

## **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<sup>1</sup>**

### **I. Introduction**

1. On 17 December 2014, the secretariat of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) received a communication from an environmental non-governmental-organization, Justice and Environment (the communicant). The communication concerns compliance by the European Union with the provisions of the Convention in connection with its alleged failure to fully transpose article 9 of the Convention into European Union law.
2. Specifically, the communicant alleges non-compliance of the Party concerned with three provisions of the Convention, namely article 2, paragraphs 1, 2, 3, 4 and 5, article 3, paragraphs 1, 2, 3, 4, 8 and 9 and article 9, paragraphs 3 and 4.
3. On 20 March 2015, the United Kingdom of Great Britain and Northern Ireland provided comments on the issue of the preliminary admissibility of the communication as an observer.
4. The Compliance Committee, having considered the admissibility of the communication at its forty-eighth meeting (Geneva, 24-27 March 2015), determined it to be admissible on a preliminary basis in accordance with paragraph 20 of the annex to decision I/7 of the Meeting of the Parties to the Convention. Pursuant to paragraph 22 of the annex to decision I/7, the communication was forwarded to the Party concerned on 28 June 2015 for its response.
5. On 25 November 2015, the United Kingdom submitted a statement concerning the communication as an observer.
6. On 26 November 2015, the Party concerned provided its response to the communication.
7. On 24 February 2016, the communicant provided comments on the Party concerned's response to the communication and on the United Kingdom's observer statement.
8. On 14 June 2016, the secretariat, at the request of the Committee, wrote to the Party concerned and communicant seeking their views on whether, given the substance of the communication, they would consider it appropriate for the Committee to proceed to commence its deliberations on the substance of the communication without holding a hearing.
9. On 20 June 2016, the Party concerned, communicant and United Kingdom as observer each stated that they agreed to the Committee's proposal to proceed to commence its deliberations without holding a hearing.
10. At its fifty-third meeting (Geneva, 21-24 June 2016), after taking into account the parties' views of 20 June 2016, the Committee confirmed its earlier proposal to commence its deliberations without holding a hearing and requested the secretariat to write to the

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<sup>1</sup> This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place.

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parties to inform them of the deadline by which they should submit any final written submissions.

11. On 27 July 2016, the secretariat wrote to the Party concerned and communicant inviting them to submit any final written submissions by 12 September 2016.

12. The Party concerned and communicant provided their final written submissions on 2 and 16 September 2016 respectively.

13. The Committee completed its draft findings through its electronic decision-making procedure on 20 March 2017, and in accordance with paragraph 34 of the annex to decision I/7, the draft findings were then forwarded for comments to the Party concerned and to the communicant on 21 March 2017. Both were invited to provide comments by 18 April 2017.

14. The communicant provided comments on the draft findings on 25 April 2017. No comments were received from the Party concerned.

15. At its virtual meeting on 18 May 2017, the Committee considered the communicant's comments on the draft findings in closed session. After taking into account the comments received, it considered that no changes to its findings were necessary.

16. The Committee adopted its findings through its electronic decision-making procedure on 24 May 2017 and agreed that they should be published as a formal pre-session document to its fifty-seventh meeting. It requested the secretariat to send the findings to the Party concerned and the communicant.

## **II. Summary of facts, evidence and issues<sup>2</sup>**

### **A. Facts**

17. In 2003, the European Community enacted legislation in order to implement the Aarhus Convention, *inter alia* with respect to access to environmental information and public participation in decision-making<sup>3</sup>

18. Also in 2003, the Commission adopted a Proposal for a directive of the European Parliament and of the Council 24 October 2003 on access to justice in environmental matters.<sup>4</sup> In 2004, the European Parliament and the European Economic and Social Committee issued their opinions on the Proposal in which they made suggestions intended to make the legal text more effective and to better implement the Aarhus Convention.<sup>5</sup>

19. In 2005, the European Community ratified the Aarhus Convention by Council Decision 2005/370/EC, without a general access to justice instrument in place, but acknowledging the primacy of the international law in the system of the European Union law. According to a roadmap issued by the Commission, the Council had its last meeting dealing with the Proposal for a directive on access to justice in 2005.<sup>6</sup>

20. In 2006, the European Union issued Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access

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<sup>2</sup> This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

<sup>3</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ L41, 14.2.2003, p. 26) and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156, 25.6.2003, p. 17)

<sup>4</sup> COM(2003) 624 final -2003/246/COD, issued 24 October 2003.

<sup>5</sup> Communication at page 3.

<sup>6</sup> Communication at page 3.

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to Justice in Environmental Matters to Community institutions and bodies (the Aarhus Regulation).<sup>7</sup>

21. Between 2006 and 2012, no significant official steps were taken with respect to the access to justice proposal. During this period, however, the Commission launched two major comparative country studies on access to justice in the member States.<sup>8</sup>

22. In 2012, a Commission communication on “Improving the delivery of the benefits from EU environment measures: building confidence through better knowledge and responsiveness” stated with respect to access to justice:

“A 2003 Commission proposal aimed at facilitating wider access has not progressed but the wider context has changed, in particular the Court of Justice has confirmed recently that national courts must interpret access to justice rules in a way which is compliant with the Aarhus Convention. National courts and economic as well as environmental interests face uncertainty in addressing this challenge.”<sup>9</sup>

23. Also in 2012, the European Parliament adopted a Resolution on the review of the 6<sup>th</sup> Environment Action Programme. Paragraph 68 of the Resolution states that the European Parliament:

“Underlines that the 7th EAP should provide for the full implementation of the Aarhus Convention, in particular regarding access to justice; stresses, in this connection, the urgent need to adopt the directive on access to justice; calls on the Council to respect its obligations resulting from the Aarhus Convention and to adopt a common position on the corresponding Commission proposal before the end of 2012;”<sup>10</sup>

24. In 2013, the European Parliament adopted a Resolution on improving the delivery of benefits from EU environment measures. In paragraphs 29 of the Resolution, the European Parliament:

“Regrets that the procedure for adopting the proposal for a directive on public access to justice in environmental matters has been halted at first reading; calls, therefore, on the co-legislators to reconsider their positions with a view to breaking the deadlock;”<sup>11</sup>

25. Also in 2013, the European Commission issued an Initiative on access to justice in environmental matters at member State level in the field of EU environmental policy that was “an indicative roadmap of the legislative procedure without prejudging the final decision of the Commission on whether this initiative will be pursued or on its final content and structure.”<sup>12</sup>

26. On 21 May 2014, the Proposal for a directive on access to justice was officially withdrawn as obsolete.<sup>13</sup>

27. On 21 July 2016, the Commission published a roadmap concerning a Communication on access to justice at national level related to measures implementing EU environmental law.<sup>14</sup> The roadmap concluded that an interpretative Communication would be based on existing provisions of EU secondary law, international obligations stemming

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<sup>7</sup> Communication at page 3.

<sup>8</sup> Communication at page 3.

<sup>9</sup> Communication at pages 3-4.

<sup>10</sup> European Parliament resolution of 20 April 2012 on the review of the 6th Environment Action Programme and the setting of priorities for the 7th Environment Action Programme – A better environment for a better life (2011/2194(INI)).

<sup>11</sup> European Parliament resolution of 12 March 2013 on improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness (2012/2104(INI)).

<sup>12</sup> Communication at page 4.

<sup>13</sup> Communication at page 4.

<sup>14</sup> See annex 2 to the communicant’s final written submissions dated 16 September 2016.

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from the Aarhus Convention and caselaw of the Court of Justice of the European Union (CJEU), and that such a Communication would be less burdensome and intrusive for member States in comparison to a new legal instrument.

## **B. Substantive issues**

28. The communication alleges a general failure by the Party concerned to implement, or to implement correctly, the provisions of articles 2, 3 and 9 of the Convention, through its failure to adopt general legislation to implement article 9 of the Convention.

29. The communicant claims that several EU bodies have acknowledged the necessity of a directive for the full transposition of the Convention, but eight years after the last substantial steps were taken, no deadline has been determined for adopting Union level legislation, nor even a definite declaration of the start of a procedure that would lead to such legislation.<sup>15</sup>

30. The Party concerned denies the communicant's allegations. It submits that it fulfils the obligations under articles 2, 3 and 9 of the Convention, and under article 9, paragraph 3 in particular, and requests the Committee to dismiss the communication as unfounded.

31. The parties' submissions are set out in more detail below.

### ***Definitions (article 2)***

32. The communicant alleges that without having identical or at least comparable definitions across the member States, there is no hope for a coherent EU-wide implementation of the Convention. The communicant refers to findings in studies, commissioned by the European Commission and conducted by Milieu Consult (the Milieu report) and Jan Darpö (the Darpö report),<sup>16</sup> that show that the terms "public authority", "environmental decision", "the public" and "the public concerned" are not consistently applied in EU member States' national environmental law with respect to access to justice. In many cases, these terms are poorly defined even within one country. The communicant further submits that the special legal status of environmental NGOs set out in the Convention's definition of "the public concerned" is not ensured in the majority of European Union member States.<sup>17</sup>

33. With respect to the definition of "public authorities" in article 2, paragraph 2, the Party concerned recalls that, as outlined in pages 46-47 of the Implementation Guide, the Convention recognizes under article 2, paragraph 2 (b) that what is considered public function under national law for the purpose of that definition may differ from country to country. Therefore, it cannot be claimed that the Convention requires the same definition of public authorities throughout the EU.<sup>18</sup>

34. In addition, with respect to the definition of "public authorities" in article 2, paragraph 2(c) of the Convention, the Party concerned refers to the CJEU's judgement in Case C-279/12, *Fish Legal*, which it submits clarified the notion of public authorities with regard to article 2, paragraph 2 (b) of Directive 2003/4 (which corresponds to article 2, paragraph 2 (c) of the Convention). The Party concerned submits that the CJEU, by referring to the Aarhus Convention, ensured the interpretation of the Directive in light of the Convention. As a result of that ruling, a common and uniform interpretation of what

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<sup>15</sup> Communication at page 4.

<sup>16</sup> Synthesis Report of the Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union, <http://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf>

<sup>17</sup> Communication at page 10.

<sup>18</sup> Response from the Party concerned at pages 12-13.

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constitutes “public administrative functions” is ensured throughout the EU because, as recalled above, the CJEU preliminary rulings do ensure uniform application of EU law.<sup>19</sup>

35. With regard to the definitions of “public” and “public concerned”, the Party concerned submits that these do not have to be transposed into EU or member States’ law as such. This is because these definitions are to be read together with the substantive provisions of article 9, paragraphs 1, 2, 3 and 4, of the Convention, which imply that subsequent measures have to be adopted within the national framework of the Parties. Rather, they can be defined when enacting the substantive requirements of article 9, paragraphs 1 to 3, of the Convention. Thus, the Party concerned submits that the lack of a common definition across the different member States is not *per se* a violation of article 2 of the Convention. The same applies to the definition of environmental decision-making, as article 9, paragraph 2, refers to “provisions of national law relating to the environment”.<sup>20</sup>

### ***General provisions (article 3)***

36. The communicant alleges that, formally speaking, the most obvious failure of the EU as a Party to the Convention is that it has failed to take any legislative or regulatory and almost any other measures to achieve compatibility with the Convention’s provisions on access to justice. Given this legal background, there are no proper enforcement measures either nor a clear, transparent and consistent framework to implement the Convention.<sup>21</sup>

37. Ensuing from this, the communicant submits that capacity building activities, such as ensuring assistance and guidance to the public in seeking access to justice and also promoting education in substantial and procedural aspects of environmental protection on the European level have not taken place either. Similarly, the EU as a Party cannot contend that it has supported EU-wide the appropriate recognition and support of associations and other organisations or groups working in the field of environmental protection. As is evident from the two reports on access to justice commissioned by the Party concerned,<sup>22</sup> in many member States there are serious problems with the possibilities of the NGOs to gain access to legal remedies in environmental cases.<sup>23</sup>

38. The communicant notes that it is well-documented that thousands of environmental activists in the world are penalized, persecuted or harassed for their involvement in environmentally significant development projects. While the communicant concedes that these cases do not predominantly occur in the territory of the EU, the region is not totally exempt from them - yet, there are no attempts to develop a EU-wide net of protection. Similarly, as the literature frequently points out, even the plans of the EU in connection with future regulations on access to justice in environmental matters totally lack guarantees against discrimination according to citizenship, nationality or domicile.<sup>24</sup>

39. The Party concerned submits that, as indicated at pages 60-61 of the Implementation Guide, article 3 of the Convention requires “parties to develop implementing legislation, executive regulations and other measures to establish and maintain a clear, transparent and consistent framework”, and this is indeed the case in the Party concerned.<sup>25</sup>

40. In addition, the Party concerned alleges, where shortcomings in the system of access to courts in individual member States are brought to the attention of the Commission (which according to article 17 of the Treaty on European Union (TEU) acts as a guardian of the Treaty), it can use infringement proceedings pursuant to article 258 of the Treaty on the

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<sup>19</sup> Response from the Party concerned at page 13.

<sup>20</sup> Response from the Party concerned at page 13.

<sup>21</sup> Communication at page 10.

<sup>22</sup> See para. 32 above.

<sup>23</sup> Communication at page 10.

<sup>24</sup> Communication at page 10.

<sup>25</sup> Response to the Party concerned at page 14.

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Functioning of the European Union (TFEU) to ensure the conformity of member States' legislation with secondary law. In this regard, the Party cites as examples Case C-137/14, *Commission v Germany*, and C-530/11, *Commission v United Kingdom*, concerning article 9, paragraph 4, of the Convention and submits that these cases also illustrate the role that infringement proceedings play in securing the objectives of the Convention.<sup>26</sup>

***Access to justice (article 9)***

(i) *The necessity of a legal framework to ensure access to justice in EU member States*

41. The communicant alleges that, without a properly detailed EU-level access to justice directive, substantial features of access to justice, such as a minimum level of standing for individuals and environmental associations, an adequate scope of judicial review, not prohibitively high costs and effective remedies, including avoidance of delays and backlogs and injunctive relief, cannot be uniformly ensured.<sup>27</sup>

42. In the view of the communicant, a binding EU-level legal act is necessary since, in accordance with earlier Committee case law, the EU has the responsibility to ensure the coherent application of the Convention throughout the EU and to monitor that its member States implement EU law properly.

43. The communicant adds that, without a EU-level access to justice tool, members of the public and organizations in the member States do not have direct access to bring infringements at the national level of EU environmental law to the EU legal fora. It submits that this weakens the legal situation of those who wish to raise their voices for the environment across the EU, contrary to the original goals of the EU's accession to the Convention.<sup>28</sup>

44. The communicant submits that in the declaration attached to its instrument of ratification, the Party concerned acknowledged that the EU level implementation of the third pillar was still missing, but expressed its view that until such legislative action could be taken, the implementation of article 9, paragraph 3, at member State level would serve to perform the EU's obligations ensuing from the Convention.<sup>29</sup>

45. The communicant concedes that it is for a Party to determine the level at which it legislates to implement the Convention's requirements and from a formalistic standpoint, regulating access to justice at the member State level may be acceptable. Nevertheless, if one has more aspirations than just formally meeting the requirements of the Convention and aims at ensuring effective judicial protection, then one cannot be satisfied with the current system but must require that the Party concerned legislate to implement the Convention's requirements.<sup>30</sup>

46. The communicant submits that the Milieu and Darpö reports show that there are many insufficiencies in the implementation of article 9 across the member States and a lack of coherence between them in respect to the laws and practices concerning access to justice.<sup>31</sup> It submits that this can also be concluded from the cases of CJEU and the findings of the Compliance Committee itself.<sup>32</sup>

47. The communicant contends that, for those applicants who can have access to justice, the remedies may be far from adequate and effective, primarily due to the Party concerned's failure to implement the relevant requirements of the Convention. It submits

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<sup>26</sup> Response to the Party concerned at page 14.

<sup>27</sup> Communication at page 6.

<sup>28</sup> Communication at page 5.

<sup>29</sup> Communication at page 4.

<sup>30</sup> Final written submissions from the communicant dated 16 September 2016, para. 5.

<sup>31</sup> Communication at page 4 and 11.

<sup>32</sup> Communication at page 4.

that in most EU member States, judicial remedies have no suspensive effect on the implementation of the administrative decisions in environmental matters and injunctive relief is more an exception than a rule in courts' practice. Fairness and equity are not included in the special requirements of legal remedies in environmental matters, because of the overall value neutrality of the European environmental procedural and public participation laws.

48. The communicant further submits that timeliness is also a major concern in the court proceedings in many member States. In addition, the costs of legal remedies, including court fees, legal fees and expert fees, coupled with the widely accepted loser pays principle, prevent many concerned members of the public, groups and organisations from starting cases against polluters or administrative bodies which neglect their responsibilities.<sup>33</sup>

49. At the outset, the Party concerned contests the premise that, under article 9, paragraph 3, of the Convention, there is a positive obligation to adopt legislation in the field of article 9, paragraph 3. The provision imposes an obligation on the Parties to “ensure” access to administrative or judicial procedures, but they are free to decide on the means to ensure compliance with that obligation. Legislation could be a possible means but it is not compulsory.<sup>34</sup> The Party concerned submits moreover that the communicant has failed to demonstrate that the European Union system as a whole does not “ensure” such access.<sup>35</sup>

50. The Party concerned submits that, according to its declaration made upon ratification, EU member States are responsible for the performance of the obligations stemming from article 9, paragraph 3 of the Convention unless and until the EU adopts provisions of EU law covering the implementation of those obligations.<sup>36</sup> It submits that, contrary to the communicant's claim that the EU is under an obligation to implement the Convention by additional legislation, the EU has the possibility, but not an obligation to further implement article 9, paragraph 3 of the Convention. This is corroborated by the wording of the Party concerned's declaration upon ratification, i.e. “unless” the Party concerned exercises its powers under the EU Treaty.<sup>37</sup>

51. The Party concerned emphasizes that the Convention is a “mixed” agreement for the EU. This means that the Convention is implemented at both EU and member State level:<sup>38</sup> First, the EU aligned its legal framework to article 9 of the Convention with regard to its institutions by adopting Regulation (EC) No 1367/2006 (Aarhus Regulation).<sup>39</sup> The Party concerned notes that this point is not disputed by the communicant, as its communication refers to a “lack of transposition other than the internal procedures of the Union”.<sup>40</sup> Second, as an expression of the fact that the EU is an international organization founded on the rule of law and democracy (article 2 TEU), the member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law under article 19 TEU.<sup>41</sup>

52. The Party concerned further submits that given that the Convention is part of EU law, the EU and its Member States have a specific obligation under article 216(2) TFEU to comply with their international obligations, and this includes the Convention.<sup>42</sup> Therefore,

<sup>33</sup> Communication at page 11.

<sup>34</sup> Response of the Party concerned at page 4.

<sup>35</sup> Response of the Party concerned at page 4.

<sup>36</sup> Final written submissions from the Party concerned dated 2 September 2016, para. 14.

<sup>37</sup> Ibid., para. 17.

<sup>38</sup> Response of the Party concerned at page 4.

<sup>39</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 in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies

<sup>40</sup> Response of the Party concerned at page 4.

<sup>41</sup> Response of the Party concerned at page 4.

<sup>42</sup> Response of the Party concerned at page 5.

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in the absence of EU legislation, which it submits is not required by article 9, paragraph 3, of the Convention, it is incumbent upon member States to fulfil the requirements of article 9, paragraphs 3 and 4, of the Convention. The Party concerned submits that the fact that the EU did not adopt specific legislation to fulfil the requirements of article 9, paragraph 3, of the Convention (with the exception of the Aarhus Regulation applying to EU institutions) cannot make the EU internationally responsible. For this reason alone, the Party concerned considers that the communication is unfounded.<sup>43</sup>

53. The Party concerned states, when assessing whether member States ensure access to justice, it has to be borne in mind that, under article 9, paragraph 3, of the Convention, Parties have the obligation to ensure access to *either* administrative or judicial procedures for members of the public, where they meet the criteria, if any, laid down in their national law.<sup>44</sup> In this respect, the Darpö report, relied upon by the communicant, recognizes that “[t]here is a basic uncertainty and also opposing opinions about the requirements of Article 9.3 – what measures are needed, what kind of decisions are covered, what kind of body (administrative or judicial) should undertake the review”.<sup>45</sup> In addition, the Party concerned alleges that the Darpö report focuses on the judicial review of administrative decisions (see page 11, last paragraph), so that its findings cannot provide evidence as to the compliance of the EU with article 9, paragraph 3, of the Convention with regard to administrative procedures.<sup>46</sup> Rather, the Darpö report can be understood in the sense that, with regard to administrative proceedings in the member States, the EU complies with article 9, paragraph 3, of the Convention.

54. The Party concerned contends that the Darpö report (page 44) recognizes that there are lower barriers to access to justice in systems which include an intermediate step with administrative appeal and that, because of the nature of the review (full case review, suspensive effect of the appeal, reformatory, effective and timely procedures and low costs for parties), these procedures meet the requirements of article 9, paragraph 3, of the Convention.<sup>47</sup>

55. The Party concerned submits that, as the communication refers exclusively to access to courts as the sole means to comply with article 9, paragraph 3, of the Convention, it disregards the letter of that provision which gives a choice to the Parties between judicial or administrative review. Furthermore, it fails to provide any evidence that access to administrative review procedures is lacking in the EU. Thus, the Party concerned submits that the communication should be dismissed as unfounded. The Party concerned nevertheless provides further observations on the communicant’s submissions concerning access to justice before courts as a subsidiary argument (see below).<sup>48</sup>

(ii) *Implementation via case law or other means*

56. The communicant alleges that, as the official explanation attached by the Commission to the 2003 Proposal established, the signature of the Convention imposed on the Party concerned the obligation to align its legislation as a condition of adhering to the Convention. The communicant further submits that the Party concerned will only be able to fulfil these obligations if it is able to grant the required access to justice in a harmonized way throughout the EU.<sup>49</sup>

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<sup>43</sup> Response of the Party concerned at page 5.

<sup>44</sup> Response of the Party concerned at page 5.

<sup>45</sup> Response of the Party concerned at page 5. Reference to section 3.1.2 on page 25 of the Darpö report.

<sup>46</sup> Response of the Party concerned at page 5.

<sup>47</sup> Response of the Party concerned at page 6.

<sup>48</sup> Response of the Party concerned at page 6.

<sup>49</sup> Communication at page 5.

57. The communicant contends that the latest relevant EU documents, such as the 7<sup>th</sup> EAP and the 2013 Initiative,<sup>50</sup> foresee a fuller regime of access to justice in environmental matters on the EU level not earlier than 2020. In the meantime, such documents offer court practice at the EU and national level as the major tools of implementation and raise non-binding, amicable alternative dispute resolution as a possible tool of implementation for the future.<sup>51</sup>

58. The communicant submits, however, that court practice that depends on the sporadic cases that are brought to the courts and which has no possibility to draw a system of rules for a certain field of law would not qualify as implementation of the responsibility of transposing an international legal requirement into the tissue of the law of a Party to a convention. The relationship between the court practice and the basic laws is rather the opposite: a uniform or at least harmonized set of rules of environmental access to justice would be necessary to bring about predictable legal interpretation at the courts and to make possible the development of a more systematic European level case law.<sup>52</sup>

59. The communicant further alleges that non-binding, amicable alternative dispute resolution tools such as brochures of best practices, internet networks or capacity building programs as planned in several relevant EU documents cannot be accepted as a proper transposition of an international law into the legal system of a Party either.<sup>53</sup>

60. The communicant moreover submits that the court practice is not general enough (e.g. it is mostly restricted to access to justice in EIA cases) and still holds (and may hold in the future, too) some views that are not fully in harmony with the Convention. Furthermore, although they contain progressive elements, the CJEU's decisions concerning standing are still based on the restrictive concept that only those with some kind of direct interest in the outcome of the case are entitled to bring challenges against decisions, acts or omissions of public authorities. In that regard, the communicant refers to the EU's 2013 consultation paper issued on access to justice in environmental matters: "this creates an obstacle to challenges related to environment law because it can often be difficult to demonstrate that the decision, act or omission sought to be challenged directly touches the plaintiff. The Aarhus Convention tries to overcome this through provisions on standing that are set out in article 9, paragraph 2, and paragraph 3. These give a particular recognition of the role of environmental associations in environmental protection."<sup>54</sup>

61. Regarding access to courts in the EU system, the Party concerned submits that, in some sectors, the European Union has adopted legislation applicable to member States which contains express provisions on access to justice before courts and administrative bodies for members of the public (NGOs and individuals, under certain conditions), within the meaning of the Convention. Some of these express provisions are relevant to article 9, paragraph 4, in combination with paragraphs 1 and 2 of the Convention. Others are relevant to article 9, paragraph 4, in combination with paragraph 3.<sup>55</sup>

62. The Party concerned notes with reference to article 9, paragraphs 1 and 4 of the Convention, article 6 of Directive 2003/4/EC<sup>56</sup> provides for access to justice. Furthermore, with reference to article 9, paragraphs 2 and 4, of the Convention, article 11 of Directive 2011/92/EU<sup>57</sup> ensures recourse to national courts of administrative bodies of member States

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<sup>50</sup> See paras. 23 and 25 above.

<sup>51</sup> Communication at page 5.

<sup>52</sup> Communication at page 5.

<sup>53</sup> Communication at page 5.

<sup>54</sup> Communication at page 6. Further details concerning the Party concerned's 2013 consultation process are available at [http://ec.europa.eu/environment/consultations/access\\_justice\\_en.htm](http://ec.europa.eu/environment/consultations/access_justice_en.htm)

<sup>55</sup> Response of the Party concerned at pages 6-7.

<sup>56</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC.

<sup>57</sup> Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment.

with regard to decisions regarding environmental impact assessments covered by it, as does article 25 of Directive 2010/75/EU.<sup>58</sup>

63. The Party concerned submits that with reference to article 9, paragraphs 3 and 4, of the Convention, provisions on access to justice are further contained in a number of sector-specific legislation, e.g. in article 13 of Directive 2004/35/CE<sup>59</sup> and article 23 of Directive 2012/18/EU (Seveso-III Directive).<sup>60</sup>

64. In addition, the Party concerned alleges that, contrary to the communicant's claims, the importance of the CJEU's caselaw in developing and ensuring the uniform application of EU law is to be underlined. It submits that, in this regard, the CJEU has clarified the notion of public authority with regard to Directive 2003/4;<sup>61</sup> recognized the importance of standing for NGOs to ensure the application of EU legislation and the conditions of standing;<sup>62</sup> clarified the notion of "member of the public" including neighbours;<sup>63</sup> clarified the scope of review;<sup>64</sup> and clarified the concept of "not prohibitively expensive" judicial proceedings.<sup>65</sup>

65. The Party concerned submits that even where EU legislation governing certain sectors (waste, water, air, nature, chemicals), does not contain specific provisions for access to national courts by members of the public, article 19, paragraph 1, TEU states that "Member States shall provide remedies sufficient to ensure effective judicial protection in the fields covered by Union law". This is the "principle of effective judicial protection".<sup>66</sup>

66. The Party concerned contends that, in accordance with CJEU case-law, "[i]n the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law [...], since the Member States are responsible for ensuring that those rights are effectively protected in each case"<sup>67</sup> and "[i]n that regard, [...] the obligations [...] which derive from Article 9(3) of the Aarhus Convention with respect to national administrative or judicial procedures [...], as EU law now stands, fall primarily within the scope of Member State law".<sup>68</sup>

67. The Party concerned points out that the CJEU has confirmed that, where public health is at stake, if a failure to observe measures required by the directives regarding air quality and drinking water could endanger human health, the persons concerned must be in a position to rely on the mandatory rules included in those directives.<sup>69</sup> In this respect, rights conferred by EU law to the persons concerned have to be judicially protected in

<sup>58</sup> Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), see response of the Party concerned at page 7.

<sup>59</sup> Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.

<sup>60</sup> Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC, see response of the Party concerned at page 7.

<sup>61</sup> Case C-279/12, *Fish Legal*.

<sup>62</sup> Cases C-240/09, *Lesoochránárske zoskupenie* ("Slovak Bears") and C-263/08C, *Djurgården-Lilla*.

<sup>63</sup> Case C-570/13, *Gruber*.

<sup>64</sup> Cases C-115/09, *Trianel*, C-72/12, *Altrip*, and C-137/14, *Commission v Germany*.

<sup>65</sup> Cases C-206-11, *Köck* and C-530/11, *Commission v United Kingdom*. See Response of the Party concerned at page 8.

<sup>66</sup> See also Case C-583/11P, *Inuit*, para. 101. See Response of the Party concerned at page 8.

<sup>67</sup> Case C-240/09, *Slovak Bears*, para. 47.

<sup>68</sup> Judgment in Joined Cases C-401/12 P to C-403/12 P, para. 60. See Response of the Party concerned at pages 8-9.

<sup>69</sup> See Cases C-361/88, *Commission v Germany*, C-58/89, *Commission v Germany*, Case C-237/07, *Janecek*, and Case C-404/13, *Client Earth*, See Response of the Party concerned at page 9.

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accordance with article 19 TEU and article 47 of the Charter of Fundamental Rights of the European Union.<sup>70</sup>

68. The Party concerned notes that in Case C-240/09, *Slovak Bears*, the CJEU confirmed that if the effective protection of EU environmental law is not to be undermined, it is inconceivable that article 9, paragraph 3, of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law. Therefore, it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of article 9, paragraph 3, of the Convention and the objective of effective judicial protection of the rights conferred by EU law.<sup>71</sup>

69. The Party concerned submits that the rationale expressed in the above judgment would also apply for other environmental law sectors where EU legislation is at stake (waste and chemicals) and where substantive rights can be said to be conferred by EU law.<sup>72</sup>

70. The Party concerned further opposes the communicant's arguments specifically as regards the CJEU case law on standing and its alleged failure to ensure a coherent system of interpretation. The Party concerned underlines that both paragraphs 2 and 3 of article 9 of the Convention allow Parties to introduce criteria for the public concerned and members of the public to bring actions before courts or administrative bodies. The Party concerned submits that the introduction of criteria regarding persons having a direct interest remains within the margin of discretion provided by the Convention. In this regard, it refers to communication ACCC/C/2005/11, in which the Committee stated that the Parties are not obliged to establish a system *actio popularis* in their national law.<sup>73</sup>

71. Second, with regard to the communicant's argument that the relevant case-law of the CJEU "could not give the legal community a coherent system of interpretation" of all relevant issues of access to justice, the Party concerned underlines that, at page 4 of its communication, the communicant itself recognises the progressive nature of the judgments by the EU courts. Furthermore, such a statement neglects the very purpose and effect of the CJEU rulings and the very characteristics of the EU's legal order.<sup>74</sup>

72. The Party concerned refers to the CJEU's settled case-law to explain the special nature of the EU legal order<sup>75</sup> as well as the primacy of EU over member State law and the direct applicability of EU law in the member States.<sup>76</sup> Furthermore, as per article 19, paragraph 1, TEU, the guardians of that legal order and the judicial system of the European Union are the CJEU and the courts and tribunals of the Member States and the CJEU must respect the autonomy of the Union legal order thus created by the Treaties (see Opinion 1/91, para. 35).<sup>77</sup> The member States are in turn obliged via, inter alia, the principle of sincere cooperation in article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law<sup>78</sup> and to take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the EU institutions. The national courts and tribunals and the CJEU must ensure the full application of EU law in all member States and to ensure judicial protection

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<sup>70</sup> Case C-583/11P, *Inuit*, para. 101. See Response of the Party concerned at page 9.

<sup>71</sup> Case C-240/09, *Slovak Bears*, para. 51. See Response of the Party concerned at page 9.

<sup>72</sup> Response of the Party concerned at page 9.

<sup>73</sup> Response of the Party concerned at page 10.

<sup>74</sup> Response of the Party concerned at page 10.

<sup>75</sup> The Party concerned refers to Case 26/62, *van Gend & Loos*, [1963] ECR I, 12 and Case 6/64, *Costa*, [1964] ECR 585, 593).

<sup>76</sup> The Party concerned refers in that regard to Opinion 1/91 [1991] ECR I-6079.

<sup>77</sup> Response of the Party concerned at page 11.

<sup>78</sup> The Party concerned refers in that regard to Case C-298/96, *Oelmühle and Schmidt Söhne*, [1998] ECR I-4767, para. 23.

of an individual's rights under that law.<sup>79</sup> The national court, in collaboration with the CJEU, fulfils a duty entrusted to them both, of ensuring that the law is observed in the interpretation and application of the Treaties.<sup>80</sup> The Party concerned submits that the judicial system of the EU is a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions.<sup>81</sup>

73. With regard to preliminary rulings, the Party concerned points out that these rulings are binding on the remitting courts and on the appellate courts or courts of review.<sup>82</sup> They have authoritative guidance on the question of the interpretation raised on a given provision of EU law.<sup>83</sup> In addition, the fact that in principle courts against whose decisions there is no remedy are obliged to ask for preliminary rulings ensures the uniform and effective interpretation of Union law.<sup>84</sup> If the national court of final appeal does not make a reference for a preliminary ruling pursuant to article 267 TFEU on the validity of EU acts, where there are grounds for believing that they may be invalid, the member State will equally be in breach of Union law and can be asked to pay damages.<sup>85</sup>

74. Finally, the Party concerned remarks, where EU law is infringed by a national court, the provisions of articles 258 to 260 TFEU provide for the opportunity of bringing a case before the Court to obtain a declaration that the member State concerned has failed to fulfil its obligations.<sup>86</sup>

75. To sum up, the Party concerned submits that the case law of the CJEU does give the legal community a coherent system of interpretation of European Union law.<sup>87</sup>

#### **D. Domestic remedies or other international procedures**

76. The communicant alleges that owing to the mounting difficulties described in communication ACCC/C/2010/54 they have not initiated the only kind of legal remedy that in principle could have been available, namely a complaint to the Court of Justice of the EU.<sup>88</sup>

77. The Party concerned does not object to admissibility but notes that the Committee should consider how this communication and communication ACCC/2008/32, which also concerns an alleged breach of article 9, paragraph 3, of the Convention, interlink and possibly suspend the current communication until its findings on communication ACCC/C/2008/32 are finalized.<sup>89</sup>

78. The United Kingdom as observer submitted that the communication should be found inadmissible on the basis of being misdirected and manifestly unreasonable.<sup>90</sup>

<sup>79</sup> Response of the Party concerned at page 11, referring to Case C-432/05, *Unibet*, [2007] ECR I-2271, para. 38 and case-law cited therein.

<sup>80</sup> Response of the Party concerned at page 11. The Party concerned refers in that regard to Case 244/80, *Foglia*, [1981] ECR 3045, para. 16, and Joined Cases C-422/93 to C-424/93, *Zabala Erasun and Others*, [1995] ECR I-1567, para. 15.

<sup>81</sup> Response of the Party concerned at page 11. The Party concerned refers in that regard to Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, [2002] ECR I-6677, para. 40)

<sup>82</sup> The Party concerned refers in that regard to Cases C-320/88 and C-206/94.

<sup>83</sup> Response of the Party concerned at page 12.

<sup>84</sup> The Party concerned refers in that regard to Case C-160/14, *Brito*, paras. 37-38.

<sup>85</sup> Response of the Party concerned at page 12. The Party concerned refers in that regard to the case-law *Köbler*, C-224/01, and *Traghetti*, C-173/03, paras. 42 and 43.

<sup>86</sup> Response of the Party concerned at page 11. The Party concerned refers in that regard to Case C-129/00, *Commission v Italy*, [2003] ECR I-14637, paras. 29, 30 and 32.

<sup>87</sup> Response of the Party concerned at page 11.

<sup>88</sup> Communication at page 12.

<sup>89</sup> Response from the Party concerned dated 26 November 2015, para. 12.

<sup>90</sup> Comments on preliminary admissibility from the United Kingdom, 20 March 2015.

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### III. Consideration and evaluation by the Committee

79. The European Union signed the Convention on 25 June 1998 and approved it through Council Decision 2005/370/EC of 17 February 2005 (the Decision).<sup>91</sup> The EU has been a Party to the Convention since 17 May 2005.

#### *Admissibility*

80. The Committee finds that the communication is admissible. As noted in paragraph 77 above, the admissibility of the communication is not contested by the Party concerned.

#### *Extent of obligations under the Convention*

81. The Committee's mandate is to review compliance by the Parties with their obligations under the Convention.<sup>92</sup> In this case, the communicant and the Party concerned do not agree about the *extent* of the obligations of the Party concerned under the Convention. That disagreement goes to the heart of this case, so the Committee begins by considering this issue.

82. Article 17 of the Convention provides:

“This Convention shall be open for signature...by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence over matters governed by this Convention, including the competence to enter into treaties in respect of these matters.”

83. It is common ground that the EU is a regional economic integration organisation (REIO) within the meaning of article 17; such a REIO may ratify, accept, approve or accede to the Convention and become a Party to it.<sup>93</sup>

84. When a REIO becomes a Party to the Convention, article 19, paragraphs 4 and 5 determine the extent to which the REIO assumes obligations under the Convention:

“4. Any organization referred to in article 17 which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under this Convention. 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 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.

5. 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.” [emphasis added]

85. The Committee considers it particularly important to note that:

(a) under paragraph 4 of article 19 a REIO and any member States that are Parties are required to *decide* on their respective responsibilities for the performance of their obligations;

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<sup>91</sup> OJ L 124 of 17.5.2005, pp. 1–3.

<sup>92</sup> Paragraph 1 of the annex to Decision I/7.

<sup>93</sup> See article 19, paragraphs 1 and 2 of the Convention.

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(b) under paragraph 5 of article 19 REIOs are required to *declare* the extent of their competence with respect to matters governed by the Convention. Such a declaration will indicate the extent to which the REIO, in accordance with the decision made under paragraph 4, assumes responsibilities for the performance of obligations under the Convention; and

(c) only REIOs are *required* by the Convention to make declarations in their instruments of ratification, acceptance, approval or accession, although State Parties may do so and a number of State Parties have done so.

86. On approval of the Convention, the Party concerned made a declaration that met the requirements of article 19, paragraph 5, which appears in the Annex to the approval Decision. The approval Decision was made following the appropriate legislative procedure involving other institutions of the EU and its validity is not disputed. The Committee therefore takes the declaration as conclusive for the purposes of article 19, paragraph 5.

87. In the declaration, the EU explains the legal base for its external competence set out in the Treaty establishing the European Community, that is its capacity to act internationally on its own behalf, in the field of the environment. The declaration goes on to say the following:

“... 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.”

88. Later the declaration says:

“The European Community is responsible for the performance of those obligations resulting from the Convention which are covered by Community law in force.”

89. In short, the effect of the Party concerned’s declaration is that it assumes obligations to the extent that it has EU law in force; member States remain responsible for the implementation of obligations that are not covered by EU law in force.

90. For the sake of completeness, the Committee notes that more implementing legislation from the EU would trigger more obligations for the EU. There is 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.”

### *Article 9*

91. As both the communicant and the Party concerned have observed,<sup>94</sup> a number of legal instruments<sup>95</sup> have been adopted by the EU to implement article 9, paragraphs 3 and 4, of the Convention. One of those legal instruments, namely the Aarhus Regulation, has already been considered at some length by the Committee.<sup>96</sup> The communicant, however, does not allege that any of those legal instruments fail to implement the relevant provisions of the Convention; rather the communicant alleges that there is a lack of transposition of the third pillar of the Convention into EU law, especially article 9, paragraphs 3 to 5, in relation to matters other than the internal procedures of the Union<sup>97</sup> and that there is improper implementation of article 9 in the draft Directive on Access to Justice in Environmental Matters.<sup>98</sup> In sum, the communicant submits that the Party concerned has failed to put in place legal instruments to implement these aspects of article 9. However, as the Committee has noted in paragraph 89 above, by virtue of its declaration, the Party concerned has obligations under the Convention only with respect to the provisions covered by EU law in force.

92. The communicant submits that there are flaws in European environmental law concerning access to justice, such as a lack of coherence and effectiveness.<sup>99</sup> It is clear to the Committee from the submissions of the communicant and the Party concerned that there has been a political debate amongst the EU and its member States for some time about whether there should be more EU legislation on access to justice in environmental matters, and that this debate may continue. Whilst the Committee appreciates the communicant has strong views on the merits of more legislation in this field, in the light of the Party concerned's declaration upon ratification, the communicant's submissions regarding the desirability of further legislation do not go to the compliance of the EU with the Convention.

93. The communicant claims that EU member States do not do enough in order to implement the Convention and especially article 9, paragraph 3; the communicant argues that this is confirmed by a number of Committee findings in which EU Member States were found to be in non-compliance with this provision.<sup>100</sup> The Committee has indeed, in a number of cases, found EU member States to be in non-compliance with article 9,

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<sup>94</sup> See, for example, paragraph 1 of the communication, and paragraphs 32 to 35 of the Party concerned's reply to the communication.

<sup>95</sup> See, for example, Directive 2003/35/EC of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, OJ L 41 of 14.2.2003, p. 26; Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26 of 28.1.2012, p. 1; Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions, OJ L 334 of 17.12.2010, p. 17; Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143 of 30.4.2004, p. 56; and Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC, OJ L 197 of 24.7.2012, p. 1.

<sup>96</sup> See the Committee's findings on communication ACCC/2008/32 (Part I), ECE/MP.PP/C.1/2011/4/Add.1, and ACCC/2008/32 (Part II) (forthcoming).

<sup>97</sup> See paragraph 2 of the communication.

<sup>98</sup> See paragraph 3 of the communication.

<sup>99</sup> See paragraph 2 of the communication.

<sup>100</sup> The communicant cites the Committee's findings on communications ACCC/C/2008/31 (Germany), ACCC/C/2010/48 (Austria), ACCC/C/2010/50 (Czech Republic) and ACCC/C/2011/58 (Bulgaria).

paragraph 3. However, since the EU was not a Party concerned in these cases, the Committee never examined whether the EU would also have been non-compliant. Therefore, the Committee does not consider these cases of non-compliance by EU member States as such to be an indication of non-compliance also by the EU.

94. Moreover, as stated in paragraphs 88 and 90 above, in accordance with its declaration upon ratification, EU obligations only arise where obligations are covered by Community law in force, and as is common ground between the parties, there is no relevant Community law in force.

95. The Committee accordingly finds that, in the circumstances of this case, not adopting a directive on access to justice does not amount to non-compliance with article 9 of the Convention by the Party concerned.

#### ***Articles 2 and 3***

96. The communicant not only alleges a general failure to implement, or to implement correctly, article 9, paragraphs 3 and 4, but also a failure to implement article 2, paragraphs 1 to 5 and article 3, paragraphs 1 to 4, 8 and 9 of the Convention. The alleged failures to implement the stated provisions of articles 2 and 3 depend directly on the proposition that there has been a failure to implement article 9. The Committee has found no failure in this case to implement article 9, and it follows that in the circumstances of this case, not adopting a directive on access to justice does not amount to non-compliance with articles 2 and 3 of the Convention by the Party concerned either.

#### **IV. Conclusions and recommendations**

97. Having considered the above, the Committee finds that, in the circumstances of this case, not adopting a directive on access to justice does not amount to non-compliance with articles 2, 3 and 9 of the Convention by the Party concerned.

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