Responses by Justice and Environment to the comments of the European Union in the framework of the Communication to the Aarhus Convention Compliance Committee concerning compliance by the European Union in connection with the transposition of the Convention's provisions on access to justice

(ACCC/C/2014/123)

I. INTRODUCTION

1. These comments by Justice and Environment (J&E) refer to the European Union's comments, transmitted to the Communicant on 2 September 2016.

II. LEGAL OBSERVATIONS OF THE EU

2. The EU has prepared an exhaustive introduction to the current case and has listed those legal matters that are relevant for making a standpoint by the Compliance Committee in the case. The issues to be decided according to the EU are the following:

   a. Who is responsible for implementing Article 9(3)?

   b. Does Article 9(3) need to be implemented by legislation?

   c. What is the role of case-law by the CJEU?

   d. What action does the EU take to further implement Article 9(3)?

3. The EU suggests that the following are the answers to the foregoing questions:

   a. Who is responsible for implementing Article 9(3)?

   "It is thus incorrect, as the Communicant states (see point 15 of his comment), that, in the context of implementing Article 9(3), *"the EU finds itself as being under an obligation to implement the Aarhus Convention"* by additional EU legislation. The Union has the possibility, but not an obligation to further implement Article 9(3) of the Aarhus Convention. This is also corroborated by the wording of the EU Declaration (*"unless"* the Union exercises its powers under the EU Treaty).

As the United Kingdom rightly pointed out in its comments on the present case of 25 November 2015, it is for a Party to determine the level at which it legislates to implement Convention requirements (see paragraphs 2 and 4 of the UK comments).

Therefore, the fact that the Union did not adopt specific legislation to fulfil the requirements of Article 9(3) of the Convention with regard to its Member States in a broader or more horizontal way cannot make the EU liable under the Aarhus Convention."

b. Does Article 9(3) need to be implemented by legislation?

"However, in the Union's view, Article 9(3) of the Aarhus Convention does not contain any positive obligation to adopt legislation in the field of this Article. 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 is not compulsory.

The important criterion with regard to Article 9(3) of the Convention is thus whether the chosen means by the Party do ensure access to administrative or judicial procedures in an effective way. As detailed in the earlier EU observations, the EU system as a whole does ensure such an effective access.

The Communicant's assertion that an EU directive on access to justice would be the only proper way to fully implement Article 9(3) of the Convention is thus clearly unfounded."

c. What is the role of case-law by the CJEU?

The Member States are bound by the verdict of the CJEU. As outlined in the earlier EU observations, these rulings are binding on the remitting courts and on the appellate courts or courts of review. They also have authoritative guidance on the question of the interpretation raised on a given provision of EU law.

For these reasons, the EU considers that the case-law of the CJEU does give the legal community a coherent system of interpretation of EU law.

d. What action does the EU take to further implement Article 9(3)?

"Indeed, the Commission services are preparing an interpretative guidance on access to justice in environmental matters, for which a detailed Roadmap has been published.[1]

To sum up, the EU system ensures effective access to justice in environmental matters by EU rules as complemented by the Member States' own measures to implement Article 9(3) of the Aarhus Convention. The upcoming interpretative guidance will further strengthen the implementation framework within the Member States."

III. LEGAL OBSERVATIONS OF THE COMMUNICANT

4. While the legal observations of the EU seem to form a coherent system, each section of the foregoing may be challenged successfully, referencing not else but the earlier statements made by EU bodies in the past or lately.

5. As the EU pointed out, it is for a Party to determine the level at which it legislates to implement Convention requirements. It may formally be true, however, only in case we absolutely set aside the requirement to ensure effective judicial protection. As it is well-known and obvious, the lack of legislation on the EU level results in a diverse and fragmented system characterized by at least 28 different systems of access to environmental justice, let alone the case of federal states. If that ineffective system is acceptable for the EU, then from a purely formalistic standpoint, this solution (having the regulation of access to justice on the Member State level) is acceptable. Nevertheless, if one has more aspirations then just formally meeting the requirements of the Convention and aims at ensuring effective judicial protection (which in fact is a requirement under EU law), then one cannot stop at being satisfied with the current system but must require that the EU legislate in the foregoing matter.

6. This is also true for the statement of the EU that the fact that the Union did not adopt specific legislation to fulfil the requirements of Article 9(3) of the Convention with regard to its Member States in a broader or more horizontal way cannot make the EU liable under the Aarhus Convention. Contrary, the only stakeholder that can be made

[1] http://ec.europa.eu/smart-regulation/roadmaps/docs/2013_env_013_access_to_justice_en.pdf

liable for the current situation where the fragmented regulation of access to environmental justice results in a highly ineffective and uneven situation is the EU itself.

7. How clear this is also for the EU is perfectly illustrated by a letter dated 27 January 2016, prepared by the Head of Cabinet of the First Vice-President of the European Commission (Mr. Frans Timmermans) addressed to the European Environmental Bureau, No. Ares (2015) 5757460 + 5347257. As the attached letter states:

"There is also a need to ensure a broad approach in accessing national courts to challenge decisions or omissions by public administrations, as required by the Aarhus Convention and in line with the principles of EU law such the principle of an effective judicial protection and effective remedies."

8. From this the Communicant concludes that in case the EU wants to ensure effective judicial protection, then it is under an obligation to legislate in the foregoing matter and is liable for not having done so to date.

The EU further points out that the important criterion with regard to Article 9(3) of the Convention is thus whether the chosen means by the Party do ensure access to administrative or judicial procedures in an effective way. The EU claims that the EU system as a whole (nota bene, the current system of at least 28 different regimes of access to justice) does ensure such an effective access. In this respect, the Communicant reminds that according to Article 3, paragraph 1 of the Convention, the Party is obliged to take the necessary legislative, regulatory and other measures, including measures to achieve compatibility between the provisions implementing the information, public participation and access-to-justice provisions in this Convention, as well as proper enforcement measures, to establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention. In its findings in ACCC/C/2004/3 and ACCC/S/2004/1 (Ukraine), the Committee stated that

"*Lack of clarity or detail in domestic legislative provisions, ... demonstrate, in the view of the Committee, that the Party concerned has not taken the necessary measures*

to establish and maintain a clear, transparent and consistent framework to implement the provisions of the Convention, as required by article 3, paragraph 1."

9. The question does naturally arise then why it is that the EU does not itself believe in this statement. Why is that that the aforementioned letter sent by the Vice-President of the Commission to the EEB states:

"We are aware that there are disparities within the EU resulting from the fact that Member States have a certain degree of discretion when implementing the commitments made under the Aarhus Convention. However, we can also see that Member States are not doing enough and therefore we believe that the best way forward would be to take an EU level initiative on access to justice in environmental matters in order to remove existing national barriers of accessing national courts."

10. Undoubtedly, the EU itself is also aware that the current system does not meet a number of requirements, among them principal is the requirement to ensure effective judicial protection.

11. Earlier in the current case, the EU responded to J&E's Communication by claiming that national case law is sufficient for ensuring access to justice in the EU, since it is binding.

"1. In that context, it is for the national courts and tribunals and for the CJEU to ensure the full application of Union law in all Member States and to ensure judicial protection of an individual's rights under that law (see, to that effect, Case C-432/05, Unibet, [2007] ECR I-2271, paragraph 38 and case-law cited).

2. 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 (see Case 244/80, Foglia, [1981] ECR 3045, paragraph 16, and Joined Cases C-422/93 to C-424/93, Zabala Erasun and Others, [1995] ECR I-1567, paragraph 15)."

12. However, in the Roadmap prepared by the European Commission to the Communication on access to justice at national level related to measures

implementing EU environmental law, also referenced by the EU itself in its response, stated on page 3:

"National courts are increasingly filling the gaps in national procedural law particularly in the area of legal standing but because their rulings relate to specific cases, they cannot provide overall clarity and predictability necessary for investment decisions."

13. Such arguments show a clear internal contradiction between the own arguments of the EU and demonstrate that such standpoints are antagonistic to each other, while a number of them in part support the Communicant's arguments.

14. Later the EU points out that the EU considers that the case-law of the CJEU does give the legal community a coherent system of interpretation of EU law.

15. While this sounds as if it was a solution to the underlying problem of not having a well-functioning regime in place that can ensure effective access to environmental justice throughout the Union, it is clearly not. The Commission itself admits it when detailing the subsidiarity check of the Communication on access to justice at national level related to measures implementing EU environmental law in the aforementioned and reference Roadmap document. It states on its page 3:

"The CJEU has already provided some important clarifications, mainly in the context of preliminary rulings, which, in some cases, for transparency and clarity reasons, need to be made explicit by way of a Communication. In some other cases, the rulings have revealed the need to further specify certain aspects in order to ensure an effective regime of access to justice in environmental matters in the Member States (e.g. scope of review). These clarifications will be made in full accordance with existing case law."

16. Let us read carefully again what the EU Court case law has achieved according to the interpretation of the Commission:

provided **SOME** important clarifications

even these **NEED** to be made explicit

in **SOME** other cases revealed new **NEEDS** to further specify aspects

there is a need for further **CLARIFICATIONS**

As it is obvious, the EU Court itself in incapable of replacing a binding legislation with its judgments, and even after many years of adjudicating important issues, and after many landmark decisions, all what we – or rather, all what the EU itself – can say is that in SOME cases clarifications were made and in other cases the Court revealed the NEED for further specifications.

17. In this context, the Communicant refers to the findings in ACCC/C/2008/33 (UK), in which the Committee

"Having concluded that the Party concerned fails to comply with article 9, paragraph 4, with respect to costs as well as time limits by essentially relying on the discretion of the judiciary, the Committee also concludes that the Party concerned fails to comply with article 3, paragraph 1, by not having taken the necessary legislative, regulatory and other measures to establish a clear, transparent and consistent framework to implement the provisions of the Convention".

18. Next to that, the Communicant is convinced that the EU Court jurisprudence on Article 9, paragraph 3 of the Convention is not consistent, which may be demonstrated by its rulings in cases C 401/12P, T-19/13, T-565/14 and other cases in which the Court interpreted the conditions for standing of environmental NGOs against the acts of the EU itself. In these cases, the Court did not follow its own requirement to interpret the procedural rules in environmental cases "to the fullest extent possible" in accordance with the objectives of Article 9(3) of the Aarhus Convention". Rather, the Court kept in following the restrictive interpretation of the "direct concern" criteria, known as the "Plaumann test" in these cases.

19. The Communicant believes that we do not have to further demonstrate that the reality is lightyears away from creating a coherent system of interpretation of EU law.

20. Finally, the EU states that the upcoming interpretative guidance will further strengthen the implementation framework within the Member States.

21. Can one truly believe that such guidance document, a non-binding Communication by the Commission was decided and will be made because that is the best way of ensuring proper access to justice in environmental matters? Indeed, not. The selection of the form of instrument is well-known to be attributed to political reasons. As the often cited Roadmap documents says on page 4:

"Finally, this [the Communication] should offer guidance to those Member States that have not yet drawn the consequences for their national legal systems of the case law of the CJEU.

It [the Communication] would be less burdensome and intrusive for Member States in comparison to a new legal instrument."

All this underlines that the Communication as an instrument was designed as a last resort by the Commission for Member States who do not follow the CJEU case law but are at the same time blocking the adoption of a binding legal instrument on access to justice. But this is purely political, as opposed to what the Aarhus Convention requires, i.e. clear and transparent framework, ensuring effective access to justice. This is why the Communicant in convinced that if the EU wants to truly meet the requirements of the Aarhus Convention and not just formally report some action under the heading "access to justice", it must adopt and it is an obligation to adopt a binding legal instrument on access to justice in environmental matters.

22. Any other solution that the EU suggest or proposes will only be a weak and insufficient substitute to a binding directive and is bound to be unsuccessful.

IV. CONCLUSION

23. For the reasons set out in the earlier J&E observations and as explained above, the Communicant concludes that the EU does not fulfil its obligations under Article 9(3) of the Aarhus Convention and reiterates its request to the ACCC to find the EU non-compliant with the Aarhus Convention.

16 September, 2016