

Observations by the European Commission, on behalf of the European Union, to the Information Request by the Aarhus Convention Compliance Committee on the use of domestic remedies in Case ACCC/C/2013/96 on compliance by the European Union in connection with access to information and public participation in the adoption of a list of projects of common interest

I. Introduction

1. These observations refer to the letter by the Aarhus Convention Compliance Committee (ACCC) dated 5 October 2015, asking the European Union (EU) to submit to the ACCC further information on its use of domestic remedies, notably, *"to provide examples of the costs for cases on access to information at all instances before the EU courts"*.
2. Pursuant to Article 17(1) of the Treaty on European Union (TEU), the European Commission replies to this letter on behalf of the EU.

II. Background of the case

3. To recall, on 28 October 2013, the Non-Governmental Organisation (NGO) "European Platform Against Windfarms" (EPAW), represented by Mr Pat Swords, introduced the above-mentioned Communication to the ACCC, which is at the basis of the current information request.
4. EPAW alleged that, in the adoption by the European Commission on 14 October 2013 of a list of 248 "Projects of Common Interest" (PCIs), by way of the so-called "PCI Regulation",¹ the EU would have breached Articles 4 (access to environmental information) and 7 (public participation concerning plans, programmes and policies relating to the environment) of the Aarhus Convention.
5. Projects included in the Union list of PCIs will benefit from accelerated permit granting procedures, better regulatory treatment and, where appropriate, financial support. However, the inclusion of projects in the list is without prejudice to the outcome of relevant environmental assessment and permitting procedures.
6. EPAW maintained, as far as it is relevant for the current information request, that inadequate information would have been provided on the projects.

¹ Commission Delegated Regulation (EU) No 1391/2013 of 14 October 2013 amending Regulation (EU) No 347/2013 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure as regards the Union list of projects of common interest; OJ L 349 of 21.12.2013, p. 28.

7. In its observations of 12 December 2014, the EU noted that the communication overlapped with requests for access to documents under the "Transparency Regulation"² and the "Aarhus Regulation"³, and that the Communicant had not exhausted in that regard the available internal remedy of addressing the General Court.
8. The EU explained that these court proceedings do not unreasonably prolong the remedy, and that they do without any doubt provide an effective and sufficient means of redress.
9. The EU therefore invited the ACCC to declare the communication as inadmissible for failing exhaustion of domestic remedies.
10. The EU only replied to the substance of the communication on a subsidiary basis, concluding that it had correctly disclosed all information concerning the EU list of PCIs, in line with Article 4 of the Aarhus Convention.
11. By a supplementary communication of 21 June 2015, the Communicant, however, observed that considerable expenditure would be required in its view to bring a case before the EU courts. The Communicant noted that, *"paying a lawyer, preparing for and attending a Court hearing in Luxemburg and potentially paying the costs of the other side if he or she loses"* (page 6 of its supplementary communication) would make such cases *"prohibitively expensive"*. The Communicant thus considered that Article 9(4) of the Aarhus Convention and its requirements in relation to a fair, equitable, timely and not prohibitively expensive procedure were not met by the Union.
12. The ACCC therefore asked the Union *"to provide examples of the costs for cases on access to information at all instances before the EU courts"*.

III. General observations

13. In its original communication of 28 October 2013, EPAW did not advance any breach by the Union of Article 9 of the Aarhus Convention. The communication was rather focused upon Articles 4 and 7 of the Aarhus Convention, as recognised also by the ACCC (cf. the "Datasheet" established on this case by the ACCC).
14. The Union argued in its observations that the communication should be declared inadmissible for failing exhaustion of domestic remedies, namely court proceedings before the EU courts. At this stage only, the Communicant maintained that these remedies would be too costly to conform to the Aarhus Convention.

² Regulation (EC) No 1049/2001 of the European Parliament and the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents; OJ L 145, 31.5.2001, p. 43.

³ 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 in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies; OJ L 264, 25.9.2006, p. 13.

15. It should not be open to a Communicant to enlarge the scope of a communication by a supplementary communication on an entirely new argument in the course of the compliance procedure.
16. Therefore, the EU considers EPAW's supplementary communication on court costs before the EU courts as going beyond the current compliance procedure. The Union's observations under Title IV are thus made on a subsidiary basis only, to reply to the ACCC's information request.
17. Furthermore, it is to be noted that the Communicant does not advance that the court costs would be too high for EPAW to bear, and that, for this reason, EPAW was not able to appeal negative replies to its access to documents requests. The Communicant limits its observations to general remarks, but does not provide any evidence regarding its individual capacity to bear the court costs so that the ACCC could assess whether the allegation that the costs are excessive is founded.⁴
18. It is also important to circumscribe the scope of the current observations. The Communicant at pages 7 to 9 of its supplementary communication provides random examples of cases before the EU courts mainly concerning state aid. It is, however, misleading to infer from such cases that costs before EU courts on access to documents were excessive. In any event, the ACCC seems to have already acknowledged this point, as it asked the EU about costs in access to documents cases only. Other typologies of cases as mentioned by the Communicant in its supplementary communication are thus not covered by the present EU observations.
19. In addition, the request by the ACCC can only be understood with regard to access to documents cases where the application of the Aarhus Regulation is at stake, as only those cases can be deemed to fall within the remit of the Aarhus Convention.

IV. Reply to the ACCC's question

20. In order to inform the ACCC about costs before the two EU courts relevant for the purpose of these proceedings⁵, the EU would like to recall a number of principles and elements which can be of assistance to the ACCC.

⁴ As the Court of Justice of the European Union (CJEU) held in its judgment of 11 April 2013 in Case C-260/11, *Edwards*, ECLI:EU:C:2013:221, the assessment whether costs are "*prohibitively expensive*" within the meaning of Article 9(4) of the Aarhus Convention, as implemented into EU law, needs to be carried out both on the basis of an objective and an individual assessment of the claimant's financial situation; see in particular paragraph 40.

⁵ These are the General Court and the CJEU. No references will thus be made to the rules of procedure of the Civil Service Tribunal. In case the ACCC wishes to consult such rules, they can be found under www.curia.europa.eu.

21. To begin with, access to the EU Courts is in principle free of charge, see Article 143 of the CJEU's Rules of Procedure⁶ (hereafter RP) and Article 139 of the General Court's RP⁷.
22. However, parties have to be represented by an agent or a lawyer (see Article 119 of the RP of the CJEU and Article 51 of the RP of the General Court). The choice of the lawyer is within the discretion of the parties. The fees related to the contractual relation between party and lawyer are not regulated and are not a matter of Union law.
23. Both the CJEU and the General Court provide, for a party to the main proceedings who is wholly or in part unable to meet the costs of the proceedings before the Court, for the possibility to apply at any time for legal aid, including before lodging the application (see Article 115 *et sequitur* of the RP of the CJEU and Article 146 *et sequitur* of the RP of the General Court).
24. Pursuant to Article 138(1) of the RP of the CJEU (Article 184 for appeals for which Articles 137 to 146 apply *mutatis mutandis*) concerning general rules as to allocation of costs, "[t]he unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party's pleadings". A similar provision is contained in Article 134 of the RP of the GC. With regard to EU institutions, this implies that, when the applicant succeeds, the institutions have to bear his/her costs.
25. Article 144 of the RP of the CJEU and Article 140 of the RP of the General Court provide that are "*recoverable costs*" the expenses necessarily incurred by the parties for the purpose of the proceedings⁸, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers, and sums payable to experts. Such recoverable costs are in principle subject to an agreement between parties. Only where there is a dispute concerning the costs to be recovered, on application by the party concerned and after hearing the opposite party and the advocate general, the CJEU makes an order concerning the costs (see Article 145 of the RP of the CJEU; an equivalent procedure is provided by Article 170 *et sequitur* of the RP of the GC).
26. It follows from these provisions that recoverable costs are limited, firstly, to those incurred for the purpose of the proceedings before the General Court or the CJEU and, secondly, to those which were necessary for that purpose (see orders of 24 January 2002 in Case T-38/95 DEP, *Groupe Origny v. Commission* [2002] ECR 11-217, paragraph 28,

⁶ Consolidated version of 25 September 2012, OJ L 265 of 29.9.2012, as amended on 18 June 2013, OJ L 173 of 26.6.2013.

⁷ OJ L 105 of 23.4.2015. The General Court may set specific fees for obtaining copies of documents, pursuant to Article 37 of the RP of the General Court.

⁸ This excludes the costs incurred in the administrative proceedings (see, for instance, Case C-326/05P, paragraph 53). In cases before EU courts on access to documents, regulated under the Aarhus and the Transparency Regulations, the arguments developed before EU courts largely recoup those advanced in administrative proceedings. This element is therefore to be taken into account when assessing the "necessary costs".

and of 6 March 2003 in Joined Cases T-226/00 DEP and T-227/00 DEP, *Nan Ya Plastics and Far Eastern Textiles v Council* [2003] ECR 11-685, paragraph 33).

27. According to established case-law, and as a general rule, the scale of costs is assessed freely, taking into account the subject-matter and nature of the dispute, its importance in terms of Union law and the difficulties of the case, the extent of work which the proceedings before the court have caused to the agents or advisers acting in the case, and the economic interests which the dispute represented for the parties (see e.g. order of 8 November 2001 in Case T-65/96 DEP, *Kish Glass v. Commission*, ECLI:EU:T:2001:261, paragraph 19).
28. In accordance with case-law, not all expenses actually incurred are "*recoverable costs*". Although the remuneration of a single lawyer may be regarded as falling within the concept of "*expenses necessarily incurred*", case-law suggests that "*the primary consideration is none the less the total number of hours of work which may appear to be objectively necessary for the purpose of the proceedings before the Court, irrespective of the number of lawyers who may have provided the services in question*" (see e.g. order in Case T-65/96 DEP, *supra*, paragraph 28).
29. With regard to the recoverable costs of the institution's agents, case-law indicates that only the real costs incurred by the institution should be recoverable (see order of the General Court in Case T-266/08P DEP, *Kerstens v. Commission*, ECLI:EU:T:2012:146, paragraph 22). The Commission's practice is to claim travel and accommodation expenses only in case a hearing is held (which totals a range between 100 and 250 € per agent representing the institution, depending on accommodation and travel costs).
30. In any event, as the Communicant also rightly recognizes, the issue of costs is confidential.
31. Finally, with regard to access to documents cases where the Aarhus Regulation is also at stake, the Commission would like to note that in four out of the six cases identified by EPAW in its supplementary communication, the issue of costs is not yet settled, as they are still under appeal (see Case T-476/12, *Saint Gobain*, under appeal in Case C-60/15P; T-402/12, *Carl Schlyter*, under appeal in Case C-331/15P; T-545/11, *Stichting Greenpeace Nederland and Pan Europe*, under appeal in Case C-673/13P).
32. In those two cases where a final judgment of the CJEU was already given, the situation is as follows: In Case T-111/11, *Client Earth*, appealed in Case C-612/13P, the issue of costs is not yet settled. For Case T-29/08, *LPN/Commission*, and appeals in Case C-514/11P and C-605/11P, despite the fact that the Commission was successful, it decided not to claim costs incurred by the Commission's agents (amounting to hotel costs for two nights and two train tickets for each of its agents).

V. Conclusion

33. In the EU's view, the supplementary communication should be deemed inadmissible, as it extends the scope of the original communication.
34. In any event, the Communicant's supplementary claims regarding the cost of procedures on access to documents before the EU courts are unfounded. The costs related to access to documents cases in environmental matters before the EU courts are clearly not "*prohibitive*".
35. Therefore, the EU respectfully reiterates the fact that the Communicant did not exhaust the internal remedy provided under EU law, namely to address the EU courts. For this reason, the ACCC should consider EPAW's original communication indeed as inadmissible.
36. In view of these considerations, the EU would ask the ACCC to dismiss the supplementary communication as inadmissible, or, on a subsidiary basis, to reject it as unfounded.