POSITION PAPER

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Industry views on Aarhus Compliance Committee Findings on Access to Justice in the EU

The Aarhus Compliance Committee Findings should not lead the EU to grant privileged access to EU Courts by environmental NGOs. Extending the scope of review under the EU Aarhus Regulation would indirectly alter the system of remedies established in EU primary law

On 17 March 2017, the Aarhus Convention Compliance Committee found the EU in breach of Art. 9(3) and (4) of the Aarhus Convention[1].

The Committee considers that neither the EU Courts jurisprudence nor the EU Aarhus Regulation (1367/2006) ensure that environmental NGOs have access to review procedures to challenge acts and omissions by EU institutions and bodies which contravene environmental law.

Based on those findings, the Compliance Committee recommends two possible and alternative means to achieve compliance with the Aarhus Convention:

- Via EU secondary legislation, for instance by amending the EU Aarhus Regulation.
- Via a change in the CJEU jurisprudence, so that the EU Courts assess the legality of EU implementing measures and interpret EU law consistently with Art. 9 of the Convention.

The Aarhus Convention sets the aim but does not prescribe the means: standing criteria are left to the discretion of Parties

- Pursuant to Art. 9(3) of the Convention, the European Union must ensure that members of the public have access to review procedures to challenge acts and omissions by public authorities contravening environmental law.
- However, the Convention leaves discretion to the Parties as to (i) the admissibility conditions ("*where they meet the criteria … laid down in national law*"); (ii) the nature of the review procedure ("*administrative or judicial*") plus, in the case of the European Union, the level at which that review takes place (i.e. before a national court/administrative authority or at EU level); and (iii) the range of acts or omissions subject to review (in contrast with other provisions on access to justice, in particular Art. 9(2) of the Convention).

[1] Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union, adopted by the Compliance Committee on 17 March 2017. Available at: https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html.

We regret that the Aarhus Compliance Committee did not take into account the specificity of the EU legal order and institutional framework when assessing compliance of the Union

- The European Union is the only ‘regional economic integration organization’ having acceded to the Aarhus Convention. Access to justice in the EU cannot be assessed the same way as in a State.
- Parties have been made aware by the Declaration that the EU made upon signature and reiterated upon approval of the Convention that "*[w]ithin the institutional and legal context of the Community […] the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention*.”
- In the EU, the competences of the institutions including the EU Courts are those that the Member States accorded to grant via the Treaties. Both the role of the EU Courts and the rules on *locus standi* are laid down in the EU Treaties.
- The jurisprudence of the CJEU cannot be altered by the Compliance Committee findings. It is for the Union judicature itself to decide on the development of its jurisprudence, within the limits of the Treaties

The conditions under which legal proceedings can be instituted under the EU Treaty are the same for all private parties

- The TFEU has established a complete system of legal remedies and procedures under Art. 263, 267 and 277, to ensure the judicial review of EU acts. Based on the principle of equal treatment, those provisions foresee the <u>same</u> rules on admissibility for <u>all</u> natural and legal persons, whether environmental NGOs, trade federations, regions, companies or citizens.
- Businesses and trade federations also experience difficulties to get standing before EU Courts as soon as the EU act is not directly addressed to them.
    - The ‘individual concern’ test has on many occasions prevented companies and trade federations to bring actions against EU acts of general application[2].
    - Although the authors of the Lisbon Treaty sought to facilitate direct access of private parties to the EU judiciary to bring actions against ‘regulatory acts’, the admissibility conditions remain difficult to meet for businesses and trade associations too. This is not only due to the ‘direct concern’ test but also to recent jurisprudence on the concept of act which “*does not entail implementing measures*”[3].
- Similarly, to environmental NGOs, businesses and trade federations unable to challenge EU acts of general application directly before the EU Courts have no other option than initiating proceedings before national courts against the national measure applying the EU act and plead the invalidity of the EU act[4].

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[2] See for instance, Case T-376/04*, Polyelectrolyte Producers Grp v. Council*; Case T-381/11*, Eurofer v. Commission*; Case T-539/08*, Etimine SA and Ab Etiproducts Oy v. Commission.*

[3] See Case C-456/13 P, *T & L Sugars Ltd and Sidul Açúcares, Unipessoal Lda v European Commission*; Case T-279/11, *T&L* Sugars; Case C-132/12 P, *Stichting Woonpunt.*

[4] See Joined Cases C-191/14 and C-192/14 *Borealis Polyolefine GmbH and OMV Refining & Marketing GmbH v Bundesminister für Land-, und Forstwirtschaft, Umwelt und Wasserwirtschaft*, Case C-295/14 *DOW Benelux BV and Others v Staatssecretaris van Infrastructur en Milieu and Others*, and Joined Cases C-389/14, C-391/14 to C-393/14 *Esso Italiana Srl and Others, Api Raffineria di Ancona SpA, Lucchini in Amministrazione Straordinaria SpA and Dalmine SpA v Comitato nazionale per la gestione della direttiva 2003/87/CE e per il supporto nella gestione delle attività di progetto del protocollo di Kyoto and Others*.

The EU Aarhus Regulation already provides access to dedicated review procedures reserved exclusively to environmental NGOs, in compliance with Art. 9(3) of the Aarhus Convention

- The Aarhus Regulation provides access to both administrative and judicial review procedures, although the Aarhus Convention only requires one <u>or</u> the other:
  - Art. 10 establishes a right to environmental NGOs to request the internal administrative review of EU acts of individual scope adopted under environmental law and omissions to adopt such acts.
  - Art. 12 provides that the NGOs who made the request for internal review may institute proceedings before the EU Court of Justice in accordance with the Treaty, thereby challenging the legality of the EU reply or failure to reply in time and/or due form.
- We do not agree with the Compliance Committee's finding that Art. 10(1) of the Aarhus Regulation fails to correctly implement Art. 9(3) of the Aarhus Convention because it covers only administrative acts.
  - Art. 9(3) of the Aarhus Convention leaves a broad margin of discretion to the Contracting Parties with regard to the procedures for review, including the material scope of such remedies.
  - In this regard, it suffices to compare Art. 9(3) with Art. 9(2) of the Convention, the latter provision being more prescriptive as regards the range of acts that should be subject to review ("*[…] <u>any</u> decision, act or omission <u>subject to the provisions of article 6</u> […]*").
  - The fact that Art. 9(3) of the Aarhus Convention does not contain unconditional and sufficiently precise obligations capable of regulating directly the legal position of individuals is one of the main reasons why the CJEU refused to review the legality of Art. 10(1) of the Aarhus Regulation in light of the Aarhus Convention[5].
  - Expanding the scope of the internal review to acts of general application would indirectly expand the right of NGOs to bring direct actions before the EU Courts, thereby circumventing the conditions of admissibility laid down in the Treaty for a sub-category of natural and legal persons.
- Finally, the Compliance Committee recommends to amend the Aarhus Regulation "*in a way that would leave it clear to the CJEU that that legislation is intended to implement Art 9(3) of the Convention"*. In our view, it is already clear from Recital 18 of the Aarhus Regulation that the latter <u>contributes</u> to implement Article 9(3) of the Aarhus Convention[6].

But as stated by the CJEU in its landmark judgments on access to justice of January 2015[7], the remedies established in the EU Aarhus Regulation are not the only remedies available for ensuring compliance with EU environmental law. Therefore, it cannot be considered that, by adopting the EU Aarhus Regulation, the EU "*intended to implement the obligations […] which derive from Article 9(3) of the Aarhus Convention […]*", such as to enable the Court to carry out a review of legality of the act at issue in light of the international agreement.

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[5] Joined Cases C-401/12 P to C-403/12 P, *Council v Vereniging Mileudefensie and Stichting Stop Luchtverontreiniging*, and Joined Cases C-404/12 P and C-405/12 P, *Council and Commission v Stichting Natuur en Milieu and PAN Europe.*

[6] Recital (18) reads: "*Article 9(3) of the Aarhus Convention provides for […] Provisions on access to justice should be consistent with the Treaty. It is appropriate in this context that this Regulation address only acts and omissions by public authorities*".

[7] See reference above, under footnote 5.

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