

Comments by the European Commission, on behalf of the European Union, to the Communicant's comments 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 the European Union (EU) refer to the Communicant's comments, transmitted to the EU on 29 February 2016, to the EU observations of 26 November 2015 to the above-mentioned Communication.
2. Pursuant to Article 17(1) of the Treaty on European Union (TEU), the European Commission submits these comments on behalf of the EU.

II. CONTENT OF THE CASE

3. To recall briefly the main content of this case, the Communicant, the non-governmental organization (NGO) *"Justice and Environment, European Network of Environmental Law Organisations"* alleged that the EU did not transpose, or at least not fully transpose, the third pillar of the Aarhus Convention on access to justice vis-à-vis its Member States.¹ Therefore, in the Communicant's view, the EU would not comply notably with Article 9 (3) of the Convention.
4. Article 9(3) of the Aarhus Convention foresees that, under certain conditions, 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 the Parties' national law relating to the environment.
5. The Communicant alleged that, without a directive on access to justice at EU level, *"substantial features of access to justice"* like standing for individuals and NGOs, the scope of judicial review and the effectiveness of the remedies, cannot be adequately addressed in a uniform way.

¹ To be noted that the Communication solely concerns implementation of the Convention's provisions on access to justice within the Member States and not implementation with respect to the EU institutions and bodies themselves. The latter aspect is therefore not covered by the present observations.

6. The Communicant further referred to recent judgments by the Court of Justice of the European Union (CJEU) which relate to such elements of access to justice. However, the Communicant took the view that these judgments are "*not general enough*" for effective transposition of the third Aarhus pillar by the Union.
7. The EU commented these allegations on 26 November 2015 by stressing that:
 - There is **no positive obligation to adopt legislation** in the field of Article 9(3) of the Aarhus Convention;
 - Provisions on access to justice are contained in a number of **sector-specific EU legislation** so that the obligations under Article 9(3) of the Aarhus Convention are fully complied with concerning these areas;
 - It is **incumbent upon Member States** to fulfil the requirements of Article 9(3) of the Convention where the EU has not adopted provisions of EU law covering the implementation of these obligations;
 - Access needs to be ensured to **either administrative or judicial procedures** for members of the public where they meet the criteria, if any, laid down in their national law; and
 - The **case-law of the CJEU** is crucial in developing and ensuring the uniform application of EU law.
8. The EU observations contain a more detailed reasoning on these issues that need not be repeated here.
9. In his comments, the Communicant reiterates that, in the NGO's view, CJEU judgments cannot substitute legislation. Only a legislative instrument would guarantee full implementation of Article 9(3) of the Convention. This legislative instrument needs to be adopted by the Union; Member State implementation would not suffice.

III. LEGAL OBSERVATIONS

10. Even though the earlier EU observations already dealt to a certain extent with questions A, B and C, below, the Union would like to reply to the Communicant by further explaining its position, as these are crucial issues for the purpose of the present Communication.

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

11. The Communicant insists that the Union rather than its Member States is under an obligation to implement Article 9(3) of the Aarhus Convention.
12. As a preliminary remark in this regard, the EU would like to recall that the Aarhus Convention and its Article 9(3) are part of Union law. The EU and its Member States, pursuant to Article 216(2) of the Treaty on the Functioning of the European Union (TFEU),² are obliged to comply with their international obligations arising from the Convention. This is undisputed.
13. However, when assessing the Union's duties in implementing Article 9(3) of the Aarhus Convention vis-à-vis its Member States, it has to be taken into account that, within the Union legal order, the Aarhus Convention is a "mixed agreement". This means that it covers an area for which competences are shared with Member States (see Article 4 TFEU³). Therefore, the Convention is implemented not solely by the EU but at both Union and Member State level.
14. This element is well known to the Aarhus bodies and all Parties and stakeholders. Indeed, according to the declaration that the Union has made upon signing and ratifying the Aarhus Convention ("EU Declaration")⁴, the Member States of the Union are responsible for the performance of the obligations stemming from

² Article 216(2) TFEU provides that "[a]greements concluded by the Union are binding upon the institutions of the Union and on its Member States."

³ Article 4(2) TFEU states that "[s]hared competence between the Union and the Member States applies in the following principal areas: [...] (e) environment".

⁴ Council Decision of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ L 124 of 17 May 2005, p. 1. This declaration is also published on UNECE's website, see https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXV-II-13&chapter=27&lang=en#EndDec

Article 9(3) of the Convention unless and until the EU adopts provisions of Union law covering the implementation of those obligations.

15. The consequence of this legal framework, as specified in the EU Declaration, is that, in the absence of EU legislation⁵, it is incumbent upon Member States to fulfil the requirements of Article 9(3) of the Convention.
16. In its case-law, the CJEU has equally underlined the Member States' responsibility for implementing Article 9(3) of the Aarhus Convention: "*In 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.*" (judgment in Case C-240/09, *Lesoochránárske zoskupenie* ("Slovak Bears"), paragraph 47). In the same vein, the CJEU held in a subsequent judgment that "[...] *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*" (see the appeal judgment in Joined Cases C-401/12 P to C-403/12 P, paragraph 60).
17. 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).
18. 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).
19. 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

⁵ The sector-specific legislation that has been adopted by the EU is outlined in the earlier EU observations.

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?

20. The Communicant insists in his comment that the absence of a directive on access to justice would constitute a breach of Article 9 of the Aarhus Convention. In the Communicant's view, anything less than a horizontal, binding instrument would not amount to full implementation of Article 9(3) of the Convention.
21. 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.
22. The Aarhus Convention Implementation Guide 2014 equally stresses the great flexibility by Parties in the implementation of Article 9(3) of the Convention (see notably p. 194).
23. Previous compliance cases also show the broad margin of discretion that the Parties enjoy in the way they implement obligations under the Convention. In Decision V/9g on compliance by the EU with its obligations under the Convention (ECE/MP.PP/2014/2/Add.1), the Meeting of the Parties welcomed the willingness by the Union to accept the ACCC's recommendation in Case ACCC/C/2010/54, namely, that it adopt a proper regulatory framework and/or clear instructions for implementing Article 7 of the Convention relating to public participation. In that case, the Meeting of the Parties explicitly allowed for other means than legislation to properly implement the Convention.
24. 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.

25. 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?

26. In his comment, the Communicant again challenges the role of EU case-law in ensuring compliance with the requirements of EU law, which includes the Aarhus Convention. In his view, these judgments are "*not coherent enough to substitute the lack of legislation*" (paragraph 54 of the comment).
27. However, the case-law of the EU Courts is essential for Member States to transpose and apply EU law correctly. This is a cornerstone of the very functioning of the Union.
28. In its earlier observations, the Union already outlined which important elements relating to access to justice in environmental matters the CJEU already clarified (the notion of public authority, the importance of NGO standing and the conditions of standing, the notion of "member of the public", the scope of review and the concept of "not prohibitively expensive" costs; see paragraph 36 of the EU observations).
29. 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.
30. In addition, the same rationale as expressed in these judgments for a specific sector would also apply for other environmental law sectors where EU legislation is at stake and where substantive rights can be said to be conferred by Union law.
31. Furthermore, the Commission follows up relevant CJEU judgments in order to ensure that the rulings are applied not only in the Member State concerned but across the entire Union.
32. To give an example: In its judgment of 16 April 2015 in Case C-570/13, *Gruber*, the CJEU found in answer to a request for a preliminary ruling from the Austrian

"Verwaltungsgerichtshof" concerning Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment that an administrative decision not to carry out an environmental impact assessment is, under certain conditions to be established by the national court, not binding on neighbours who form part of the "public concerned". The Commission commissioned a study to a framework contractor to find out whether the ruling is relevant, beyond the specific legal situation in Austria, for other Member States as well. Should that be the case, Member States are, pursuant to the second subparagraph of Article 4(3) TEU, to take any appropriate measure to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the EU institutions.

33. 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)?

34. Even though this point is not specifically raised in the Communicant's comment, when looking at the Union's implementation of Article 9(3) of the Aarhus Convention, the ACCC should take into account the evolving nature of the implementation measures by the EU.
35. The Commission Work Programme for 2016 states that *"the Commission will also take forward work to clarify access to justice in environmental matters."*
36. Indeed, the Commission services are preparing an interpretative guidance on access to justice in environmental matters, for which a detailed Roadmap has been published.⁶
37. This document will spell out the existing requirements for the transposition of access to justice rules in environmental matters into the national law of the Member States. It will address several access to justice guarantees as provided for in the

⁶ http://ec.europa.eu/smart-regulation/roadmaps/docs/2013_env_013_access_to_justice_en.pdf

Aarhus Convention and also specified by case-law of the CJEU, namely: (1) standing; (2) scope of challenge; (3) procedural safeguards including timeliness and protection against being exposed to prohibitive costs as a litigant; and (4) effective remedies, including injunctions to prevent irreparable environmental harm taking place. National administrations, legal practitioners, economic operators and civil society will then exactly know what the body of EU law is and how it is interpreted by the Commission in light of the CJEU case-law. The Communication will clarify the role of members of the public in initiating review mechanisms at Member State level in case of ineffective access to justice.

38. Certainly, the Commission cannot at this point prejudge the exact content of the planned guidance document. However, it will be an important element of Article 9 implementation and the EU stands ready to provide further information once the document is adopted, should the ACCC wish so.
39. 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.

IV. CONCLUSION

40. For the reasons set out in the earlier EU observations and as explained above, the EU concludes that it fulfils the obligations under Article 9(3) of the Aarhus Convention and reiterates its request to the ACCC to dismiss the Communication as unfounded.