

## 1. The EU in violation of the access to justice provisions of the Aarhus Convention

“The EU fails to comply with the Aarhus Convention with regard to access to justice by members of the public because neither the Aarhus Regulation nor the jurisprudence of the ECJ implements or complies with the obligations arising under the Convention”. The UNECE committee which is mandated to discuss and decide on possible violations of the Aarhus Convention, the Aarhus Convention Compliance Committee (“ACCC”), has reached such a conclusion in its draft findings adopted at its fifty-third meeting of 21-24 June 2016.

This outcome constitutes a clear indication that the European Court’s interpretation of the criteria laid down in the Treaty on the Functioning of the EU on access to the EU courts is too strict to meet the requirements under the Convention. What is more, it makes it clear that the regulation which applies the Convention does not provide for an adequate administrative review procedure either and leaves the European Union in non-compliance. The conclusions of the Committee should lead the EU to adopt the necessary steps to ensure that decisions of EU institutions are subject to adequate, effective, fair and equitable review mechanisms in full compliance with the principles and rights laid down in the Convention.

### 1. Interpretation of the individual concern criteria (findings part I)

This case follows a communication submitted by ClientEarth in 2008 (the Communication). ClientEarth alleged that the *locus standi* criteria for individuals and NGOs to challenge decisions of the EU institutions before the European Court of Justice has been interpreted by the European Courts in a way that has precluded any access to justice to private individuals and NGOs. As a result of the so-called “Plaumann test”, which has been maintained by the Court in a continuous line of jurisprudence, no action by an environmental organisation has ever been held admissible by the European courts, with the exception of those cases concerning access to environmental information where the environmental organisation has been the addressee of the administrative decision. As a result, the jurisprudence established by the ECJ was too strict to meet the criteria of the Convention.

Additionally, the Communication alleged that EU legislation implementing the provisions of the Aarhus Convention, namely Regulation (EC) No. 1367/2006 (the Aarhus Regulation)<sup>1</sup>, failed to comply with the Convention on the following grounds:

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<sup>1</sup> Regulation (EC) No. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters to Community institutions and bodies.

- 1) Regulation 1367/2006 failed to grant to individuals or entities other than NGOs, access to internal review mechanisms.
- 2) The scope of the internal review procedure under the Aarhus Regulation was too narrow and limited to administrative acts of individual nature such as certain permits and authorizations, whilst the Convention applies to all acts and omissions.

In 2011 the Committee issued its findings and recommendations on the Part I of the Communication. It held that if the EU Courts continued interpreting the treaties as it had - blocking access to the courts without compensation through adequate administrative remedies - the EU would be in breach of the Convention. In addition, the Committee concluded that, contrary to what the European Commission argued, the system of preliminary ruling failed to comply with the requirements of access to justice in article 9(3) of the Convention. The judicial review in the EU Member States courts could not compensate for the strict jurisprudence of the EU Courts.

Given the strictness of the jurisprudence, the ACCC recommended the EU to take the necessary steps to ensure compliance with the Convention, but refrained from examining whether the Aarhus Regulation or any EU internal remedies met the requirements on access to justice under the Convention to wait for the outcome of the *Stichting Milieu* case<sup>2</sup>, which was pending at that time.

## 2. The Aarhus Regulation and interpretation of last limb of Article 263(4) TFEU (draft findings Part II)

The Aarhus Committee examined the developments of the EU Courts jurisprudence in access to justice since Part I and the EU legislative framework on the application of the provisions of the Aarhus Convention.

As regards the EU Courts jurisprudence, the Committee concluded that there has been no development since Part I that would ensure compliance with the Convention. It further noticed that the EU Courts do not apply to themselves the same requirements they address to national courts, as in the *Slovak Bear* case, to bring procedural rules in compliance with the Convention in ensuring that environmental NGOs have access to courts. The Committee adopted, in particular, the following conclusions:

- 1) The Committee agreed with the findings of the General Court in the *Stichting Milieu* and concluded that Article 10(1) of the Aarhus Regulation fails to correctly implement the Aarhus Convention, since the former limits the concept of “acts” as used in Article 9(3) of

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<sup>2</sup> Joined cases C-401/12 P to C-403/12 P and joined cases C-404/12 P and C-405/12 P.

the Convention, to “administrative acts”, which is defined in Article 2(1) (g) of the Aarhus Regulation as “measure[s] of individual scope”. The General Court’s ruling was however annulled by the Court, which led the Committee to examine other relevant case-law developments.

- 2) The outcome of the *Inuit*<sup>3</sup> and *Microban*<sup>4</sup> cases is unsatisfactory for the purpose of the compliance of the EU Courts jurisprudence with the Convention. First, the ECJ’s interpretation in *Inuit* of “regulatory act” is too narrow in scope to bring the EU into compliance with Article 9(3) of the Convention. Second, the condition of “direct concern”, as explained in *Microban*, “to directly affect the legal situation of the individual” excludes in practice access to justice for NGOs promoting environmental protection. The Committee further noticed that the requirement, under Article 263(4) TFEU, for the regulatory act to not entail any implementing measure, excludes certain legal acts from the judicial review.

As regards the Aarhus Regulation, the Committee held that the Regulation does not correct the flaws of the EU Courts jurisprudence. The Committee concluded, in particular, the following:

- 1) Article 10(1) of the Regulation only entitles NGOs that meet particular criteria to make a request for internal review, whilst Article 9.3 not only includes NGOs, but requires “members of the public” to be given access to administrative or judicial procedures.
- 2) Article 10(1) of the Aarhus Regulation fails to correctly implement Article 9, paragraph 3, of the Convention because it only covers acts of individual scope. The Committee reiterated that whilst Article 9(3) allows Parties a degree of discretion to provide criteria that must be met by members of the public before they have access to justice, it does not allow Parties any discretion as to the acts that may be excluded from implementing laws.
- 3) The combined effect of Article 2(1) (g) and Article 2(1)(f) of the Aarhus Regulation is too narrow and, thus, the Aarhus Regulation fails to implement the requirement set out in Article 9, paragraph 3 of the Aarhus Convention, to provide a right of challenge against acts which contravene laws relating to the environment. According to the Committee, the scope of the latter includes, but is not limited to acts issued under environmental law. On the contrary, this provision also covers acts which have not been adopted under environmental law, insofar as they contravene laws related to the environment under the Convention.
- 4) Article 10(1) of the Regulation is in breach with the Convention in that it only covers acts that have legally binding and external effects.

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3 C-583/11 P - *Inuit Tapiriit Kanatami and Others v Parliament and Council*

4 T-262/10 - *Microban International and Microban (Europe) v Commission*

- 5) The exemption of administrative review provided in Article 2(2) Aarhus Regulation is not consistent with the requirements of the Convention. These exemptions apply to measures taken or omissions by an EU institution or body in its capacity as an administrative review body such as under competition rules, infringement, Ombudsman and OLAF proceedings.
- 6) Finally, the Committee concluded that the EU Courts may still interpret Article 12 of the Aarhus Regulation that refers "to the relevant provisions of the Treaty", that is Article 263(4) TFEU and therefore the individual and direct concern criteria, in a way that would be in compliance with the Convention.

### **3. Recommendations of the Compliance Committee**

In the light of its assessment, the ACCC calls for the Aarhus Regulation to be amended in a way that would leave it clear to the ECJ that legislation is intended to implement Article 9(3) of the Convention. In particular, the EU should correct failures in implementation stemming from the use of words or terms that do not fully correspond to the wording of the Convention. The ACCC further recommended that the ECJ interprets EU law in a way which is consistent with the objective of providing adequate and effective judicial remedies for members of the public to challenge acts which contravene national law relating to the environment.

### **4. Significance of the Compliance Committee findings**

If there are no substantive comments by the parties, the present draft findings and recommendations can be adopted as final in a future meeting of the Committee. Despite the fact that the Committee cannot issue binding decisions, the EU should consider carefully its recommendations and make sure that the commitments that have been made under the Convention are fully implemented. To start with, the EU should adopt the necessary measures to provide legal standing to the public before the European Courts. ECJ's rulings on access to justice in environmental matters must also reflect the Committee's findings.

The practice and interpretation of the Aarhus Convention at EU level has deprived EU citizens of their rights to challenge decisions of EU institutions that breach EU environmental law. Providing NGOs and citizens to have access to justice would enhance democracy and contribute to a better implementation and enforcement of EU environmental law. Both of which are really needed today to ensure the EU is on the right track.

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