

The Case Law of the European Court of Justice on Access to Justice in the Aarhus Convention and Its Implications for Switzerland

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1. Introduction

The Court of Justice of the European Union (CJEU) has handed down a number of important decisions interpreting the provisions of the Aarhus Convention relating to access to justice over the last years.¹ The following contribution assesses first the content of the case law of the CJEU. Then, the implications of this case law for Switzerland as a non-Member State of the EU, but party state to the Convention are assessed. A number of different threads relating to different parts of Article 9 of the Convention can be identified in the Court's case law and are subsequently addressed separately after a short overview over the topic of access to justice in the Aarhus Convention.

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¹ The present contribution picks up and combines threads developed in earlier contributions on the case law of the European Court of Justice in environmental matters and on the Aarhus Convention more specifically as well as on implications for Switzerland. The respective sources will be duly referred to throughout this article.

As the so-called third pillar of the Convention, access to justice stands next to access to environmental information and public participation in environment-related procedures. The pertinent Article 9 provides in its first paragraph that states have to create judicial remedies that enable each individual to bring a claim based on the right of access to information according to Article 4 of the Convention. Article 9 (2) requires access to justice to be granted in cases concerning decisions covered by Article 6 on public participation in environment-related decision-making. The public concerned are individuals either having a “sufficient interest” or alternatively “maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition”. Apart from such individuals, a right of action is also to be granted to environmental associations that pursue environmental interests and meet other requirements of the Convention.² Article 9 (3) provides that members of the public meeting the criteria laid down in national law must have access to administrative and judicial procedures to challenge acts and omissions contravening provisions of the national environmental law in addition to the aforementioned rights of action. Lastly, Article 9 (4) specifies that all mentioned procedures have to provide “adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive”.

2. The Case Law of the CJEU

The threads that can be identified in the case law of the Court concern the temporal scope of application of the provisions on access to justice, the case of specific legislative acts that ought to be excluded from the Convention’s obligations, interim relief, the range of pleas that can be brought forward for judicial review, the role of procedural errors, the notion of prohibitively expensive costs of proceedings, access to justice for environmental associations as granted under Article 9 (2) and 9 (3) of the Convention and the relevance of the right to property where a permit has been annulled.

² Article 9 (2) third and fourth sentence. See on these requirements in more detail sections 2.7 and 2.8.

2.1. The temporal scope of application of provisions on access to justice

In *Gemeinde Altrip*³ an administrative procedure had started before the end of the deadline for implementation of the pertinent predecessor provision of Article 11 of Directive 2011/92,⁴ while the resulting permit was only granted afterwards. The Court held that Article 11 could indeed be applied to “future effects”, but not to “legal situations that have arisen and become definitive under the old law”.⁵ The duty to conduct an environmental impact assessment itself had been found not to apply in the case of large-scale projects when the application for consent for a project had been formally lodged before the expiry of the implementing period, since neither such already complex procedures should be made even more cumbersome and time-consuming by the Directive’s requirements nor should already established situations be affected thereby.⁶ However, for the Court this reasoning was not applicable to the specific requirement of Article 11, which only increased the pre-existing risk of a project becoming the subject of contentious proceedings by improving access to a legal remedy.⁷ The mere practical effect that the completion of a project could be delayed thereby was inherent in the review of legality of decisions over such projects and justified by the objectives of the Aarhus Convention; in particular, Article 11 could not be rendered redundant for situations already existing before its implementation deadline based merely on this potential disadvantage.⁸

The Court’s distinction between the scope of application of the duty to conduct an environmental impact assessment and the provision on access to justice is justified if one considers that an impact assessment can indeed affect the way in which a project is executed, in particular since its results must be taken into account in the final authorizing decision. In the case of access to justice, however, the only question is who may initiate judicial review of a project without affecting the substance of a project or pre-existing legal situations, since there is no right not to have administrative decisions reviewed by a court.⁹

³ Case C-72/12, *Gemeinde Altrip*, Judgment of 7 November 2013, not yet reported.

⁴ An amended version of Article 10a of Directive 85/337, OJ 1985 L 175/40.

⁵ Para 22.

⁶ Para 26.

⁷ Para 27.

⁸ Paras 28-29.

⁹ A. Epiney, *Zur Rechtsprechung des EuGH im Umweltrecht im Jahr 2013*, EurUP 2014 (1) p. 53, 56.

2.2. Specific acts of national legislation and the non-applicability of the obligations under the Aarhus Convention

Article 1 (5) of Directive 85/337¹⁰ provides that its requirements are not applicable to projects adopted by a “specific act of national legislation”, as the objectives would thus be achieved through the necessary legislative process. In *Boxus*¹¹ the problem arose that as a consequence of such a procedure no judicial remedy was available which caused concern as to the effectiveness of Article 9 of the Aarhus Convention and Article 10a of the Directive as the latter’s implementing provision.

The Court held that the exclusion from applicability of Article 1 (5) could only cover projects that met two conditions, first that its details are adopted by a specific legislative act and second that the objectives of the Directive must be achieved through the legislative process.¹² The relevant legislative act would thus have to consider all the elements of the project relevant to the environmental impact assessment¹³ and no adoption of further measures had to be required for the developer to be entitled to proceed with the project.¹⁴ As regards the second condition, the legislature must have sufficient information at its disposal when the project is adopted.¹⁵ A two-stage legislative procedure during which the legislature can take advantage of the information gathered during a prior administrative procedure was considered in principle admissible.¹⁶ However, a legislative act could not fall under the exception of Article 1 (5) of the Directive if it only “ratifies” a pre-existing administrative act and merely refers to overriding reasons in the general interest without any substantive legislative process.¹⁷ As a consequence, the Court determined that in such a case where the exception for specific legislative acts was not applicable it would deprive Article 9 of the Aarhus Convention and Article 10a of the Directive of all effectiveness if such an act was by no

¹⁰ OJ 1985 L 175/40.

¹¹ Cases C-128-131/09 and C-134-135/09, *Boxus* [2011] ECR I-9711.

¹² Para 37.

¹³ Para 39.

¹⁴ Para 40.

¹⁵ Para 43. Based on the Directive, the minimum information includes “a description of the project comprising information on the site, design and size of the project, a description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects, and the data required to identify and assess the main effects which the project is likely to have on the environment”.

¹⁶ Para 44.

¹⁷ Para 45.

means amenable to judicial review.¹⁸ The guarantee of access to justice therefore cannot be circumvented by a merely “formal” legislative procedure.¹⁹

2.3. Interim relief and the *effet utile* of provisions on access to justice

In *Križan and others*²⁰ the Court was asked whether access to justice as granted under Article 25 of Directive 2010/75²¹ included a possibility for members of the public to ask the court or the competent independent and impartial body established by law to order interim measures of a nature to temporarily suspend the application of a permit.

The Court held that the right to bring an action in the Directive had to be read in the light of the objective of that Directive, i.e. to achieve integrated prevention and control of pollution by putting in place measures designed to prevent or reduce emissions of listed activities.²² However, the full effectiveness of the right to bring an action could not be achieved if an installation which had been granted a permit in violation of the Directive could not be prevented from continuing to function pending a definitive decision on the contested permit.²³ Consequently, interim relief had to be provided, as the Court had already established was necessary for national courts seised of a dispute involving EU law to ensure the full effectiveness of the judgment to be given on rights claimed under EU law.²⁴

The general wording chosen by the Court indicates that these findings are more broadly applicable. It is highly likely that the corresponding provisions of Directive 2011/92²⁵ on environmental impact assessments are to be interpreted similarly, since the Directive also addresses the prevention of environmental pollution as an objective.²⁶ Moreover, for the Court interim pro-

¹⁸ Para 53.

¹⁹ A. Epiney, *Zur Rechtsprechung des EuGH im Umweltrecht im Jahr 2011*, EurUP 2012 (2) p. 88, 93. Also, it is remarkable that the Court bases itself constantly on both Article 9 of the Convention and Article 10a of the Directive together, which is most likely due to the practically identical wording of the two provisions.

²⁰ Case C-416/10, *Križan and others*, Judgment of 15 January 2013, not yet reported.

²¹ OJ 2010 L 334/17. At issue in the case was actually the predecessor provision, Article 15a of Directive 96/61 (OJ 1996, L 257/26), which is, however, phrased identically.

²² Para 108.

²³ Para 109.

²⁴ Para 107.

²⁵ OJ 2012 L 26/1.

²⁶ Epiney, *supra* note 8 at p. 54.

tection must be provided for in national procedural law whenever, based on EU law, judicial remedies have to be granted to review the compatibility of administrative decisions with EU law or national implementing law. This conclusion is of particular importance for Member States which pursue a rather objective approach to judicial protection in administrative law and therefore tend to not grant interim protection broadly.²⁷

2.4. The possible pleas for judicial review

As part of the right to access to justice, the Court was also confronted with the question whether before a court an individual could complain not only about a missing environmental impact assessment, but also about an irregular execution of such an assessment. In *Gemeinde Altrip*²⁸ the Court decided that the relevant provision of EU law, the predecessor provision of Article 11 of Directive 2011/92,²⁹ restricted in no way the pleas that could be put forward; the national implementing law could therefore not restrict itself to challenges of a decision because of the lack of an environmental assessment and exclude cases where such an assessment was found to be vitiated by defects; this would otherwise render largely nugatory the relevant provisions of EU law.³⁰ To decide otherwise would clearly run counter to the objectives pursued by the Directive.

2.5. The role of procedural errors

A further open question tackled by the CJEU is to what extent access to justice can be denied in the case of a procedural error that could not have had any effect on the decision ultimately taken and did not affect in any way the substantive legal position of the applicant. In *Gemeinde Altrip* the Court decided based on the relevant provision of EU law³¹ that Member States could make the admissibility of an action conditional either on the applicant having a sufficient interest in bringing the action or on her maintaining the impairment of a right in their national legislation.³² However, in accordance with the principle of effectiveness the relevant procedural rules could not make it in practice impossible or excessively difficult to exercise rights con-

²⁷ Id. at p. 54.

²⁸ Case C-72/12, *Gemeinde Altrip*, Judgment of 7 November 2013, not yet reported.

²⁹ Article 10a of Directive 85/337, OJ 1985 L 175/40.

³⁰ Paras 36-37.

³¹ Article 10a of Directive 85/337, OJ 1985 L 175/40.

³² Para 42.

ferred by Union law.³³ Procedural defects must thus be available at least as a matter of principle as a possible plea. Nonetheless, based on the significant discretion granted by the Directive to Member States to determine what constituted an impairment of a right, the Court found a national rule acceptable which did not consider the rights of an individual impaired where a procedural defect could not conceivably influence through its invocation the contested decision and thus excluded access to justice.³⁴ However, the burden of proof for showing the potential influence of a defect on the ultimate decision could not be imposed on the applicant.³⁵ The relevant assessment had to be undertaken by the competent court, taking into account the seriousness of the defect invoked and the extent to which that defect has deprived the public concerned of one of the guarantees of access to information and participation in decision-making in accordance with the objectives of the Directive.³⁶

As a result of the Court's conclusions, national law can require that at the merits phase only the same impairments of rights can be claimed as at the phase of admissibility. Furthermore, despite the discretion Member States enjoy in defining such "rights", they must ensure that such rights as are granted by Union law can be enforced in court, which includes for the Court in particular rights resulting from the provisions of the Aarhus Convention and the relevant Union legislation on public participation; only rarely will it be possible to find sufficient proof to be able to exclude procedural defects in this case because they could in no way impact on the final decision.³⁷

2.6. The notion of "not prohibitively expensive" costs of proceedings

Article 9 (4) of the Convention and the corresponding implementing provisions of EU law³⁸ require that as part of access to justice as granted by the Aarhus Convention, costs for proceedings must not be prohibitively high. In *Edwards and Pallikaropoulos*,³⁹ the Court found that this certainly would

³³ Para 45.

³⁴ Para 51.

³⁵ Para 52.

³⁶ Paras 53-54.

³⁷ *Epiney*, *supra* note 8 at p. 56 et seq.

³⁸ Article 10a of Directive 85/337 (OJ 1985 L 175/40) and Article 15a of Directive 96/61 (OJ 1996, L 257/26) as codified in Article 11 (4) of Directive 2011/92 (OJ 2012 L 26/1) and Article 16 (4) of Directive 2008/1 (OJ 2008 L 24/8), respectively.

³⁹ Case C-260/11, *Edwards and Pallikaropoulos*, Judgment of 11 April 2013, not yet reported.

not prevent a court from ordering one party to bear the costs.⁴⁰ The question whether costs are prohibitive calls for an overall assessment, taking into account all the costs borne by the party concerned.⁴¹ Considering the objective of the pertinent EU legislation to give to the public concerned wide access to justice, the right to an effective remedy enshrined in Article 47 of the Charter of Fundamental Rights of the Union as well as the principle of effectiveness and, lastly, the Implementation Guide published in 2000 by the United Nations Economic Commission for Europe,⁴² the cost of judicial proceedings ought not to be prohibitively expensive in as much as the relevant persons “should not be prevented from seeking, or pursuing a claim for, a review by the courts that falls within the scope of those articles by reason of the financial burden that might arise as a result.”⁴³ According to the Court, to achieve this objective a national court has to take into account all the relevant provisions of national law, in particular legal aid schemes or costs protection regimes.⁴⁴

The Court insisted that an objective and subjective assessment ought to be undertaken, since both the interest of the person wishing to defend her rights and the public interest in the protection of the environment had to be taken into account.⁴⁵ Thus, the national court’s assessment could not be carried out solely on the basis of the financial situation of the person concerned and whether the costs of proceedings exceeded her resources, but also required an objective analysis of the amount of costs. The latter analysis should assess whether the costs would appear objectively unreasonable, given that members of the public and associations are “naturally required” to play an active role in defending the environment.⁴⁶ In the framework of the analysis of the financial situation of the person concerned, the national court should not use the estimated resources of an “average” applicant;⁴⁷ legitimate criteria are, however, the reasonableness of the prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure and the potentially frivolous nature of a claim.⁴⁸ The fact that the claimant has not been deterred in practice to bring her claim cannot be considered sufficient proof

⁴⁰ Para 25.

⁴¹ Para 28.

⁴² Paras 31, 33 and 34.

⁴³ Para 35.

⁴⁴ Para 38.

⁴⁵ Para 39.

⁴⁶ Para 40.

⁴⁷ Para 41.

⁴⁸ Para 42.

that the proceedings are not prohibitively expensive.⁴⁹ Also, there cannot be a different assessment based on whether a court is adjudicating at the level of first-instance proceedings, an appeal or even second appeal.⁵⁰

While some guidance is thus given on the criteria for acceptable costs of proceedings, some of said criteria remain quite open, such as the criterion of “objective reasonableness”. The considerable differences between the Member States as to the costs of proceedings are also unlikely to be affected by the decision, since the Court admits several criteria apart from the financial situation of the party concerned. This conclusion permits – and in some cases may even require – a case-by-case assessment of what constitute prohibitively expensive costs.⁵¹

Lastly, it remains unclear after the CJEU’s decision whether the obligation to prevent proceedings from becoming prohibitively expensive implies simultaneously that Member States have to provide for a functional system of legal aid. The Court’s insistence that applicants should not be deterred from pursuing their claims before a court, however, points in the direction that such an effective legal aid scheme must be available.⁵²

2.7. Access to justice for environmental associations under Article 9 (2) Aarhus Convention

In a first decision in *Djurgarden-Lilla*⁵³ the Court had to discuss a number of questions relating to the right of action for environmental associations as provided in Article 9 (2) of the Convention. It first held that public participation in environmental decision-making and legal review had a different purpose, and that as a consequence access to a review procedure could not be made dependent by Member States in any way on whether an individual had taken part and expressed its views during the public participation phase of a project.⁵⁴

A clear distinction has also to be drawn according to the Court between actions by individuals and actions by nongovernmental organisations; the latter also have to be granted access justice if they fulfil the requirements set out in national law.⁵⁵ Consequently, an obligation to introduce or maintain a

⁴⁹ Para 43.

⁵⁰ Para 45.

⁵¹ *Epiney*, *supra* note 8 at p. 55.

⁵² *Id.*

⁵³ Case C-263/08, *Djurgarden Lilla* [2009] ECR I-9967.

⁵⁴ Para 39.

⁵⁵ Paras 34-35.

right of action for environmental organisations can be derived from Directive 2011/92 and its predecessors,⁵⁶ respectively.⁵⁷

The Court also clarified the margin of discretion that Member States enjoy to impose requirements on such nongovernmental organisations with respect to their access to justice. The national rules must in particular ensure wide access to justice and render effective the respective provisions of the Directive.⁵⁸ National law may require that an association has as its object the protection of the environment.⁵⁹ In principle, it would also be conceivable that such associations must have a minimum number of members; however, this minimum number must not be fixed in a way contrary to the objectives of the Directive.⁶⁰ Fixing the minimum number at 2000 members was found contrary to the Directive, since the latter concerned not only projects on a regional or national, but also the local scale, which would mean local associations would be excluded from access to justice.⁶¹ Furthermore, the Court considered it unacceptable that smaller associations would have to contact larger associations and ask them to bring an appeal, as this might lead to a system of “filtering” of appeals incompatible with the objectives of the Directive.⁶²

It seems clear after this judgment that a system which only grants full access to justice to environmental associations at the national level is incompatible with the Directive. Moreover, the criteria established in national law may only serve to scrutinize environmental associations as to their “seriousness”, by examining e.g. their actual existence, the pursuit of relevant goals and probably durability. By contrast, Member States must not “filter” them according to other criteria.⁶³

Some further elements have been added to the interpretation of Article 9 (2) and the pertinent provisions of EU law in *Bund für Umwelt und Naturschutz Deutschland*,⁶⁴ which concerned the question whether a national law could make the access to justice for environmental associations dependent upon whether a violation of a norm providing rights for individuals was at stake. The starting point for the Court were the predecessor provision of

⁵⁶ Directive 85/337, OJ 1985 L 175/40.

⁵⁷ A. Epiney, Zur Rechtsprechung des EuGH im Umweltrecht im Jahr 2009, EurUP 2010 (3) p. 134, 136.

⁵⁸ Case C-263/08, Djurgarden Lilla [2009] ECR I-9967, para 45.

⁵⁹ Para 46.

⁶⁰ Para 47.

⁶¹ Para 50.

⁶² Para 51.

⁶³ Epiney, *supra* note 52 at p. 137.

⁶⁴ Case C-115/09, Bund für Umwelt und Naturschutz Deutschland [2011] ECR I-3673.

Article 11 of Directive 2011/92⁶⁵ as an implementation measure of the Aarhus Convention and the latter's objective, which support an interpretation that, whichever criteria for the admissibility of an action a Member State chooses, environmental associations are entitled to a review procedure before a court of law or another independent and impartial body established by law to challenge relevant decisions based on substantive or procedural grounds.⁶⁶ The Court therefore accepted that the national legislature could confine to "individual public-law rights" the rights whose infringement may be relied on by individuals in legal proceedings contesting a decision; however, such a limitation could not be applied to environmental associations without disregarding the objective of the Directive.⁶⁷ It would be contrary to the principle of effectiveness to prevent such associations from access to justice in the case of impairment of EU rules protecting only the public interest and not interests of individuals, as this would largely deprive these associations of the possibility of verifying compliance with the directly applicable rules of EU environmental law and the provisions of national law implementing EU environmental law.⁶⁸

Before the background that the national rule at issue could not be interpreted in a way compatible with EU law, the Court went on to confirm the direct effect of the second and third sentence of Article 11 of the Directive which state that the interest of any non-governmental organisation meeting the respective requirements are to be deemed sufficient and that such organisations are to be deemed to have rights capable of being impaired.⁶⁹

The Court thereby interprets the access to justice to be granted to environmental associations very broadly; the latter must be able to bring before a court or similar body any violation of the national provisions implementing EU law or of directly applicable provisions of EU environmental law. This implies simultaneously that the courts must be able to scrutinize the merits of such claims, which means that the extent of their powers of judicial review must correspond to the breadth of access to justice granted under the Directive. This approach is convincing, as otherwise the right of action of environmental associations would never be more extensively granted than the same right for individuals and would therefore lose all practical significance of its own, despite the clear distinction in the wording of the Directive and of Article 9 (2) of the Aarhus Convention.⁷⁰

⁶⁵ Article 10a of Directive 85/337, OJ 1985 L 175/40.

⁶⁶ Para 42.

⁶⁷ Para 45.

⁶⁸ Para 46.

⁶⁹ Para 57.

⁷⁰ *Epiney*, *supra* note 18 at p. 90 et seq.

The decision also strengthens the previously mentioned obligation for Member States of introducing or maintaining a right of action for environmental associations. However, the Court correctly limits the extent of this obligation to national norms which are based on EU environmental law and to directly applicable norms of EU environmental law. This limitation corresponds to the limited competence of the EU which cannot regulate questions of access to justice in areas not covered by EU law. The respective competence of the EU is based here on the fact that procedural rules serve the effective implementation and application of EU law in the present case. Based on Article 192 TFEU as a legal basis it would be in principle conceivable to regulate questions of access to justice – including the topic of a right of action for environmental associations – for all or several areas of EU environmental law in a comprehensive legal act. However, the introduction of a general right of action for environmental associations would not be covered on this legal basis, since such a right of action would apply to purely national areas of environmental law as well. The EU competence to regulate questions of the execution and of judicial remedies in this area has thus mere annex character.⁷¹

Nonetheless, the Court's approach leaves three questions unanswered. First, the notion of norms of EU environmental law and of national laws that serve its implementation or execution is not clarified. Clearly, this encompasses all legal acts taken based on Article 192 TFEU. However, since environmental protection is treated as a mainstreaming issue in the Treaty⁷² and environmental concerns thus ought to play an important role also in the field of other EU policies, arguably EU norms should already be considered to fall within the field of environmental protection if their content and/or objectives concern among others environmental issues, which could be determined on a case-by-case basis.⁷³

Second, there are no clear criteria to identify when a national norm is implementing EU environmental law. Large parts of national environmental law are nowadays determined to some extent by EU law. If the limits of competences ought to be respected, only those provisions of national law are to be considered that are indeed based on EU law insofar as they implement requirements of EU law; these include, however, also EU fundamental rights or the general principles of EU environmental law. In individual cases, there may appear difficulties in delineating what part of a norm is determined by EU law, e.g. in the case of rather vaguely formulated requirements of EU

⁷¹ See already on this topic *A. Epiney*, *Gemeinschaftsrecht und Verbandsklage*, NVwZ 1999 p. 485, 490 et seq.

⁷² See Articles 114 (3) and 11 TFEU.

⁷³ *Epiney*, *supra* note 18 at p. 91.

law. In case of doubt, arguably even situations where the national legislature implements “more” than EU law prescribes precisely should be treated as being covered by EU law; it is certainly impossible to treat parts of one norm as implementation of EU law while rejecting the same for other parts of the same norm.⁷⁴

A third question arises for the national legislator as to whether two different regimes for the right of action for environmental associations ought to coexist, one for claims under EU law-determined situations and another for claims under national law. There is arguably a good case against such a different treatment. Not only are there hardly any good reasons to grant preferential access to justice in the first case and not in the second one; the mentioned difficulties of distinguishing situations determined by EU law from others also do not arise in the first place as a consequence.⁷⁵

2.8. Access to justice for environmental associations under Article 9 (3) Aarhus Convention

In *Lesoochranarske*⁷⁶ the Court had to examine whether a direct right to bring a claim for environmental associations could be derived from Article 9 (3) of the Convention. Although the EU had not implemented the provision, the Court found itself competent to interpret Article 9 (3) based on the Habitats Directive⁷⁷ which protected the species relevant to the case.⁷⁸ However, as a hardly surprising finding the Court decided that Article 9 (3) had no direct effect, since it did not contain a sufficiently clear and precise obligation.⁷⁹ Nonetheless, in areas covered by EU law – here the Habitats Directive – the national court had to interpret national law including the procedural rules in a way which to the fullest extent possible was consistent with the aim of Article 9 (3) of the Convention to grant effective access to justice, which in this case meant to enable an environmental protection organisation to challenge before a court an administrative procedure liable to be in breach of EU environmental law.⁸⁰

⁷⁴ Id. at p. 91 et seq.

⁷⁵ Id. at p. 92.

⁷⁶ Case C-240/09, *Lesoochranarske* [2011] ECR I-1255.

⁷⁷ Directive 92/43, OJ 1992 L 206/7.

⁷⁸ Case C-240/09, *Lesoochranarske* [2011] ECR I-1255, para 37. See also on this aspect of the case *S. Schlacke*, Stärkung überindividueller Rechtsschutzes zur Durchsetzung des Umweltrechts – zugleich Anmerkung zu EuGH, Urteil vom 8.3.2011 – Rs. C-240/09, ZUR 2011, p. 312, 313 et seq.

⁷⁹ Para 45.

⁸⁰ Paras 50-51.

The Court thus finds that despite the lack of direct effect a provision of an international treaty remains relevant for the Member States in areas covered by EU law, which means that they have to interpret their national law in conformity with such a provision. However, the fact remains that Article 9 (3) of the Convention grants substantive discretion to Member States. For claims of individuals, admissibility can thus be made dependent upon the fulfilment of additional criteria such as the existence of a sufficient interest or impairment of a right, as long as access to justice is not excluded as a matter of principle. For environmental organisations, however, the Court indicates that at least a full-scale exclusion of the access to justice in areas where compliance with EU environmental law is at stake is not in compliance with Article 9 (3) of the Convention. This provision thus has important implications for Member States which had not necessarily been foreseen in the doctrine⁸¹ and requires the latter to introduce a right to bring an action for environmental associations. Such a duty goes arguably beyond creating a right of action in the case of permit decisions for certain dangerous activities or activities subject to an environmental impact assessment and would indeed implicate that the implementation of Article 9 (3) of the Convention is replaced by an EU legal act, at least as far as the requirement to introduce such a right of action to claim a violation of EU environmental law or its implementing national law is concerned. Nonetheless, with the Court's rather terse reasoning it is not clear yet whether there will not be further developments on this question.⁸²

2.9. Annulment of a permit and the right to property

In *Križan and others*⁸³ the Court was confronted with the claim that the annulment of a permit in the context of proceedings under the national provisions implementing Article 9 (2) and 9 (4) of the Aarhus Convention and the respective EU Directive⁸⁴ would constitute an unjustified interference with the right to property of the developer as enshrined in Article 17 of the Charter of Fundamental Rights. The Court held that the right to property was not absolute and could be restricted based on objectives of general interest

⁸¹ See in earlier writing A. Epiney & K. Sollberger, *Verwaltungsgerichtlicher Rechtsschutz in Umweltangelegenheiten – Rechtsvergleich, europa- und völkerrechtliche Vorgaben und Implikationen für die Schweiz*, 2003, p. 173 et seq.

⁸² *Epiney*, *supra* note 18 at p. 89.

⁸³ Case C-416/10, *Križan and others*, Judgment of 15 January 2013, not yet reported.

⁸⁴ Article 15 a of Directive 96/61, OJ 1996 L 257/26.

and in a proportionate fashion.⁸⁵ Recognising that the protection of the environment could constitute such a general interest, the Court then rather quickly accepted the proportionality of the restriction caused by the Directive based on the fact that the latter “operates a balance” between the right to property and the protection of the environment.⁸⁶

The result is in principle convincing. The contextual remarks of the Court also lead to the conclusion that in a case where a permit has been found by a court to have been granted in violation of a directive or its national implementing measures the annulment of said permit is not only optional, but compulsory because of the effectiveness of EU law.⁸⁷ At the same time, the Court’s reasoning remains deplorably terse when examining the proportionality of the Directive. The Court does not distinguish between the prongs of suitability, necessity and proportionality *stricto sensu*. This approach is rather frequently found and criticised in cases where the Court is asked to review secondary legislation against the benchmark of primary law.⁸⁸

3. Implications for Switzerland

While Switzerland has ratified the Aarhus Convention on March 3rd 2014,⁸⁹ the country is nonetheless no Member State of the EU and therefore not directly bound by the case law of the CJEU. Nonetheless, the *dicta* of the Court are indirectly relevant for Switzerland.

First, as a party Switzerland is in any event bound by the provisions of the Aarhus Convention. The way in which the CJEU interprets said provisions is of course not binding for Switzerland. But under international law, the judgments handed down by national high courts and international and supranational courts are to be considered at least as important leads for the interpretation of treaty provisions. As a result of this, not even taking into consideration these interpretations would be hard to justify e.g. in the framework of interpreting the Aarhus Convention in Switzerland. Article 31 (3) b of the Vienna Convention on the Law of Treaties explicitly specifies

⁸⁵ Case C-416/10, *Križan and others*, Judgment of 15 January 2013, not yet reported, para 113.

⁸⁶ Paras 114-115.

⁸⁷ *Epiney*, *supra* note 8 at p. 54 et seq.

⁸⁸ *Id.* at p. 54. See also *B. Pirker*, *Proportionality Analysis and Models of Judicial Review*, 2013, pp. 253-255.

⁸⁹ See for the list of the parties to the Convention https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en (last access 15 May 2014).

that the “subsequent practice” of parties to a treaty is to be taken into account in the interpretation of said treaty, which includes in particular binding judicial pronouncements.⁹⁰ Furthermore, the Aarhus Convention has been concluded in the framework of the United Nations Economic Conference for Europe, which means that a practice taken by the 28 EU Member States is of particular significance in this regional context. Taking these points into account, only very good or even compelling reasons appear to be able to justify that Switzerland deviates from the CJEU’s case law in interpreting the Aarhus Convention. The case would be even stronger if the Court’s interpretation aligns with that of the Compliance Committee which controls compliance with the Convention based on Article 15 of the latter and issues non-binding statements on its interpretation. Such statements are not only relevant for interpretations given by the Court on provisions of the Convention itself, but also for provisions of EU secondary law which mirror the Convention’s wording. The Court also bases its reasoning in the latter cases on the corresponding objectives and provisions of the Aarhus Convention that the EU legislator wanted to transpose.⁹¹

Second, if a new bilateral agreement on electricity between the EU and Switzerland would be concluded, the obligations of the EU Directives on environmental impact assessments and integrated pollution prevention could become applicable for Switzerland as well.⁹² It is conceivable that the interpretation of the CJEU of these legal acts would thus have to be followed by Switzerland, too, although the exact extent of such an obligation of parallel interpretation could only be examined based on the actual agreement.⁹³ The EU for its part is likely to insist for future agreements to ensure as far as possible an identical legal situation in Switzerland compared to that of EU Member States, which also includes the relevant jurisprudence of the

⁹⁰ See generally on interpretation and subsequent practice in international law *G. Nolte* (ed.), *Treaties and Subsequent Practice*, 2013, *passim*.

⁹¹ *A. Epiney*, *Rechtsprechung des EuGH zur Aarhus-Konvention und Implikationen für die Schweiz*, *AJP* 2011 (11) p. 1505, 1512.

⁹² See already *A. Epiney, D. Furger & J. Heuck*, “Umweltplanungsrecht” in der Europäischen Union und Implikationen für das schweizerische Recht – Zu den Vorgaben des EU-Rechts in den Bereichen UVP, SUP, IVU, Gewässer- und Naturschutz und dem Anpassungsbedarf des schweizerischen Umweltrechts im Falle der Verbindlichkeit des einschlägigen EU-Rechts, 2011, 1 et seq.

⁹³ See, nonetheless, generally on the topic of “parallel“ interpretation of the existing bilateral agreements *A. Epiney, B. Metz & B. Pirker*, *Zur Parallelität der Rechtsentwicklung in der EU und in der Schweiz - Ein Beitrag zur rechtlichen Tragweite der "Bilateralen Abkommen“*, 2012, *passim*.

CJEU.⁹⁴ Cases such as *Lesoochranarkse* are more complicated in this regard, as they concern the implications of Article 9 (3) of the Convention as part of an international treaty of the EU and not an act of EU secondary legislation. Only an analysis of a future bilateral agreement could show whether such cases could be relevant for Switzerland and its interpretation of the Convention in a similar fashion.⁹⁵

Although these questions remain open, some examples concerning concrete norms of the Swiss legal order can already now be raised in the light of the CJEU's findings on Article 9 of the Aarhus Convention. Article 55 Umweltschutzgesetz (USG, Law on Environmental Protection) provides for a right of action for environmental associations concerning administrative procedures concerning the planning, construction or change of installations that require an environmental impact assessment. In principle, this right of action should satisfy the requirements the Court set out in *Djurgarden Lilla* and more extensively in *Bund für Umwelt und Naturschutz Deutschland*, although the exclusion from the scope of application of the USG of radioactive substances and ionising radiation leaves some doubts in this regard.⁹⁶ After having ratified the Convention, it seems convincing to argue that Switzerland can no longer amend Article 55 USG as to the right of action for environmental associations because of its international obligations. A parallel duty to abstain from amendments would arise if the EU directives on environmental impact assessment and integrated pollution prevention would become applicable. Furthermore, after the CJEU's statements in *Djurgarden Lilla* it seems more than doubtful that the requirement established in Article 55 (1) USG that an environmental association must be active at the national level ("gesamtschweizerisch tätig") to be granted the right of action complies with the Convention. Also, the limitation of Article 55 (2) USG that the right to action is only open to associations if the relevant area has been covered by the association's objectives may be excessive and go beyond what is necessary to verify the mere seriousness of the association as stated by the CJEU. Moreover, it would also need to be assessed in the light of the findings in *Djurgarden Lilla* whether no inadmissible link is drawn between the public participation in permit proceedings and the following access to justice of such associations. Ultimately, the reach of Article 9 (3) of the Convention as set out in *Lesoochranarske* is questionable as to its impact on Swiss environmental law. While the decision can partly be understood as based on the

⁹⁴ See with the example of the free movement of services *A. Epiney*, Zur rechtlichen Tragweite eines Einbezugs der Schweiz in den unionsrechtlichen Besitzstand im Bereich des Dienstleistungsverkehrs, 2011, 81 et seq.

⁹⁵ *Epiney*, *supra* note 85 at p. 1512.

⁹⁶ Article 3 (2) USG.

specificity of EU law which perceives international treaties concluded by the EU as an integral part of its legal order,⁹⁷ there remain some general remarks of the Court that are also relevant for Switzerland. First, direct effect of the provision would likely also have been excluded by the Swiss Federal Supreme Court which uses criteria similar to those of the CJEU in its respective case law.⁹⁸ Second, in *Lesoochranske* the Court interprets Article 9 (3) to signify that states have to introduce as a matter of principle a right of action for environmental associations which the latter can use to claim a violation of environmental norms of national law. Based on the text of the provision and its full effectiveness this obligation necessarily must go beyond the possibility of granting a right of action for decisions falling under Article 6 of the Aarhus Convention. In Switzerland, Article 12 Bundesgesetz über den Natur- und Heimatschutz provides for a broadly phrased right of action for environmental associations in matters of nature and heritage protection, which – taken together with the mentioned right of action under Article 55 USG – probably meets this requirement. Nonetheless, more research would be needed as to whether some lacunae remain and whether they amount to a violation of the Aarhus Convention.⁹⁹

4. Conclusions

The CJEU has contributed to quite some extent to an emerging *acquis* under the Aarhus Convention. In a number of cases, the Court clarified the sometimes vague provisions of the Convention and at some points gave teeth to provisions that the doctrine had previously judged as not containing strong obligations, as the case of Article 9 (3) of the Convention shows. Nonetheless, many questions remain open, such as the boundaries of what constitutes EU environmental law and national law implementing EU environmental law in order to assess the realm within which the strict requirements of Article 9 (2) of the Convention concerning the right of action for environmental associations apply. Others have yet to be addressed or to be addressed in more detail, as the example of subjective and objective ap-

⁹⁷ See also A. *Epiney*, Zu den Implikationen der EU-Mitgliedschaft für die Stellung und Anwendung des Völkerrechts im innerstaatlichen Bereich, in H. Hestermeyer, D. König, N. Matz-Lück, V. Röben, A. Seibert-Fohr, P.-T. Stoll and S. Vöneky (eds.) *Coexistence, Cooperation and Solidarity – Liber Amicorum Rüdiger Wolfrum*, 2012, p. 1909, 1909 et seq.

⁹⁸ BGE 124 III 90; BGE 105 II 49. It should nonetheless be noted that despite this fact sometimes the Federal Supreme Court reaches different conclusions.

⁹⁹ *Epiney*, *supra* note 85 at p. 1513 et seq.

proaches to assessing whether costs of proceedings are prohibitively expensive shows; in this case the Court stopped short of explaining the notion of “objective reasonableness”. Even for non-Member States of the EU such as Switzerland, the Court’s *dicta* should arguably not be ignored, not only because generally interpretations given to international treaties like the Convention by high national and international courts are relevant under the customary rules of interpretation of international law, but also because in the future some of the EU directives interpreted in these cases by the CJEU could become binding for Switzerland in the framework of a new bilateral agreement.