

## ◀ The Eastern Way of Europeanisation in the Light of Environmental Policymaking?

### – Implementation Concerns of the Aarhus Convention-related EU Law in Central and Eastern Europe

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#### I The Eastern Way of Europeanisation

The domestic impact of the EU on the Central and Eastern European countries is an essential part of the Europeanisation research agenda.<sup>1</sup> It might be interesting to examine whether the acceding countries transpose, implement and enforce the EU *acquis* in the same way as do the EU-15 region, or if there is a specific eastern way of Europeanisation. As for the chosen policy area, the extent to which post-Communist countries guarantee certain rights for non-governmental actors regarding environmental matters could be considered as a democratic indicator, since their former state approach usually focussed on economic growth driven by industrialisation, while environmental protection was of a lower priority.

The subject of this paper is the third pillar of the Aarhus Convention-related EU legislation, the provisions of the Environmental Impact Assessment Directive (hereinafter referred to as the Directive) which guarantee the access to justice for the public concerned including NGOs in environmental matters. The Aarhus Convention (hereinafter referred to as the Convention) as mixed agreement of the European Union is a unique international legal instrument which combines the subject of environmental protection with protection of human rights and with environmental activism as enforcement tool.<sup>2</sup> The method of this paper is based on different

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<sup>1</sup> Tanja A. Börzel, Buzogány Áron, 'Governing EU Accession in Transition Countries: the Role of No State Actors' [2010] *Acta Politica* 158-182; Antonatea L. Dimitrova, 'The new Member States of the EU in the aftermath of new Enlargement: Do new European rules remain empty shells?' (2010) 17 (1) *Journal of European Public Policy* 137–148; Ulrich Sedelmeier, 'Europeanisation in New Member and Candidate States' (2006) 3 *Living Rev. Euro. Gov.*; Ulrich Sedelmeier, 'After Conditionality: Post-accession compliance with EU law in East Central Europe' (15) 2008 (6) *Journal of European Public Policy* 806-825; Gerda Falkner, Oliver Treib, 'Institutional Performance and Compliance with EU Law: Czech Republic, Hungary, Slovakia and Slovenia' (2010) 30. I. 101-1-6. *Jul. Publ. Pol.* 101-116.

<sup>2</sup> Justice and Environment, 'Report on Access to Justice in Environmental Matters' (2010) 3-4. [http://www.justiceandenvironment.org/\\_files/file/2010/05/JE-Aarhus-AtJ\\_Report\\_10-05-24.pdf](http://www.justiceandenvironment.org/_files/file/2010/05/JE-Aarhus-AtJ_Report_10-05-24.pdf) accessed 9 February 2014.

country clusters, which refer to the compliance culture of the different Member States concerned – and takes into consideration the empirical evidence gained by the implementation of certain social directives. The territorial categorisation is intended to model the national and regional approach to the observance of EU law, especially of the Directive.

Hence, this paper examines whether the territorial categorisation can be applied to environmental policymaking – especially with regard to the implementation and post-implementation concerns of the EIA Directive; and whether there is a specific eastern way of Europeanisation.

## II Europeanisation of the Administrative Jurisdiction

### 1 Europeanisation Theories and the Accession of Central and Eastern European Countries

Most Europeanisation theories treat the Central and Eastern European region separately and, as a rule, use the pre-accession conditionality as a starting point. The legislation and institutions of candidate countries showed significant commitment towards meeting the accession criteria, which however attracted much criticism in the literature. The adoption of EU-related laws was often fast-tracked, with no effective parliamentary discussions, and limited party-political competition on socio-economic issues, as well as with the centralisation of the decision-making process.<sup>3</sup> As a result, the ‘*eastern problem*’ led observers question whether EU-driven reforms would last.<sup>4</sup>

Gerda Falkner focussed on the transposition and implementation of certain social and employment directives. Taking the empirical evidence as a starting point, while examining whether the *misfit*<sup>5</sup> and the *veto player*<sup>6</sup> approach explain the domestic impact of the EU appropriately and precisely. According to the *misfit* theory, transposition problems arise from the conflict of the EU and national rules and institutional traditions, whereas the *veto player* theory attributes them to the large number of players in the transposition process and to the persistent conflicts of interest. Her analysis revealed that these approaches have weak explanatory power.

<sup>3</sup> Sedelmeier, *Europeanisation...* (n 1) 807.

<sup>4</sup> Dimitrova (n 1) 138.

<sup>5</sup> Francesco Duina, ‘Explaining Legal Implementation in the European Union’ (1997) 25 (2) *International Journal of the Sociology of Law*, 155-179; Christoph Knill, Andrea Lenchow, ‘Coping with Europe – The Impact of German and British Administration on the Implementation of EU Environmental Policy’ (1998) 5 (4) *Journal of European Public Policy* 595-614; Tanja A. Börzel, ‘Why There is No ‘Southern Problem’? – On Environmental Leaders and Laggards in the European Union’ (2000) 1 (7) *Journal of European Public Policy*, 141-162.

<sup>6</sup> Thomas Risse, M.G. Cowles, James Caporoso, ‘Europeanization and Domestic Change: Introduction’ in M. G. Cowles, James Caporoso, Thomas Risse (eds), *Transforming Europe, Europeanization and Domestic Change* (Cornell University Press 2001) 1–20; George Tsebelis ‘Decision-making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism, and Multipartism’ (1995) 25 *British Journal of Political Science*, 289-325.

Consequently Falkner's new theory – called the *worlds of compliance*<sup>7</sup> – took *compliance culture*, the attitude of certain groups of Member States towards the EU's policy requirements, as a starting point and set up a more elaborated system which, however, did not take the new Member States into account. On the basis of the labour market directives<sup>8</sup> she categorised the EU-15 into three groups.

In the law-abiding group of Denmark, Sweden and Finland, transposition is timely and in accordance with the objectives of the directives; the culture of compliance with EU requirements works as a socially integrated self-enforcing mechanism (*world of law observance*). As empirical evidence shows, in the second group of Germany, Austria, the Netherlands, Belgium, the United Kingdom and Spain, timely and appropriate transposition is subject to compatibility with national policy considerations (*world of domestic politics*). Lacking this condition, the clash with preferences of political parties, the government and advocacy groups may result in the violation of EU requirements in the long term, in an incomplete transposition or the complete failure of that. The third group of Portugal, Greece and France, is characterised by late or merely formal transposition, supported by an underlying bureaucratic attitude and the power of administrative traditions. In this case, linking transposition to internal reforms could be a means of compliance with EU requirements (*world of transposition neglect*).

To refine the theory, Falkner extended the geographical scope of the examination and separated the transposition stage from the application and enforcement of the actual transposition acts. With regard to the transposition, new Member States were able to demonstrate particularly good results; however, through the analysis of the enforcement phase, a new category was created based on the results, according to which EU requirements in this group of countries remain dead letters or – to use an official term – empty words (*world of dead letters*).<sup>9</sup>

As for the explanation of the newly introduced cluster, it was revealed that political debates had been unusual at the time of the accession, yet their number increased in the region at the time of transposing the directives, and so did the rate of systematic non-compliance at the enforcement and application stage. The reasons lie in the coordination problems within the relevant organisational system, the lack of capacity in the law enforcement bodies, the lack of resources available to them, and the limited nature of information systems.<sup>10</sup>

Dimitrova uses a similar terminology to describe the attitude towards EU norms in this region (*empty shells*). Moreover, – in her view – after the accession, obvious backsliding took place in

<sup>7</sup> Gerda Falkner, Miriam Hartlapp, Oliver Treib, 'Worlds of compliance: Why leading approaches to European Union implementation are only 'sometimes-true theories' (2007) 46 *European Journal of Political Research*, 395–416.

<sup>8</sup> Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time [2003] OJ L299/46.; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/43.; Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [2002] OJ L269/45.

<sup>9</sup> Falkner, Treib (n 1) 102-103.

<sup>10</sup> Falkner, Treib (n 1) 112-114.

certain fields.<sup>11</sup> However, it is indicative that not only the countries of this region, but also Ireland and Italy were classified as states implementing politicised transposition processes and struggling with deficient enforcement.<sup>12</sup>

According to Sedelmeier, the relevance of the eastern problem should not be overestimated, considering that the EU-8 countries (post-Communist new Member States) in some cases outperform old Member States; moreover, they settle infringement cases considerably faster and at an earlier stage. The reason for this is, among others, that new Member States are more inclined to perceive good compliance as appropriate behaviour.<sup>13</sup>

The different conclusions of the articles cited suggest that the issue calls for further and deeper research. As for the different policy areas, the *worlds of compliance* model – according to Falkner – can cover not only labour law but also the specific compliance culture of other EU policies.<sup>14</sup> Therefore, other policy areas should be examined to find out whether the eastern problem as such exists at all, and whether the EU requirements are indeed just empty words in the region. As such, the aim of this analysis is to examine the worlds of compliance theory on the basis of the Central and Eastern European transposition of the amended Environmental Impact Assessment Directive (Directive 85/337/EEC amended by Directive 2003/35/EC and the codification Directive 2011/92/EU).<sup>15</sup> Additionally similar policy patterns<sup>16</sup> of the social policy area have recently been identified by the Europeanisation research agenda, which could serve as a basis to broaden the scope of application of the *worlds of compliance* model.

The transposition of the environmental directives is of particular significance in post-Communist countries, because the Communist state ideology – due to rapid industrialisation – focused on economic growth, while nature tended to be seen as an obstacle to progress.<sup>17</sup> Environmental impact assessment, as an indicator, can show whether post-Communist administrative regimes, seeking to fulfil post-accession requirements, are capable of and willing to adopt a previously extraneous approach, which manifests in the broadest possible examination of the relevant environmental impacts, in channelling the results into the decision-making process and in ensuring public participation in the processes concerned.<sup>18</sup>

<sup>11</sup> Dimitrova (n 1) 138.

<sup>12</sup> Falkner, Treib (n 1) 113.

<sup>13</sup> Sedelmeier, *Europeanisation...* (n 1) 807.

<sup>14</sup> Falkner, Hartlapp, Treib (n 7) 411.

<sup>15</sup> Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC [2003] OJ L156/46.; Directive 2011/92/EU of the European Parliament and of the Council of 13 Dec 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L 26/1.

<sup>16</sup> Oliver Treib, Holger Bähr, Gerda Falkner, 'Social policy and environmental policy: comparing modes of governance' in Udo Dietrichs, Reiners Wulf, Wolfgang Wessels, *The dynamics of Change in EU Governance* (1st edn, University of Cologne 2011, Köln) 103-131.

<sup>17</sup> Oivind Stole, 'Europeanisation in the Context of Enlargement: A Study of Hungarian Environmental Policy' (2003) 7 *Arena Report*, 12.

<sup>18</sup> Stole (n 17) 13.

As a result of the change of attitude, post-Communist administrative and legal systems might consider non-state actors as non-conformist bodies or as partners who can significantly strengthen the capacity of state actors in public policymaking.<sup>19</sup> However, non-state actors – as evidenced by the fact that the protection of subjective rights is the main role of the administrative jurisdiction – have rather been regarded in the region as non-conformist bodies, and not only in recent decades. This type of objective, public interest action – resulting from its indicator function – is suited for the accession countries to demonstrate their willingness to comply with the requirements formulated by the European Union.

## 2 Historical Aspects of the Administrative Jurisdiction

Obviously, public administration – also due to its name and function – has to represent public interest throughout all its activities while it must avoid monopolising it. And when others – for example, non-state organisations – act on the grounds of public interest, it cannot be judged as an expression of distrust towards public administration.<sup>20</sup>

The European aspect of the involvement of non-state actors – especially the issue of citizen suits – can also be examined in the light of how the relationship between the *state and its citizens* has been defined. The Central European region is characterised by the fact that the protection of subjective rights is the main role of the administrative judicial review system. The reason for this is that the legal developments of the second half of the nineteenth century, balancing democracy and monarchy, precluded the possibility of subjecting the responsibility of the administration to judicial review. The legal capacity of the individual was recognised, but only if and insofar as individuals were acting in their own interest, whereas ‘political implications’ on public affairs as such could not constitute a separate legal dispute.<sup>21</sup> These findings refer to the *Kaiserreich*, yet the Central and Eastern European region is also characterised by the fact that the protection of subjective rights is the main function of the administrative jurisdiction. In contrast, in France, as a result of the French Revolution, it was acknowledged that the legitimacy of the executive branch also came from the people.<sup>22</sup> In 1790, the revolutionary legislation of France forbade ordinary courts to exercise control over public administration and entrusted the head of the executive branch, whose consultant organ was the *Conseil d’État*, with the consideration of complaints against the administration.<sup>23</sup> Consequently, the principles saying that the scope of protection should be limited to subjective rights, were eliminated. The plaintiff – due to the semi-administrative nature of the judicial review system in the French model – is

<sup>19</sup> Börzel, Buzogány (n 1) 158-182.

<sup>20</sup> Hans-Joachim Koch, ‘Die Verbandsklage im Umweltrecht’ (2007) Heft 4 Neue Zeitschrift für Verwaltungsrecht (NVwZ), 368-379, 370ff.

<sup>21</sup> Johannes Masing, *Die Mobilisierung des Bürgers für die Durchsetzung des Rechts: europäische Impulse für eine Revision der Lehre vom subjektiv-öffentlichem Recht* (Duncker und Humboldt Verlag 1997, Berlin) 219.

<sup>22</sup> Masing (n 21) 84.

<sup>23</sup> Fazekas Marianna, Ficzer Lajos (eds), *Magyar közigazgatási jog – Általános Rész* (Osiris Kiadó 2004, Budapest) 464.

considered, until this day, as the plaintiff of maladministration and, thus, as ‘the guardian of public interest.’<sup>24</sup>

There are several pros and cons concerning wider access to justice in environmental matters. Granting standing rights can reduce the democratic deficit at the EU level. At the national level – especially in a former Communist state – the extent to which non-state actors participate in both legislation and law enforcement can be perceived as a democratic indicator.<sup>25</sup> Local communities may respond faster to administrative decisions concerning local affairs, including the possibility of a more coordinated action. In addition, if the action is dismissed, the (local) social acceptance of the decision may be higher if the standing rights are guaranteed in general.<sup>26</sup> A common counterargument is that ‘the enforcement of public interests must remain the role of the state itself and cannot be transferred to non-state organisations.’<sup>27</sup> However, the right to initiate legal action must not be denied on these grounds.<sup>28</sup> Another possible counterargument is the lengthiness and costliness of proceedings and the fact that environmental cases require highly qualified professionals, who are not always available to these organisations.

Nevertheless, the high number of arguments about the advantages and disadvantages of wider access to justice does not change the fact that, due to the legislative will of the EU, NGOs have become increasingly involved, while Member States must comply with EU requirements which, in certain cases, may collide with the national administrative traditions.

### 3 Supranational Requirements vs National Administrative Traditions

The dilemma for the national legislator of legal systems where judicial review is intended to protect subjective rights arises from the fact that – in principle – these organisations could not initiate legal action in the absence of any violation of their subjective rights (*impairment of rights doctrine*).

EU requirements concerning procedural law affect the regulation of the present field of study in a specific way. Implementing EU requirements and EU law is the responsibility of national courts and authorities, while national autonomy in respect of the general rules of administrative procedure still applies today. However, the requirement of an effective and equivalent legal protection laid down in the case law of the European Court of Justice (hereinafter CJEU) determines which criteria national courts must fulfil when implementing EU law.<sup>29</sup> On account

<sup>24</sup> Dudás Gábor, ‘A magyar közigazgatási bírászkodás néhány kérdése a francia és német modell tükrében’ (1998) 3 Magyar Közigazgatás, 163.

<sup>25</sup> Börzel, Buzogány (n 1) 175.

<sup>26</sup> Dietrich Murswiek, ‘Die Verbandsklage’ (2005) Band 38 Die Verwaltung, 268.

<sup>27</sup> Hans-Detlef Horn, Walter Schmidt-Glaeser, *Verwaltungsprozessrecht – Kurzlehrbuch mit Systematik zur Fallbearbeitung* (Boorberg R. Verlag 2000, München) 118.

<sup>28</sup> Koch (n 20) 371.

<sup>29</sup> Joined cases no. 205/82-215/82 - *Deutsche Milchkontor GmbH and others v Federal Republic of Germany* [1983] ECR I-02633; Case C-217/88 *Commission of the European Communities v Federal Republic of Germany* [1990] ECR I-02879; Case C-222/84 - *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR I-01651.

of the joint prevalence of Member States' autonomy and an effective and equivalent legal protection, the Union can only influence the sectoral regulations of Member States through its policies, guaranteeing wider access to justice. Through sectoral regulation, EU law, in turn, may have indirect repercussions on general procedural laws of the Member States.<sup>30</sup> However some indicators suggest that the procedural autonomy of Member States' could be considered as a historical term. The 'mushrooming of EU agencies'<sup>31</sup> as an institutional sign, newly enacted provisions on implementing acts and regulatory acts of Lisbon primary law as a legal basis show the emerging relevance of direct implementation of EU law by its own bodies. Additionally, the democratic and implementation deficit of EU law at national level was identified long ago as a major concern in creating a well-functioning harmonised internal market as cornerstone of the integration.

The relationship between the citizens and the national administrative regimes was influenced by the EU integration; therefore the isolation of national (administrative) regimes remained theoretical. Additionally the Court of Justice has emphasized the role of citizens since the *Van Gend & Loos* judgment in order to enforce community law against the not necessarily loyal national administration.<sup>32</sup> Therefore the EU uses the wider access to justice of citizens before national courts<sup>33</sup> as a tool to facilitate the enforcement of the EU law concerning several policy areas. As a result the *acquis* has incorporated this tool in the policy framework of the consumer protection<sup>34</sup> as well as of the equal treatment.<sup>35</sup>

In the environmental sector the European Union and international law is mobilised to an extent greater than the average because fighting against global problems can only be effective at a global level.<sup>36</sup> The promotion of public participation was included in the Rio Declaration as

<sup>30</sup> Volkmar Götz, 'Europarechtliche Vorgaben für Verwaltungsprozessrecht' (2002) 1 Deutsches Verwaltungsblatt, 2.

<sup>31</sup> Herwig C.H. Hofmann, Alessandro Morini, 'The Pluralisation of EU Executive – Constitutional Aspects of 'Agencification' (2012) vol. 37 European Law Review, 419-443; Stefan Griller, Andreas Orator, 'Everything under Control? – The 'Way forward' for European Agencies in the Footsteps of the Meroni doctrine' (2010) 1 European Law Review, 3-35.; Szegedi László 'Challenges of Direct European Supervision of Financial Markets (2012) 3 Public Finance Quarterly, 368-379.

<sup>32</sup> Bruno de Witte, 'The Impact of *Van Gend & Loos* on Judicial Protection at European and National Level: Three Types of Preliminary Questions' in Court of Justice of the European Union: 50th Anniversary of the Judgement in *Van Gend & Loos* (1963-2013), Conference Proceedings, Luxembourg, 13th May 2013 (Court of Justice of the European Union 2013, Luxembourg) 95-96.; Joseph Weiler, 'Revisiting *Van Gend & Loos*: Subjectifying and Objectifying the Individual' in Court of Justice of the European Union: 50th Anniversary of the Judgement in *Van Gend & Loos* (1963–2013), Conference Proceedings, Luxembourg, 13th May 2013 (Court of Justice of the European Union, 2013, Luxembourg) 13-14.

<sup>33</sup> See Bernhard W. Wegener, 'Rechtsschutz für gesetzlich geschützte Gemeinwohlbelange als Forderung des Demokratieprinzips?' HFR 2000, Beitrag 3, 2-10 <http://www.humboldt-forum-recht.de/druckansicht/druckansicht.php?artikelid=35> accessed 5 February 2014.

<sup>34</sup> Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests [2009] OJ L110/52.

<sup>35</sup> Council Directive 2000/78/EC of 27 november 2000 establishing a general framework for equal treatment in employment [2000] OJ L303/43. and Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/43.

<sup>36</sup> Szamel Katalin, 'A közérdek érvényesíthetősége a környezetvédelemben' in Szamel Katalin (ed), *Közérdek és közigazgatás* (MTA Jogtudományi Intézet 2008, Budapest) 235.



its 10th principle, yet it was undoubtedly the *Aarhus Convention*,<sup>37</sup> adopted in 1998, that collected and systematised those elements of public participation in the environmental field which had already existed in international law and in national legal systems. The European Community also signed the Convention, which is therefore considered as a mixed agreement (see *below*). Thus, although a number of relevant Community provisions had been adopted before, intense Community legislation activity (which, as a rule, manifested in the form of directives) started with regard to the subject. With the submission of Directive 2003/35/EC regulating environmental matters, the European Commission wanted to mobilise EU citizens by ensuring them procedural rights to enforce environmental community law before national courts.<sup>38</sup>

It is essential to examine the general objectives of the Convention and Directive 2003/35/EC as well as of its codification Directive 2011/92/EU since directives are binding as to their objective, and the Directive, by definition, intends to contribute to the implementation of the obligations arising under the Aarhus Convention.<sup>39</sup>

The recitals of the Aarhus Convention emphasise the role of citizens, non-governmental organisations and the private sector in environmental protection in general. The question arises whether Member States have some room for manoeuvre when implementing the objectives through transposition and if they do, how wide this room can be. As Peter Kremer and Alexander Schmidt put it, 'broad access' under Aarhus requirements is a distinct objective to be achieved by the Member State, which entails concrete requirements to ensure the protection of rights.<sup>40</sup> According to Wolfgang Ewer, the Rio Declaration made it clear that the tools of environmental protection must provide for action in the event of infringement of the provisions designed to fight against long-term practices that do not involve specific environmental damage.<sup>41</sup> This question gains practical importance with regard to reference to the direct effect of the Directive, which, in turn, raises the topic of enforceability.

A key factor regarding the enforcement of the Aarhus requirements is that, besides international law, they were also introduced to community acts – even if to directives requiring transposition. The so-called Aarhus Compliance Committee (hereinafter Compliance Committee) ensures that compliance with the Convention requirements is reviewed. If a state (as Party in terms of the international law) does not comply with the provisions of the Convention, it is possible to submit a communication to the Compliance Committee, which may

<sup>37</sup> Pursuant to *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 37770 UNTS 447 (entered into force 30 October 2001) Art 20 (1).

<sup>38</sup> Koch (n 20) 370.

<sup>39</sup> Article 2 of Directive 2003/35/EC, Preamble of Directive 2011/92/EU.

<sup>40</sup> Peter Kremer, Alexander Schmidt, 'Das Umwelt-Rechtsbehelfsgesetz und der weite Zugang zu Gerichten – Zur Umsetzung der auf den Rechtsschutz in Umweltangelegenheiten bezogenen Vorgaben der sog. Öffentlichkeitsrichtlinie 2003/35/EG' (2007) 2 *Zeitschrift für Umweltrecht* [ZUR], 57-63.

<sup>41</sup> Wolfgang Ewer, 'Ausgewählte Rechtsanwendungsfragen des Entwurfs für ein Umwelt-Rechtsbehelfsgesetz' (2007) Heft 3, *Neue Zeitschrift für Verwaltungsrecht* [NVwZ] 272.



give a recommendation to ensure compliance with the Convention. Additionally, the main role of the Compliance Committee is to interpret the requirements of the Aarhus Convention.

Regarding EU law, the compliance mechanism differs greatly if a Member State does not achieve the objectives of any directive, or does not transpose a directive at all. In this case, a complaint may be submitted to the European Commission, which then may initiate infringement proceedings. A further tool for non-governmental organisations concerned is to rely on the directive's direct effect.<sup>42</sup> National courts (and authorities) are required to consider the supremacy of EU law as well as interpret the national law in conformity with the directive – and also refrain from the application of those national rules which contravene the EU law.<sup>43</sup> These doctrines which also determine the legal status of certain EU provisions in the national law does not constitute a purely coherent legal order. The argument against the directive-conform interpretation of the courts and of the direct effect of directives is that it threatens legal certainty, as it cannot substitute for the implementing act in line with the objectives concerned.<sup>44</sup>

As for the detailed Aarhus requirements, the Aarhus Convention defines three pillars in its structure: access to information, public participation in decision-making and access to justice. However, the resulting Directive 2003/35/EC only amended two further directives and requires Member States to ensure the pillar-based rights, including the access to justice in the areas covered by the amended secondary legislation, which approach has been followed by Directive 2011/92/EU as well. Article 10a of Directive 85/337/EC (on impact assessment), Article 15a of Directive 96/61/EC (on integrated prevention and decrease of pollution) and Article 11 of Directive 2011/92/EU broadly follow Article 9(2) of the Aarhus Convention as Member States shall ensure that NGOs as members of the 'public concerned' have access to a review procedure before a court of law or another independent and impartial body established by law. Additionally the interest of any NGO meeting the requirements concerned shall be deemed sufficient for the purpose of this Article, while these organisations shall also be deemed to have rights capable of being impaired for the purpose of this Article.

As for the enforcement of Article 9(2) of the Convention in form of the former 2003/35/EC Directive, the discretion of the national legislator in determining the national criteria became relevant in the case-law of the CJEU. Relying on the direct effect with respect to the last two sentences of Article 10a (3) of the Convention ('if the national legal system requires sufficient interest, or the impairment of a right, as a precondition to the review procedure, the interest of

<sup>42</sup> Case C-271/91 *H. M. Marshall v Southampton and South-West Hampshire Area Health Authority* [1993] ECR I-4367.; Case 8/81. *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53.; Case C-148/78 *Criminal proceedings against Tullio Ratti* [1979] ECR 01629.

<sup>43</sup> Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA.* [1978] ECR 00629.; Case 103/88 *Fratelli Costanzo SpA v Comune di Milano* [1989] ECR 01839.; Case C-224/97 *Erich Ciola v Land Vorarlberg* [1999] ECR I-02517.; Case C-198/01 *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato* [2003] ECR I-08055.; Case C-555/07 *Seda Küçükdeveci v Swedex GmbH & Co. KG* [2010] ECR I-00365.; Case C-237/07 *Dieter Janecek kontra Freistaat Bayern* [2008] ECR I-06221.

<sup>44</sup> Anette Prehn, *Der Einfluss des Gemeinschaftsrechts auf den mitgliedstaatlichen Verwaltungsvollzug im Bereich des Umweltschutzes am Beispiel Deutschlands* (Nomos Verlag 2006, Potsdam) 187.

any non-governmental organisation shall be deemed sufficient for having rights capable of being impaired') has been excluded by legal scholars due to conditions laid down by national law.<sup>45</sup> However, the CJEU made it clear in its *Trianel judgement* with respect to the cited provision that Member States have no discretion in determining the criteria of national legislation.<sup>46</sup> The CJEU also explicitly identified certain national provisions as practically excluding the access of NGOs to justice by determining strict national criteria. An example of non-compliant national regulation is that the CJEU has held that a Swedish regulation, that reserved access to justice solely to environmental NGOs with at least 2,000 members, was not in conformity with Article 10 of the Directive (given that only a small number of associations could fulfil this condition).<sup>47</sup>

Certain provisions of the Convention have not been transposed into EU's secondary law. Article 9(3) of the Convention, which raised many issues, is not part of the EU *acquis* – it is therefore necessary to give a separate account of it.<sup>48</sup> Article 9(3) – in contrast to Article 9(2) (and the abovementioned Articles 10a, 15a and 11) – intends to ensure access (beyond the possibility of review and without prejudice to it) to administrative and judicial procedures not just for the public concerned but also for the public as a whole.<sup>49</sup> Regarding judicial procedures, acts and omissions by public authorities as well as by private persons can be challenged. The decisive factor is whether these acts and omissions contravene provisions of national law relating to the environment rather than compliance with the relevant provisions of the Convention and of the Directive on public participation.

Given the great importance of Article 9(3), its criteria have been interpreted on several occasions. The Aarhus Compliance Committee gave guidelines as to the interpretation of the 'criteria laid down in the national law'. In the view of the Compliance Committee the criteria of the Parties cannot be defined in a way that precludes all or almost all environmental organisations from access to justice in practice. At the same time, the states (Parties to the Convention) are

<sup>45</sup> Ralf Alleweldt, 'Verbandsklage und gerichtliche Kontrolle von Verfahrensfehlern: Neue Entwicklungen im Umweltrecht – Zum Einfluss der Aarhus-Konvention und der Richtlinie 2003/35/EG auf die deutsche Rechtsordnung' (2006) Heft 15, Die öffentliche Verwaltung [DÖV], 630.

<sup>46</sup> Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* [2011] ECR I-03673.

<sup>47</sup> Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsörening v Stockholms kommun genom dess* [2009] ECR I-09967.

<sup>48</sup> 'In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above – Articles 10a and 15a (1) and (3) of the Directive – each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.'

<sup>49</sup> According to Article 2 of the Convention and Article 1(2) of the Directive, '*the public*' means one or more natural or legal persons and, in accordance with national legislation or practice, their associations, organisations or groups. '*The public concerned*' means the public affected or likely to be affected by or having an interest in the environmental decision-making procedures referred to in Article 2(2) (under the Convention: the public affected or likely to be affected by, or having an interest in, the environmental decision-making); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

not obliged to establish a system of *actio popularis* in their national system of legal remedies.<sup>50</sup> It has also been confirmed that – having regard to the special character of community law – ‘national law relating to the environment’ includes directives even when they have not been fully transposed by a Member State.<sup>51</sup>

Regarding enforcement of Article 9(3), it must be noted that it may have a direct effect on primary law basis due to the *mixed agreement* nature of the Convention – as it was concluded by the Member States as ‘Parties’ as well as by the European Community.<sup>52</sup> Such agreements have the same status in the community legal order as purely community agreements in so far as the provisions of the mixed agreement fall within the scope of community competence.<sup>53</sup> Within the Community system the Member States fulfil an obligation in relation to the Community by concluding this kind of agreements.<sup>54</sup> Concerning the field of environmental protection, where the Member States and the European Union exercise shared competence, the CJEU held that the Union exercised its regulatory powers under Article 9(3), so the CJEU has jurisdiction to decide on the direct effect of a given provision of the mixed agreement.<sup>55</sup>

Finally, the CJEU made it clear in the *Slovak bears* case that Article 9(3) of the Convention has no direct effect in EU law, given that it does not contain a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.<sup>56</sup>

Legal scholars<sup>57</sup> have criticised the judgement of *Slovak bears* due to the lack of CJEU’s jurisdiction in the light of the substantive nature of the Habitats Directive referred in the case and of the declaration attached to the Council Decision on the conclusion of the Aarhus Convention on behalf of the EC.<sup>58</sup> However the CJEU itself has not always applied the ‘criteria

<sup>50</sup> Report no. ACCC/C/2005/11 of the Aarhus Compliance Committee; <http://live.unece.org/env/pp/pubcom.html> accessed 10 February 2014.

<sup>51</sup> Report no. ACCC/C/2006/18 of the Aarhus Compliance Committee; <http://live.unece.org/env/pp/pubcom.html> accessed 10 February 2014.

<sup>52</sup> Council Decision 2005/370/EC of 17f of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L124/48.

<sup>53</sup> Case C-239/03 *Commission of the European Communities v French Republic* [2004] ECR I-09325; Case C-459/03 *Commission v Ireland* [2006] ECR I-04635.

<sup>54</sup> Case 12/86 *Meyrem Demirel v Ville de Schwäbisch Gmünd* [1987] ECR 03719.

<sup>55</sup> Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, [2011] ECR I-01255.

<sup>56</sup> Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-01255.

<sup>57</sup> Jan H. Jans, ‘Who is the Referee? Access to Justice in a Globalised Legal Order: A Case Analysis of ECJ Judgment C-240/09 *Lesoochránárske Zoskupenie* of 8 March 2011 (May 7, 2011)’ (2011)1 *Review of European Administrative Law*, 85-99; Alexander Schink, *Der slowakische Braunbär und der deutsche Verwaltungsprozess* (CH Beck, Die öffentliche Verwaltung 2012) 625-626, Christina Eckes, ‘Environmental Policy ‘Outside-In’: How the EU’s Engagement with International Environmental Law Curtails National Autonomy, EU Law qua Global Governance Law’ (2012) 13 (11) *German Law Journal*, 1168.

<sup>58</sup> Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters [2005] OJ L124/48.

of jurisdiction check' in favour of environmental protection.<sup>59</sup> Additionally the CJEU expressed in the *Slovak bears judgement*, that the national courts are required to interpret the national procedure rules in conformity with the Convention (therefore safeguarding the objective of effective judicial protection of the rights conferred by EU law), regardless of the actual transposition of Article 9(3) into the EU's secondary legislation.

The case-law concerned is of high importance due to the identified activism followed by the Court, which reveals that the general principles of legal protection at national level have to be kept under review due to the emerging importance of Union citizens in the enforcement of EU law. In the Member States of our region, the judicial review of administrative decisions is intended to protect individual rights and – in principle – NGOs do not have locus standi in the absence of violation of their individual rights (individual rights doctrine). The examination of the evolution of such doctrines in the context of the related EU regulation and of the CJEU's case-law could reveal the potential effects of Union law on the administrative regulation and jurisdiction of Member States.

#### 4 The Protection of Subjective Rights by the Administrative Jurisdiction in Central and Eastern Europe

In the Czech legal system, a party to the administrative proceedings can file a complaint to the administrative court, alleging that the decision infringed their rights.<sup>60</sup> The definition of who can be party in the administrative procedure is relatively broad. According to the Code of Administrative Procedure of the Czech Republic, it includes the applicant; in proceedings initiated ex officio, persons concerned who are affected by the conduct of the administrative authority; other persons concerned, if the decision may directly affect their rights or obligations; and persons who are so entitled by a special act (Article 27 of Act No. 500 of 2004).<sup>61</sup> However, for example, the legal interpretation of the courts is restrictive in consent procedures for issuing land use permits and building permits: as a result, only the owners of the building and plots concerned ('the neighbours') can act as parties, while others who are likely to be affected by the decision (for example flat-renters) or be affected in different ways than in terms of their property rights (e.g. the right to a favourable environment granted by the Czech Constitution) are omitted. Hence, they are not granted standing to sue these kinds of decisions either.<sup>62</sup> Besides, the Czech Code of Administrative Procedure recognises as parties only those entities to which such rights are granted by certain (sectoral) laws, such as the environmental impact assessment law, or the Nature Conservation Act.<sup>63</sup>

<sup>59</sup> Case C-213/03. *Syndicat professionnel coordination des pêcheurs de l'étang de Berre v la région kontra Électricité de France* I-07357.

<sup>60</sup> Milieu Ltd, 'Summary Report on the Inventory of EU Member States' Measures on Access to Justice in Environmental Matters, Country Report for the Czech Republic' (2007) 11. [http://ec.europa.eu/environment/aarhus/study\\_access.htm](http://ec.europa.eu/environment/aarhus/study_access.htm) accessed 14 October 2013.

<sup>61</sup> Milieu, Country Report for the Czech Republic (2007) 11.

<sup>62</sup> Justice and Environment (n 2) 7.

<sup>63</sup> Milieu, Country Report for the Czech Republic (2007) 11.

Slovakia follows similar practice, since the precondition to have locus standi is being recognised as a participant (party) in the administrative proceedings, by claiming that the procedure or the decision of the administrative body affects their rights.<sup>64</sup> According to the Slovak administrative procedural law, a participant (party) is a person whose rights, legally protected interests and/or duties are the subject of the proceedings or whose rights, legally protected interests and/or duties are directly affected by the decision or even if the party claims that (Article 14(1) of Act no. 71 of 1967).<sup>65</sup> Parties must be able to show a direct, personal and legitimate interest and the decision should have consequences on their substantive legal position.<sup>66</sup> Special provisions enable the participation of non-state organisations, regardless of the conditions cited above [Article 14(2) of Act no. 71 of 1967]. The amendment of several sectoral laws in 2007 restricted the procedural rights of NGOs, excluding access to justice of NGOs in certain types of cases.<sup>67</sup>

In Hungary – similarly to Slovakia and the Czech Republic – judicial review is a tool of the protection of subjective rights (Law Unification Decision no. 2/2004). Act CXL of 2004 on the general rules of administrative proceedings and services (the code of administrative procedure, CAP) granted the right of standing for NGOs by recognising their legal status in the administrative proceedings.<sup>68</sup> In contrast to the abovementioned countries, it is the general Environmental Code<sup>69</sup> rather than a separate environmental impact assessment law that provides the procedural standing rights for NGOs in environmental matters. However, the related judicial practice is controversial. According to earlier Hungarian case-law, the involvement of NGOs and the recognition of their legal status in administrative proceedings depended on the inclusion of environmental authorities as consultant authorities in the prior administrative procedure. As such, excluding environmental authorities from the decision-making process potentially meant the exclusion of NGOs. Law Unification Decision no. 1/2004 of the Supreme Court of Hungary held that NGOs are entitled to the status concerned – and so to the right of standing – in proceedings where the resolution of the environmental authority as a consultant authority is required by law.

In Austria, legislation usually expressly defines which specific rights can be impaired with respect to certain parties (e.g. usually neighbours concerning noise, smell, property).<sup>70</sup> Consequently, the violation of these specific rights (only and exclusively) can be claimed by affected persons in court and can form a basis for their legal standing. For example, neighbours of a polluting facility may address air or water quality issues with regard to health or pollution

<sup>64</sup> Milieu, Country Report for Slovakia (2007) 15.

<sup>65</sup> Milieu, Country Report for Slovakia (2007) 13.

<sup>66</sup> Milieu, Country Report for Slovakia (2007) 13.

<sup>67</sup> Justice and Environment (n 2) 5.

<sup>68</sup> 2004. évi CXL. törvény a közigazgatási hatósági eljárás és szolgáltatás általános szabályairól (Act CXL of 2004 on the general rules of administrative proceedings and services) Art 15 (5).

<sup>69</sup> 1995. évi LIII. törvény a környezet védelméről (Act LIII of 1995 on the general provision of environmental protection) Art 98 (1).

<sup>70</sup> Justice and Environment (n 2) 6.

of their private wells, but may not refer to the violation of general environmental considerations.<sup>71</sup> The legal position of NGOs in EIA and IPPC procedures could be considered as an exception which falls under the scope of the Directive.<sup>72</sup>

In most of these countries, the legal position of NGOs has been regulated in specific sectoral laws (separate EIA or Environmental Act) and not in the general procedural codes. This corresponds with the concept that EU law can only influence the sectoral (procedural) legislation of Member States directly. These countries thus continue to consider judicial review as a tool to protect subjective rights. The enlargement of the EU – Austria’s accession and that of states of the post-Communist region alike – did not change the general approach concerning the function of judicial review – nor the role of the administrative jurisdiction.

## 5 Post-accession Compliance Fatigue?

The most recent case law of the CJEU and of the Compliance Committee also deals with the restriction concerning Member States’ access to justice.

The CJEU has held that – due to the general restrictive practice based on the procedural legislation of the Czech Republic – only a part of the public concerned had access to judicial review in environmental matters. Hence, in procedures for issuing land use permits, only the owners of the affected buildings and plots and their tenants have the right to initiate the review procedure, while in noise protection, nuclear and mining procedures only the investors have such rights. NGOs could only successfully state the infringement of their own procedural rights, as these were the only subjective rights they could have in the environmental procedures.<sup>73</sup> Consequently, the CJEU ruled against the Czech Republic for failure to transpose Article 10a (1-3) of the Directive.<sup>74</sup>

The relevant amendment of the EIA Act established the right of environmental NGOs to initiate a review procedure before the court against the development consent decision issued after the environmental assessment, regardless of whether they were parties to the earlier procedure.<sup>75</sup> Recent judgements of the CJEU have not changed the restrictive interpretation of Czech courts in general. However, a few individual decisions of regional Czech courts reflected the related case-law of CJEU with main focus on the *Slovak bears* judgement. As for the data collected by the updated version of the Milieu Study on the implementation of Article 9(3), it could be concluded that the NGOs, according to the prevailing case-law of the Czech courts as the consequence of the strict application of the impairment of rights doctrine, can claim only

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<sup>71</sup> Milieu, Country Report for Austria (2007) 9.

<sup>72</sup> Justice and Environment (n 2) 7.

<sup>73</sup> See more at Justice and Environment: Selected Problems of the Aarhus Convention Application, (2009) 19-25. [http://www.justiceandenvironment.org/\\_files/file/2009/09/access\\_to\\_justice\\_collection.pdf](http://www.justiceandenvironment.org/_files/file/2009/09/access_to_justice_collection.pdf) accessed 25 March 2014.

<sup>74</sup> Case C-378/09 *European Commission v Czech Republic* [2010] ECR I-00078.

<sup>75</sup> Justice and Environment (n 2) 50.



infringement of their procedural rights in the administrative procedures, not the substantive legality of the administrative decisions as such.<sup>76</sup>

As a consequence of several amendments precluding access to justice in the environmental sector, an infringement procedure was launched against Slovakia, which resulted in the withdrawal of certain amendments, including those excluding legal remedy.<sup>77</sup> With the 2007 amendments, the Slovak legislator weakened the procedural position of local and environmental NGOs, as a result of which they were recognised only as participating persons ('persons involved doctrine'), under the terminology of the general procedural code. This was a major step back compared to the legal position of NGOs just after accession. The scope of the amendments included the Act on the Promotion of the Construction of Highways, the Nature Protection Act and the EIA Act. Pursuant to Article 15a of Act 71/1967 on Administrative Procedure, participating persons may not appeal against the decision and may not challenge it before the Slovak courts. Consequently, access to national courts was entirely abolished in certain cases. Additionally, the Compliance Committee concluded, that public participation was not guaranteed either in the case of the Mochovce Nuclear Power Plant.<sup>78</sup>

In relation to Article 9(3) of the Convention, which has not been transposed to the Directive, a Slovak environmental NGO turned to the CJEU to decide on the direct effect of the Article. In the *Slovak bears judgment* the CJEU concluded that, although the relevant provision of the Convention has no direct effect, the Slovak court was obliged to interpret it in accordance with the requirements of the Convention. This was a significant development, and not only in terms of Slovakian law. In a broader context, the national courts are obliged to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law.<sup>79</sup>

In the absence of a comprehensive judicial interpretation in environmental matters, the Supreme Court of Hungary issued a new law unification decision in 2010. Law Unification Decision No. 4/2010 excluded NGOs' ordinary status as a party (client) in environmental administrative proceedings. The Supreme Court held that it would result in *contra legem* practice to grant NGOs an ordinary status of party in the absence of an explicit provision of other laws stipulating that in matters not regulated by the Environmental Code the Code shall be

<sup>76</sup> European Commission 'Study on Implementation of Article 9.3 and 9.4 of the Aarhus Convention in 17 Member States of the European Union – Czech Republic (2012–2013)' 25-26 [http://ec.europa.eu/environment/aarhus/access\\_studies.htm](http://ec.europa.eu/environment/aarhus/access_studies.htm) accessed 28 March 2014.

<sup>77</sup> Justice and Environment (n 73) 46-49.

<sup>78</sup> Report no. ACCC/C/2009/41 of the Aarhus Compliance Committee; <http://live.unece.org/env/pp/pubcom.html> accessed 10 February 2014.

<sup>79</sup> Case C-240/09 *Lesoochránárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-01255.



applied except in nature conservation-related issues. In 2008, to curb abusive practice by NGOs (among other goals), an amendment to CAP was introduced, according to which exercising the right of party (properly notified of the initiation of the proceeding) may be subject to the party submitting a request or making a statement during the first instance proceeding.<sup>80</sup> According to the most recent amendment to the CAP, instead of the general status of party, NGOs are only granted the right to make a statement.<sup>81</sup> This does not necessarily result in the restriction of organisations' right of participation, as it does not preclude access to justice, but leaves more room for the sectoral legislator to decide on their actual right in certain sectoral proceedings. However the most recent case-law of the Supreme Court of Hungary (Curia) shows that the Law Unification Decision No. 4/2010 practically precludes access to justice of environmental NGOs concerning environmentally relevant but formally non-environmental decisions.<sup>82</sup>

In the case of Austria, communications submitted to the Compliance Committee must be mentioned. In 2008 the restriction of the right of access to justice was not established, given that no decisions were at stake to which the review under Article 9(2) would have applied.<sup>83</sup>

In its recent decision, the Compliance Committee concluded that Austria was not ensuring the standing of environmental NGOs to challenge acts or omissions of a public authority or private person in many of its sectoral laws (mainly *outside* EIA regulation); therefore, it was not in compliance with article 9(3) of the Convention.<sup>84</sup> The recent judgments of the CJEU (i.a. the *Slovak Brown Bear* case) have not led to changes in the jurisprudence of the national courts concerning the legal standing of environmental NGOs.<sup>85</sup> Within the administrative system of appeal, the competent administrative authority respectively the competent independent tribunal (i.a. *Unabhängige Verwaltungssenate, Umweltsenat*) could address both the substantial and procedural legality of administrative decisions. However, the tribunal did not function as the authority of appeal which was debated before the Administrative Court (*Verwaltungsgerichtshof*) as well as before the Constitutional Court (*Verfassungsgerichtshof*) of Austria.<sup>86</sup> As of 1 January 2014 the Administrative Court of First Instance (*Verwaltungsgerichte erster Instanz*) is also entitled to address both the substantial and procedural legality of challenged administrative

<sup>80</sup> Act CXL of 2004 Art 15 (6).

<sup>81</sup> Act CXL of 2004 Art 15 (6a).

<sup>82</sup> Rozsnyai Krisztina, Szegedi László, *The mandatory nature of Environmental Impact Assessment decisions and the legal status of local governments in administrative litigation cases in the Hungarian Supreme Court's (Curia) Judgement of 3rd December 2012*. (2013) 4 Casenotes, 48-61.

<sup>83</sup> Report no. ACCC/C/2008/26 of the Aarhus Compliance Committee; <http://live.unece.org/env/pp/pubcom.htm> accessed 10 February 2014.

<sup>84</sup> Report no. ACCC/C/2010/48 submitted to the Aarhus Compliance Committee; <http://live.unece.org/env/pp/pubcom.html> accessed 10 February 2014.

<sup>85</sup> Administrative Court of Austria (*Verwaltungsgerichtshof*), Decision no. 2009/02/0239, 27 April 2012.

<sup>86</sup> Administrative Court of Austria (*Verwaltungsgerichtshof*), Decision no. 2009/03/0067, 30. 9. 2010, 0072; Constitutional Court of Austria (*Verfassungsgerichtshof*), Decision no. B254/11., 28 June 2011.

decisions instead of the Administrative Court, as the newly established Administrative Courts of First Instance can ascertain the relevant facts of the case *ex officio* or gather any evidence.<sup>87</sup>

In the case of the Czech Republic and Slovakia, more serious infringements of international and EU requirements and general regression could be observed. The Hungarian law was somewhat ahead of its time by formally ensuring several forms of public participation, including the extension of the party (client) status, partly due to the fact that the Aarhus Convention had been the focus of discussions as early as in the mid-90s.<sup>88</sup> However, because of a relatively comprehensive sectoral code, it was mainly up to the courts to interpret its generally formulated provisions and terms (i.e. which matters are to be recognised as environmental). Austria, on the other hand, follows the ‘minimum level’ approach, thus exposing itself to criticism from the organisations concerned.

Overall, it would be difficult to treat the examined states as a homogeneous group; however, these Member States, also including the formally non-post-Communist Austria, seem to have similar deficiencies concerning the implementation and enforcement of the Aarhus requirements of access to justice.

As an example of non-compliant national regulation, the former Swedish law precluded the access to justice of environmental NGOs in general.<sup>89</sup> In other words, a state belonging to the *world of law observance* also imposed regulations which run counter to the objectives of the Directive. CJEU also ruled in its *Trianel judgement* on the strict interpretation of the ‘impairment of right’ doctrine, applied in Germany, which actually does not meet the related EU Aarhus requirements.<sup>90</sup> It should also be mentioned that in several cases examined by the Compliance Committee, the European Commission and the CJEU, it is not the formal requirements concerning locus standi imposed by the Member States that constitutes a real barrier for NGOs; rather the prohibitively expensive nature of procedures, which can only be assessed on a case-by-case basis (Article 9 (4) of the Convention; Articles 10a (5), 15a (5) and 11 (5) of the Directives concerned).<sup>91</sup>

## Conclusion

Concluding the experience gained by the transposition, implementation and enforcement of EIA Directive, the post-implementation concerns occurred in the countries of the region: standing (and other procedural) rights in relation to the EIA regulation – that had been originally

<sup>87</sup> European Commission, ‘Study on Implementation of Article 9.3 and 9.4 of the Aarhus Convention in 17 Member States of the European Union – Austria (2012-2013)’ 19-20 [http://ec.europa.eu/environment/aarhus/access\\_studies.htm](http://ec.europa.eu/environment/aarhus/access_studies.htm) accessed 28 March 2014.

<sup>88</sup> Bándi Gyula, ‘A környezetvédelmi közigazgatási hatósági eljárás fogalmáról’ (2007) 3 Közigazgatási Szemle 91.

<sup>89</sup> Case C-263/08 *Djurgården-Lilla Värtans Miljöskyddsforening v Stockholms kommun genom dess* [2009] ECR I-09967.

<sup>90</sup> Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* [2011] ECR I-03673.

<sup>91</sup> Case *David Edwards and Lilian Pallikaropoulos v Environment Agency and Others*.

guaranteed in the implementation acts – were abolished or a restrictive use of general provisions (or restrictive interpretation of broader standing rights) was introduced. The provisions concerned were not just ‘dead letters’ or ‘empty shells’, but backsliding also took place in certain areas. Due to the external pressure by different actors, steps were taken to ensure a minimum level of law observance, which, however, does not mean that all Aarhus requirements are currently fulfilled.

Due to the lack of sufficient empirical evidence, it is difficult to decide if the above-mentioned theories are ‘sometimes true’ or if the Eastern problem as such actually exists. Presenting the concerns with regard to one directive in four different countries does not seem to provide enough evidence to formulate a comprehensive theory or to criticize other ones.

The Europeanisation theory might have a positive input in this regard. One of the major tasks is to identify the compliance patterns that determine which countries belong to the same compliance culture regarding certain directives. Taking country clusters as a starting point of the categorisation I assumed that it might be the ‘impairment of right doctrine’ element that may link different legal systems in relation to environmental citizen suits. In other words, this doctrine, which determines the role of administrative jurisdiction, was expected to contravene the EU requirement related to the enforcement of EU Aarhus requirements and environmental law. Creating these clusters and identifying the different compliance patterns might be useful for the EU legislator in order to model the potential outcome of the future implementation processes in diverse policy areas.