Aarhus Convention Compliance Committee

ANSWERS

to the comments of the European Union and of the United Kingdom in case No. ACCC/C/2014/123

Name of Communicant: Justice and Environment, European Network of Environmental Law Organizations

Name of Party Concerned: European Union

I. Answers to the Comments of the EU

The numbering of the answers corresponds to the numbering of the comments of the EU.

8.

The Communicant is convinced that while CJEU judgments are important sources of legal development, they are the tools of interpretation and cannot substitute legislation per se. In its findings formulated in case ACCC/C/2012/70 (Czech Republic), para 66., the Committee confirmed the responsibility of the EU in designing a common framework for its Member States to implement the Convention, to ensure the compatibility of that framework with the Convention and to monitor that its Member States in implementing EU law properly meet the obligations resting on them by virtue of the EU being a party to the Convention (see also findings on communication ACCC/C/2010/54 (EU), para 76. The Communicant believes that the obligation of Art. 3.1 of the Convention to take the necessary legislative, regulatory and other measures to achieve compatibility between Art. 9.3 of the Convention and the provisions of environmental law throughout the EU and to establish and maintain a clear, transparent and consistent framework to implement this provision can only be achieved by virtue of a legislative instrument.

12.

The Communicant believes that the two cases are not dependent on each other, given that the current one is on the regulation of access to justice by the EU with respect to the situation in its Member States and the other as referred to by the EU is on access to the EU Courts.

14.

Partial or fragmented implementation of the Convention in certain areas, fields, by certain individual legal instruments cannot be sufficient especially in light of Art 9.3 of the Convention aspiring for universal implementation by its wording ("…each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment"). As the Committee concluded in its findings on the communication ACCC/C/2008/31 (Germany), para 92., Art. 9.3 of the Convention applies to a broad range of acts or omissions. The criteria for standing, if any, laid down in national law according to this provision should always be consistent with the objective of the Convention to ensure wide access to justice. Not ensuring standing of environmental NGOs in many (in fact the majority) of its sectoral laws to challenge acts or omissions of public authorities or private persons which contravene provisions of national law relating to the environment was, in the quoted findings, evaluated as a failure by the Party concerned to comply with Art. 9.3 of the Convention.

15.

This point and the argumentation therein fully and totally supersedes the preceding arguments therefore we regard it as a confession that the EU also finds itself as being under an obligation to implement the Aarhus Convention.

16.

Critical remarks made in the original Communication had an intention to call the attention of the Party to possible future non-compliances, in line with the case law of the ACCC. In the Belgian case (ACCC/C/2005/11) and also in the EU case (ACCC/C/2008/32) the findings contain a certain degree of conditionality, presupposing that in case the current practice of Belgium or of the EU continues, then in the future non-compliance can be established. The claims of the Communicant were referring to this type of practice by the Committee and suggests that the Committee finds the non-compliance of the European Union, in case needed, with this type of conditionality, mutatis mutandis.

19.

Indeed there is legislation if force in the EU, but that does not reach the level of the expectations of the Convention. The letter of the Commission sent to the EEB by the Chef de Bureau of the president of the Commission (attached) proves that the Member States do not do enough in order to implement the Convention and especially its Art. 9.3. The same is confirmed by numerous findings of the Committee on non-compliance of the EU Member States with this provision (e.g. the findings in ACCC/C/2008/31 (Germany), ACCC/C/2010/48 (Austria), ACCC/C/2010/50 (Czech Republic), ACCC/C/2011/58 (Bulgaria).

20.

While the Convention is clearly a mixed agreement and it was never contested, the purpose of the EU joining the Convention would be to enhance the level of access. If the EU does not legislate in the matter, the very essence and reason of joining the Convention by the EU is lost.

22.

Rule of law and democracy are fundamental values but in this very specific case the expectations of Art. 9.3 of the Convention cannot simply be met by the EU or any Member State thereof being a democracy based on rule of law.

23.

In case we accept the reasoning of the Commission that in case of mixed agreements the EU is also a party to the agreement and the Member States are obliged to comply with the international obligation thus made part of the EU law, there would be no need whatsoever for any EU level legislation in any matter thus covered by mixed agreements.

This would also mean that all the directives that the EU is referring to on access to environmental information and participation in decision-making are useless since the Member States would be bound to comply with the Convection anyway, just via the EU being a Party to the Convention. This may clearly not be a reason for not legislating in a matter.

24.

From the letter of the Commission referred above and attached to the current Answers, it is clear that the Member States do not do enough to implement Art. 9.3 of the Convention. ACCC case law (ACCC/C/2010/54) however makes the EU liable for cases of non-compliance by Member States with the obligations arising from international law or EU law. And as was noted by the EU, the Convention is part of EU law.

26.

Jan Darpö's many findings quoted by the EU, for instance the one spelling out that "there is a basic uncertainty" was one of the reasons why J&E submitted the current Communication.

28. to 30.

All these paragraphs are clearly evidences that the implementation of Art 9.3 is uneven and non-coherent in the EU Member States.

35.

Indeed it is an overstatement that the existence of sectoral access to justice rules make the EU fully compliant with the Convention's Art. 9.3.

36.

The CJEU judgments are not legislation and it does not have to be further explained why an obligation to legislate cannot be met by any number of judgments made for individual cases and situations. The court cases deal only with certain elements of the problem but do not solve the genuine problem that for having even access to justice in environmental cases in all 28 Member States of the European Union, there is a need for an access to justice directive.

37.

First of all, remedies provided for by the TFEU do need to meet certain criteria but not all that were set by the Convention e.g. timeliness, fairness, equity. Also it is not the same circle of persons whose rights get protected upon the obligation stemming from the TFEU and from the Convention. This Communication is to protect those specific interests that are acknowledged by the Convention.

38.

The Slovak Brown Bear case demonstrates that these situations that originally gave rise to the case (killing of bears) happen in the lack of EU regulation in the matter and thus need years to be solved. The "absence of EU rules" as the judgment says is clearly a negative phenomenon here. Also the national implementations result in many different solutions, many different shortcomings, whose reparation is made only on a case-by-case basis whereas this should be done in a systematic way by

legislation on the EU level in the form of a directive. This is what the EU's joining the Convention would mean as an added value.

43.

The margin of discretion does exist but it cannot be such that it should effectively bar every member of the public from having access to justice under Art. 9.3 of the Convention. This is the major finding and lesson of the Belgian case of the Committee (ACCC/C/2005/11).

44.

Undoubtedly, the CJEU's rulings cannot solve the problem of missing legislation on the EU level.

45.

The primacy of the EU legal order as an essential characteristic is the solution to the problem created by the lack of legislation in the matter. By this the EU in fact confessed that it also believed that the solution of the problem is genuine legislation by the EU.

48.

Although it is for the national courts and tribunals and the CJEU to ensure full application of the Union law, the EU still remains liable in case Member States do not properly apply the Convention or the EU law, or the Convention which is part of EU law (Ireland case, ACCC/C/2010/54).

53.

Such case that gives rise to infringements only allows the Commission to bring a case to the EU, and not the citizens, the members of the public concerned or the NGOs.

54.

The judgments of the CJEU are clearly not coherent enough to substitute the lack of legislation in the matter.

58.

If – as the European Commission states – the definitions of the Aarhus Convention had not to be transposed into EU law, the question arises why the Access to Justice Directive Draft contained reference thereto. The draft directive contained amongst others the definitions of Public authority, Member of the public or Environmental law. As stated above, the EU is responsible for designing a common framework for the Member States to implement the Convention.

60.

Indeed the Commission can start infringement proceedings but only the Commission and nobody else; and even the Commission is using this prerogative less and less due to the lack of resources and for the use of other means of implementation and enforcement such as the Pilot procedure.

II. Answers to the Comments of the UK

The numbering of the answers corresponds to the numbering of the comments of the EU.

2.

The comment of the UK does not necessitate further examination or argumentation given that the Party concerned, the European Union itself had confirmed that the Communication is not misdirected.

The UK argument that the communication is "misdirected", as, due to the declaration, EU does not have the competence in the area which the communication addresses (i.e. issuing legislation on Art. 9.3) is not valid. The declaration that „*the EU legal instruments in force at the time of the EU approval of the AC (17 February 2005) did not cover fully the implementation of the obligations resulting from Article 9(3) of the Convention, relating to administrative and judicial procedures to challenge acts and omissions other than the institutions of the EU"* is a statement of a fact, which as such has no relevance for the scope of the EU duties under the Convention.
By stating that „*EU Member States are responsible for the performance of these obligations (i.e. obligations resulting from Art. 9(3) at the time of approval of the Convention by the EU and will remain so unless and until the EU, in the exercise of its powers under the Treaty, adopts provisions of Community law covering the implementation of those obligations.*", the EU declared that it is not, until it adopts its own implementing legislation, directly responsible for performance of the obligations under Art. 9.3 by the Member States. However, this does not change anything on the obligation of the EU to take the necessary legislative measures to implement (also) Art. 9.3 of the Convention in its legal order. On the contrary, the words of the declaration "*.... until the EU, in the exercise of its powers under the Treaty, adopts provisions of Community law covering the implementation of those obligations*" should be read as confirmation by the EU itself that it was aware of and under this obligation at the time of issuing of the Declaration.

2.

As a response to the comments of the UK, the Communicant would like to confirm and reiterate that the Communication never alleged that the breach of the Aarhus Convention is attributable to a legislative proposal that was not adopted and which has now been withdrawn as widely known.

4.

According to the case law of the ACCC, there have been cases in which the Committee expressed its standpoints as regards the level of legislation needed to comply with the Convention. The Committee typically recommends to the Parties, consistently with Art. 3.1 of the Convention, "that it takes the necessary l**egislative, regulatory** and administrative measures and practical arrangements" to ensure the compliance with the Convention (emphasis added). In this respect, there is also a certain level of

self-contradiction between the points 4 and 5 of the comments of the UK, since while the point 4 denies that there is any relevance of where the legislative organ is positioned, point 5 states that in some circumstances it might be appropriate for the Committee to consider an argument that the absence of legislation at a particular level arises questions about a Party's compliance with the Convention.

5.

Referring to Point 5 of the UK's comments, one of its sentences can certainly be read as a confession regarding existing gaps in the implementation of the Convention. If there are gaps that a Party has to plug, then there is a ground for finding non-compliance.

6.

As a response to point 6 of the UK's comments, the extent of competence of a Party means that it can be party to certain types of international agreements as well as can implement them to a certain extent, but it cannot exceed its limitations. The current case is not like that. Here the EU has all the powers to fully implement the Convention including to legislate in access to environmental justice (Art. 9.3 of the Convention). What we see here is not the lack of competence but only an unwillingness to implement the Convention on the EU level. While the competence is an objective barrier, the TFEU does not pose such an objective barrier to the EU. The current situation of not having a directive on the EU level in the matter is due to a subjective factor, the unwillingness of the EU to legislate.

8.

Point 8 of the UK's comments confirms what the Communicant believes is the case: the EU does not face objective barriers and EU directives are a means of implementing the Convention - as was the case in access to information and participation in decision-making - so the only plausible reason for the EU not legislating in access to justice is its own decision not to do so.

11.

It is not the withdrawal of the legislative proposal that constitutes non-compliance, it is the situation in which there is no valid legislation in force that would transpose Art. 9.3 of the Convention into EU law. And in such cases, just like in the cases Belgium (ACCC/C/2005/11) and EU (ACCC/C/2008/32) the proposed finding from the ACCC would be to establish that in case the Party upholds such situation in the future, it will be non-compliant with the Convention.

It is also in line with the mandate of the ACCC not only to oversee compliance but to recommend and suggest to the Parties to the Convention, thus contribute to the forming of the law.

14.

The Communicant claims that it never stated that incomplete and unadopted legislative proposals could form the basis of a finding of non-compliance.

Respectfully,

Signed in Tartu, on 24 February 2016 by Siim Vahtrus, Chairman of Justice and Environment