts. The case study that I chose to represent this period is *Stichting Natuur*, one of the first cases brought before the EU judiciary under art. 12 AR. Once again, I chose this case because all the main arguments used by the applicants' lawyers have been reflected in following rulings on access to justice under the AR.

3. *The 'post-Aarhus II' period*: the last two periods considered both run from 2018 to present. In fact, the study of this timeframe actually explores two different (and contemporary) legal 'pathways' that are currently being used by ENGOs in an attempt to get access to justice before EU Courts.

I. *Post-Aarhus II – post findings*: the first pathway refers, once again, to art. 12 AR. This section will draw attention to how the arguments used by ENGOs changed after the publication – in 2017 – of the ACCC findings on EU compliance with the Aarhus Convention. For this reason, I have chosen *Mellifera* as a case study for this period.

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[1] I am perfectly aware of the fact that the periods to be considered could be more than three. This since, as aforementioned, the legal changes occurred in the timeframe under analysis go well beyond the entry into force of the Aarhus Convention and the adoption of the Aarhus Regulation. However, the cases here examined were 'mainly' affected by the legal changes that will be mentioned throughout the article.

II. *Post-Aarhus II – the CCL trend*: the second pathway refers to the EU Treaty provisions under which natural and legal persons may seek access to justice in actions for annulment before the EU judiciary. This section will particularly emphasise how the ongoing global climate change litigation (CCL) trend is affecting the arguments used by civil society organisations to overcome the *Plaumann* test. The case study that I chose for this period is *Carvalho*.

Having offered an overview of the different timeframes under consideration, it is now necessary to provide the reader with a clearer structure of the overall article. In particular, my contribution will seek to: *i)* describe each case study, the relevant legal framework, its factual background and the legal arguments put forward by both, applicants and judges of the EU Courts. The purpose is to try to create a sort of 'taxonomy' of ENGOs' and judges' arguments; *ii)* provide preliminary remarks on the findings for each case study. In these preliminary remarks, I will also try to highlight what these ENGOs have actually achieved in terms of access to environmental justice by litigating before EU Courts; *iii)* set out some concluding remarks on the overall analysis.

I. – THE 'PRE-AARHUS PERIOD': GREENPEACE

Before the entry into force of the Aarhus Convention, ENGOs tried on a number of occasions [2] to challenge EU measures before the CJEU under the relevant Treaty provisions. But they never succeeded. The *Greenpeace* case [3] is thus crucial in the current analysis for a number of reasons. It is the very first direct challenge against an EU measure brought by an

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[2] See T-142/03, *Fost Plus v. Commission* (2005) ECLI:EU:T:2005:51; joined cases T-236/04 and T-241/04, *EEB and Stichting Natuur en Milieu v. Commission* (2005) ECLI:EU:T:2005:426; T-91/07, *WWF-UK v. Council* (2008) ECLI:EU:T:2008:170.

[3] Case T-585/93, *Stichting Greenpeace Council (Greenpeace International) and others v. Commission* (1995) ECLI:EU:T:1995:147; C-321/95 P, *Greenpeace and Others v. Commission* (1998) ECLI:EU:C:1998:153. Hereinafter '*Greenpeace* (CFI)' and '*Greenpeace* (CJEU)'.

ENGO before the EU judiciary. Because of this and because of the legal arguments raised before the Court, this case has been used as a point of reference by other environmental litigants in subsequent actions for annulment. Furthermore, the *Greenpeace* case has contributed to stimulating a rich academic debate over environmental judicial protection in the EU[4]. In the light of this, an in-depth analysis of this case study is included in the following sections.

2. — *Article 173 TEC and the Plaumann test.*

When the proceedings in *Greenpeace* were brought before the Court of First Instance (CFI[5]) in 1993, art. 173(4) TEC was the provision establishing the conditions under which any natural or legal person could seek the annulment of an EU act before the EU judiciary. Notably, under paragraph 4: *Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.*

The CJEU interpreted the criterion of 'individual concern' for the first time in 1963 in the Plaumann case[6]. In this ruling, the Court held that: «persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in

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[4] See, *inter alia*, C. Hilson, *Community Rights and Wrongs: Greenpeace before the Court of Justice*, in *Envtl. L. Rev.* (1999) 1, p. 52; Olivier de Schutter, *Public Interest Litigation before the European Court of Justice*, in *Maastricht J. Eur. & Comp. L.*, (2006) 13, p. 9; T. Crossen, V. Niessen, *NGO Standing in the European Court of Justice – Does the Aarhus Regulation Open the Door?*, in *RECIEL* (2007) 16, pp. 332-340. doi:10.1111/j.1467-9388.2007.00569.x; L. Krämer, *Access to Environmental Justice: the Double Standards of the ECJ*, in *Journal for European Environmental & Planning Law* (2017) 14(2), pp. 159-185. doi: https://doi-org.ezproxy.eui.eu/10.1163/18760104-01402003.

[5] Current 'General Court' (GC).

[6] Case 25-62, *Plaumann & Co. v. Commission* (1963) ECLI:EU:C:1963:17.

which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed»[7].

The criteria for standing established in this decision have since then been referred to as the '*Plaumann* test', which has traditionally been extremely difficult to satisfy in environmental litigation. This because environmental measures are usually acts of general application and rarely capable of addressing specific subjects or affecting them by reason of certain attributes that are peculiar to them[8]. Such a narrow interpretation of the individual concern requirement is thus particularly problematic when environmental protection is at stake. In this regard, it is no surprise that – at present – no action for annulment brought by ENGOs has ever been deemed admissible by the EU judiciary.

3. — *Factual background.*

In 1991, the European Commission (the Commission) adopted Decision C(91) 440 (decision 1) granting Spain financial assistance from the European Regional Development Fund (ERDF) for the construction of two power stations in the Canary Islands, works which had to be carried out by the Spanish company 'Unelco'.

A relevant aspect to stress is that art. 5 of decision 1 allowed the Commission to reduce or suspend the aid granted to the operation in issue «if an examination were to reveal an irregularity and in particular a significant change affecting the way in which it was carried out for which the Commission's approval had not been requested»[9].

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[7] *Ibid.*, § 9.

[8] *E.g.* EU measures setting national quotas for fishing or maximum residue levels for products.

[9] *Greenpeace* (CFI), see n. 4, § 2.

Nevertheless, with decision 1, the Commission 'promised' Spain that it would finance the project, but – as it will now be outlined – the period of time between this promise and the actual 'payment' of that aid, was characterised by a remarkable 'activism' on the part of individuals and groups concerned about the Commission's decision.

Indeed, a few months after the adoption of the aforementioned decision, two Spanish individuals informed the Commission by letter that they considered that the works carried out on one of the islands (namely Gran Canaria) were unlawful, as Unelco had failed to undertake an environmental impact assessment (EIA) as required by the EIA Directive[10].

Almost a year later, in November 1992, again by letter, another individual sought the Commission's assistance on the ground that the Canary Islands Commission for Planning and the Environment (Cumac) had not issued its declarations of EIA with regard to Unelco's work on Gran Canaria and Tenerife in accordance with Spanish law. However, such declarations were issued by Cumac a few days later[11].

In spite of the issuing of these declarations, in spring 1993, two local environmental associations (namely *Tagoror Ecologista Alternativo* – TEA and *Comisiòn Canaria contra la Comtaminaciòn* – CIC) lodged two different administrative actions for judicial review before the Spanish competent authorities against Cumac's declarations of EIA relating to the contested projects. The same was also done by 'Greenpeace Spain' (GP), an ENGO particularly active at national level[12].

Besides the judicial proceedings brought in Spain, GP sent a letter to Directorate-General of the Commission for Regional Policies (current DG REGIO) asking it to confirm «whether Community structural funds had been paid to the Regional Government of the Canary Islands for the con-

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[10] Current Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28 January 2012, pp. 1-21.

[11] *Greenpeace* (CFI), see n. 4, § 4.

[12] *Ibid.*, §§ 6-7.

struction of two power stations and to inform it of the timetable for the release of those funds»[13].

DG REGIO answered by recommending GP to read the decision containing «details of the specific conditions to be respected by Unelco in order to obtain Community support and the financing plan»[14]. The ENGO thus asked the Commission for full disclosure of all information relating to measures it had taken with regard to the construction of the two contested power stations in accordance with art. 7 of Council Regulation n. 2052/88[15] on the tasks of the Structural Funds and their effectiveness and on coordination of their activities between themselves and with the operations of the EIB[16] and the other existing financial instruments[17].

Under this provision, measures financed by the Funds or receiving assistance from the EIB or from another existing financial instrument shall be in keeping with the provisions of the Treaties, with the instruments adopted pursuant thereto and with EU policies, including those concerning … environmental protection[18].

Nevertheless, the EU executive denied access to information, since the request was deemed to concern the internal decision making procedure of the Commission. After a meeting in Brussels between representatives of DG REGIO and GP, the latter – along with various individuals – decided to bring an action before the CFI seeking annulment of the decision alleged to have been taken by the Commission to disburse regional development funds to Spain (decision 2)[19]. In 1995 the CFI released its ruling, dismissing the action brought by the applicants for lack of standing. Such a decision was then upheld by the CJEU three years later, in 1998.

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[13] *Ibid.*, § 8.

[14] *Ibid.*, § 9.

[15] No longer into force.

[16] European Investment Bank.

[17] *Greenpeace* (CFI), see n. 4, § 10.

[18] *Ibid.*

[19] *Ibid.*, § 13.

4. — *The applicants' arguments and the answers of the CJEU.*

In *Greenpeace*, the applicants put forward a number of legal arguments mainly aiming to support three different propositions: i) *The environment and ENGOs should receive special treatment:* environmental protection is a peculiar kind of public interest which requires a different treatment. This is enshrined in EU primary law and in the case law of the CJEU. As a consequence, even ENGOs should receive a special treatment when accessing EU courts; ii) *Effective judicial protection:* by denying standing to ENGOs before EU courts, there arises a judicial protection vacuum in the EU legal order; iii) *EU law consistency:* granting standing to civil society environmental organisations would be a consistent step to take having regard to EU law as well as with the case law of the CJEU in legal areas other than environmental protection.

4.1. – *Treating the environment differently.*

According to the applicants in *Greenpeace*, the Court's traditional interpretation of art. 173(4) TEC had to be amended in order to also take into account the peculiar characteristics of the environment.

In particular, in the appeal process of this case, the applicants explained the main reason why – in their view – the environment should receive special judicial treatment. They maintained that in the area of environmental protection, the interests are, «by their very nature, common and shared, and the rights relating to those interests are liable to be held by a potentially large number of individuals»[(20)].

Even Advocate General (AG) Cosmas seemed to agree with the applicants on this point, as in his opinion he stated: *For environmental protection is indeed a matter of general interest. Conservation of the environment is a legal interest theoretically shared by all natural persons; it thus has a communal dimension. Further-*

[(20)] *Greenpeace* (CJEU), see n. 4 § 18.

more, the more significant is the intervention in or impingement on the environment, the greater is the number of persons affected thereby[21].

In the same opinion, AG Cosmas provided an interesting overview of the position occupied by environmental protection in the EU Treaties and the Court's case law[22]. By so doing, he seemed to imply that environmental protection already had – even at that time – a special place within the EU legal order. Indeed, he recalled that in 1985 the EU judicature in *ADBHU*[23] affirmed that «environmental protection is one of the fundamental objectives of the [EU]», a status confirmed one year later, when the European Single Act introduced a specific chapter on the environment in EU primary law.

«The general outlines of that policy – argued the AG – are elaborated in Title XVI of the Treaty (of the European Communities, *ndr*)»[24]. That policy is to contribute, under art. 130r of the Treaty (current art. 191 TFEU), *inter alia*, to «preserving, protecting and improving the quality of the environment, protecting human health», and «prudent and rational utilization of natural resources»[25]. The AG further pointed out that EU primary law also establishes that «environmental protection requirements must be integrated into the definition and implementation of other [EU] policies». A principle testifying the 'peculiar place' of environmental policy in the EU Treaties[26].

In spite of AG Cosmas' overview, the CJEU was silent on the argument related to the 'distinctiveness' of the environment as an objective or as a policy domain. Indeed, the EU judges did not provide any answer on whether they agreed or not with the applicants and the AG. Conversely, the Court highlighted that the environmental rights invoked by the applicants under the EIA directive were judicially 'fully protected'. On this point, the Court stressed that it was the Commission's decision to build the two power

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[21] Opinion AG Cosmas, Greenpeace (CJEU), see n. 4, § 102.

[22] *Ibid.*, § 51.

[23] Case 240/83, *Procureur de la République v. Association de défense des brûleurs d'huiles usagées (ADBHU)* (1985) ECLI:EU:C:1985:59.

[24] Opinion AG Cosmas, Greenpeace (CJEU), see n. 4, § 51.

[25] *Ibid.*

[26] Today the principle of integration is enshrined under art. 11 TFEU.

stations in question which was able to affect the environmental rights arising under the EIA directive that the appellants were seeking to invoke[27]. Nevertheless, the Court concluded by holding that those rights were «fully protected by the national courts which may, if need be, refer a question to this Court for a preliminary ruling under [art. 267] of the Treaty»[28].

The Court thus seemed to disagree with the applicants on *how* this 'special treatment' for the environment should be recognised. According to the CJEU, by establishing an efficient system of judicial protection for the environment at national level. According to the ENGOs, this efficient system should also include a broader access to the EU jurisdictions.

Interestingly, some years later after *Greenpeace*, the applicants' argument relating to the 'communal dimension' of the environment was implicitly referred to (and enriched by) two AGs – namely Sharpston and Kokott – in two different cases dealing with access to justice in environmental matters at national level[29].

The first reference, by AG Sharpston, was made during the hearing of the *Trianel* case[30], where she ascertained that the 'fish cannot go to Court' and added: «the environment cannot protect itself if it is threatened or harmed. It is a public good and should be supported by public voice». By saying so, AG Sharpston pointed out a second reason why the environment should be treated differently: because it has no voice. Therefore, it requires someone acting on its behalf.

The second reference was made by AG Kokott in her opinion for the *Edwards* case[31], dealing with costs in environmental judicial proceedings in

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[27] *Greenpeace* (CFI), see n. 4, § 30.

[28] *Ibid.*, § 33.

[29] Both of these cases have not been taken into consideration for the current analysis. The arguments put forward in the opinions of AGs Kokott and Sharpston have been reported only to show how the question related to the 'specialty of the environment' has been raised also in cases dealing with access to justice at national level.

[30] C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen* (2011) ECLI:EU:C:2011:289.

[31] Opinion AG Kokott, C-260/11, *Edwards and Pallikaropoulos* (2013) ECLI:EU:C:2012:645.

the UK. Here the Court's advisor argued that: «Recognition of the public interest in environmental protection is especially important since there may be many cases where the legally protected interests of particular individuals are not affected or are affected only peripherally. However, the environment cannot defend itself before a court, but needs to be represented, for example by active citizens or non-governmental organisations»[32].

In this section of her opinion, AG Kokott actually put forward a third reason why the environment should be granted a special treatment by courts: because there may be cases where the environmental is severely impacted while the legally protected interests of individuals are not affected at all or are affected only incidentally. Furthermore, the AG argued for an 'external' intervention' in defence of the environment, which needs to be represented by civil society or ENGOs.

4.1.1. - *Treating ENGOs differently*.

Because of the need of this 'external intervention', according to the plaintiffs in *Greenpeace*, distinctive judicial treatment of the environment should naturally also imply a special treatment accorded to ENGOs. Indeed, «environmental associations should be recognised as having locus standi where their objectives concern chiefly environmental protection and one or more of their members are individually concerned by the contested [EU] decision, but also where, independently, their primary objective is environmental protection and they can demonstrate a specific interest in the question at issue»[33].

In this regard, the EU judges rejected any idea of making an exception for ENGOs under art. 173(4) TEC and pointed out that the same criterion used for natural persons applies to associations which claim to have *locus standi* on the basis of the fact that the persons whom they represent are individually concerned by the contested decision[34].

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[32] *Ibid.*, § 42.

[33] *Greenpeace* (CJEU), see n. 4, § 25.

[34] *Ibid.*, § 29.

4.2. – *Effective judicial protection.*

The second main proposition put forward by GP to justify why the Plaumann test should be overcome, concerned the fundamental right to effective judicial protection, today enshrined under art. 47 of the European Charter of Fundamental Rights (ECFR).

The applicants claimed that, if the individuals affected by the challenged EU measure were not granted *locus standi*, this would create a legal vacuum in the EU judicial protection system[35]. Plus, this vacuum could not be filled even by the possibility of bringing proceedings before the national courts. In fact, the plaintiffs clarified that they had already brought such proceedings in Spain, but these concerned the national authorities' failure to comply with their obligations under the EIA directive and not the legality of the contested EU measure. In other words, the illegality alleged at the EU level centered on the lawfulness under EU law of the Commission's disbursement of structural funds on the ground that that disbursement was in violation of an obligation for protecting the environment[36].

Nonetheless, as mentioned before, the CJEU responded by simply stating that the rights which the plaintiffs claimed to be impaired by the contested EU decision were in fact «fully protected by the national courts which may, if need be, refer a question to this Court for a preliminary ruling».

This line of reasoning was confirmed by the Court a few years later in another relevant ruling, namely *Unión de Pequeños Agricultores* (*UPA*)[37]. In this case, the EU judiciary held that current art. 263 TFEU[38] should be read in a more systemic way, in accordance with arts. 267 and 277 TFEU. This since, under these provisions, the Treaty has established a «*complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions, and has entrusted such review to the* [EU] *Courts. Under that system, where*

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[35] *Ibid.*, § 18.

[36] *Ibid.*

[37] C-50/00 P, *Unión de Pequeños Agricultores v. Council* (2002) ECLI:EU:C:2002:462.

[38] Art. 173 TEC at that time.

natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of article 173 TEC, directly challenge [EU] *measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the* [EU] *Courts under article 177 TEC or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid, to make a reference to the Court of Justice for a preliminary ruling on validity. / Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection*»[39].

Therefore, in the Court's view, the EU judicial system should not be seen as limited to the GC and the CJEU, but as also including all the Member States' (MSs) courts. Indeed, national courts contribute to 'complete' the EU judicial protection system, having the duty to apply and enforce EU law provisions and – at least in the case of courts from which there is no right of appeal – the duty to refer questions of interpretation or validity to the CJEU.

However, in other cases[40] the applicants shared the view that, in some circumstances, the preliminary reference procedure may not be sufficient. Indeed, they claimed that access to justice before the EU judiciary must be granted wherever no legal remedies under national law are available. In addressing this argument, the GC affirmed the sharp separation between the judicial proceedings at national and EU level, and stated that «the admissibility of an action for annulment before the [EU] courts does not depend on whether there is a remedy before a national court enabling the validity of the act being challenged to be examined»[41]. As an inevitable consequence, the argument was rejected and EU Courts never recognised a breach of the fundamental right to effective judicial protection with regard to the Plaumann test.

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[39] *UPA*, see n. 37, §§ 40-41.

[40] Joined cases T-236/04 and T-241/04, *EEB and Stichting Natuur en Milieu v. Commission* (2005) ECLI:EU:T:2005:426; T-541/10, *ADEDY and Others v. Council* (2012) ECLI:EU:T:2012:626.

[41] *Ibid.*, *EEB*, § 67.

4.3. – *EU law consistency*.

The third main assumption supported by ENGOs in actions for annulment in the pre-Aarhus period concerns the necessity of guaranteeing the *consistency* of the EU legal order. By the term *consistency*, I refer to the necessity of making sure that the interpretation provided by the Court in a given case is coherent with the overall jurisprudence of the Court as well as with EU primary and secondary law.

Indeed, according to the applicants who put forward the argument, a more comprehensive reading of EU primary and secondary law, as well as of the jurisprudence of the CJEU, would naturally lead the latter to actually grant standing to ENGOs in direct actions. This for the reasons that will be outlined in the following sections.

However, as far as consistency with EU primary law and the CJEU's jurisprudence in environmental matters is concerned, I would like to refer back to the description of AG Cosmas' arguments, presented in section 4.1 of this article. Therefore, the sections below will explore the arguments used in *Greenpeace* to promote a better consistency with EU secondary law and the case law of the CJEU in areas *other* than environmental protection.

4.3.1. - *Consistency with EU secondary law*.

Consistency in the granting of *locus standi* in direct actions, on the one hand, and EU secondary law, on the other, has usually been translated by environmental litigants in terms of consistency between the procedural rights recognized by EU primary law in the *litigation phase* and the procedural rights provided by EU secondary law in the *pre-litigation phase*.

To give a clear example, in *Greenpeace* the applicants claimed that «*special circumstances such as the role played by an association in a procedure which led to the adoption of an act within the meaning of article 173 of the Treaty may justify holding admissible an action brought by an association whose members are not directly and individually concerned by the contested measure*»[(42)].

[(42)] *Greenpeace* (CFI), see n. 4, § 59.

In this regard, given that some of the applicants submitted complaints to the Commission in the pre-litigation phase, it was argued that the Court should grant them standing on this basis alone. The plaintiffs added that the exchange of correspondence and the meeting in Brussels between members of GP and the Commission was enough to provide them with *locus standi*.

In addressing these arguments, the EU judiciary sharply distinguished between the *spontaneous participation* of private parties in the EU decision-making and *mandatory consultation duties* provided under EU law. The CFI made clear that «no specific procedures are provided for whereby individuals may be associated with the adoption, implementation and monitoring of decisions taken in the field of financial assistance granted by the ERDF»[43]. «The Commission – continued the Court – was under no duty either to consult or to hear the applicants in the context of the implementation of the contested decision. Greenpeace's approaches to the Commission cannot, therefore, give it *locus standi*»[44].

4.3.2. - *Consistency with the case law of the CJEU.*

This section explores the arguments of the applicants in *Greenpeace* which aim to strengthen the consistency of the case law of the CJEU on standing in environmental matters on the one hand, and in different areas of EU law on the other hand.

In particular, the plaintiffs held that the requirement that in order to establish *locus standi*, applicants must show that they are affected in the same way as the addressee of a decision was «not borne out by the case-law of the Court of Justice»[45]. In this regard, the plaintiffs cited the CJEU case law in the field of State aids, «recognizing that competitors of beneficiaries of aid have standing to bring an action under art. 173 of the Treaty although their interests are not affected in the same way as the addressee of a decision,

[43] *Ibid.*, § 56.

[44] *Ibid.*, § 63.

[45] *Greenpeace* (CFI), see n. 4, § 31.

which is the Member State concerned»[46]. The applicants pursued mobilising the GC to adopt a more liberal approach toward standing. In particular, they argued that «their *locus standi* can depend not on a purely economic interests but on their interests in the protection of the environment»[47].

In other words, the real question raised in *Greenpeace* was: why *yes* for corporations in State Aid cases and *no* for NGOs in environmental cases?

On this point, the EU judges did not provide a comprehensive answer[48]. They limited themselves to defending the CJEU's *Plaumann* formula and maintained that this test 'remains applicable whatever the nature, economic or otherwise, of those of the applicants' interests which are affected' and that the conditions laid down in art. 173(4) TEC may not be disregarded.

5. — *Preliminary remarks on the 'pre-Aarhus period'.*

This close analysis of the plaintiffs' reasoning in *Greenpeace* allows me to lay down some preliminary remarks on how ENGOs looked at direct access to justice in the field of environmental protection before the entry into force of the AR.

First, we can notice that the question of access to environmental justice was a question purely internal to the EU legal order. Indeed, in the absence of an international agreement governing the matter, the plaintiffs solely referred to provisions and principles laid down in EU law. These arguments mainly aimed at supporting three particular propositions. The first one being that the protection of the environment represents a particular kind of public interest, deserving a special treatment in courts. The second one being that denying standing to ENGOs before EU Courts creates a legal vacuum in the EU judicial protection system. The third one being that standing of ENGOs must be

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[46] Case C-198/91, *William Cook plc v. Commission* (1993) ECLI:EU:C:1993:197.

[47] *Greenpeace* (CFI), see n. 4, § 32.

[48] For an interesting explanation of the traditional standard on standing of the CJEU, see T. Hartely, *The Foundations of EC law*, Oxford (2010), p. 374.

ensured in order to guarantee consistency between EU primary and secondary law as well as in the case law of the CJEU in all the policy domains.

Second, ENGOs had a very *procedural* approach to *locus standi*. On this point, in all the environmental actions for annulment brought before the Court in the pre-Aarhus period, the applicants put particular emphasis on procedural participatory rights.

In *Greenpeace*, the plaintiffs claimed standing on the basis of their spontaneous participation in the decision-making process. Similarly, in *WWF* – a case dealing with the Common Fisheries Policy – the plaintiff held that its membership to the North Sea Regional Advisory Council was sufficient to prove that the organisation was actually individually concerned by the contested EU measure[49].

Third, by simply looking at the names of the plaintiffs[50], we can notice that the main and most famous European (and international) ENGOs were all actively involved in litigating before the CJEU in order to try to get access to justice. The first cases brought under art. 173(4) TEC were initiated by leading organisations like Greenpeace, WWF and the EEB, while – as it will be shown – the most recent environmental actions for annulment see very different actors acting as applicants.

II. – THE 'POST-AAHRUS (I)' PERIOD: STICHTING NATUUR

In 2005, the EU ratified the 1998 UNECE Aarhus Convention, which had already entered into force on 30 October 2001[51]. This Convention aims at fostering environmental democracy in Europe by enshrining three procedural rights with a strong link to environmental protection. The first Aarhus 'pillar' is represented by the right to receive environmental informa-

[49] *WWF-UK v. Council*, see n. 3, § 44.

[50] See case law outlined in nn. 3-4.

[51] Council Decision 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 OJ L 124, 17 May 2005, pp. 1-3.

tion that is held by public authorities. The second pillar consists of the right to participate in environmental decision-making. The third pillar involves the right to review procedures to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general (namely, the right to 'access to justice').

6. — *The Aarhus Regulation*.

In 2006, one year after its ratification of the Convention, the EU adopted the so-called 'Aarhus Regulation' – namely Regulation n. 1367/2006[52] – which binds the EU institutions, bodies and agencies to respect the obligations stemming from the Aarhus Convention. Indeed, the AR – *inter alia* – aims to grant access to justice in environmental matters at EU level under the conditions laid down by the Regulation. In this regard, art. 10 provides a procedure for internal review of administrative acts which is available to any ENGO meeting the criteria set out in art. 11.

Any non-governmental organisation which meets the criteria set out in art. 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act.

This request for internal review of EU administrative acts must be made in writing and within a time limit not exceeding six weeks after the administrative act was adopted, notified or published. Plus, in case the EU institution addressed rejects the request or stays silent, the ENGO may institute proceedings before the EU Courts «in accordance with the relevant provisions of the Treaty»[53].

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[52] Regulation (EC) n. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies OJ L 264, 25 September 2006, pp. 13-19.

[53] *Ibid.*, art. 12.

It is worth noticing that, since the entry into force of the AR, ENGOs have usually brought actions for annulment via the internal review procedure established under the AR.

At present[54], civil society organisations have submitted forty-one requests to the Commission under art. 10 AR and only 10 of these have been found admissible. 18 out of the remaining 31 requests ended up in court proceedings. In six of these proceedings the applicants withdrew their applications before adjudication. At the moment, two cases are pending, while the other ten cases were concluded with a final ruling/order issued by the EU judiciary[55].

7. — *Factual background.*

The *Stichting Natuur* case[56] was brought by two ENGOs founded under

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[54] 20 October 2019.

[55] Repository of requests for internal review lodged with the European Commission pursuant to art. 10 of Regulation (EC) No 1367/2006 ('Aarhus Regulation'). Available at: *ec.europa.eu* (20 October 2019). It should be noted, however, that other EU bodies can – and do – also receive requests. Lists of requests which ended up in court proceedings: T-338/08, *Stichting Natuur en Milieu and Pesticide Action Network Europe v. Commission* (2012) ECLI:EU:T:2012:300; T-574/12, *PAN Europe and Stichting Natuur en Milieu v. Commission* (2015) ECLI:EU:T:2015:541; T-396/09, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht v. Commission* (2012) ECLI:EU:T:2012:301; T-232/11, *Stichting Greenpeace Nederland and PAN Europe v. Commission* (2015) ECLI:EU:T:2015:342; T-192/12, *PAN Europe v. Commission* (2014) ECLI:EU:T:2014:152; T-458/12, *Générations futures v. Commission* (2015) ECLI:EU:T:2015:155; T-168/13, *EPAW v. Commission* (2014) ECLI:EU:T:2014:47; T-177/13, *TestBioTech and Others v. Commission* (2016) ECLI:EU:T:2016:736; T-8/13, *ClientEarth and Others v. Commission* (2015) ECLI:EU:T:2015:348; T-19/13, *Frank Bold v. Commission* (2015) ECLI:EU:T:2015:520; T-462/14, *EEB v. Commission* (2015) ECLI:EU:T:2015:327; T-565/14, *EEB v. Commission* (2015) ECLI:EU:T:2015:559; T-685/14, *EEB v. Commission* (2015) ECLI:EU:T:2015:560; T-33/16, *TestBioTech v. Commission* (2018) ECLI:EU:T:2018:135; T-108/17, *ClientEarth v. Commission* (2019) ECLI:EU:T:2019:215; T-12/17, *Mellifera v. Commission* (2018) ECLI:EU:T:2018:616; T-436/17, *ClientEarth and Others v. Commission* (pending); T-393/18, *Mellifera v. Commission* (pending).

[56] T-338/08, *Stichting Natuur en Milieu and Pesticide Action Network Europe v. Commission*

Dutch law, namely *Stichting Natuur en Milieu*, set up in 1978 and established in Utrecht, whose object is protection of the environment, and *Pesticide Action Network Europe*, set up in 2003 and established in London, whose purpose is to campaign against the use of chemical pesticides.

In 2008, these ENGOs submitted two requests under art. 10 AR to the Commission for an internal review of Regulation n. 149/2008[57] amending Regulation n. 396/2005 of the European Parliament and of the Council on maximum residue levels (MRLs) of pesticides in or on food and feed of plant and animal origin.

Art. 2(1)(g) AR defines 'administrative act' as meaning «any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects». On the basis of this, the Commission rejected the applicants' requests presented under art. 10 by holding that «a request for internal review shall comply with certain conditions, including the nature of the administrative act, which has to fall under the definition given in article 2(1)(g) of the same Regulation»[58]. The Commission did not consider that the contested measures constituted administrative acts within the meaning of the AR. In the light of this rejection, in 2008 the two ENGOs instituted proceedings before the GC and sought the annulment of both the Commission's decision rejecting the requests as well as of the initial Regulation which had formed the subject matter of the ENGOs' internal review demand.

At the end of the judicial proceedings, the applicants' arguments prevailed before the GC, which found the *Fediol* and *Nakajima* case law to be applicable. The Court thus annulled the two contested measures, namely the

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(2012) ECLI:EU:T:2012:300; joined cases C-404/12 P and C-405/12 P, *Council and Commission v. Stichting Natuur en Milieu and Pesticide Action Network Europe* (2015) ECLI:EU:C:2015:5. Hereinafter '*Stichting Natuur* (GC)' and '*Sitchting Natuur* (CJEU)'.

[57] Commission Regulation (EC) No 149/2008 of 29 January 2008 amending Regulation (EC) No 396/2005 of the European Parliament and of the Council by establishing Annexes II, III and IV setting maximum residue levels for products covered by Annex I thereto (Text with EEA relevance) OJ L 58, 1 March 2008, pp. 1-398.

[58] *Stichting Natuur* (GC), see n. 56, § 4.

initial Regulation (object of the internal review request) and the Commission's decision rejecting the requests of the ENGOs. The GC's judgment was then appealed by the Council and the Commission and the case was finally decided by the CJEU in 2015.

8. — *The arguments of the applicants.*

By contrast with *Greenpeace*, in the drafting of this section I have had the advantage of gaining access to the original application file[59] submitted by the applicants in the appeal process of *Stichting Natuur* before the CJEU[60].

In seeking the annulment of the two EU measures, the applicants in *Stichting Natuur* put forward a number of legal arguments, aimed mainly at supporting two different propositions, each an alternative to the other: i) *An act of 'individual scope'*: the act for which the internal review under art. 10 AR was requested (the initial Regulation, ndr) is an administrative act, having individual scope; ii) *Compliance with international environmental law*: art. 2(1)(g) AR is not in compliance with art. 9(3) of the Aarhus Convention. Plus, the latter can be invoked in order to assess the legality of the AR.

8.1. – *An act of 'individual scope.*

The EU's adoption of the AR immediately provoked an interesting change in EU environmental litigation. While in previous actions for annulment ENGOs had struggled to show that they were 'individually concerned' by the contested EU act, the real challenge under the AR related to the quality of 'challengeable act'.

In this respect, in *Stichting Natuur* the applicants were required to prove that the act for which they submitted a request for internal review was an

[59] *Stichting Natuur* – AF.

[60] In this regard, I warmly thank the law firm *Van Den Biesen* in Amsterdam for making such file available for legal research.

administrative act having 'individual scope'. However, all their arguments were firmly rejected by the EU judiciary.

The case law of the CJEU does not offer any definition of 'act of individual scope' but it does provide a definition of its opposite, namely of what does 'act of general scope' entail under EU law. Indeed, in the *UCDV* case, the CJEU ruled that a measure is regarded as being of general application if it applies to «objectively determined situations and entails legal effects for categories of persons envisaged generally and in the abstract»[61].

In the case here at stake, the applicants claimed that the Commission wrongly found that the challenged Regulation could not be considered to be an act of 'individuals scope'[62]. In this regard – the plaintiffs – maintained that the contested EU measure represented a specific application of the general standards laid down in Regulation n. 396/2005[63] and applied only to specific activities[64]. In addition, Directive 91/414/EEC on the placing of plant protection products on the market grants the possibility to submit to the Commission a separate application for establishment or modification of each temporary MRL. For this reason, the applicants argued that the contested measure had to be considered as a 'bundle of individual decisions'[65].

On such points, the GC found that the contested Regulation set out the list of active substances for plant protection products evaluated under EU law for which no MRLs were required[66]. Thus, the EU judges held that – in view of its purpose and content – the contested Regulation had to be qualified as an 'act of general scope'. This was because it applied to «objectively determined situations» and entailed «legal effects for categories of persons envisaged generally and in the abstract; that is to say, economic operators who are manufacturers, growers, importers or producers of products cov-

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(61) C-244/88, *UCDV v. Commission* (1989) ECLI:EU:C:1989:588, § 13.

(62) *Stichting Natuur* (GC), see n. 55, § 27.

(63) *Ibid.*, § 41.

(64) *Ibid.*, § 42.

(65) *Ibid.*, § 27.

(66) *Ibid.*, § 38.

ered by the annexes to Regulation n. 396/2005»[67].

Being an 'act of general scope', the fact that the contested Regulation applied to a clearly defined group of products and substances to which no other substance could be added at a later stage was thus for the Court «not relevant for the purposes of identifying the scope of that regulation»[68].

Furthermore, with regard to the 'bundle of individual decisions' argument advanced by the applicants, the GC recalled the *International Fruit Company* case law[69], according to which «a contested measure adopted in the guise of a measure of general application is deemed to constitute a bundle of individual decisions if it has been adopted in order to respond to individual claims, so that the contested measure affects the legal position of each claimant»[70]. Since the MRLs established by the challenged EU act were not adopted in response to individual claims, the Court concluded that the applicants' argument had to be rejected[71].

8.2. – *Compliance with international environmental law*.

In *Stichting Natuur*, the applicants also invoked a plea of illegality before the GC: if the latter had not found the contested measure to be an 'act of individual scope', the Court then had to recognise art. 9(3) of the Aarhus Convention as having direct effect and review the legality of art. 10 AR *vis-à-vis* such a provision. Art. 9(3) of the Convention represents the 'heart' of the Aarhus third pillar and reads as follows: «Each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment».

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[67] *Ibid.*

[68] *Ibid.*, § 44.

[69] Joined cases 41/70 to 44/70, *NV International Fruit Company and others v. Commission of the European Communities* (1971) ECLI:EU:C:1971:53.

[70] *Stichting Natuur* (GC), see n. 55, § 45.

[71] *Ibid.*

Therefore, in the applicants' view, an internal review procedure limited to administrative acts of 'individual scope', was not compatible with the wording of art. 9(3).

By so arguing, the applicants raised the crucial question of whether provisions of an international agreement, to which the EU is a party, can be relied on in support of an action for annulment of an act of secondary EU legislation. According to the CJEU's *Intertanko*[72] and *FIAMM*[73] jurisprudence, applicants may rely on such provisions when «first, the nature and the broad logic of that agreement do not preclude it and, secondly, those provisions appear, as regards their content, to be unconditional and sufficiently precise»[74] (in other words, have direct effect).

However, in the case here at stake, the GC recalled that where the EU has intended to «implement a particular obligation assumed under an international agreement, or where the measure makes an express *renvoi* to particular provisions of that agreement, it is for the Court to review the legality of the measure in question in the light of the rules laid down in that agreement»[75]. In this regard, the EU judges found the so-called *Fediol*[76] and *Nakajima*[77] 'exceptions' applicable to in relation to the contested measures.

In those cases the Court recognised its competence to review the legality of the EU act at issue, and the acts adopted for its implementation, in the light of the rules of the World Trade Organisation (WTO) agreements where (i) the EU intends to implement a particular obligation concluded in the context of the WTO (*Nakajima* exception)[78]; or (ii) where the EU act at issue re-

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[72] C-308/06 *Intertanko and Others* (2008) ECLI:EU:C:2008:312.

[73] C-120/06 P *FIAMM and Others v. Council and Commission* (2008) ECLI:EU:C:2008:476.

[74] *Ibid.*, §§ 110–20.

[75] *Stichting Natuur* (GC), see n. 55, § 54.

[76] Case 79/87 *Fédération de l'industrie de l'huilerie de la CEE (Fediol) v. Commission of the European Communities* (1989) ECLI:EU:C:1989:254.

[77] C-69/89 *Nakajima All Precision Co Ltd v. Council of the European Communities* (1991) ECLI:EU:C:1991:186.

[78] *Ibid.*, § 31.

fers explicitly to specific provisions of those agreements (*Fediol* exception)[79].

The GC dismissed the plaintiffs' argument on direct effect of art. 9(3) based on the *Slovak bear*[80] case law, where the CJEU held that art. 9(3) of the Aarhus Convention does not contain «any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals and therefore does not meet those conditions».

Nonetheless, the GC found that the AR 'implemented' the relevant international agreement, as it was adopted to meet 'the European Union's international obligations under art. 9(3) of the Aarhus Convention'. By carrying out its review, the GC pointed out that the Convention does not provide any definition of the term 'acts'[81], and an internal review procedure covering only measures of individual scope would be very limited, «since acts adopted in the field of the environment are mostly acts of general application»[82]. The GC thus found the internal review procedure laid down under art. 10 AR incompatible with the Convention and annulled the contested measures.

The GC's decision was then appealed by the Council and the Commission, which maintained that the Court erred in law in finding the two exceptions applicable. On the opposite, the ENGOs argued that the Court also erred in law in denying direct effect of art. 9(3) of the Convention. This point deserves a closer reading. Indeed, in their pleadings the ENGOs strongly emphasised that *Slovak bear* and *Stichting Natuur* had very different scopes. *Slovak bear* dealt with the 'procedure' under which national ENGOs could be granted access to justice in Slovakia, while the present case dealt with the 'object' of the internal review procedure, namely the notion of 'administrative act' as laid down in the AR[83].

In other words, the ENGOs seemed to argue that art. 9(3) could be denied direct effect with regard to standing at national level, but that provision

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[79] *Fediol*, see n. 76, § 19.

[80] C-240/09 *Lesoochranárske zoskupenie* (2011) ECLI:EU:C:2011:125.

[81] *Stichting Natuur* (GC), see n. 55, § 72.

[82] *Ibid.*, § 76.

[83] *Stichting Natuur* – AF, 9.

is sufficiently clear and precise to set aside EU legislation limiting the object of a judicial or administrative review to environmental administrative acts of individual scope.

In spite of the ENGOs' arguments, the CJEU confirmed what was stated in *Slovak bear* and denied the direct effect of art. 9(3) of the Aarhus Convention. Moreover, the Court dismissed the applicability of the *Fediol* and *Nakajima* exceptions on the basis that they were «justified solely by the particularities of the agreements that led to their application»[(84)]. As to the *Fediol* exception, it did not apply to the cases at issue since art. 10 AR does not directly refer to any specific provisions of the Aarhus Convention, nor does it explicitly confer a right on individuals. As to the *Nakajima* exception, the factual and legal background of *Nakajima* had to be distinguished from the case at hand[(85)]. In *Nakajima* the dispute centred on an EU implementing act linked to the anti-dumping system, which was, according to the Grand Chamber, «extremely dense in its design and application, in the sense that it provides for measures in respect of undertakings accused of dumping practices»[(86)]. As a consequence, the CJEU concluded that no implementation was at stake in the *Stichting Natuur* case[(87)].

Furthermore, by adopting the AR, which concerns only EU institutions and one of the remedies available to private citizens for ensuring compliance with EU environmental law, the EU was not intended to implement the obligations deriving from art. 9(3) of the Convention, within the meaning of the *Fediol* and *Nakajima* case law[(88)]. According to the Court's reasoning, those obligations «fall primarily within the scope of Member States law», as previously stated in the *Slovak bear* case. As a consequence, the CJEU dismissed the cross-appeal and set aside the GC's ruling.

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(84) *Stichting Natuur* (CJEU), see n. 55, § 49.

(85) H. Schoukens, *Access to Justice in Environmental Cases after the Rulings of the Court of Justice of 13 January 2015: Kafka Revisited?*, in *Utrecht Journal of International and European Law* (2015) 31(81), p. 58.

(86) *Stichting Natuur* (CJEU), see n. 55, § 51.

(87) H. Schoukens, see n. 78, 58.

(88) *Stichting Natuur* (CJEU), see n. 55, § 52.

9. — *Preliminary remarks on the 'post-Aarhus (I)' period.*

In the light of the final outcome of the *Stichting Natuur* case, it is possible to argue that the entry into force of the AR in the EU legal order has brought small 'procedural' changes but no 'substantive' improvements with regard to access to environmental justice before EU Courts[89].

The internal review procedure laid down under art. 10 AR could be seen – initially – as a 'new tool', to be used by civil society organisations to push the EU institutions to reconsider their administrative decisions taken in the field of the environment. However, the narrow scope of the review provided under the Regulation makes extremely difficult that ENGOs' requests are deemed admissible by the addressed institution.

In particular, accessing EU Courts under the AR has made the 'object' of the procedure the main obstacle on the ENGOs' path toward judicial review: the problem is the 'act' in itself, rather than the relationship between the act and the legal sphere of the applicant (as it is under Plaumann). Furthermore, the AR has increased the use of the plea of illegality in EU environmental litigation. Indeed, ENGOs have usually invoked the remedy available under art. 277 TFEU to contest the legality of the AR in actions for annulment. Plus, such illegality has generally been based on the alleged incompliance between the AR and the Aarhus Convention.

This aspect probably highlights the most interesting change that the AR has brought in the EU legal order. From being a purely internal issue – to be solved only through the provisions available under EU law – the question of access to environmental justice has suddenly become a matter of 'EU exter-

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[89] H. Schoukens, *Articles 9(3) and 9(4) of the Aarhus Convention and Access to Justice before EU Courts in Environmental Cases: Balancing On or Over the Edge of Non-Compliance?*, in *European Energy and Environmental Law Review* (2016) 25(6), p. 178; M. Pallemaerts, *Access to Environmental Justice at EU Level: Has "the Aarhus Regulation" Improved the Situation?*, in Id., *The Aarhus Convention at Ten: Interactions and Tensions between Conventional International Law and EU Environmental Law*, Europa Law Publishing, 2011, p. 271; J.H. Jans, G. Harryvan, *Internal Review of EU Environmental Measures. It's True: Baron Van Munchausen Doesn't Exist! Some Remarks on the Application of the So-Called Aarhus Regulation*, in *Review of European and Administrative Law* (2010) 3(2), p. 55.

nal relations' and compliance with the Aarhus Convention. In other words, if in the pre-Aarhus period the question of access to justice was a matter of 'EU law *versus* EU law', after Aarhus the same question has become a matter of 'EU law *versus* international law'[(90)]. An important shift, which has brought also international compliance bodies to take position on this matter (as it will be outlined in the next sections).

One last interesting aspect worth consideration regards the 'new' litigants arisen after the entry into force of the AR. In addition to some of the ENGOs already litigating in the pre-Aarhus period (such as Greenpeace, EEB and Stichting Natuur), the (potential) opportunities offered by the procedure laid down under art. 10 AR have attracted a number of smaller and highly specialised ENGOs. These include organisations like 'Testbiotech' (focusing on risks deriving from genetical engeneering)[(91)] and 'Mellifera' (focusing on bees protection[(92)], as it will be reported in the next sections).

III. – THE 'POST-AARHUS (II)' PERIOD

The 'post-Aarhus (II)' period runs from 17 March 2017 – the day on which the Aarhus Convention Compliance Committee (ACCC) released its findings on compliance of the EU with the Aarhus Convention – to the present. As mentioned at the beginning of the chapter, the study of this timeframe actually explores two different legal 'pathways', currently used by ENGOs in the attempt to get access to justice before EU Courts. The first pathway concerns, once again, access to justice under the AR (after the ACCC findings); the second pathway focuses on access to justice under the relevant Treaty provisions and it seeks to highlight how the ongoing global CCL trend is affecting the reasoning of the ENGOs in actions for annulment.

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(90) I acknowledge that this is not entirely correct, since international agreements to which the EU is a party become integral part of EU law.

(91) From Testbiotech official website, available at: *testbiotech.org*.

(92) From Mellifera e. V. official website, available at: *mellifera.de*.

10. — *The ACCC findings.*

The ACCC is the non-confrontational, non-judicial and consultative body established in Geneva in 2002 which is called upon to check the conformity between the legislation of the Parties to the Aarhus Convention with the Convention itself. It is interesting to notice that even associations and ENGOs may submit communications to the Committee with regard to the compliance of one of the Parties with the Convention, which counts 47 Parties (including the EU).

The Committee adopts findings which do not have any legally binding character and if non-compliance is found, it may make recommendations either to the Meeting of the Parties (MOP), or, with the Party's agreement, directly to the Party concerned (on a case by case basis)[93].

In 2008, the ENGO 'ClientEarth' submitted a communication[94] to the Committee concerning compliance by the EU with the Aarhus Convention. In particular, the ENGO complained about the *Plaumann* test and the alleged incompliance between the internal review procedure laid down under the AR and the Aarhus Convention.

With regard to the Plaumann test, the ACCC pointed out that art. 263(4) TFEU – on which the EU judges have based their strict position on standing – is «drafted in a way that could be interpreted so as to provide standing for qualified individuals and civil society organizations in a way that would meet the standard of article 9(3) of the Convention»[95].

In this regard, in its communication, ClientEarth argued that, to be individually concerned, according to the CJEU, «the legal situation of the person must be affected because of a factual situation that differentiates him or

[93] United Nations Economic Commission for Europe, Guide to the Aarhus Convention Compliance Committee, 2nd edn (draft) (2015) 6. Available at *unece.org*.

[94] Communication ACCC/C/2008/30.

[95] Report of the Compliance Committee, findings and recommendations with regard to communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, 14 April 2011, § 86. Hereinafter 'Part I'.

her from all other persons»[96]. Thus, private citizens cannot be individually concerned if the decision or regulation takes effect by virtue of an objective legal or factual situation[97]. The consequences of applying the Plaumann test to environmental and health issues is that in effect no member of the public is ever able to challenge a decision or a regulation in such case before the CJEU[98].

The ACCC thus concluded that «without having to analyse further in detail all the cases referred to, it is clear to the Committee that this jurisprudence established by the [CJEU] is too strict to meet the criteria of the Convention»[99].

With regard to the internal review procedure laid down under the AR, it is necessary to highlight that, at the time of the ACCC review, the *Stichting Natuur* case was still pending before the CJEU. For this reason, the Committee refrained from examining whether the AR or any other relevant internal administrative review procedure of the EU met the Convention's requirements on access to justice.

Therefore, on 14 April 2011, the ACCC released only a first part of its findings and simply concluded that – with regard to access to justice by members of the public – if *the jurisprudence of the EU Courts, as evidenced by the cases examined, were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraphs 3 and 4, of the Convention*[100].

The second part of the ACCC findings was thus published on 17 March 2017[101], two years after *Stichting Natuur* was ultimately decided. The Committee found that art. 2(1)(g) AR, defining 'administrative act' as meaning

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[96] *Ibid.*

[97] *Ibid.*

[98] *Ibid.*

[99] *Ibid.*, § 87.

[100] *Ibid.*, § 94.

[101] Report of the Compliance Committee, findings and recommendations with regard to communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union, 17 March 2017. Hereinafter 'Part II'.

«any measure of individual scope adopted under environment law (…)», was in breach of the obligations stemming from art. 9(3) of the Convention, as the latter covers 'any act under any law' which contravenes law relating to the environment.

Plus, the Committee maintained that even the scope of the expression 'acts adopted under environmental law' is too narrow, as art. 2(1)(f) AR intends 'environmental law' as including any EU legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of the EU policy on the environment as set out in the Treaty[102]. Conversely, the scope of art. 9(3) of the Convention – held the ACCC – is broader than that, since it is clear that, under the Aarhus Convention, «an act may contravene laws relating to the environment without being adopted under environmental law» within the meaning of art. 10 AR[103]. Furthermore, the Committee found that the Treaty of Lisbon – amending the fourth paragraph of art. 263(4) TFEU – did not bring substantive changes for ENGOs seeking access to justice at EU level[104].

The ACCC's final assessment stressed a serious instance of non-compliance with art. 9(3) and (4) of the Convention with regard to «access to justice by members of the public because neither the [AR], nor the jurisprudence of the CJEU, implements or complies with the obligations arising under those paragraphs»[105]. In conclusion, the Committee recommended to the EU that it amends the AR and invited the CJEU in particular to 'update' its jurisprudence on art. 263(4) TFEU[106].

Nonetheless, at its sixth session which took place in Budva (Montenegro) on 11-13 September 2017, the MOP – «considering the exceptional circumstances» – decided by consensus to «postpone the decision-making on draft decision VI/8f concerning the EU to the next ordinary session of the

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[102] *Ibid.*, § 96.

[103] *Ibid.*, § 98.

[104] *Ibid.*, § 120.

[105] *Ibid.*, § 123.

[106] *Ibid.*

Meeting of the Parties to be held in 2021»[107]. On the other side, the EU recalled its «willingness to continue exploring ways and means to comply with the Convention in a way that is compatible with the fundamental principles of the Union legal order and with its system of judicial review»[108].

Such a final outcome of the sixth session of the MOP was highly criticised by civil society organisations, which accused the EU of 'hypocrisy' and invited the latter, without delay, to start the process of «revising the [AR] which up to now, in combination with the jurisprudence of the [CJEU], has effectively prevented NGOs from seeking access to justice in defence of the environment at the EU level in all but access to documents cases»[109].

11. — *Post-Aarhus (II) – post findings: Mellifera.*

The first case brought by an ENGO under the AR after the ACCC released the final part of its findings on compliance of the EU, is *Mellifera*[110]. Given that the appeal process is still pending, for the analysis of this case it has so far only been possible to rely on the GC's decision, adopted in September 2018.

The factual background in *Mellifera* is very similar to the one in *Stichting Natuur*. 'Mellifera eV' is a German environmental association aiming at preserving bees' health. The association asked the Commission to review – under art. 10 AR – implementing regulation 2016/1056[111], extending the

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[107] See *ukhumanrightsblog.com*.

[108] Full Summary of the Budva Meetings – Sixth Session of the Meeting of the Parties to the Aarhus Convention. Available at: *unece.org*.

[109] European Eco Forum statement on the role of the European Union in relation to the finding that it is in non-compliance with the Aarhus Convention, Budva, Montenegro, Thursday 14 September 2017. See *wecf.eu*.

[110] T-12/17, *Mellifera v. Commission* (2018) ECLI:EU:T:2018:616.

[111] Commission Implementing Regulation (EU) 2016/1056 of 29 June 2016 amending Implementing Regulation (EU) No 540/2011 as regards the extension of the approval period of the active substance glyphosate (Text with EEA relevance) C/2016/4152 OJ L 173, 30 June 2016, pp. 52-54.

approval period of the active substance glyphosate. The European executive rejected Mellifera's request on the ground that such a measure did not constitute a challengeable EU administrative act as outlined in art. 2(1)(g) AR. As a consequence, in January 2017 the association decided to challenge the Commission's decision rejecting its request before the EU GC.

Apart from the arguments advanced by the applicant to demonstrate that the contested measure was an administrative act having 'individual scope', what is extremely worth considering in *Mellifera* is the explicit invitation made to the Court to take into account the ACCC findings and modify the jurisprudence on the 'act of individual scope' requirement[(112)]. In addition, the association invited the EU judges to provide a consistent interpretation of art. 10 AR with the Aarhus Convention, in order to bring the EU closer to a full compliance with the international agreement[(113)].

As showed in section II, in *Stichting Natuur* the GC proved to be more willing than the CJEU to review conformity of EU secondary law with the Aarhus Convention. In that case, the GC actually declared art. 10 AR incompatible with the Convention and it annulled the EU measures challenged by the applicants. However, such a 'progressive' interpretation of the AR was already abandoned by the GC in *Frank Bold*[(114)] in 2015, where the EU judiciary aligned its case law with the jurisprudence of the CJEU on art. 10 AR. Such consistency in the case law has been confirmed by the GC also in *Mellifera*, where, in spite of the applicant's invitation to take into account the ACCC findings, the Court dismissed the action brought by the association.

In this regard, the applicant in *Mellifera* recalled that the Aarhus Convention is binding on the EU and that art. 9(3) guarantees the broadest access to justice possible, not limiting the possibility to challenge measures having a negative impact on the environment to acts of 'individual scope'[(115)]. This

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(112) *Mellifera*, see n. 96, § 78.

(113) *Ibid.*, § 79.

(114) T-19/13, *Frank Bold v. Commission* (2015) ECLI:EU:T:2015:520.

(115) *Mellifera*, see n. 96, § 78.

is a stricter definition introduced by the EU legislator that is not required by the Aarhus Convention.

In addition, the applicant stressed that, in spite of the lack of direct effect of art. 9(3) of the Convention – strongly affirmed in *Stichting natuur* and *Slovak bear* – the Court has a duty of consistent interpretation of EU secondary law with international agreements to which the EU is party. This meant that, according to Mellifera, the Court had to interpret [where possible] art. 10 AR in compliance with art. 9(3) of the Aarhus Convention[116].

Nevertheless, the GC rejected all the applicant's arguments. First, it denied once again that art. 9(3) may have direct effect in the EU legal order[117]. Second, regarding the invitation to follow the ACCC findings, the EU judges answered that even assuming that such findings had binding force, these are nothing more than a simple 'draft', not officially adopted by the MOP and released on 17 March 2017, therefore once the contested regulation had already been adopted by the Commission (in 2016, *ndr*)[118].

Regarding the duty of consistent interpretation with international agreements to which the EU is Party, the Court held that this is possible only where the wording of the concerned legislation allows for such an interpretation and this does not lead to an interpretation *contra legem*[119].

On this point, the EU judges noticed that, since the wording of the AR is very clear in limiting the types of challengeable measures to administrative acts having an 'individual scope', a consistent interpretation of such a regulation must be excluded, especially in the case at stake, since the Court had already qualified the contested implementing regulation 2016/1056 as a measure of 'general scope'. For these reasons, the Court rejected all the pleas advanced by the association and dismissed its action.

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[116] *Ibid.*, § 79.

[117] *Ibid.*, § 95.

[118] *Ibid.*, § 86.

[119] *Ibid.*, § 87. See also C-106/89, *Marleasing v. Comercial Internacional de Alimentación* (1990) ECLI:EU:C:1990:395.

12. — *Preliminary remarks on the 'post-Aarhus (II) – post findings' period.*

The 'post-Aarhus' period can be seen, in the end, as a 'post-Lisbon' period too[120]. Indeed, the Treaty of Lisbon – entered into force in 2009 – should also be mentioned in an analysis like this one, which tries to describe how ENGOs' arguments in actions for annulment have evolved in accordance with an equally evolving EU legal order. However, the changes occurred in Lisbon did not have a major impact on the arguments and the remedies used by ENGOs when seeking to challenge the legality of EU environmental measures. This was also confirmed by the ACCC in its findings and this is why no specific section was devoted to the 'post-Lisbon' period in this paper.

With regard to the findings of the ACCC, these can surely be considered as a major achievement for ENGOs with regard to access to justice before EU Courts. Indeed, the impact of these findings can be considered from both, a legal and a political perspective.

From a purely legal point of view, the ACCC findings have already been referred to by other ENGOs (like *Mellifera*) in actions brought under art. 263(4) TFEU. This in order to try to convince the EU judiciary to take into account the outcome of a review which – although not binding on the Parties – has highlighted a serious non-compliance by the EU with the Aarhus Convention. However, *Mellifera* shows, once again, that the CJEU is the ultimate judge of the EU, the only institution authorised by the Treaties to rule on the autonomy of the EU legal order and to decide to what extent, international agreements to which the EU is a party, may be invoked before EU Courts[121].

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[120] Treaty of Lisbon.

[121] In this regard, see K. Lenaerts, *Direct Applicability and Direct Effect of International Law in the EU Legal Order*, in I. Govaere, E. Lannon, P. van Elsuwege, S. Adam, *The European Union in the World – Essays in Honour of Marc Maresceau*, Leiden, The Netherlands: Brill | Nijhoff, 2014, p. 45, doi: *doi.org*; N. Zipperle, *The Court's Case Law on Direct Effect of International Agreements (Free Trade Associations, Accession Associations, Development Associations and EEA) and Status of WTO Law*, in Id., *EU International Agreements*, Springer, Cham, 2017,

Moreover, in *Mellifera* the Court also relied on a chronological argument – according to which the findings were released only after the challenged implementing regulation – as a justification for disregarding the fact that the EU still is not in compliance with the Aarhus Convention. Given this argument, it will be interesting to see how the Court will answer to applications challenging EU measures adopted 'after' the publication of the ACCC findings[122].

From a political point of view, it is undeniable that the ACCC findings put considerable pressure on the EU institutions. In particular, the European Parliament (hereinafter 'the EP'), the Council of the EU (hereinafter 'the Council) and the European Economic and Social Committee (hereinafter 'the EESC') have all taken clear positions with regard to compliance of the EU with the Aarhus Convention.

First, the EP on 15 November 2017 adopted a resolution on an 'Action Plan for nature, people and the economy'[123]. In this document the EP emphasized 'the role of civil society in ensuring better implementation of Union nature legislation, and the importance of the provisions of the AC in this regard'[124]. In addition, and most importantly, the European co-legislator called on the Commission to: *come forward with a new legislative proposal on minimum standards for access to judicial review, and a revision of the Aarhus Regulation implementing the Convention as regards Union action in order to take account of the recent recommendation from the Aarhus Convention Compliance Committee*[125].

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p. 9; N. Ghazaryan, *Who Are the 'Gatekeepers'?: In Continuation of the Debate on the Direct Applicability and the Direct Effect of EU International Agreements*, Yearbook of European Law, Vol. 37, 2018, p. 27, *doi.org*.

[122] In this regard, see T-141/19, *Sabo and Others v. Parliament and Council* (pending).

[123] European Parliament resolution of 15 November 2017 on an Action Plan for nature, people and the economy [2017/2819(RSP)].

[124] *Ibid.*, § 15.

[125] *Ibid.*, § 16.

Second, the EESC – in its opinion[126] adopted on 7 December 2017 on the Commission's notice on access to justice in environmental matters[127] – highlighted the limitations inherent in that notice in «failing to include the findings of the independent Compliance Committee of the Aarhus Convention (ACCC) (…)»[128].

Furthermore, the European Committee expressed its full support to «the Aarhus Convention and its full implementation by and within the EU», and added «[it] is therefore essential that the findings on compliance of the ACCC, appointed by the Parties, are fully endorsed by the Parties»[129].

Third, with respect to this matter, the Council decided on 11 June 2018 to trigger the procedure under art. 241 TFEU, which has rarely been used in the EU legal history. This Treaty provision allows the Council, acting by a simple majority, to: *request the Commission to undertake any studies the Council considers desirable for the attainment of the common objectives, and to submit to it any appropriate proposals. If the Commission does not submit a proposal, it shall inform the Council of the reasons*[130].

In its decision triggering the procedure, the Council took into serious consideration the ACCC findings and asked the Commission to complete the study by 30 September 2019 and, if changes to the AR are considered appropriate in view of the outcomes of the study, to prepare a proposal for an amendment of the regulation by 30 September 2020[131].

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[126] EESC opinion on Communication from the Commission of 28 April 2017 'Commission Notice on Access to Justice in Environmental Matters' [C(2017) 2616 final].

[127] Commission Notice on access to justice in environmental matters, C/2017/2616, OJ C 275, 18 August 2017, pp. 1-39.

[128] EESC opinion, see n. 109, § 1.12.

[129] *Ibid.*, § 1.13.

[130] Council decision requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006.

[131] *Ibid.*, art. 1.

In October 2019, the Commission published its final study[132] along with a report[133] on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters. The report tries to «look at the Union system of judicial redress as a whole, taking account of the national courts as well as the CJEU». In this respect, the report seems to identify the preliminary reference on validity[134] – laid down under art. 267 TFEU – as the most suitable remedy to fill the gap between the EU judicial protection system and the Aarhus Convention provisions on access to justice. A solution already highly criticized by many ENGOs[135].

13. — *Post-Aarhus (II) – the CCL trend.*

In June 2015, the Hague District Court decided the infamous case *Urgenda*[136], where the national court ruled that the Dutch State must take more action to reduce the greenhouse gas emissions in the Netherlands. The case was brought by the 'Urgenda Foundation', a Dutch ENGO aiming for a «fast transition towards a sustainable society, with a focus on the transition towards a circular economy using only renewable energy»[137].

In spite of being a national case, *Urgenda* is also relevant in the present analysis for the following reasons. Indeed, *Urgenda* started a significant

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[132] Final study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters. Available at: *ec.europa.eu*.

[133] Commission Report published on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters. Available at: *ec.europa.eu*.

[134] *Ibid.*, 27.

[135] *Ibid.* See also M. van Wolferen, M. Eliantonio, *Access to Justice in Environmental Matters: The EU's Difficult Road Towards Non-Compliance With the Aarhus Convention*, in M. Peeters, M. Eliantonio, *Research Handbook on EU Environmental Law*, Edward Elgar, Research Handbooks in European Law series, 2019.

[136] Urgenda Foundation v. The Netherlands [2015] HAZA C/09/00456689 (24 June 2015); aff'd (9 October 2018); aff'd (20 December 2019) (District Court of the Hague, The Hague Court of Appeal and the Supreme Court of the Netherlands).

[137] From the 'Urgenda Foundation's official website. Available at: *urgenda.nl*.

global CCL trend[138], promoted by civil society organisations, aiming to hold States and corporations accountable for the negative effects that climate change has on citizens' fundamental rights (FRs). These lawsuits are therefore characterised by a loosen causation between States interventions (or omissions) and FRs violations at the expenses of present and future generations of citizens. Such a causation link with FRs violations (present or future) is generally supported by extensive scientific data, submitted by plaintiffs along with their applications files.

14. — *The Carvalho case*.

Needless to say that also EU Courts are not completely immune from the global CCL trend described here above. Indeed, *Urgenda* paved the way to actions brought by individuals and ENGOs under art. 263(4) TFEU, aiming to hold the EU institutions accountable for the negative effects of climate change on individuals.

In particular, in 2018, ten families (36 individuals in total) – from Portugal, Germany, France, Italy, Romania, Kenya and Fiji – as well as one civil society organisation, namely the 'Saami Youth Association Sáminuorra', challenged the legality of three EU measures. By these measures, the EU seeks to comply with the 'nationally determined contributions' (NDCs), as required by art. 4(2) of the Paris Agreement. The case – still pending before the CJEU – is called *Carvalho*[139], also known as the *People's Climate* case[140].

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[138] *E.g. Notre Affaire à Tous and Others v. France* (France, brought in 2018, pending); *Plan B Earth and Others v. The Secretary of State for Business, Energy, and Industrial Strategy* (United Kingdom, decided on 20 January 2019); *Juliana v. United States* (U.S., brought in 2015, pending); *Thomson v. Minister for Climate Change Issues* (New Zealand, decided on 2 November 2017). Data available on *climatecasechart.com*. See also J. Setzer, R. Byrnes, *Global trends in climate change litigation: 2019 snapshot*, Policy report, July 2019, p. 3. Available at: *lse.ac.uk*.

[139] T-330/18, *Carvalho and Others v. Parliament and Council* (2019) ECLI:EU:T:2019:324.

[140] See *peoplesclimatecase.caneurope.org*.

To simplify, in *Carvalho* the plaintiffs maintain that the climate targets laid down in the contested measures are not sufficiently ambitious to preserve their FRs. A reasoning very similar to the one adopted in *Urgenda*, to which the applicants made a direct reference in their application file[141].

14.1. – *The arguments of the applicants*.

In order to overcome the Plaumann test and prove that they were all individually concerned by the contested measures, the applicants in *Carvalho* devoted a considerable part of their application file to the admissibility of the case. In this regard, they put forward claims supporting two main assumptions: i) *Effective judicial protection*: the Plaumann test is not compatible with the general principle of effective judicial protection; ii) *The EU action breaches individuals' FRs*: by setting insufficiently ambitious climate targets, the EU is not doing enough to protect the applicants from violations of their FRs.

14.1.1. - *Effective judicial protection*.

In *Carvalho*, the plaintiffs maintained that the Plaumann formula is not itself based in the text of current art. 263(4) TFEU. It was originally conceived on the basis of the old text of art. 173 TEC, which referred to 'decisions' as the object of an action, not to 'acts' (as in the current wording[142]). Given that now even legislative acts having general scope may be challenged under Treaty provisions, «the application of the admissibility criterion must reflect the general character of legislative acts»[143].

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[141] I want to thank the applicants in *Carvalho* for making their application file publicly available even before the case was decided. All the case-related documents are available here: *peoplesclimatecase.caneurope.org*. Hereinafter '*Carvalho* - AF', § 38.

[142] Art. 263(4) TFEU: *Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.*

[143] *Ibid.*, § 131.

Moreover, the plaintiffs stressed the so-called 'Plaumann paradox': the more widespread the damaging effects of a measure, the more restrictive the access to courts will be. 'This leads to an obvious gap in judicial protection'[144].

On this point, the plaintiffs also recalled AG Jacobs' opinion in the *UPA*[145] case, where the Court's advisor proposed an alternative interpretation of the Treaty provisions allowing for access to justice of private parties before EU Courts. In Jacobs' view, a natural or legal person should be regarded as «individually concerned by [an EU measure] of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him»[146].

Interestingly, in the attempt to address these arguments, the GC limited itself to simply 'report' them in its final order. Actually, the Court confirmed the Plaumann formula without even trying to provide convincing counterarguments to dismiss those claims.

However, the Court responded to the argument relating to art. 47 ECFR, enshrining the FR to effective judicial protection[147]. The applicants held that, even though, such a provision «is not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions», the conditions of admissibility must nevertheless «be interpreted in the light of the fundamental right to effective judicial protection».

In this respect, the plaintiffs attempted to anticipate the GC's answers on the availability of the preliminary reference procedure, the counterargument traditionally used by the EU judiciary in its case law[148]. «The CJEU considers that this complete system is provided on the premise that there is coor-

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[144] *Ibid.*, § 132.

[145] *UPA*, see n. 39.

[146] *Carvalho* – AF, § 141.

[147] *Carvalho*, see n. 119, § 52.

[148] *Carvalho* – AF, § 144.

dination of remedies before national and EU courts, including through the availability of preliminary reference» claimed the applicants. However, «as the CJEU has held, this all depends on the availability of appropriate remedies in national law»[149]. The plaintiffs argued that such a case could only be solved by the EU judiciary, as the action was *not directed against implementing measures of either Member States or EU institutions but rather against the fundamental legal basis for climate action; more precisely the allocation by the GHG Emissions Acts of an excessive and unlawful quantity of emissions. That allocation is dictated by the Emissions Acts themselves, and requires no implementing measures which could be the subject of a challenge.*

Regarding this, the GC pointed out that art. 47 ECFR does not require that an individual should have an unconditional entitlement to bring an action for annulment of such a legislative act of the Union directly before the [CJEU]. The Court then confirmed the traditional reasoning on the already existing 'complete system of legal remedies'[150] and upheld the argument proposed by the Parliament and the Council. According to the institutions the implementation of the climate package presupposes a number of implementing measures to be adopted by national authorities. As a consequence, such measures could be challenged by natural and legal persons before national courts which may then refer the CJEU for a preliminary ruling on validity or interpretation[151].

14.1.2. - *Breaching individuals' FRs.*

With regard to the alleged breaches of their FRs, the applicants held that *while all persons may in principle each enjoy the same right (such as the right to life, or the right to an occupation) the effects of climate change (to which the EU Emissions Acts under challenge contribute) and hence the infringement of rights is distinctive and different for each individual. A farmer who is affected by drought is in a different position from a fisherman affected by a loss of sea ice*[152].

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[149] *Ibid.*

[150] See *supra* 'pre-Aarhus' period, section 3.2.

[151] *Carvalho*, see n. 121, § 53.

[152] *Ibid.*, § 128.

On this point, the plaintiffs argued that, given that the EU has not adhered to the European Convention on Human Rights (ECHR), «the CJEU is to be the sole arbiter of the reconciliation of EU measures and [FRs]». «It must follow – continued the plaintiffs – that an individual whose [FRs] are at stake necessarily has a right of access to the EU judicature. In consequence, it should be held that a person is *individually concerned* where the person is *affected in a fundamental right*»[153].

The plaintiffs also tried to rely on the *Codorniu*[154] and *FIAMM*[155] case law. In the former the applicant established individual concern because it had an individual right (a trademark) that was adversely affected by the legislative act (notwithstanding the act being of general application).

In the latter, an Italian accumulator manufacturer, claimed that the EU had infringed WTO law thereby provoking US countermeasures imposing customs on accumulator imports. For this reason, FIAMM requested compensation. The plaintiffs in *Carvalho* noticed that although the application was «denied in substance it was found admissible without the Court as well as the [CJEU] on appeal even mentioning the question of standing. This is notable because many other manufacturers of accumulators may also have been affected by the US customs».

Noteworthy, to these claims the EU judges responded by acknowledging that climate change may certainly affect the enjoyment of FRs[156]. However, the EU Treaties require a clear (and strict) link between the contested measure and the legal sphere of the applicant, not between climate change, on the one hand, and individuals' FRs, on the other.

The risk – argued the Court – would be to recognise standing to any citizen and make the requirements established under art. 263(4) TFEU completely meaningless[157].

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[153] *Ibid.*, § 140. Emphasis added.

[154] C-309/89, *Codorniu v. Council* (1994) ECLI:EU:C:1994:197.

[155] *FIAMM*, see n. 68.

[156] *Carvalho*, see n. 121, § 50.

[157] *Ibid.*

Indeed, the GC found that the plaintiffs did not establish that the contested provisions of the legislative package infringed their FRs and distinguished them individually from all other natural or legal persons concerned by those provisions just as in the case of the addressee[158].

As a consequence, the case was dismissed by the GC for lack of standing of the applicants.

15. — *Preliminary remarks on the 'post-Aarhus (II) – the CCL trend' period.*

An increasing amount of individuals and civil society organisations throughout the world is turning to courts to remedy the institutional negligence regarding cuts to greenhouse gases emissions. In this respect, *Carvalho* clearly shows how the global CCL trend also affected EU ENGOs and jurisdictions. New litigants and new arguments have been brought before the CJEU, which seems still unresponsive to the requests of the applicants in the field of climate change.

With regard to the 'new litigants', the most recent climate actions for annulment see individuals taking over, although 'backed up' by a few ENGOs[159]. This is also in line with the global CCL trend, where it is possible to notice more and more individual plaintiffs (rather than organisations) seeking to hold governments and corporations accountable for climate change[160].

Moreover, with regard to the 'new arguments', even the recent case law of the Court in the field of climate change has definitely experienced a 'FRs turn' in the legal reasoning proposed by the plaintiffs. This is also perfectly in line with the global CCL trend, as extensively explained by leading legal scholars in the field of CCL[161].

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[158] *Ibid.*, § 49.

[159] This can be noticed in both, the *Carvalho* and *Sabo* cases (see n. 122).

[160] See for instance the *Juliana* case (n. 138) or the *Lliuya v. RWE AG* (Germany, brought in 2015, pending).

[161] See J. Peel, H.M. Osofsky, *A Rights Turn in Climate Change Litigation?*, Transnational Environmental Law, (2018) 7 (1), p. 37.

However, the impact of *Urgenda* does not seem to be sufficient to explain this strong shift from *aggregate* (ENGOs) to *individual* plaintiffs and from *procedural* to (fundamental) *substantive* rights in EU environmental litigation. On this point, some scholars have linked the 'rights turn' to a broader 'narrative turn' that is currently taking place in global CCL[(162)]. Climate litigants are using courts to 'tell stories' and raise public awareness by focusing on individual narratives having a significant 'emotional content'[(163)]. Literature in the fields of digital education and psychology helps us understand that showing individual litigants instead of organisations favours a better 'identification' with the plaintiff, since 'individuals have stories'[(164)] and moving stories may inspire empathy in other people[(165)]. As a consequence, the will to 'empathize' is also incredibly affecting the legal reasoning, which has to be framed in new terms aiming to facilitate the 'identification process'.

For instance, in *Carvalho* one of the applicants claimed to *own a section of forest in central Portugal near Vila de Barba (12 ha in total) where they carry on forestry work. As the applicant has observed, the trend in recent years in this region has been for a general temperature increase, more frequent heatwaves and droughts. This culminated*

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(162) C. Hilson, *Law, courts and populism: climate change litigation and the narrative turn*, in S.M. Sterett, L.D. Walker, *Research Handbook on Law and Courts*, Edward Elgar Publishing, 2019, p. 90. doi: *doi.org*.

(163) *Ibid.* However, it must be stressed that this is not the case for all CCL cases worldwide. Indeed, ENGOs still continue to bring climate cases in their own name. On this point, see for instance the 'Carbon Majors' case in the Philippines (brought by Greenpeace South Asia and other organisations) or the 'announced' Italian climate case 'Giudizio Universale', more info here: *giudiziouniversale.eu*.

(164) V.X. Wang, *Handbook of Research on Education and Technology in a Changing Society*, Florida Atlantic University (2014), p. 109. On this point, see also, G.J. Westerhof, E.T. B*ohlmeijer*, *Life Stories and Mental Health: The Role of Identification Processes in Theory and Interventions*, Narrative works (2012) 2(1), p. 106; K. Dill, M. Green, *Engaging with Stories and Characters: Learning, Persuasion, and Transportation into Narrative Worlds*, in K. Dill, *The Oxford Handbook of Media Psychology*, Oxford University Press, 2012, p. 449.

(165) P.J. Zak, *Why inspiring stories make us react: the neuroscience of narrative*, Cerebrum: the Dana forum on brain science, 2015, p. 2.

in catastrophic fires in October 2017, which burnt all the forest areas owned by the Carvalho family (…)[166].

Another applicant, in the (pending) *Sabo* case, described *the choice he has made to raise his family in a region of Slovakia where he can access the forests to which he has a deep personal connection, specifically so that he can pass on this connection to his sons. Mr Sabo's connection to the forests is grounded in his deep understanding of their ecological significance and his own interdependence as a human being with natural systems*[167].

Some scholars have stressed how FRs already have, *per se*, a high emotional and cultural content[168]. The novelty here lies in the litigants' attempt to link this FRs' emotional value to the global and widespread challenges of climate change. An attempt that may be legally unrewarding, but politically fruitful.

This said, in *Carvalho* this new FRs-emotional narrative has been added to the 'effective judicial protection' arguments, already presented more than twenty years ago in *Greenpeace*. And just like twenty years ago, the case was dismissed for lack of standing. In this respect, *Carvalho* also suggests that the CJEU probably is a forum immune to CCL cases initiated by ENGOs. This because of the narrow standing requirements provided under the EU Treaties, as interpreted by the Court[169]. The Plaumann test requires applicants to prove a strict causation between the contested EU measure and their legal sphere, a condition particularly hard to meet in CCL[170]. EU Courts, just like in the pre-Aarhus period, refer private applicants to national courts, which

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[166] *Carvalho* – AF, § 46.

[167] *Sabo* – AF, § 196.

[168] See L. Norman, *Theorizing the social foundations of exceptional security politics: Rights, emotions and community*, Cooperation and Conflict, 2018, Vol. 53, Issue 1, p. 84: *doi.org*; L. Hall, *Rights and the Heart: Emotions and Rights Claims in the Political Theory of Edmund Burke*, The Review of Politics, 2011, Vol. 73, Issue 4, p. 609; K. Abrams, *Emotions in the Mobilization of Rights*, Harvard Civil Rights-Civil Liberties Law Review, Scholarship Repository, 2011, vol. 46, p. 551.

[169] See also L. Krämer, *Climate Change, Human Rights and Access to Justice*, Journal for European Environmental & Planning Law, 2019, Vol. 16, Issue 1, pp. 21-34: doi: *doi-org.ezproxy.eui.eu*.

[170] See also J. Peel, *Issues in Climate Change Litigation*, Carbon & Climate Law Review (2011) 5(1), pp. 15-24.

should be considered – in the CJEU's wording – «the ordinary judges of EU law». Since the Court's judgment in *UPA*, it is clear that the CJEU and the Commission[171] conceive national courts as integral pieces of the EU judicial protection puzzle, which may rely on a «complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions».

IV. — CONCLUDING REMARKS

16. — *Conclusions.*

The description of the Court's case law on Plaumann in the field of environmental protection and climate change allows us to identify some key takeaways.

Litigation in the 'pre-Aarhus' period is essentially dominated by some of the main EU ENGOs, such as Greenpeace International, EEB and WWF. In this first period, the question of access to environmental justice before the CJEU was a matter purely internal to the EU legal order, while the rights allegedly breached were mainly *procedural/participatory* rights.

In the second phase, 'post-Aarhus I', a few relevant legal changes – specifically the adhesion of the EU to the Aarhus Convention and the consequent adoption of the AR in 2006 – gave the impression to open new litigation opportunities for ENGOs before the CJEU. However, civil society's expectations were soon deluded by the narrow definition of 'administrative act' included in art. 2(g) AR.

Therefore, the entry into force of the AR has not brought any substantive improvement for environmental litigation in the EU, but it has contributed to transform the question of access to justice from a matter purely internal to the EU legal order into a matter of compliance of EU law with international law.

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[171] Commission report, see n. 115.

In spite of this, the CJEU keeps denying direct effect of art. 9(3) of the Convention, making impossible to set aside the EU secondary law provisions impeding ENGOs to challenge EU administrative acts having an impact on the environment. In order to set aside such provisions, environmental litigants also tried to rely on an EU remedy traditionally underexploited, the plea of illegality, but with extremely modest results.

Nevertheless, the adoption of the AR has also pushed other ENGOs to make use of the internal review procedure laid down under art. 10 AR. If in the pre-Aarhus period the main litigants were essentially Greenpeace International, EEB, Stichting Natuur en Milieu and WWF, in the post-Aarhus I and II periods new litigants have, first, sought the internal review and, after, the Court's judicial review of EU environmental measures. In particular, the entry into force of the AR has been followed by cases also brought by Pesticide Action Network Europe, Vereniging Milieudefensie, Stichting Stop Luchtverontreiniging Utrecht, Stichting Greenpeace Nederland, Générations futures, EPAW, TestBioTech, ClientEarth, Frank Bold and Mellifera.

In particular, one of these ENGOs, ClientEarth, has taken the EU before the ACCC, in the attempt to bring the Union in compliance with the provisions of the Aarhus Convention on access to justice. In 2017, the Aarhus Committee has ascertained a major incompliance of the EU with the Convention and has recommended amendments of 'constitutional relevance' in the EU legal order. The Union has *de facto* 'taken time', while exploring means and tools to respect the findings of the ACCC. In the meantime, other lawsuits have been initiated by individuals and civil society organisations under both, the AR and art. 263(4) TFEU, in the ongoing period that I called post-Aarhus II.

With regard to the cases brought under the AR, environmental organisations keep mobilising the EU judiciary with the purpose of implementing the Aarhus Committee's findings and setting aside the AR provisions being incompatible with the Convention. On this point, the ENGO Mellifera has invited the Court to take into account the ACCC findings when reviewing the definition of 'individual act' *vis-à-vis* the Convention. By so doing, the or-

ganisation attempted to favour a dialogue between the UN compliance body and the EU judiciary However, the latter has declined Mellifera's claims and has stated that the Aarhus Committee's findings are only a 'draft' version, which has not yet been endorsed by the MOP to the Convention. In this way, the Court has made clear that it is the 'ultimate judge of EU law', the only institution allowed to give definitive interpretations of EU law provisions, as specified under art. 19 TEU.

Conversely, with regard to the actions brought under 263(4) TFEU, these are mainly initiated by climate litigants seeking to hold the EU institutions accountable for the negative effects of climate change on citizens' FRs. EU climate litigants have been encouraged and inspired by the infamous *Urgenda* case, where even the Dutch Supreme Court has recently declared the Dutch State responsible for protecting the rights enshrined under the ECHR from the effects of climate change. In particular, the Dutch judges have required the Netherlands to cut their emissions from 17% to 25% by 2020.

However, EU climate lawsuits brought after the *Urgenda* case under art. 263(4) TFEU show a number of peculiarities, especially in terms of plaintiffs and legal reasoning. Indeed, current EU climate plaintiffs are mainly individuals rather than ENGOs, which usually decide to 'accompany' the individual applicants in their 'fights' for protecting their own FRs. On this point, the legal reasoning of these applicants is characterised by a strong focus on FRs violations, marking a sharp shift from the *procedural* claims of the pre-Aarhus period, to the *substantive* FRs claims of the post-Aarhus II period. Some scholars have explained this 'narrative turn' in CCL as justified by major public awareness reasons. Current EU climate lawsuits seem to mainly aim at inspiring people rather than convincing judges. To achieve this goal, the FRs claims embedded in the application files usually refer to the individual stories of the plaintiffs, stressing the sufferance and the emotional dimension of the FRs violations, rather than the authority of indisputable scientific evidence.

In addition to the 'international' pathway pursued by ClientEarth via the ACCC, the 'narrative turn' in EU CCL seems to be the ultimate 'new pathway' attempted by private applicants to try to overcome the Plaumann test.

Given the difficulties in convincing the Court to abandon its restrictive test on standing, as well as the peculiar attention that climate change is receiving nowadays in mainstream media, climate litigants seem to want to mobilise EU citizens by inspiring them with 'climate stories'. This in order to obtain something probably much bigger than winning a case or get access to justice: winning the favour of citizens.