

Reducing the Judicial Deficit in Multilevel Environmental Regulation: The Example of Plant Protection Products

Andrea Keessen*

1. Introduction

Environmental law often has an international background.¹ When the EU Member States are Party to an environmental convention, its rules are transformed into European law by Community institutions. As a rule, the Member States are responsible for the implementation of European law. However, international and Community institutions and bodies can also take implementing measures. Yet environmental organisations aiming to challenge those measures depend on national courts to provide for judicial review. The national procedural rules governing these proceedings have not been designed to function in a multilevel context.² Moreover, as a result of the procedural differences in the EU Member States, access to court for environmental organisations is not guaranteed in all EU Member States. The Aarhus Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental

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¹ See for a review: J.H. Jans, *European Environmental Law*, Groningen: Europa Law Publishing, 2000.

² A.W.H. Meij, "Toenemende complexiteit van het Europese recht" [Increasing complexity of European law], in: *Raad voor de Rechtspraak, Europa en de Nederlandse rechtspraak: de praktische gevolgen*, Rechtstreeks, Vol. 1 2006, p. 35.

Matters aims to redress this issue.³ Better access to justice for environmental organisations is expected to improve the implementation of environmental law.⁴ The regulation of plant protection products is here used as an example in order to evaluate the impact of the Aarhus Convention in a multilevel regulatory context.⁵ I first survey the decision-making procedures in this field and discuss two judgments by the Community courts to demonstrate why the current judicial review procedure presents a judicial deficit. I then evaluate the reduction of the judicial deficit in this field by the incorporation of the rules on judicial review contained in the Aarhus Convention into the European legal order.⁶

2. Regulation of Plant Protection Products

Plant protection products are pesticides used for agricultural purposes. Their use benefits farmers as they kill weed or insects. Environmental organisations take an interest in plant protection products because they are also associated with serious risks to human health, especially children's health, and the environment. They affect people, animals and plants via their contamination of groundwater, soils, food and even the air. As early as 1962, Rachel Carson's

³ The text of the Aarhus Convention can be found at <www.unece.org/env>.

⁴ H. Somsen, "The Private Enforcement of Member State Compliance with EC Environmental Law: an Unfulfilled Promise?", in: H. Somsen, (ed.), *The Yearbook of European Environmental Law* (1) Oxford: Oxford University Press, 2000, pp. 311-360; D. Curtin, "The Decentralised Enforcement of Community Law Rights. Judicial Snakes and Ladders", in: D. Curtin and David O'Keeffe, (eds), *Constitutional Adjudication in European Community and National Law*, Dublin: Butterworth, 1992, p. 34; N. de Sadeleer, et al., (eds), *Access to Justice in Environmental Matters and the Role of NGOs; Empirical Findings and Legal Appraisal*, Groningen: Europa Law Publishing, 2005, p. 177.

⁵ See for other examples: A.S. Mathiesen, "Public Participation in Decision-making and Access to Justice in EC Environmental Law: The Case of Certain Plans and Programmes", *EELR*, 2003, pp. 36-51; J. Verschuuren, "Public Participation regarding the Elaboration and Approval of Projects in the EU after the Aarhus Convention", in: T.F.M. Etty and H. Somsen, (eds), *The Yearbook of European Environmental Law*, Vol. 4 2005, Oxford: Oxford University Press, pp. 29-48.

⁶ As the focus of this contribution is on the judicial deficit, the other two pillars of the Aarhus Convention – access to information and public participation – will not be discussed, even though they are of equal importance and contribute to effective judicial review. Access to justice related to denial of environmental information or public participation rights is also omitted.

Silent Spring exposed the hazards of the pesticide DDT.⁷ It changed thinking about technological progress and helped set the stage for the environmental movement and for environmental legislation regulating pesticides.

2.1. International Rules and Measures

Plant protection products are regulated by three international conventions. The most important piece is the 2001 Stockholm Convention on Persistent Organic Pollutants (hereafter, POPs), which entered into force in 2004.⁸ It aims to eliminate or at least reduce production, use, emissions and discharges of chemicals and pesticides exhibiting the characteristics of POPs. Both the European Union and the Member States are Parties to this Convention. Currently, the Stockholm Convention is of limited significance to them, because it targets only 12 chemicals and pesticides. It does not completely ban these POPs, e.g. it allows the use of DDT to fight malaria. Its relevance might increase in the coming years, because it contains criteria for the evaluation of chemicals and pesticides in use, it regulates their disposal and it obliges the Parties to prevent the development of new POPs. It may even introduce a POP review committee that would issue recommendations to the Conference of the Parties concerning the inclusion of other chemicals and pesticides on the Appendix to the Convention.⁹ In addition, the (1998) Rotterdam Convention on Prior Informed Consent regulates the import and export of chemicals and pesticides that have been banned or severely restricted for health or environmental reasons by Parties to the Convention.¹⁰ Finally, the (1989) Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal applies to plant protection products when they have become waste.¹¹

⁷ R. Carson, *Silent Spring*, Boston: Houghton Mifflin, 1962.

⁸ The Stockholm Convention on Persistent Organic Pollutants (2001). See <www.pops.int>. It was preceded by the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants and the Protocol on Persistent Organic Pollutants (1998) to this Convention, to which the EC was also a Party.

⁹ The international review committee will act in the context of the Strategic Approach to International Chemicals Management (SAICM) within the United Nations Framework.

¹⁰ The Rotterdam Convention on Prior Informed Consent (1998), preceded by a voluntary prior informed consent procedure, in effect since 1989. See <www.pic.int>.

¹¹ The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989). See <www.basel.int>. See for a survey of these

2.2. European Rules and Measures

The European Union is ahead of the international developments. It bans the POPs that the Stockholm Convention forbids from being used in plant protection products via Regulation 850/2004,¹² which also lists other active substances whose presence is forbidden in plant protection products.¹³ Moreover the EU has general legislation in the field of water and waste, aiming to curb pesticide pollution. What makes the EU really ahead of international developments is that it not only bans substances, but also regulates other aspects. There is European legislation regulating the marketing of pesticides¹⁴ as well as pesticide residues in food¹⁵ and the classification, packaging and labelling of pesticides.¹⁶ For the time being, the regulation of the use of pesticides still belongs to the competences of the Member States. This situation will change as the Commission is developing a Community strategy and action plan on the sustainable *use* of pesticides.¹⁷

three Conventions and their inter-relationship: <www.pops.int/documents/background/hwc.pdf>.

¹² Regulation 850/2004 of the European Parliament and of the Council of 29 April 2004 on persistent organic pollutants and amending Directive 79/117/EEC, *OJ* 2004 L 158/7.

¹³ Council Directive of 21 December 1979 prohibiting the placing on the market and the use of plant protection products containing certain active substances, *OJ* 1978 L33/36, as amended.

¹⁴ Council Directive 91/414 EC of 15 July 1991 concerning the placing of plant protection products on the market, *OJ* 1991 L 230/1, as amended and Directive 98/8/EC of the European Parliament and of the Council, concerning the placing of biocidal products on the market, *OJ* 1998 L 123/1. Directive 98/8/EC was modelled on Directive 91/414/EC.

¹⁵ Directive 90/642 on the fixing of maximum levels for pesticide residues in and on certain products of plant origin, including fruit and vegetables, *OJ* 1990 L 350/71, frequently amended.

¹⁶ Directive 99/45 concerning the approximation of the laws, regulations and administrative provisions of the Member States relating to the classification, packaging and labelling of dangerous preparations, *OJ* 1999 L 200/1.

¹⁷ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, A Thematic Strategy on the Sustainable Use of Pesticides, COM (2006) 373 final, as proposed in Decision 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Environmental Action Programme, *OJ* 2002 L242/1, Art. 8 (c) and (d). See also: Communication from the Commission to the Council, the Parliament, the Economic and Social Committee and the Committee

Within the European Union the marketing of pesticides for agricultural use is regulated by Directive 91/414/EC on the placing on the market of plant protection products.¹⁸ This Directive harmonises the legal regimes of the Member States for the authorisation of plant protection products¹⁹ by introducing common authorisation criteria in a multilevel setting.²⁰ Since 1992, the Commission reviews the active substances used in plant protection products.²¹ In the Community review procedure each applicant has to prove that an active substance can be used safely in respect of human and animal health and the environment. The European Food Safety Authority (EFSA) assists the Commission with this task. On the basis of the EFSA's advice, the Commission – assisted by the Standing Committee on the Food Chain and Animal Health – decides whether an active substance may be listed on Annex I to the Directive. A positive decision is issued as a daughter directive to Directive 91/414, because it adds an active substance to the Annex. A negative decision is issued in the form of a Commission or Council decision addressed to the Member States.

2.3. National Rules and Measures

The Community legislation and decisions determine the content of national decisions authorising or rejecting plant protection products containing those active substances, because the Member States are only allowed to authorise plant protection products containing active substances that have been listed on Annex I to Directive 91/414/EC. Other Member States may recognise an

of the Regions on the sixth environmental action programme of the European Community, "Environment 2010: Our future, Our choice", COM (2001) 31 final, pp. 43-45.

¹⁸ Council Directive 91/414 EC. All references are to the consolidated version: CONSLEG 1991 L0414 – 01/01/2004.

¹⁹ In the Netherlands the Pesticides Act (*Bestrijdingsmiddelenwet*), which regulates plant protection products and biocides. See: Backes et al., *Hoofdlijnen milieubestuurrecht* [Outline of Environmental Administrative Law], Den Haag: Boom Juridische Uitgevers, 2004, pp. 252-259; E.M. Vogezang-Stoute, *Bestrijdingsmiddelenrecht. Een rechtsvergelijking* [Pesticide Legislation Compared], Deventer: Kluwer, 2004.

²⁰ Art. 8 Dir. 91/414/EC.

²¹ The review takes place in accordance with Commission Regulation 3600/92 of 11 December 1992 laying down the detailed rules for the implementation of the first stage of the programme of work referred to in Art. 8 (3) of Directive 91/414, *OJ* 1992 L 366, p. 10. The regulatory comitology procedure is followed, as Art. 5 and 6, 19 and 20 Council Directive 91/414/EC refer to Arts 5 and 7 Council Decision 1999/468, *OJ* 1999 L 184/23.

authorisation issued in accordance with this multilevel procedure by issuing an identical national authorisation.²² By contrast, a decision not to include an active substance on Annex I means that the Member States have to ban the substance as well and revoke authorisations for plant protection products containing that active substance. Even though the Directive allows the Member States to deviate from the European rules either by prohibiting plant protection products authorised by other Member States or by allowing them even if they contain banned active substances, such derogations are meant to be temporary.²³ Not all plant protection products are covered by a national authorisation issued in accordance with the multilevel procedure of the Directive.²⁴ Since the Directive entered into effect without any active substances listed on the Annex I, a transition regime allows the Member States to maintain national authorisations of plant protection products until all active substances have been evaluated at Community level.²⁵

3. Judicial Review

Judicial review is not available at the international level in reference to the regulation of plant protection products. The Stockholm Convention does not provision judicial review of decisions taken by the Conference of the Parties to the Stockholm Convention, e.g. broadening the use of DDT or placing new chemicals on the Annexes to the Convention after evaluation by the POP review committee of the Stockholm Convention. Although the EC Treaty provides that the Court of First Instance (CFI) and the European Court of Justice (ECJ) may offer judicial protection to individuals, it restricted their access by imposing standing criteria. Therefore, as a rule, individuals depend on the national courts to obtain

²² Art. 10 Dir. 91/414/EC.

²³ Respectively Art. 11 and Art. 8 (4) Dir. 91/414/EC.

²⁴ C-316/04 *Stichting Zuid-Hollandse Milieufederatie v. College voor de toelating van bestrijdingsmiddelen*, [2005] ECR I-0000. Cf C-125/88 *Nijman* [1989] ECR 3533.

²⁵ According to Art. 8 (2) and (3) Dir. 91/414/EC, the transition period was supposed to end 12 years after notification of the Directive. It appears from the case law that the Court has accepted an extension of this period, e.g. C-443/02 *Schreiber* [2004] ECR I-7275. See for a critical review of the Dutch practice: J. Rutteman, “De toelating van bestrijdingsmiddelen: terug naar 1975?” [Admission of pesticides; Return to 1975?] *MenR*, Vol. 12 2002, pp. 312-317.

judicial review. Two cases in the field of plant protection products demonstrate why the current judicial review procedure presents a judicial deficit.

3.1. Getting a Preliminary Ruling

The European review of the active substance Aldicarb resulted in Council Decision 2003/199 refusing to include Aldicarb in Annex I to Council Directive 91/414/EEC. The Council ordered withdrawal of national authorisations for plant protection products containing Aldicarb within 2003, but it allowed limited uses considered as essential until 30 June 2007. Two Dutch environmental organisations brought proceedings before a Dutch court against the decision by the Dutch competent authority to allow essential uses of plant protection products containing Aldicarb, taken on the basis of the Council Decision. They contested the validity of Art. 2 of Council Decision vis-à-vis Art. 8 (2) of the Directive. The Dutch court decided to ask for a preliminary ruling.²⁶ The Court of Justice (ECJ) reviewed the Council Decision marginally, out of respect for the room for discretion. It explained that Art. 8 (2) does not establish the period within which Member States must ensure that those authorisations are withdrawn or varied, but refers to a prescribed period, i.e. a period to be fixed in an implementing measure, which is exactly what the Council did in its Decision. Art. 2 (3) of the Decision sets the time limit for the withdrawal of plant protection products containing Aldicarb. Moreover, it is not inconsistent that a decision sets different time limits, since the Directive does not contain a restriction in that regard. In the absence of efficient alternatives to certain limited uses in certain Member States, it appeared necessary to allow further essential uses of those products for a limited period and under strict conditions aimed at minimising risk. The ECJ concluded that the Council had carried out a global assessment of the advantages and drawbacks of the system to be established and that that system was not on any view manifestly inappropriate in the light of the objectives pursued.

This example shows how difficult it is to challenge decisions taken in a multilevel regulation context. If the ECJ had ruled that the period of grace in the Council Decision was not proportionate, that would have led the national court to invalidate the national decision allowing for essential uses during a period of grace. However, since the period of grace lasted until 2007, the long duration of the proceedings diminished the relevance of the outcome. The Council Decision was taken in 2003, whereas the ECJ gave its judgment in 2006. The long

²⁶ CBB 19 April 2005: AWB 04/300 32010; C-174/05 *Stichting Zuid-Hollandse Milieufederatie, Stichting Natuur en Milieu v. College voor de toelating van bestrijdingsmiddelen* [2006] ECR I-0000.

duration is caused by the fact that the environmental organisations had to bring proceedings against the national implementing decision. In these proceedings they questioned the validity of the Community decision, which led the national court to ask for a preliminary ruling. This detour doubles the time spent waiting for judicial review. Nevertheless, the environmental organisations should be grateful for two reasons. First of all, they should be grateful for the reference, as the national court does not have to refer if it harbours no doubts regarding the interpretation or the validity of a Community act.²⁷ Only if a national court seriously doubts the validity of a Community measure does it have to refer the case, since only the Community courts can declare a Community measure invalid,²⁸ whereas only the national courts can declare a national measure invalid.²⁹ Secondly, they should consider it a privilege to have access to court in a Member State. Until the laws of the Member States become harmonised, environmental organisations depend on the national procedural laws to be granted standing. These laws display considerable difference with regard to standing rights for environmental organisations.³⁰ For all these reasons, the preliminary ruling does not seem the best instrument to provide for judicial review in a multilevel regulation context. Therefore, environmental organisations tried to bring proceedings against a Community decision at the European level.

3.2. Trying Direct Action

In order to speed up the review of a Community decision, the European Environmental Bureau (EEB) and a Dutch environmental organisation brought proceedings before the Court of First Instance (CFI) against two Commission decisions concerning the non-inclusion on Annex I of Atrazine and Simazine (for convenience this is called the *EEB* case).³¹ The environmental organisations protested against the duration of the period of grace for essential uses granted in the Commission decisions. These decisions were addressed solely to the Member States. Therefore, the environmental organisations had to pass the

²⁷ C-283/81 *Cilfit* [1982] ECR 3415. See for a critical view: P.J. Wattel, et al., “We Can’t Go on Meeting Like This”, *CMLRev.*, 2004, pp. 177-190.

²⁸ C-314/85 *Foto Frost* [1987] ECR 4199.

²⁹ Cf C-97/91 *Borelli*, [1992] ECR I-6313.

³⁰ N. de Sadeleer, G. Roller and M. Dross (see *supra* n. 4), pp. 178 et seq.

³¹ Order of the CFI in Joined Cases T-236/04 and T-241/04, *European Environmental Bureau, Stichting Natuur en Milieu v. Commission* [2005] ECR II-0000. On the same day, the CFI delivered a similar Order in T-94/04 *European Environmental Bureau (EEB) and Others v. Commission*, [2005] ECR II-0000.

hurdle of direct and individual concern of Art. 230 (4) EC. They protested in vain, as the CFI declared their action inadmissible. According to the CFI, the environmental organisations were not “individually concerned” by the Community decision, since they were not affected by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee of the act would be.³² The CFI argued that even if it were accepted that the contested provisions of the Atrazine and Simazine decisions have the effect of allowing certain Member States to maintain temporarily in force, for certain uses, the authorisation for plant protection products containing Atrazine or Simazine – active substances which, according to the applicants, harm the environment – it is clear that those provisions affect the applicants in their objective capacity as entities whose purpose is to protect the environment, in the same manner as any other person in the same situation. Therefore, they should bring proceedings in the Member States concerned.

The *EEB* case demonstrates that it is not easy to persuade the Community courts to relax the standing requirements. This reluctance can be explained by the workload of the Community courts, which is estimated to increase as a result of the enlargement of the European Union and the developments in the communitarized third pillar.³³ The argument that relaxation of the standing requirements can be based on the principle of effective judicial protection³⁴ did not prove successful in the *EEB* case, as could have been assumed from earlier judgments.³⁵ In the *Greenpeace* case, the ECJ held that denying the applicants the right to bring proceedings against the Commission decision granting Spain

³² The famous *Plaumann* formula, developed in: C-25/62, *Plaumann & Co v. Commission*, [1963] ECR p. 95.

³³ See on the challenges ahead: B. Vesterdorf, “The Community Court System Ten Years from now and Beyond: Challenges and Possibilities”, *ELRev.*, 2003, pp. 303-323; N. Lavranos, “The New Specialised Courts within the European Judicial System”, *ELRev.*, 2005, pp. 261-272; L.A. Geelhoed, “The Expanding Jurisdiction of the Court of Justice of the EC”, Coll: Asser Institute October 2004, forthcoming. Statistics can be found in the Annual Reports of the Court of Justice and the Court of First Instance: <curia.europa.eu/nl/instit/presentationfr/index.html>.

³⁴ Landmark cases in this respect are: C-222/84 *Johnston* [1986] ECR 1651, C-222/86 *Heylens* [1987] ECR 4097 and C-213/89 *Factortame* [1990] ECR I-2433.

³⁵ In accordance with the ECJ judgments in: C-50/00 P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677; T-173/98 *Union de Pequenos Agricultores v. Council* [1999] ECR II-3357 and C-263/02 P *Jégo Quéré v. Commission* [2004] ECR I-3425; T-177/01 *Jégo Quéré v. Commission* [2003] ECR II-2365.

financial assistance for the building of two power stations – because concern for the environment is a collective and not an individual concern – did not infringe the principle of effective judicial protection, because they could bring proceedings against the Spanish decision to grant a building permit.³⁶ In the *EEB* case, the environmental organisations found a deaf ear to the argument that the annulment of the decision in a direct action would prevent triggering a myriad of complex, lengthy and costly authorisation procedures in various Member States. The Community courts were not impressed by the argument that a Community decision may not be challenged before the national courts as effectively as before the Community courts. Apparently, the Community courts adhere to the principle that access to court – an important element of the principle of effective judicial protection – should preferably be realised at the national level.³⁷

4. Impact of the Aarhus Convention

Both the Member States and the European Union have committed themselves to change the rules on access to court in environmental matters. They did so by becoming a Party to the 1998 Convention on access to information, public participation in decision-making, and access to justice regarding environmental matters (hereafter, the Aarhus Convention) in the context of the United Nations Economic Commission for Europe.³⁸ It provides citizens – and environmental organizations in particular³⁹ – with minimum procedural rights on access to

³⁶ See *supra* n. 35.

³⁷ J. Manuel and C. Martín, “Ubi Ius, Ibi Remedium? – Locus Standi of Private Applicants under Art. 230(4) EC at a European Constitutional Crossroads”, *MJ*, Vol. 11 2004, p. 239. See also: E. Rehbinder, “Locus Standi, Community Law and the Case for Harmonization”, in: H. Somsen, (ed.), *Protecting the European Environment: Enforcing EC Environmental Law*, London: Blackstone Press Limited, 1996, pp. 151-166. But see also: T-33/01 *Infront WM AG v. Commission* [2005] ECR II-0000, para. 108 and 109.

³⁸ EU ratification by Council Decision 2005/370/EC of 17 February 2005. The Member States (and other States, Members of the Economic Commission for Europe) have signed and ratified the Convention as well. The Aarhus Convention entered into force on 30 October 2001, available at <www.unece.org/env/pp/welcome.html>.

³⁹ This can be explained by the fact that Environmental organisations played an important role in the coming into existence of the Aarhus Convention, see: J. Waters, “The Aarhus Convention: A Driving Force for Environmental Democracy”, *JEEPL*, 2005, pp. 2-11, in particular pp. 9 and 10.

documents, public participation in decision-making and access to justice in the field of environmental law. These procedural rights should improve the enforcement of environmental rules.⁴⁰ A real novelty is that these rights can be invoked not only before national authorities and national courts, but also before European authorities and courts. This is due to the broad definition of public authority in Art. 2 (2) (d) Aarhus Convention, referring specifically to the institutions of any regional economic integration organization which is a Party to the Convention, in other words, to the institutions and bodies of the EU.⁴¹

4.1. Access to Justice at the International Level

The Aarhus Convention does not aim to change judicial review of implementing decisions made by Conferences of the Parties to environmental conventions. It addresses only in vague terms the issue of judicial review of decisions of international organisations other than the European Union. The Parties should promote the application of the principles of the Aarhus Convention in international environmental decision-making processes and within the framework of international organisations in matters relating to the environment.⁴² Currently, individuals do not have access to court at the international level. Therefore, it would require amendments of environmental conventions in order to apply the rules of the Aarhus Convention on access to court at the international level. For instance, the Parties to the Stockholm Convention might consider amending the Stockholm Convention in order to offer administrative review to environmental organisations which enjoy observer status as a first step towards judicial review of their decisions. If they ignore the rules on judicial review established by the Aarhus Convention, environmental organisations should seek judicial review once the international decisions are implemented into Community and national decisions.

⁴⁰ The Aarhus Convention focuses on procedural guarantees. This is not completely new, e.g. the Espoo Convention on Environmental Impact Assessment in a Transboundary Context (1991).

⁴¹ See for a general survey: V. Rodenhoff, "The Aarhus Convention and its Implications for the 'Institutions' of the European Community", *RECIEL*, 2002, pp. 343-357. See for the (desired) impact of the Aarhus Convention on situations similar to the Greenpeace case: F. de Lange, "Beyond *Greenpeace*, Courtesy of the Aarhus Convention", in: H. Somsen, et al., (eds), *The Yearbook of European Environmental Law*, 3rd edn, Oxford: Oxford University Press, 2003, pp. 227-248. Note that the Commission, in the explanatory memorandum to its proposal for the Aarhus Regulation explicitly excluded internal and judicial review of such financial decisions.

⁴² Art. 3 (7) Aarhus Convention.

4.2. Anticipating the Implementation of the Aarhus Convention at the European Level

The EU signed and ratified the Aarhus Convention before finishing its implementing legislation. Since an international agreement that has been signed and ratified forms an integral part of the Community legal order,⁴³ the environmental organisations could have asked the CFI in the EEB case to interpret Community law in accordance with international law.⁴⁴ An interpretation of direct and individual concern in conformity with the Aarhus Convention means that individuals⁴⁵ having a sufficient interest⁴⁶ may challenge the substantive and procedural legality of a decision, act or omission issued by a Community institution or body.⁴⁷ The Aarhus Convention states that what constitutes a sufficient interest

⁴³ E.g. C-459/03 *Commission v. Ireland (MOX Plant)*, [2006] ECR I-0000; C-213/03, *Syndicat professionnel coordination des pêcheurs de l'Étang de Berre et de la région v. Electricité de France* [2004] ECR I-7357 and C-239/03 *Commission v. France (Étang de Berre)* [2004] ECR I-9325. See: J. Wouters and D. van Eeckhoutte, "Enforcement of Customary International Law through European Community Law" in: J.M. Prinszen and A. Schrauwen, (eds), *Direct Effect. Rethinking a Classic of EC Legal Doctrine*, Groningen: Europa Law Publishing, 2002, pp. 193-234; K. Lenaerts and P. Van Nuffel, *Constitutional Law of the European Union*, London: Sweet & Maxwell, 1999, p. 551; N. Lavranos, *Decisions of International Organisations in the European and Domestic Legal Orders of Selected EU Member States*, Groningen: Europa Law Publishing, 2002; P. Eeckhout, *Does Europe's Constitution stop at the Water's Edge? Law and Policy in the EU's External Relations*, W. van Gerven Lectures, 5th edn, Groningen: Europa Law Publishing, 2005.

⁴⁴ C-84/95 *Bosphorus v. Minister for Transport, Energy and Communications, Ireland and the Attorney General* [1996] ECR I-3953; T-115/94 *Opel Austria* [1997] ECR II-39; C-162/96 *Racke* [1998] ECR I-3655; C-377/02 *Van Parys* [2005] ECR I-0000; T-19/01 *Chiquita* [2005] ECR II-0000; T-69/00 *FIAMM and FIAMM Technologies/ Council and Commission* [2005] ECR II-0000; T-306/01 *Yusuf* [2005] ECR II-0000; T-315/01 *Kadi* [2005] ECR II-0000.

⁴⁵ Note that Art. 9 (2) Aarhus Convention uses the term members of the public concerned. This means the public affected or likely to be affected by, or having an interest in, the environmental decision-making, according to the definition given in Art. 2 (5) Aarhus Convention. The members of the public include legal persons.

⁴⁶ Art. 9 (2) Aarhus Convention offers as an alternative to having a sufficient interest: maintaining the impairment of a right, where the administrative procedural law of a Party requires this as a precondition. It is ignored because this is not a precondition that follows from Art. 230 (4) TEC.

⁴⁷ Art. 9 (3) of the Aarhus Convention also prescribes access to justice to challenge acts and omissions by private persons. This is not implemented through Community

must be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of the Aarhus Convention. Environmental organisations, i.e. non-governmental organizations promoting environmental protection and meeting any requirements under national law, are deemed to have an interest.⁴⁸ Such an interpretation in conformity with the Aarhus Convention would have been similar to the interpretation of individual concern as proposed by Advocate General Jacobs in his Opinion in the *UPA* case.⁴⁹ He proposed that a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests. The fact that the ECJ did not follow the approach proposed by Advocate General Jacobs might serve to explain why the CFI did not interpret direct and individual concern in conformity with the Aarhus Convention of its own volition.

In the *EEB* case, the CFI was confronted with a different argument related to the Aarhus Convention. The environmental organisations tried to gain a grant of access to court by referring to their specific status as environmental organisations in the light of the implementation of the Aarhus Convention in the European legal order. They argued that the CFI should grant them standing because, in the statement of reasons for its proposal for a Regulation, the Commission mentioned that European environmental protection organizations which meet certain objective criteria have standing for the purposes of the fourth paragraph of Art. 230 EC, and they fulfil these requirements.⁵⁰ However, the CFI responded frostily to this argument. It stated that the hierarchy of norms precludes secondary legislation from conferring standing on individuals who do not meet the requirements of Art. 230 (4) EC. A fortiori this rule applies to proposals for secondary legislation. Accordingly, the proposed Regulation relied on by the applicants did not release them from having to show that they are individually concerned. Moreover, even if they were acknowledged as qualified

legislation because of the subsidiarity principle (according to the explanatory memoranda). The EU Member States have to implement this part of the Convention themselves.

⁴⁸ Arts 9 (2) and 2 (5) Aarhus Convention.

⁴⁹ Opinion AG Jacobs in case C-50/00 P *Union de Pequenos Agricultores v. Council* [2002] ECR I-6677.

⁵⁰ Proposal for a Regulation of the European Parliament and of the Council 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 EC institutions and bodies, COM (2003) 622 final.

entities for the purpose of the Regulation, they had not put forward any reason why that status would lead to the conclusion that they are individually concerned by those decisions. This is impossible as long as the ECJ's interpretation of individual concern is only related to economic concern. Environmental protection is a collective concern, defended in particular by environmental organisations. Unfortunately for them, the ECJ had already showed in the *Greenpeace* case that environmental interests do not deserve a different status from economic interests.⁵¹ Moreover, the CFI considered it irrelevant that this approach differs from the situation in some Member States, where environmental organisations have standing before the national courts to protect the environmental interest.⁵² Thus, the CFI dashed the hopes of the environmental organisations that it would anticipate the implementation of the Aarhus Convention by granting them a privileged position.

4.3. Implementing the Aarhus Convention

Since the ECJ stated in the *UPA* case⁵³ that it would take a Treaty change before it would change its interpretation of direct and individual concern, it is easy to agree with De Lange that it takes a Treaty change to implement the Aarhus rules on judicial review.⁵⁴ Unfortunately, a Treaty change does not seem close after the French “non” and the Dutch “nee” to the Constitution in 2005.⁵⁵ But even if it were to come into effect, the Constitution would not have brought about the required Treaty change.⁵⁶ The Constitution changes (see below in italics) the present wording of Art. 230 (4) EC only slightly. Art. III-365 Constitution states: Any natural or legal person may, under the same conditions [on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of power] institute proceedings against an act addressed to that person or

⁵¹ P. Sands, “Is the Court of Justice an Environmental Tribunal?” in: H. Somsen, (ed.), *Protecting the European Environment: Enforcing EC Environmental Law*, London: Blackstone Press Ltd., 1996, pp. 23-35.

⁵² M.A. Heldeweg, R. Seerden and K. Deketelaere, “Public Environmental Law in Europe: A Comparative Search for a *ius commune*”, *EELR*, 2004, p. 86.

⁵³ C-50/00 P *Union de Pequeños Agricultores v. Council* [2002] ECR I-6677.

⁵⁴ F. de Lange, “Case Note European Court of Justice, Unión de Pequeños Agricultores v Council”, *RECIEL*, Vol. 12 2003, p. 118.

⁵⁵ Respectively on 29 May and 1 June 2005.

⁵⁶ P. Craig, “Standing, Rights, and the Structure of Legal Argument”, *European Public Law*, 2003, p. 508.

which is of direct and individual concern to him or her, *and against a regulatory act which is of direct concern to him or her and does not entail implementing measures*.⁵⁷ Even though it can be assumed that a regulatory act should be understood in a broad sense,⁵⁸ this does not facilitate the implementation of the Aarhus Convention at the European level, because it does not change the requirement of individual concern. It is the requirement of individual concern that makes it so difficult for third parties to obtain access to the Community courts, particularly in environmental cases, because environment protection is a collective concern.⁵⁹

In the absence of a Treaty change, the Commission, the Council and the European Parliament found a way to implement the Aarhus rules on judicial review in the European legal order. They took advantage of the leeway offered by Art. 230 (4) EC. It follows from this provision that individuals do not have to pass the direct and individual concern test if they are the addressees of a decision. Hence the Aarhus Regulation prescribes that judicial review is only open for environmental organisations that made a request for internal review of a decision.⁶⁰ Thus, they first file a request for review before the authorities that issued the decision. Once they have obtained a review decision addressed to them, they are entitled to judicial review.⁶¹ If the authorities do not issue a (timely) review decision, the Aarhus Regulation allows for judicial review to protest against failure to act.⁶² This approach is in line with the Aarhus Convention, as it explicitly allows for internal review preceding judicial review.⁶³ Apart from the fact that this creates an opportunity for the authorities to reconsider their decision, it also results in a wider circle of addressees entitled to judicial

⁵⁷ R. Barents, "The Court of Justice in the Draft Constitution", *MJ* 2, 2004, pp. 130-134.

⁵⁸ *Ibid.*, p. 134.

⁵⁹ F. de Lange (see *supra* n. 55), p. 118.

⁶⁰ Art. 10 Regulation 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 and Access to Justice in Environmental Matters to Community Institutions and Bodies *OJ* 2006 L 264/13 ("Aarhus Regulation").

⁶¹ Art. 12 (1) Aarhus Regulation. Internal review should not be confounded with public participation. In the policy areas where public participation is introduced, it takes place during the decision-making, while internal review takes place on request after a decision has been issued.

⁶² Art. 12 (2) Aarhus Regulation.

⁶³ Art. 9 (2) Aarhus Convention

review at the European level. Widdershoven argues that the implementation of the internal review construction will compel the Community courts to grant standing to environmental organisations. Once they have become addressees of a Community decision, the present framework of Art. 230 (4) EC allows them to bring proceedings before the Community courts.⁶⁴ That would resolve an important issue of the judicial deficit for those organisations who qualify.

Although internal review may offer environmental organisations access to court without having to pass the direct and individual concern test, the Aarhus Regulation still attempts to reconcile the restrictive interpretation of the ECJ of Art. 230 (4) EC with the rules of the Aarhus Convention.⁶⁵ The Aarhus Regulation takes the requirement of individual concern into account by not creating an *actio popularis* against any measure that impacts the environment.⁶⁶ The Commission considered that the establishment of a right of action for every natural and legal person is not a reasonable option because it would imply an amendment of Art. 230 EC and could hence not be introduced by secondary legislation. Therefore, access to court is limited to environmental organisations that meet a number of conditions. This is in line with Art. 9 (3) of the Aarhus Convention, which offers the possibility to limit standing by laying down criteria. The Aarhus Regulation also takes the requirement of direct concern into account, since it qualifies the decisions against which judicial review will be open. Thus, the implementation of the Aarhus Regulation will only result

⁶⁴ R. Widdershoven, “Rechtsbescherming in het milieurecht in Europees perspectief” [Protection under the law in environmental legislation: a European perspective], *MenR*, Vol. 9 2004, p. 532. Contrary: J.H. Jans, “Did Baron von Munchhausen ever Visit Aarhus? Some Critical Remarks on the Proposal for a Regulation on the Application of the Provisions of the Aarhus Convention to EC Institutions and Bodies”, in: R. Macrory, (ed.), *Reflections on 30 Years of EU Environmental Law: A High Level of Protection?*, Groningen: Europa Law Publishing, 2006, pp. 483, 484.

⁶⁵ It was easier to make the rules on information and participation compatible with those of the Convention. Similar difficulties arise in the implementation of the Convention into Directives. The rules on information and public participation have already been implemented in respectively Directive 2003/4 and Directive 2003/35, but the rules on judicial review remain a proposal. See: Proposal for a Directive of the European Parliament and the Council on access to justice in environmental matters, COM (2003) 624 final (“Proposal for a Directive on access to justice in environmental matters”).

⁶⁶ Art. 4 of the proposed Directive on access to justice in environmental matters does not prescribe an *actio popularis*. Note that the proposed Directive prescribes a minimum standard.

in access to the Community courts for qualified environmental organisations in relation to acts and omissions by Community institutions and bodies which contravene environmental law.⁶⁷ The task of providing complementary judicial review is entrusted to the Member States.

4.4. Access to Court under the Aarhus Regulation

The “individuals” that will enjoy administrative and judicial review at the European level are non-governmental organisations that meet the conditions of the Aarhus Regulation. A non-governmental organisation is only entitled to make a request for internal review if:

- “(a) It is an independent and non-profit-making legal person in accordance with a Member State’s national law or practice;
- (b) It has the primary stated objective of promoting environmental protection in the context of environmental law;
- (c) It has existed for more than two years and is actively pursuing the objective referred to under (b);
- (d) The subject matter in respect of which the request for internal review is made is covered by its objectives and activities.”⁶⁸

These criteria may be further defined, as the Commission may adopt the provisions that are necessary to ensure their transparent and consistent application.⁶⁹ Hence it follows from Art. 10 to 12 of the Aarhus Regulation that an environmental organisation is entitled to make a request for internal review, provided that the subject matter in respect of which a request for internal review is made is covered by its objectives and activities. Only after obtaining a review decision – unless the action is directed against a failure to decide on the request for internal review – is judicial review possible. It is obvious that these criteria do not permit environmental organisations to qualify. For

⁶⁷ Explanatory Memorandum to the Proposal for the Aarhus Regulation, pp. 15, 16.

⁶⁸ Art. 11 Aarhus Regulation slightly differs from Art. 12 of the proposal for the Aarhus Regulation, COM (2003) 622 final. Art. 12 also demanded that a “qualified entity” be active at Community level and that it must have its annual statement of accounts for the two preceding years certified by a registered accountant.

⁶⁹ Maybe this is a re-introduction via the back door of Art. 13 of the proposed Regulation, which entitled the Commission to recognize environmental organisations. According to the proposal, only recognized environmental organisations were allowed to request internal review and subsequently bring proceedings before the Community courts.

environmental organisations like those that brought the proceedings discussed above, it should be easy to qualify.

Qualified environmental organisations are only entitled to internal review and hence judicial review of “administrative acts” and “omissions” taken by Community institutions and bodies contravening “environmental law”. In line with the Aarhus Convention, the Aarhus Regulation defines environmental law broadly as

“Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources and promoting measures at international level to deal with regional or worldwide environmental problems.”⁷⁰

A measure qualifies as an administrative act in the sense of the Aarhus Regulation if it is a measure of individual scope under environmental law, taken by a Community institution or body, having legally binding and external effects.⁷¹ An omission refers to the failure of a Community institution or body to adopt an administrative act, where it is legally required to do so.⁷² Legally binding and external effects are familiar concepts to the ECJ and the CFI, as an act is only subject to review under Art. 230 EC if it is a measure the legal effects of which are binding on and capable of affecting the interests of the applicant by bringing about a distinct change in his legal position.⁷³ The concept “individual scope” is new. It is not clear what it means. It could refer to the distinction between regulations and decisions. The ECJ and the CFI used to distinguish between these measures on the basis of the abstract terminology test. They considered that a measure is of general application if it is addressed in abstract terms to undefined classes of persons and applies to objectively determined situations.⁷⁴

⁷⁰ Art. 2 (f) Aarhus Regulation

⁷¹ Art. 2 (g) Aarhus Regulation

⁷² Art. 1 (h) and 10 (1) Aarhus Regulation. Cf. Explanatory memorandum to the proposal for the Aarhus Regulation, p. 10.

⁷³ C-8-11/66 *Cimenteries Cementbedrijven et al. v. Commission* [1967] ECR 75, C-60/81 *IBM v. Commission* [1981] ECR 2639. Recently: Joined Cases T-377/00, T-379/00, T-390/00, T-260/01 and T-272/01 *Philip Morris International and Others v. Commission* [2003] ECR 2639, upheld in appeal: C-131/03 P *Reynolds and Others v. Commission* [2006] ECR I-0000.

⁷⁴ C-789 and 790/79 *Calpak SpA and Società Emiliana Lavorazione Frutta SpA v. Commission* [1980] ECR 1949. See P. Craig and G. de Burca, *EU Law, Text, Cases*

However, the ECJ held in the *Jégo Queré* case that even a measure of general application such as a regulation can be of direct and individual concern to some individuals and is thus in the nature of a decision in their regard.⁷⁵ Hence the distinction between decisions and acts of general application has become somewhat blurred in European case law.⁷⁶ If the CFI and the ECJ prefer to interpret individual scope in a narrow sense, it would be a step backwards.

4.5. Trying a Direct Action Again

Access to court under the Aarhus Regulation is only possible if the decision concerning the placing of an active substance on Annex I to Directive 91/414/EC constitutes a measure of individual scope under environmental law, taken by a Community institution or body, having legally binding and external effects. Some of these requirements are easier to fulfil than others. The Community decision whether or not to place an active substance on the Annex to the Directive is taken by the Commission or – exceptionally – the Council. Hence it is certainly a measure taken by a Community institution. Whether the regulation of plant protection products belongs to environmental law should not be difficult to decide. The definition of environmental law in the Aarhus Regulation does not add policy areas, like the proposal for the Aarhus Regulation. This is a pity, as the list of examples included chemicals and pesticides.⁷⁷ It is not necessarily disadvantageous that the list disappeared. The definition of environmental law is sufficiently broad for the regulation of plant protection products to be included.

It is not so easy to decide whether the listing of a substance is a decision “of individual scope under environmental law.” A listing decision could be considered to have a general scope under environmental law. The ban or approval of an active substance concerns a specific substance, but it is objectively formulated and it applies to an indefinite group of market participants. Hence access to the internal review procedure could be denied on this ground. That would undermine the aim of the Aarhus Convention to guarantee wide access to court. A different interpretation would emphasise the implementing nature of the decision to list or ban an active substance and consider that these Community decisions affect the environment. The Community decision whether or not to

and Materials, 3rd edn, Oxford: Oxford University Press, 2003, pp. 493-495.

⁷⁵ C-263/02 P *Jégo Queré v. Commission* [2004] ECR I-3425.

⁷⁶ A. Arnall, *The European Union and its Court of Justice*, 2nd edn, Oxford: Oxford University Press, 2006, pp. 70-74.

⁷⁷ Art. 2 (1) (g) of the Proposal for the Aarhus Regulation.

list an active substance on the Annex to Directive 91/414 determines whether the national authorities will grant or refuse a product authorisation for products containing that active substance. If the Community decision is considered a measure of individual scope under environmental law, it also needs to have legally binding and external effects in order to qualify. The decisions are binding on the Member States to whom they are directed, so they have both binding and external effects. Thus, it seems likely that after following the internal review procedure an environmental organisation can challenge a listing decision before the Community courts without having to pass the individual and direct concern test because it has a decision directed to it.

4.6. Access to National Courts

If it turns out that it is not possible for environmental organisations to bring proceedings against a Community listing decision because its scope is too general, then at least the implementation of the Aarhus Convention into the national laws of the Member States should enable them to bring proceedings against implementing measures taken at the national level and thus against the underlying Community decisions too.⁷⁸ In any event, the national level is the appropriate level to bring proceedings against decisions, acts or omissions of national authorities or private individuals concerning plant protection products.⁷⁹ If a national court then doubts whether a national decision is in breach of Community legislation or decisions concerning plant protection products, it may use the preliminary ruling procedure.⁸⁰ The Parties to the Aarhus Convention have to implement its rules into national legislation. The Aarhus Directive on access to court, which is still a proposal, may be used as an intermediary step in the Member States. As the Directive is based on Art. 175 EC, it offers minimum harmonisation. This means that the Member States can introduce or maintain

⁷⁸ On the basis of a complaint from a Belgian environmental organisation, the Aarhus Convention Compliance Committee has warned Belgium in Communication ACCC/C/2005/11 that if the jurisprudence of the Council of State is not altered, Belgium will fail to comply with art. 9, paragraphs 2 to 4, of the Convention by effectively blocking most, if not all, environmental organisations from access to justice with respect to town planning permits and area plans, as provided for in the Wallonian region.

⁷⁹ Respectively Art. 4 and Art. 3 Proposal for a Directive on access to justice in environmental matters.

⁸⁰ C-283/81 *Cilfit* [1982] ECR 3415.

rules that guarantee a broader access to court.⁸¹ As the European Parliament and the Council still have the opportunity to amend the proposed Directive, this can only be a tentative description of the future (minimum) procedural rules in the Member States.

Under the rules of the proposed Aarhus Directive, access to the national courts is not limited to environmental organisations. It is open for all members of the public at the national level. In line with the Aarhus Convention, the Directive does not prescribe an *actio popularis*. Members of the public have access to environmental proceedings to challenge the procedural and substantive legality of administrative acts and omissions where (a) they have sufficient interest or (b) they maintain the impairment of a right, where the administrative procedural law requires this as a precondition. The Member States determine what constitutes a sufficient interest or the impairment of a right, but they have to take the privileged position of environmental organisations into account. Hence, environmental organisations have access to court without having to prove a sufficient interest or maintaining the impairment of a right, if they bring an action against a matter that is covered specifically by their statutory activities and it falls within their specific geographical area of activities.⁸² It must be possible for environmental organisations – and for others – to bring proceedings against decisions concerning plant protection products. These decisions clearly fall under the definition of environmental law, as they are (still) explicitly mentioned in the definition of environmental law in the Directive.⁸³ Therefore, the implementation of the Aarhus Convention into the Aarhus Directive will safeguard access to court at the national level for concerned individuals and environmental organisations when they want to bring proceedings against plant protection product authorisations and the underlying Community or international decisions.

5. Conclusion

It is argued that multilevel environmental regulation presents a judicial deficit. Although environmental law is implemented at the international, European and national level, judicial review against implementing measures is not equally distributed between these three levels. It is impossible for individuals to bring proceedings at the international level. The situation is only slightly less dramatic

⁸¹ Explanatory memorandum of the Proposal for a Directive on access to justice in environmental matters, para. 3.6.

⁸² Art. 5 Proposal for a Directive on access to justice in environmental matters.

⁸³ Art. 1 (g) Proposal for a Directive on access to justice in environmental matters.

at the European level. Individuals have to pass the requirement of direct and individual concern to bring proceedings against decisions that are not directed to them. This proves impossible for environmental organisations due to the restrictive interpretation the Community courts give to these requirements. As the environment is a collective and not an individual concern, they never qualify. Therefore, they depend on the national courts, which can – by asking for a preliminary ruling – move the case up to the European level. Unfortunately, not all Member States allow environmental organisations to bring proceedings. Moreover, for various reasons the national level may not be the most appropriate level at which to bring proceedings. In particular if a national decision is the pretext to challenge a Community decision, the length of proceedings and their dependence on national courts asking for a preliminary ruling do not leave an impression of effective judicial review.

The Aarhus Convention should facilitate access to court in environmental matters. It has no direct effect on other environmental conventions, but it may have in the future, as its Parties have committed themselves to promote the application of the principles of the Aarhus Convention in international environmental decision-making processes and within the framework of international organisations in matters relating to the environment. The implementation of the Aarhus Convention into an EC Regulation will benefit qualified environmental organisations, as they may request administrative review against decisions issued by Community institutions and bodies. The main hurdle seems to be which Community implementing measures will be considered an administrative act or omission in the sense of the Aarhus Regulation. If these concepts are broadly interpreted, environmental organisations should be able to bring proceedings against the administrative review decision before the Community courts. The implementation of the Aarhus Convention into national legislation will bring about (minimum) harmonisation of national procedural rules, as the Parties to the Aarhus Convention should ensure that environmental organisations and other interested parties can obtain judicial review of environmental decisions, including those based on Community or international measures. Thus the main contribution of the Aarhus Convention is that it reduces the current judicial protection deficit in the field of environmental multilevel regulation in the States that are Parties to the Convention, including the European Union, by facilitating access to court.