

**United Kingdom comments on
ACCC/C/2015/123 (European Union)**

25 November 2015

Summary

1. We submit that this communication is inadmissible and request that the Committee reverse its preliminary decision when making its final determination on admissibility.
2. The communication is **misdirected**. By naming the EU as the Party Concerned in respect of the allegations of non-compliance with article 9(3) of the Convention, the communicant has ignored the effects of the EU's declaration upon approval of the Convention and article 19(5) of the Convention. In accordance with this declaration, the Member States are responsible for these obligations where they are not subject to EU legislation. The Committee's role is to give a view on whether Parties have complied with the Convention, not to determine at which level a Party should legislate to implement Convention requirements.
3. The communication is **manifestly unreasonable**. It is unreasonable for the communicant to hold the Party in this case to account for matters that it has declared, on its approval of the Convention, to be the responsibility of its Member States. Further, it is also clearly unreasonable to allege that the Party has breached the Convention by reference to a legislative proposal that was not adopted and which has now been withdrawn.

Comments on admissibility

4. The essence of the communicant's argument is that the EU is in non-compliance because of the absence of EU legislation on access to justice. The Committee's role, in accordance with article 15 of the Convention and paragraph 1 of decision I/7, is to review compliance by Parties with their obligations under the Convention. It is for Parties to determine at what level they should legislate in order to comply with those obligations. It would be beyond the Committee's remit to make findings or recommendations that purport to instruct a Party at which level it should legislate.
5. It might, in some circumstances, be appropriate for the Committee to consider an argument that the absence of legislation at a particular level raises questions about a Party's compliance with the Convention. There might, for example, be a question mark over whether legislation adopted at different levels provides sufficient coverage for the purposes of compliance. It would still be open to a Party to plug any gap that might be identified by legislating at whichever level it considers appropriate. However, the situation here is subject to a specific declaration by the EU, the proper effects of which have been ignored by the communicant.

6. Article 19(5) of the Convention provides the following:

“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.”

7. The EU (European Community as then was) made a declaration in accordance with article 19(5) upon approval of the Convention.¹ The declaration provides as follows.

“...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.”

8. The communicant appears to misunderstand the effects of this declaration. They suggest that this is something merely that the EU has “alleged” as being a means of implementing the Convention, rather than being a declaration required under article 19(5) of the Convention.

9. The declaration sets out, in accordance with article 19(5) as it applies to regional economic integration organisations like the EU, “the extent of their competence with respect to the matters governed by this Convention”. As well as being submitted to comply with this Convention requirement, the EU’s declaration was deposited alongside the EU’s approval of the Convention. This is the basis upon which the EU is a Party to the Convention. It carries with it much greater significance than the communicant suggests.

10. The communicant also erroneously suggests that not all EU Member States are Parties to the Convention. Substantive concerns about access to justice should be directed to the Member State(s) concerned, unless these matters are already addressed under EU legislation or relate to the EU institutions, as is consistent with most communications brought to date.

11. An allegation that the absence of EU legislation constitutes a breach of the Convention, when made against the background of the article 19(5) declaration by the EU on competence, is clearly unreasonable. It is also unreasonable to make specific allegations of non-compliance against the EU in respect of a legislative proposal that was not adopted by the Party and has now been withdrawn. No finding of compliance or non-compliance by the Party can be made on the basis of a withdrawn legislative proposal. On the basis of paragraph

¹ Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-13&chapter=27&lang=en.

20(c) of the annex to decision I/7, the Committee should not consider this communication further because it is manifestly unreasonable.

12. Additionally, given the Committee's increasing workload, it is more important than ever that it is able to use its time to consider communications properly directed and formulated, rather than those that have been submitted on a fundamentally flawed basis.

13. We request that the Committee finds this communication inadmissible in order to:

- take proper account of article 19(5) of the Convention;
- ensure that the effects of the EU's declaration are not ignored; and
- make it clear to communicants that allegations made on the basis of inchoate legislation will not be considered by the Committee because it cannot make a finding of compliance or non-compliance on such allegations.

14. Considering this communication further could set a worrying precedent with regard to the effect of declarations made by Parties and would call into question the effects of article 19(5) of the Convention. It would also signal that incomplete and unadopted legislative proposals could form the basis of a finding of non-compliance. This would be at odds with the need for the Committee to consider what measures a Party has actually put in place when considering making findings on compliance.