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Apportioning the Obligations Arising Under the UNECE Aarhus Convention Between the EU and its MSs: The Real Scope of the 'Community Law in Force'

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Abstract: The article engages with the long-standing debate as to the relationship between the European Union (EU) and the international legal orders by testing this relationship in the context of the participation of the EU, together with its Member States (MSs), in the UNECE Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters (the Aarhus Convention). Through the analysis of three cases submitted to the Compliance Committee established under the Convention, dealing with national transport plans, national renewable energy and transnational electricity plans, the article highlights the practical and legal difficulties to identify the rightful subject of a communication on the basis of the so-called 'declaration of competence' made by the EU upon approval of the Aarhus Convention. In search for practical solutions, the article suggests that it could be relied on the atypical and less formal nature of the Compliance Committee in order to envisage the possibility that individuals, NGOs or a non-EU Party to the Aarhus Convention consult the EU and its MSs as to whom should be considered the rightful subject of a communication, in the light of the 'scope of the EU law in force'.

Keywords: declaration of competence; shared competence; joint accountability; non-compliance mechanisms; plans related to the environment.

1. Introduction

The relationship between the international and the European legal orders has always been complex one[1], as it is reflected in the European Court of Justice (ECJ) case-law. While it was initially claimed

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[*] The views expressed in this article constitute the personal view of the author and do not reflect the position of the Aarhus Convention Compliance Committee. As a former member of the Committee I no longer participate in, or otherwise influence, the deliberations of the Committee. I am grateful to Professor Antonino Alì for his insightful comments. The usual disclaimer applies.

[1] This has been affirmed in the late nineties by C. Timmermans, *The EU and Public International Law*, in *European Foreign Affairs Review*, vol. 4, 1999, pp. 181-194, at 181. The author was also suggesting that '[i]n the early days of the European Communities the relationship between Community law and international law may have been slightly antagonistic. However, it has now developed into a more modern form of partnership: a relationship of living apart together and in good harmony' (ibid., p. 194). On the relationship between the EU and the international legal orders see, more recently, R. A. Wessel, *Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?*, in E. Cannizzaro, P. Palchetti, R. A. Wessel (Eds.), *International Law as Law of the European Union*, The Hague, 2012, pp. 9-33, at 11-18; N. Lavranos, *Protecting European Law from International Law*, in *European Foreign Affairs Review*, vol. 15, 2010, n. 2, pp. 265-282; and J. Wouters *et al.*, *Introduction: The Europeanisation of*

that the European Union (EU) legal order (at the time, 'Community legal order') was autonomous from international law[2], from the 1970s ECJ jurisprudence began to integrate the EU with the international legal order. International treaties to which the EU was a Party were considered as 'an integral part of Community law'[3]. More recently, the early claims for autonomy of the EU legal order from the international law one, seem to have regained momentum when the ECJ stated that the EU legal order is 'an autonomous legal system which is not to be prejudiced by an international agreement'[4].

This article engages with the discussion of the 'relational problems' of the EU with international law (and vice versa) and focuses in particular on the participation of the EU, together with its Member States (MSs), in multilateral environmental agreements (MEAs)[5], with special regard to the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters (which are often referred to as the 'three pillars' of the Aarhus Convention)[6].

The analysis combines some special features of both the international and the EU legal orders. With regard to the former, the legal context is that of the so-called 'compliance mechanisms' that complement the more traditional principles and procedures for breach of a treaty and that are also referred to as 'soft remedies' or 'soft enforcement procedures' as opposed to the 'hard enforcement' of treaty provisions through courts and tribunals that are typically confrontational and adversarial[7]. In 2002, within the institutional framework of the Aarhus Convention, a Compliance Mechanism was

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International Law, in J. Wouters *et al.* (eds.) *The Europeanisation of International Law: The Status of International Law in the EU and its Member States*, The Hague, 2008, pp. 1-12.

[2] See, for example, case C-26/62, *Van Gend Loos v Ireland*, Judgment of 5 February 1963, at p. 12.

[3] See, for example, case 181/73 *Haegeman v Belgium* [1974] ECR 449.

[4] Joint cases C-402/05 P and C-515/05 P, *Kadi and Al Barakaat v Council of the EU and Commission of the EC*, Judgment of the Court (Grand Chamber) 3 September 2008, ECR I-06351, especially paras 282 and 316. See also Opinion 2/13 of the Court (Full Court) on Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, where it is stated that 'the autonomy enjoyed by EU law in relation to the laws of the Member States and in relation to international law requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU' (para 170).

[5] On MEAs in international law see, amongst many, P. Sands, *Principles of International Environmental Law*, Cambridge, 2012, p. 96.

[6] United Nations, *Treaty Series*, vol. 2161, p. 447. The Convention was adopted on 25 June 1998 in Aarhus (Denmark) under the auspices of the United Nations Economic Commission for Europe (UNECE). The Convention entered into force at the international level on 30 October 2001 and, at present (August 2017), it has 47 Parties. See E. Fasoli, *The UN-ECE Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters*, in M. Fitzmaurice, A. Tanzi (eds.), *International Conventions/Multilateral Environmental Agreements/International Organisations*, Cheltenham, 2017, pp. 422-435, and the entries written by J. Ebbesson, *Access to Information on Environmental Matters*, *Access to Justice in Environmental Matters*, and *Public Participation in Environmental Matters,* in R. Wolfrum *et al.* (eds.), *Max Planck Encyclopedia of Public International Law*, Oxford, 2012, respectively at pp. 31-37, 37-44 (vol. I) and 574-581 (vol. VIII).

[7] In the present article, we will discuss the potential 'accountability', 'non-performance', 'non-fulfilment' or 'non-compliance' of the EU and its MSs as a matter of international law as distinguished from the more traditional 'responsibility for internationally wrongful acts' or 'international liability'. For the difference between 'non-compliance' and the more traditional procedures for breach of a treaty, see, amongst many, M. Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 1993, vol. 3, *Yearbook of International Environmental Law*, pp. 123-162; and F. Francioni, *International Soft Law: A Contemporary Assessment*, in V. Lowe, M. Fitzmaurice (eds.), *Fifty Years of the International Court of Justice: Essays in Honour of Sir Robert Jennings*, Cambridge, 1996, pp. 167-178. See also the contributions in T. Treves *et al.* (eds.), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements*, The Hague, 2009; and in U. Beyerlin, P. T. Stoll, R. Wolfrum (eds.), *Ensuring Compliance with Multilateral Environmental Agreements: A Dialogue between Practitioners and Academia*, Leiden, 2006. For the more traditional international responsibility of the EU see F. Hoffmeister, *Litigating Against the European Union and Its Member States – Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?*', 2010, vol. 21, *European Journal of International Law*, pp. 723-747.

established for the review of compliance by the Parties with their obligations under the Convention[8]. This Mechanism is unusual in providing for the public (i.e. natural and legal persons, associations, groups, or non-governmental organisations and not only Parties to the Agreement)[9] to trigger cases by complaining about alleged non-compliance by Parties[10].

With regard to the special feature of the EU legal order, the participation of the EU together with its MSs in a MEA, such as the Aarhus Convention, is a peculiar, yet well-known, phenomenon of the external exercise of shared competence. In essence, in a 'situation' of internal shared competence (such as the environment)[11] this competence 'extends' externally so that both the EU and the MSs are contracting Parties to the agreement that it is called 'mixed agreement'[12]. Such a mixed agreement, like any other treaty concluded by the EU, is binding upon the institutions of the EU and on its MSs[13]. An important consequence of the participation of the EU in the Aarhus Convention together with its MSs is that the EU can be subject to a communication brought to the Compliance Committee[14].

Against this backdrop, through the analysis of three cases brought before the Committee against the EU, we will highlight the practical and legal difficulties involved in the apportioning of the respective international obligations of the EU and its Member States on the basis of the so-called

[8] The first Meeting of the Parties (MOP) held in Lucca in 2002 adopted Decision I/7 on the review of compliance that sets out the main features and structure of the Committee and the procedures for the review of compliance (ECE/MP.PP/2/Add.8, par 38). See also the *Report of the First Meeting of the Task Force on Compliance Mechanisms* (CEP/WG.5/2000/40).

[9] Article 2, paragraph 4, of the Aarhus Convention defines 'public' as 'one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups'.

[10] So far, nearly 150 cases have been triggered by the public. The full list of communications submitted is available at the Committee's webpage https://www.unece.org/env/pp/cc/com.html. In legal doctrine see, C. Pitea, *Procedures and Mechanisms for Review of Compliance under the 1998 Aarhus Convention on Access to Information, Public Participation and Access to justice in Environmental Matters*, in T. Treves et al (eds.), *Non-Compliance Procedures*, above cit., pp. 263-274; and V. Koester, *The Convention on Access to Information, Public Participation in Decision- Making and Access to Justice in Environmental Matters*, in G. Ulfstein et al. (eds.), *Making Treaties Work. Human Rights, Environment and Arms Control,* Cambridge, 2007, pp. 179-217.

[11] Article 4(2)(e) TFEU. As described by P. J. Kuijper and N. Paasivirta, *EU International Responsibility and its Attribution: From the Inside Looking Out*, in M. Evans and P. Koutrakos (eds.) *International Responsibility of the EU: European and International Perspectives*, Oxford-Portland, 2013, pp. 36-71 at 59: '[t]he area of shared competence is dynamic in the sense that it requires verification whether the EU has exercised its competence. If so, the Member States are to the same extent excluded from exercising their competence. Thus, developing legislation may turn shared competence areas into areas of exclusive competence. Moreover, even if the Union has not fully exercised its competence in an area of shared competences the Union may have a legal interest in the matter. In practice, this can arise in the context of a "mixed agreement" '. On the separation of competences after the Lisbon Treaty, see L. S. Rossi, *Does the Lisbon Treaty Provide a Clearer Separation of Competences between EU and Member States?*, in A. Biondi *et al.,* (eds.) *EU Law After Lisbon*, Oxford, 2012, pp. 85-106.

[12] On mixed agreements see, amongst many, F. Hoffmeister, *Course or Blessing? Mixed Agreements in Recent Practice of the European Union and its Member States*, in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements Revisited: The EU and its Member States in the World*, Oxford-Portland, 2010, pp. 249-268, at 254-262; P. J. Kuijper, *International Responsibility for EU Mixed Agreements*, in ibid., pp. 208-227; and S. Amadeo, *Unione Europea e Treaty-Making Power*, Milano, 2005, pp. 313-324.

[13] Article 216(2) TFEU. With special regard to the Aarhus Convention, the ECJ has recently stated that 'according to settled case-law, the provisions of [the Aarhus Convention] form an integral part of the legal order of the European Union.' See C-240/09, *Reference for a preliminary ruling under Article 234 EC from the Najvyšší súd Slovenskej republiky (Slovakia)*, judgment of 8 March 2011, para 30. For a discussion of the extent to which a mixed agreement is a source of EU law see the excellent work by E. Neframi, *Mixed Agreements as a Source of European Union Law*, in E. Cannizzaro *et al.,* (eds.) *International Law* above cit., pp. 325-349.

[14] So far, 7 cases have addressed the issue of the EU's compliance with the Aarhus Convention. The first case against the EU was brought in 2006 by a Lithuanian environmental association alleging non-compliance with the Convention in relation to the decision-making process concerning co-financing of the establishment of a landfill in Lithuania, as well as for a general failure of implementation of the provisions of the IPPC Directive (ACCC/C/2005/17, ECE/MP.PP/2008/5/Add.10). For the other cases see the Committee's webpage for submissions at https://www.unece.org/env/pp/cc/com.html

'declaration of competence'[15] made by the EU upon accession to the Convention for the purposes of starting an action. These cases deal with the breach of the so-called 'second pillar' of the Aarhus Convention that requires, *inter alia*, that Parties, including the EU, assure the participation of the public during the development of strategic decisions like the adoption of national plans, programmes and policies related to the environment[16]. The article will focus on the adoption of national transport plans, national renewable energy and transnational electricity plans. Of special interest will be the situation where the 'EU law in force', that triggers the obligations of the EU under the Convention on the basis of the declaration of competence, is framework legislation that delegates the main powers and duties (including those to conduct public participation in relation to the plans) to a body of mixed composition with both representatives of the MSs and of the EU. A word of caution is in order: the aim of the analysis that will follow is not to evaluate whether the EU did or did not conduct a proper public participation in relation to these energy and transport plans but, rather, to ascertain whether, given the specificity of this 'EU law in force', the EU should be considered a rightful addressee of the related communication under the Convention instead of (or together with) its MSs.

2. The Participation of the European Union in the UNECE Aarhus Convention

As in the case of the other MEAs, the Aarhus Convention is open for accession by regional economic integration organizations (REIO)[17] constituted by sovereign 'States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by the Convention, including the competence to enter into treaties in respect of these matters'[18]. When a REIO becomes a Party to the Aarhus Convention, Article 19, paragraphs 4 and 5, determine the extent to which the REIO assumes obligations. Where the member State of such a REIO is a Party to the Convention

> the organization and its member States *shall decide on their respective responsibilities* for the performance of their obligations under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under the Convention concurrently. In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations referred to in article 17 *shall declare the extent of their competence* with respect to the matters governed by this Convention. These organizations shall also inform the Depositary of any substantial modification to the extent of their competence[19].

On 17 February 2005 the EU, which is a REIO within the meaning of article 17 of the Aarhus Convention, acceded to it; some of its MSs were already Parties, and others became Parties subsequently. As a consequence, the EU had to declare the scope of its competence with respect to the matters governed by the Convention, given that the latter does not allow the exercise of the rights under the Convention concurrently (i.e. jointly) between the organisation and its member States (i.e. the EU and its MSs)[20].

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[15] See J. Heliskoski, *EU Declarations of Competence and International Responsibility*, in Evans and Koutrakos (eds.) *International Responsibility of the EU*, above cit., pp. 189-212.

[16] The analysis will focus in particular on article 7 of the Convention under which 'each Party shall make appropriate practical and/or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, within a transparent and fear network, having provided the necessary information to the public.' See J. Jendroska, *Public Participation in Environmental Decision-Making*, in M. Pallemaerts (ed.), *The Aarhus Convention at Ten*, Groningen, 2011, pp. 93-147.

[17] See L. Krämer, *Regional Economic Integration Organizations. The European Union as an Example*, in D. Bodansky *et al* (eds.), *The Oxford Handbook of International Environmental Law*, Oxford, 2007, pp. 853-876.

[18] Article 17 of the Aarhus Convention.

[19] Emphasis added.

[20] Article 19, paragraph 4, of the Convention provides in fact that 'if one or more of such an organization's member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for

While these declarations are usually made for the purposes of apportioning the obligations arising under the international treaties with specific regard to the application of the rules of international responsibility, they are also relevant in the context of the more 'flexible' compliance procedures.

With regard to the Aarhus Compliance Committee, third parties (i.e. non-EU States, individuals or NGOs) have discretion to choose targeting either the EU or the MSs or both, and the Compliance Committee would not be prevented (even if in the same situation, the law of international responsibility would require the contextual invocation of either the EU or the MS) from considering a communication concerning only one of the two entities. But once the action is triggered, the Compliance Committee must sometimes face the difficult challenge of apportioning the obligations under the Convention to the EU and its MSs for the purposes of determining non-compliance. For instance, in the first case brought against the EU[21], the Committee had to address the nature and the scope of EU competence in order to assess whether in the specific case the obligations upon the EU were triggered[22]. Therefore, as one commentator has highlighted, the EU declaration of competence produces effects in this context of 'non-compliance', albeit in a rather 'informal' way[23].

One should note, though, that in other international agreements, different from MEAs[24], where the EU is a contracting Party alongside its MSs, a declaration of competence is not always made. The WTO is, for example, a mixed agreement with participation of both the EU and the MSs where no such declaration is made[25].

From the international law point of view, if a declaration of competence is absent, joint responsibility applies and the obligations under the MEAs are incumbent upon both the EU and its MSs in accordance with the principle of integrity of the treaty[26]. This approach is reflected in the

the performance of their obligations under this Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under this Convention concurrently'.

[21] See above footnote n. 14.

[22] The case referred to the breach of Article 6 of the Convention that obliges the Parties to meet the minimum requirements for public participation in decision-making related to all activities listed in Annex I. The Committee stated that 'while this applies to the Party concerned too, the structure of the European Community and its legislation differs from those of all other Parties to the Convention in the sense that while relevant Community legislation has been adopted to ensure public participation in various cases of environmental decision-making, it is the duty of its Member States to implement Community directives' (ACCC/C/2005/17, ECE/MP.PP/2008/5/Add.10), at para 44.

[23] A. Nollkaemper, *Joint Responsibility between the EU and Member States for Non-Performance of Obligations Under Multilateral Environmental Agreements*, in E. Morgera (ed.) *The External Environmental Policy of the European Union*, Cambridge, 2012, pp. 304-346, at 344. See also C. Pitea and A. Tanzi, *The Interplay Between EU Law and International Law Procedures in Controlling Compliance with the Aarhus Convention by the EU Member States*, in M. Pallemaerts (ed.), *The Aarhus Convention at Ten*, above cit., pp. 367- 381, at 376.

[24] In fact, all MEAs contain a 'REIO' clause. Another example is the recently adopted Paris agreement on climate change, that differently from its predecessor Kyoto Protocol, has introduced a provision to the effect that the international organisations and their MSs 'shall not be entitled to exercise rights under the Agreement concurrently' (Article 20, paragraph 3, Paris Agreement). An interesting case is the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture. Technically, there is no REIO clause in the text. However, a request for REIO to submit 'a declaration of competence specifying the matters in respect of which competence has been transferred to it by its Member States' is contained in Article 2, paragraphs 5 and 7, of the FAO Constitution. Interestingly, the EU Commission has started the process to update the declaration of competence already made in 1994. This proposal has been criticized by some Countries, such as the UK, given that it lacks 'any recognition of the extent to which the EU has not exercised its competence under shared competence areas' (J. Wouters, A-L. Chané, *Brussels Meets Westphalia, The European Union and the United Nations*, in P. Eeckhout, M. Lopez-Escudero (eds.) *The European Union's External Action in Times of Crisis*, Oxford, 2016, p. 321).

[25] P. J. Kuijper and E. Paasivirta, *EU International Responsibility*, above cited, at 57. However, 'competence problems remain a source for a complex participation of both the EU and its member states in the WTO', as pointed out by R. A. Wessel, *The Legal Framework for the Participation of the European Union in International Institutions*, 2011, vol. 3, *European Integration*, pp. 621-635, at 629.

[26] Article 26 of the 1986 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisation. This approach finds confirmation also in *Interpretation of the Agreement of 25 March 1951 between the WTO and Egypt, Advisory Opinion*, I.C.J. Reports 1980, at 89-90. In legal doctrine see S. Talmon,

Draft Articles on the Responsibility of International Organization adopted by the International Law Commission in 2011. The Commentary to Article 48(1) of the Draft Articles refers to the fact that, in the case of a mixed agreement that does not provide for the apportionment of the responsibility between the EU and its MSs, the responsibility of each State or the organization may be invoked for the same internationally wrongful act (i.e. the breach of the agreement)[27].

Considering the issue as a matter of EU law, though, the possibility to apply joint responsibility in absence of the request for a declaration of competence by the MEA, may be disputed. While some pronouncements by the ECJ/CJEU seem to accept that the responsibility is joint between the EU and its MSs[28], others maintain that the international agreement cannot fall entirely within the competence of the EU, because the EU should be held responsible only to the extent it has assumed responsibility[29].

Be that as it may, as anticipated, the Aarhus Convention requires that REIOs, such as the EU, declare, inter alia for the benefit of the non-EU States (but also individuals or NGOs), the extent of their competence vis-à-vis the matters governed by the Convention. On approval[30], the EU, after explaining the Treaty legal base for its external competence (i.e., former Article 175.1 TEC, now corresponding to Article 192 TFEU) and its capacity to act internationally on its own behalf in the field of the environment, made the following declaration:

> the European Community declares that it has already adopted several legal instruments, binding on its Member States, implementing provisions of this Convention and will submit and update as appropriate a list of those legal instruments to the Depositary in accordance with Article 10(2) and Article 19(5) of the Convention. In particular, the European Community also declares that the legal instruments in force do not cover fully the implementation of the obligations resulting from Article 9 (3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2 (2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations.

Later on, the declaration of competence of the EU states

> The European Community is responsible for the performance of those obligations resulting from the Convention which are covered by *Community law in force*[31].

Responsibility of International Organizations: Does the European Community Require Special Treatment?, in M. Ragazzi (ed.), *International Responsibility Today. Essays in Memory of Oscar Schachter*, Leiden, 2005, pp. 405-421, at 416-418.

[27] *Draft Articles on the Responsibility of International Organizations, with Commentaries*, *Yearbook of the International Law Commission* (2001), vol. II, Part Two, para 88, commentary to Article 48, para 1.

[28] For example, case C-316/91, where the ECJ stated that, in absence of division of competences, the EU and its MSs are 'jointly liable to [third States] for the fulfilment of every obligation arising from the commitments undertaken' (C-316-91, *Parliament v Council*, Judgment of 2 March 1994, in *Gen. Rec.*, 1994, p. I-625 ff., at pp. I-660-661, recital 29).

[29] For example, case C-13/00, *Commission of the European Communities v Ireland*, *Opinion of Advocate General Mischo*, 27 November 2001, in Gen. Rec., 2002, p. I-2943 ff., at p. I-2950, para 30. These opposing views are described by M. Björklund, *Responsibility in the EC for Mixed Agreements - Should Non-Member Parties Care?*, in *Nordic Journal of International Law*, vol. 70, 2001, pp. 373-402, at 400-1; and in the work of the International Law Commission in *Responsibility of International Organisations, Comments and Observations Received from International Organisations*, A/CN.545, 25 June 2004, p. 31, para 20.

[30] *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*, OJ (2005) L 124/1.

[31] Emphasis added. On the basis of the succession of the European Union to the European Community (Art. 1 TEU, as amended by the Lisbon Treaty), this paper refers from now on to 'EU law in force'.

Following this declaration of competence, the EU adopted (or had already in place) several instruments to ensure the proper implementation of the Aarhus Convention at both the MSs and EU's levels. The EU assumed obligations in relation to the first, second and, partially, the third pillar of the Convention, while leaving, at least for the time being, the responsibility for the implementation of the provisions on 'access to justice in order to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment' under Article 9, paragraph 3, to its MSs[32]. This will remain so up until the moment at which the EU decides 'to cover' this area by adopting legislation. In this regard, the Compliance Committee had very recently the opportunity to find that, in light of the EU declaration, 'the desirability of further legislation' in the area of access to justice in environmental matter does 'not go to the compliance of the EU with the Convention'[33]. The Committee also stated that 'more implementing legislation from the EU would trigger more obligations for the EU. There is in fact a dynamic process by which the EU may assume more legal obligations over time. As the declaration explains "the exercise of Community competence is, by its nature, subject to continuous development"'[34].

The declarations of competence submitted by the EU, including the one made upon approval of the Aarhus Convention, are thus intended to be flexible in order to reflect the (possible) change of the scope of the EU competence. However, as pointed out by the legal scholars, these declarations, apart from their two legitimate functions to make clear to non-EU Parties that the EU is concluding the agreement next to its MSs and to give some idea about who might be responsible/accountable if something goes wrong, '[f]or the rest, they have just brought sorrow'[35].

The declaration of the EU in the Aarhus Convention is no exception. At first blush, it seems clear about the apportionment of the competences with regard to the individual provisions. One could think of a situation where the EU decides, in an area where it has exercised its competence as in the case of the second pillar of the Convention on 'public participation in plans and programmes related to the environment'[36], to adopt a piece of secondary legislation[37], such as, for example, a directive that provides how MSs should exercise their own regulatory competence to adopt a plan. As it will be shown in section 3.1. this is the case in the Renewable Energy Directive, which specifies the national renewable energy targets for each country and provides for minimum requirements for MSs, including for conducting proper public participation, in order for them to adopt their national renewable energy action plans (NREAPs)[38]. Such a Directive provides for a 'floor of provisions' while leaving the MSs a certain margin of discretion for making their own independent policy choices, even within the 'occupied field'[39]. Hence, the division of competences vis-a-vis the

[32] The most relevant instruments are Directive 2003/4 on public access to environmental information, [2003] OJ L41/26 and Directive 2003/35 on public participation [2003] OJ L156/17. Other relevant provisions are contained, for example, in Directive 2010/75 on industrial emissions, [2010] OJ L333/17; and in Directive 2004/35 on environmental liability [2004] OJ L143/56. The EU has also adopted a Regulation on the application of the Aarhus Convention to its institutions and bodies, so-called, 'Aarhus Regulation' 1367/2006 [2006] OJ L264/13. This Regulation is supposed to implement the access to justice provisions in Aarhus as far as the EU institutions and bodies are concerned, but the EU has still not adopted a general EU access to justice measure.

[33] See the findings of the Compliance Committee in case ACCC/C/2013/123 (ECE/MP.PP/C.1/2017/21), *Findings and Recommendations with regard to communication ACCC/C/2014/123 concerning compliance by the European Union, adopted by the Compliance Committee on 24 May* 2017, para 92. The sixth MOP has 'taken note' of these findings. See below footnote n. 43.

[34] Ibid., para 90.

[35] P. J. Kuijper and E. Paasivirta, *EU International Responsibility*, above cited, at 70.

[36] See above footnote n. 16.

[37] For an overview of the different legislative techniques adopted by the EU in the environmental area see S. van Holten, M. van Rijswick, *The Governance Approach in European Union Environmental Directives and its Consequences for Flexibility, Effectiveness and Legitimacy*, in M. Peeters *et al.* (eds.) *EU Environmental Legislation*, Cheltenham, 2014, pp. 13-45.

[38] Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC [2009] OJ L140/16.

[39] This is without prejudice to the case in which, in a situation of shared competence, the EU adopts legislation that is totally 'pre-emptive' and MSs are prevented from adopting divergent national regulatory standards unless and until the

obligations under the Aarhus Convention would be fairly clear: and action could be directed against the EU for properly inserting a public participation process in the Directive that contains the 'floor of provisions' for the MSs, whereas an action against the latter could be initiated for properly enacting these provisions at the national level during the implementation of the Directive (i.e., during the preparation of the NREAPs) and for making sure that the process is in line with the Convention. But what if it is much more difficult to apportion on the respective international obligations of the EU and its Member States on the basis of secondary legislation? Let us consider the case, for example, of a framework legislation that delegates the main powers, including those to adopt the plans and to conduct public participation thereto, to a body of mixed composition made of both representatives of the MSs and of the EU. How could it be possible for third parties (i.e. non-EU States, individuals or NGOs) to select whom should be the subject of a communication/submission[40] in such a case? Could the EU shield behind its declared separation of competences and 'escape accountability'[41]? In the next section, we will try to answer to the above questions by looking at three cases that have been submitted to the Aarhus Compliance Committee.

3. The Scope of the 'EU Law in Force' in Three Cases Submitted to the Compliance Committee

The Aarhus Convention Compliance Committee has been receiving an increasing number of cases brought against the EU. We will focus in particular on three of them dealing with national transport plans, national renewable energy and transnational electricity plans. The findings and recommendations adopted by the Committee in relation to the first EU case have been already endorsed by the MOP of the Aarhus Convention in 2014[42], the findings of the second one have been 'noted' by the MOP in 2017[43], whereas the third case is still pending before the Committee[44]. All of them address the delicate issue of the apportioning of obligations between the EU and its MSs with regard to the proper implementation of article 7 of the Convention.

3.1. Ireland's Renewable Energy Plan

This case was brought in 2010 by an individual who claimed that the EU was in non-compliance, among the other provisions, with Article 7 of the Convention[45]. The main issue was the approval and funding of Ireland's renewable energy programme through the EU Commission. According to the communication, the latter did not respect the legal obligations enshrined in the Aarhus Convention

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relevant EU legislation is revised or repealed; as well as to the case in which, in certain areas of shared competence, the actual exercise of EU competence might have no pre-emptive affect at all (A. Dashwood *et al*., *Wyatt and Dashwood's European Union Law*, Oxford-Portland, 2011, pp. 102-103).

[40] In the practice of the Compliance Committee, if the action is brought by an individual or an NGO, it is called 'communication', whereas if it is triggered by a State it is called 'submission' by the 'Party concerned.'

[41] For similar questions see also A. Nollkaemper, *Joint Responsibility*, above cit., pp. 304-346; and M. Björklund, *Responsibility in the EC for Mixed Agreements - Should Non-Member Parties Care?*, in *Nordic Journal of International Law*, vol. 70, 2001, pp. 373-402.

[42] ACCC/C/2010/54 (ECE/MP.PP/C.1/2012/12). See *Report of the Fifth Session of the Meeting of the Parties, Addendum, Decisions Adopted by the Meeting of the Parties*, ECE/MP.PP/2014/2/Add.1, 15 October 2014, pp. 65-66.

[43] ACCC/C/2014/101 (ECE/MP.PP/C.1/2017/18). *Findings and Recommendations with regard to communication ACCC/C/2014/101 concerning compliance by the European Union, adopted by the Compliance Committee on 18 June 2017*, available on the Committee's webpage. When the Committee does not find a Party in non-compliance it does not adopt recommendations in this regard and the MOP only 'takes note of' its findings (instead of endorsing them). On the legal effect of the endorsement of the findings and recommendations of the Aarhus Compliance Committee by the MOP, see also E. Fasoli and A. McGlone, *The Non-Compliance Mechanism under the Aarhus Convention as a "Soft" Enforcement Procedure: Not So Soft After All!* (forthcoming).

[44] ACCC/C/2013/96. The documents are available at the Committee's webpage.

[45] In the Compliance Committee's practice, the actor, either an individual and/or an NGO, is called the 'communicant', whereas the respondent State is called the 'Party concerned'.

concerning public participation in decision-making during the phase of the approval of the State aid and the direct funding of the Irish NREAP and the dissemination of information related to the environmental benefits[46]. The case concerned the compliance only of the EU as, at that time, Ireland was not Party to the Aarhus Convention[47].

The task of the Compliance Committee was twofold. First of all, it had to evaluate whether the EU had in place a proper regulatory framework in the Renewable Energy Directive[48], containing clear instructions to the MSs on how to adopt the NREAPs, including for conducting public participation. In addition, the Committee had to evaluate whether the EU properly monitored Ireland's implementation of article 7 of the Aarhus Convention during adoption of its NREAP. From a strictly EU law perspective, the monitoring obligations placed upon the EU with regard to the conduct of one of its MSs, i.e. Ireland, even though the latter, at that time, was not a Party to the Convention, are a consequence of the obligations that MSs owe to the EU because the latter had assumed responsibility for the due performance of the agreement vis-à-vis the other Parties of the treaty[49]. As one commentator has argued, 'the ratification of a Treaty by the EU binds the Member States on matters falling within the competence of the Union even when they have not themselves become Parties to the MEA in question'[50].

In relation to both the allegations, the Compliance Committee found the EU in non-compliance[51]. What is interesting to note is that the preparation and the adoption of the renewable energy action plan by Ireland was indeed required by Article 4 of the Renewable Energy Directive. In other words, the preparation and adoption of the Irish NREAP was 'covered' by 'EU law in force' that, therefore, had to contain provisions for the proper implementation of the second pillar of the Aarhus Convention. Instead, an action could not be directed against Ireland for properly enacting these provisions at the national level during the preparation of the NREAP, because at that time it was not a Party to the Convention[52].

3.2. UK's Plan for a High-Speed Railway

This case was communicated to the Compliance Committee in 2014 by an NGO and a private individual. It concerns the alleged non-compliance by the EU with respect to the decision-making procedures of a plan in the form of a 'Command paper'[53]. This plan was adopted by the UK's authorities in the context of the proposed construction of a new 'Y' shaped high-speed railway from

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[46] ACCC/C/2010/54 (ECE/MP.PP/C.1/2012/12), para 2.

[47] Ireland ratified the Aarhus Convention only in 2012.

[48] Under Directive 2009/28/EC, every MS has to develop a plan, which sets the share of energy from renewable sources consumed in transport and in the production of electricity and heating for 2020. In preparing this plan, MSs have to take into consideration efficiency measures aiming at reducing the final energy consumption (Article 4).

[49] This is a corollary of the rule that the 'agreements concluded by the Union are binding upon the institutions of the Union and on its Member States' according to Article 216(2) TFEU. See case C-104/81 *Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A*, Judgment of the Court of 26 October 1982, in Gen.rec., 1982, p. 3641 ff., at p. 3662, para 13.

[50] N. Notaro, *The Policy and Practice of the European Union on Compliance Mechanisms under Multilateral Environmental Agreements*, in Treves *et al.* (eds.), *Non-Compliance Procedures*, above cited, at 537. Symmetrically, should the MSs conclude an international agreement alone, which, at least in part, falls within the exclusive competence of the EU, they would face 'constraints under which the MSs, although fully sovereign States, operate at an international level as a result of their Union obligations (M. Cremona, *Member States Agreements as Union Law*, in E. Cannizzaro *et al.,* (eds.) *International Law as Law of the European Union*, above cited, 291-324, at 324).

[51] ACCC/C/2010/54 (ECE/MP.PP/C.1/2012/12), para 85.

[52] For an analysis of the parallel powers of the EU Commission to bring proceedings against its MSs see, particularly, A. Alì, *The EU and the Compliance Mechanism of Multilateral Environmental Agreements: The Case of the Aarhus Convention*, in E. Morgera (ed.), *The External Environmental Policy*, above cited, at 300-3. See also C. Pitea, A. Tanzi, *The Interplay Between EU Law and International Law Procedures in Controlling Compliance with the Aarhus Convention by the EU Member States*, in M. Pallemaerts (ed.), *The Aarhus Convention at Ten*, above cited, pp. 367- 381, at 373-381.

[53] This plan was adopted in 2012 by the Department for Transport: '*High Speed Rail: Investing in Britain's Future – Decisions and Next Steps*'.

London to the West Midlands, Manchester and Leeds, also known as 'High Speed 2' or 'HS2.' In parallel, in relation to the same facts, an action was brought against the UK[54]. As anticipated above, the findings in relation to the EU have been 'noted' by the sixth MOP, whereas the decision against the UK is still pending.

According to the communicants, the case concerned the EU because the latter should have had in place a proper regulatory framework (a 'floor of provisions') that, as in the previous case analysed, contain clear instructions, including on public participation, for the MSs when preparing and adopting the national plan related to the environment (i.e. the Command paper). However, the Committee found that the adoption of the UK Command paper was not required by 'EU law in force' that could trigger obligations for the EU under the Convention. The Committee noted that 'the [Command paper] is not covered by the SEA Directive. Nor it is covered by the Public Participation Directive. Moreover, public participation in the preparation of the [Command paper] is not required by any other piece of EU legislation in force nor is the preparation of the [Command paper] itself required by any EU legislation in force'[55]. As a result, the Committee did not find the EU in non-compliance with Article 7 of the Convention since there was no 'EU law in force' that could instruct the UK on how to adopt the Command paper according to the provisions of the Aarhus Convention. Therefore, only the MS, in this case, the UK, could be the addressee of an action for the (potential) non-fulfilment of the public participation provisions in relation to the adoption of the Command paper. This case illustrates how difficult for third parties can be to understand how to apportion on the respective international obligations of the EU and its Member States arising under the Convention.

3.3. European Energy Infrastructure Plans

Although this case has not been decided yet at the time of writing, it nevertheless raises some critical and problematic issues in terms of the scope of the 'EU law in force'. The action against the EU was brought before the Compliance Committee by an umbrella organisation representing environmental NGOs throughout Europe. It concerns the alleged failure to conduct proper public participation in relation to the adoption of a list of nearly 250 projects of common interest ('EU list of PCIs'), mainly energy infrastructure projects, such as transmission lines, storage projects and smart grid projects, that benefit from accelerated permit granting procedures, financial incentives and improved regulatory treatment. The case refers in particular to wind turbines in the Irish midlands[56].

In 2013, a first EU list of PCIs, containing clusters of interconnections between MSs (e.g. areas of generation of renewable energy in Ireland to be transmitted to the UK)[57] was adopted by way of a 'Commission Delegated Regulation'[58], in the form of an annex to Regulation 347/2013 (TEN-E Regulation)[59]. In essence, TEN-E Regulation provides guidelines for the identification of the trans-

[54] The full list of documents of the case is available at https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2014100-united-kingdom.html
[55] *Findings and Recommendations with regard to communication ACCC/C/2014/101* above cited, at para 53.
[56] As stated by the DG Energy, 'these projects are essential for completing the European internal energy market and for meeting the EU's energy policy objectives of affordable, secure and sustainable energy.' http://ec.europa.eu/energy/en/topics/infrastructure/projects-common-interest.
[57] An example of cluster of interconnections, which is contained in the list, is as follows: '*Ireland – United Kingdom interconnection between Wexford (IE) and Pembroke, Wales (UK)* [currently known as "Greenlink"].'
[58] Commission Delegated Regulation 1391/2013 amending Regulation 347/2013 on guidelines for trans-European energy infrastructure as regards the Union list of projects of common interest, which was adopted 17 April 2013. A second EU list of PCIs was adopted on 18 November 2015 through Delegated Regulation 2016/89. Under Art. 291 TFEU the EU Commission is empowered to create non-legislative, but nevertheless binding, acts, which may be in the form of Regulations, Directives, or Decisions.
[59] Regulation 347/2013 on guidelines for trans-European energy infrastructure and repealing Decision No 1364/2006/EC and amending Regulation No 713/2009, No 714/2009 and No 715/2009, [2013] L 115/39.

European energy infrastructure projects, for the facilitation of the permit granting procedures, for the cross-border allocation of costs[60] and, most importantly, for enhancing public participation[61].

It is important to note that the adoption of the EU list of PCIs in the form of a delegated act by the EU Commission, is based on provisional lists of candidate PCIs[62] prepared by twelve regional groups. These groups, that are also mandated to conduct a consultation process[63], are characterized by a mixed composition that includes representatives of the MSs, including Ireland, national regular authorities, project promoters, but also representatives of the EU Commission, along with the EU networks of transmission system operators for electricity and gas and, finally, the EU Agency for cooperation of energy regulators. This enhanced participation of the private sector should be considered against the backdrop of the so-called 'co-regulation' legislative policy, whereby the EU, especially since the adoption of the Better Regulation Strategy in 2002, favours the involvement, when possible, of private actors (especially those that are relevant to the specific economic sector concerned) in the relevant regulatory processes, including legislative, at both the EU and MSs levels[64]. The mixed composition of these regional groups raises the question as to which entity between the EU and its MSs could be considered the proper addressee of a communication before the Compliance Committee on the basis of the scope of the 'EU law in force'. Was the EU the rightful addressee or should the case have been brought (also or only) against Ireland, given that it refers in particular to public participation in relation to wind turbines to be located in the Irish midlands?

3.3.1. Options for Apportionment

The legal situation established under the TEN-E Regulation has some similarities with that described in section 3.1. In both cases the EU had in place a regulatory framework (the Renewable Energy Directive and the TEN-E Regulation, respectively) that provided for minimum requirements for MSs (including Ireland) on how to adopt the plans (the NREAPs and the list of PCIs, respectively) for them to be in line with Article 7 of the Aarhus Convention. A major difference between the two cases, though, is that the TEN-E Regulation delegates the main powers related to the adoption of the plans (including that to conduct public consultation thereto) not to MSs solely, such as in the case of the renewable energy action plan, but to regional bodies of mixed composition with representatives of both the EU and the MSs.

The TEN-E framework is also different from the case analyzed in section 3.2. in so far as the UK 'Command paper' was not required by any 'EU law in force', whereas here the adoption of both the regional lists of candidate PCIs and the final EU list of PCIs is required by the TEN-E Regulation. Most importantly, this last case is different from the two cases analyzed in the previous sections in so far as the scope and nature of the TEN-E Regulation, in conjunction with the declaration of competence of the EU, do not help us to understand what entity could be in breach of its obligations under the Convention. In light of that, it seems that there are two different ways to apportion the obligations arising under Article 7 of the Convention.

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[60] Article 1, General Provisions, TEN-E Regulation.

[61] Article 9, on transparency and public participation, states, in essence, that the MSs have to publish a manual of procedures for the permit granting process applicable to the PCIs and that this manual has to be made available to the public. In parallel, the project promoters have to draw up and submit a concept for public participation to the national competent authorities following the procedures outlined in the manual (paras 1 and 3 of TEN-E Regulation).

[62] This is stated in Preamble no. 6 of the Commission Delegated Regulation 1391/2013.

[63] Point 5 of Annex III, Regulation 347/2013, provides that during the adoption of the regional lists of candidate PCIs each Regional Group has to consult the organisations representing stakeholders, including, if appropriate, stakeholders directly, and producers, distribution system operators, suppliers, consumers and organisations for environmental protection.

[64] *Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Environmental Agreements at Community Level Within the Framework of the Action Plan on the Simplification and Improvement of the Regulatory Environment*, COM(2002)412 final, 17 July 2002. In legal literature see, particularly, P. Verbruggen, *Does Co-Regulation Strengthen EU Legitimacy?*, in *European Law Journal*, 2009, vol. 15, n. 4, pp. 425-441.

According to a first line of interpretation, given the choice of the EU to establish regional groups (that include also representatives of the EU) to which it can delegate the decision-making functions regarding the list of PCIs, including the power to conduct public participation thereto, it could be maintained that the EU could remain accountable for its MSs', including Ireland, compliance with the Convention. Hence in this context, the conduct of the EU could indeed be subject of scrutiny by the Committee.

Alternatively, given the minimum level of specification and detail contained in the list of PCIs, one could maintain that it is for the MSs, in practice, at a later stage during the actual realisation of the projects (therefore, not at the level of participation of the MS in the regional groups), to exercise the main powers and duties, including those to conduct strategic environmental assessment and environmental impact assessment of the projects and public participation thereto. Therefore, the EU would not be the (or not be the only) rightful addressee of this communication in so far as the main powers are delegated at the MSs level. It follows that the MSs, namely, Ireland, could have been (also) the subject of the communication related to this case. In other words, following this line of interpretation, from the perspective of the communicants, but also of any other non-EU party to the Convention, Ireland could have been seen as an entity that wielded the actual power to secure performance of the obligations under the Convention, at least, in relation to the cluster of projects within its jurisdiction.

The first solution clearly gives more relevance to the fact that the EU 'appears' to have EU law in force. The fact that the EU adopted legislation in the form of the TEN-E Regulation would be the basis of making the EU subject of the communication. The second solution gives instead more importance to the entity that 'in practice is in the better position' to act in a way that would finally deliver compliance with the Convention[65]. Of course, these solutions would be both viable because of the atypical (or 'less formal') nature of the Aarhus Compliance Committee[66] that, as already anticipated in the introductory section, is different from the classical functioning of judicial bodies that apply the 'search for responsibility approach'[67].

Either way, the declaration of competence of the EU is of very little help to identify the rightful subject of any communication relating to non-compliance. On the one hand, the 'inscrutability' of the EU declaration is not protective of the interests of non-EU Parties to the Convention in accordance with the general principle of good faith in the performance of the treaties in force[68]. One the other hand, from a strictly EU law perspective, third Parties do not have the right to interfere in the division of responsibility/accountability and thus in the internal division of powers between the EU and its MSs[69]. Here lies the heart of the 'relational problems' of the EU with international law (and vice versa), from the specific angle of the present analysis.

In search for practical solutions, one could imagine that in future cases, when it will be similarly difficult for individuals, NGOs or non-EU Parties to the Aarhus Convention to understand which entity is the rightful addressee of a claim, the example of the MEAs that provide for joint responsibility as a consequence of the failure to inform, could be followed. In that context, when it is unclear whether the EU or the MSs are responsible in relation to a specific matter, any third Party could request to clarify this issue within a given time and without prejudice to the right to initiate

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[65] A. Alì, *Non-Compliance Procedures in Multilateral Environmental Agreements: The Interaction Between International Law and European Union Law*, in T. Treves *et al.* (eds.), *Non-Compliance Procedures,* above cited, at 532.

[66] The Compliance Committee enjoys a certain room for manoeuvre also in the assessment of the scope of its review, being the latter not necessarily confined by the scope of the communications/submissions received.

[67] A. Alì, *Non-Compliance Procedures*, above cited, ibid. See also A. Tanzi and C. Pitea, *Non-Compliance Mechanisms: Lessons Learned and the Way Forward*, in T. Treves *et al* (eds.), *Non-Compliance Procedures*, above cited, p. 579: 'the consequences of the findings of the committee are not those of State responsibility with consequent remedial action but those practically useful to engage in a process finally leading to full compliance.'

[68] Article 26 of the Vienna Convention on the Law of Treaties.

[69] P J Kuijper and E Paasivirta, *EU International Responsibility*, above cited, at 69.

proceedings against both entities anyway. Failure to provide this information results in joint responsibility[70].

Even though the Aarhus Convention does not fall under such category of MEAs in so far as, as shown, in the text there is no provision to this effect, at the same time, one could imagine that an informal practice is established within the Compliance Committee whereby (absent objections of the Parties to the Convention to this practice) during the preliminary admissibility stage, when the Committee seeks the views of both Parties, including through a public hearing for enhancing the initial dialogue between them[71], the communicant of a claim brought against the EU and/or one of its MSs uses this informal channel of communication in order to consult the EU and its MSs as to whom they consider that the action should be rightfully addressed to. This solution would be in accordance with the duty of loyal cooperation between the EU and its MSs under EU law[72]. At the same time, such a request for clarification should be without prejudice to the possibility to initiate the proceeding against the EU and/or its MS anyway, or to not trigger the mechanism at all, once (and if) these clarifications have been received. In case both the EU and its MS are targeted, the tusk to attempt to identify the actual division of competences (or at least, that which 'appears' being so) would be left on the Compliance Committee's shoulders.

4. Concluding Remarks

It emerges from the foregoing analysis that the relationship between the EU and the international legal order is indeed a difficult one. When tested against the participation of the EU and its MSs in a MEA such as the Aarhus Convention, there is friction, in particular, in relation to the identification of the actual competences between the EU and its MSs. This is particularly challenging for third parties such as individuals, NGOs and non-EU States.

The cases submitted to the Aarhus Convention Compliance Committee, dealing with national transport plans, national renewable energy and transnational electricity plans and the provisions for public participation thereto, illustrate the practical and legal difficulties to apportion on the respective international obligations of the EU and its Member States on the basis of the so-called 'declaration of competence' for the purposes of directing a claim. While in the first case analysed a problem of identification of the subject of the communication could not arise given that, when the action was brought, the MS in question (Ireland) was not a Party to the Convention, in the second case the Compliance Committee had to declare that the specific type and scope of the 'EU law in force' was not able to trigger obligations under the Convention for the EU, which implicitly means that the EU was not the correct subject of the communication. In the third case the 'inscrutability' of the declaration of competence is, if possible, even more conspicuous given the framework nature of the

[70] This is the case, for example, of the Energy Charter Treaty where the EU (the European Communities at that time) made a statement pursuant to Article 26(3)(ii) of the Treaty with regard to the investor-State arbitration procedures: '[t]he Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States concerned will make such determination within a period of 30 days' [1998] *Official Journal of the European Communities* L69/115. An analogous provision is contained in Article 6 of Annex XI to the Law of the Sea Convention.

[71] At the very beginning of the compliance procedure, at the first available meeting after the communication is forwarded to the Committee, the latter decides whether it is sufficiently well prepared in order to be further considered and if the domestic remedies have been explored. More precisely, under paragraph 20 of Decision I/7, the Committee has to determine that the communication is a) not anonymous; b) not an abuse of the rights to make the communication; c) not manifestly unreasonable; d) not incompatible with the provisions of Decision I/7 or with the Convention. See *Guide to the Aarhus Convention Compliance Committee* (2nd edn., UNECE).

[72] For the operation of this duty, including in the context of the mixed agreements, see, amongst many, F. Casolari, *The Principle of Loyal Co-Operation: A 'Master Key' for EU External Representation?*, in Blockmans *et al*. (eds.), *Principles and Practices of EU External Representation* (CLEER Working Papers, 2012), pp. 11-35, and C. Hillion, *Mixity and Coherence in EU External Relations: The Significance of the "Duty" of Cooperation*, in C. Hillion and P. Koutrakos (eds.), *Mixed Agreements*, above cited, pp. 87-115.

relevant 'EU law in force' and the mixed composition of the body to which the main powers (including for conducting public participation in relation to the plans) are delegated. Here, two solutions seem equally plausible given the atypical, less formal, nature of the Aarhus Compliance Committee. According to the first one, the EU could be considered a rightful addressee of the communication as 'it appears' to have EU law in force. Under a different reading of the case, the MS could be (also) targeted given that it is 'in practice in the better position' to adopt the conduct that would finally result in compliance with the Convention. Either way, the declaration of the EU made upon accession to the Aarhus Convention has indeed only 'brought sorrow'[73]. A practical suggestion for future cases would be for potential communicants to ask the EU and the MS to clarify whom should be considered the rightful subject of a communication, in the light of the 'scope of the EU law in force'. While this would not be a decisive solution to this complex legal and practical issue, it seems that, at least, it could be used for the benefit of the third parties that otherwise are 'unduly burdened with enquiring under whose area of competence a specific matter falls'[74].

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[73] Above text corresponding to footnote n. 35.
[74] S. Talmon, *Responsibility of International Organizations*, above cited, at 419.