EU Statement following the open session of 25 November 2020

of the Aarhus Convention Compliance Committee

regarding the request ACCC/M/2017/3 (EU) in case ACCC/C/2008/32

26 November 2020

1. Introduction

We thank the Committee for the opportunity to explain how we have responded to its findings in case ACCC/C/2008/32.

The following explains the purpose and implications of the legislative proposal aiming to amend the Aarhus Regulation and the priority actions to be implemented with Member States, identified in the Commission communication accompanying the legislative proposal, both adopted by the Commission on 14 October 2020. The legislative process leading to the adoption of the Regulation by the EU co-legislators – the European Parliament and the Council – is ongoing.

To prepare the new measures, all options have been explored for bringing the EU into compliance with the Convention in a way compatible with the EU legal order, as we signed up to at the Meeting of the Parties in 2017.

Public consultations were held, a thorough study was performed, and a comprehensive Commission report was prepared, assessing the options available.

All these reflect the EU's strong commitment to ensure compliance with its international obligations under the Aarhus Convention, consolidating and expanding effective opportunities to hold EU institutions and bodies accountable if they make decisions that contravene environmental law.

Before diving into details, it is important for us to underscore just how significant the changes we have proposed are. These targeted changes to the Aarhus Regulation will have massive implications. Like all public institutions, the Commission is as well under huge resource pressures whilst the political expectations for new initiatives are ever growing. Against this backdrop it is all the more noticeable that we have been able to come forward with very substantial solutions to the most important findings, even if this will have significant implications on our staff resources. This is the strongest possible

measure of the political commitment to make the EU compliant with the Convention. It is a hard won battle, based on agreements with colleagues dealing with many other important policy areas.

2. How will the proposal improve the current system of review?

The revised Aarhus Regulation brings a very important step towards more effective scrutiny of EU decisions.

Today NGOs can challenge only individual decisions, for example an authorisation to use a specific chemical addressed to a single company. However, general decisions applicable to all firms cannot be challenged.

In the future, NGOs can challenge also general decisions. In addition, decisions will be opened up for review under any policy area, be it environment, transport, energy or health, such as major energy or transport infrastructure projects.

The expansion will be a genuine game-changer: it brings sweeping changes in the current system and new opportunities to hold EU institutions accountable. The importance of the proposed changes cannot be emphasised enough.

We are confident that these changes, taken together with the priority actions outlined in the communication, are fully addressing the findings and concerns of the Committee.

3. The review of implementing measures, and in particular of the national ones

Where a non-legislative act contrary to EU environmental legislation contains provisions requiring the adoption of further implementing measures – at EU or national level – the review of such measures is possible once such measure are adopted, because they deploy the effects and allow an assessment of whether such measures, and the provision which has mandated their adoption, is contrary to the EU environmental laws.

The implementing measures do not transpose the EU legislation, but are occasionally mandated by EU non-legislative acts with a view to organize the application of certain elements.

The legislative proposal does not provide for a blanket exception of the entirety of an act entailing implementing measures. The definition is carefully crafted to ensure that all provisions of an administrative act can be reviewed,

except those provisions requiring national implementing measures. Further, Union law must be explicit on the fact that a particular provision requires implementing measures. This leaves no room for unjustified broadening of the exception.

To provide a hypothetical example: an administrative act may have a 10 provisions, 9 of these require no further implementing measures at national level. All 9 of these can be challenged under the Aarhus Regulation. It is only that single provision requiring implementing measures, which cannot be challenged. Typically, these would be provisions that could themselves unlikely contravene environmental law. For example, a requirement for countries to designate competent authorities, or to determine the total allowable catch (TAC), as the examples submitted in writing at the request of the Committee earlier today illustrate.

This brings us to a second point: where national implementing measures are required, the provision of a decision made at EU level produces consequences at national level, where the measures are taken. NGOs can challenge such measures before a national court.

Therefore, the exclusion from the scope of the Aarhus Regulation simply means that NGOs can challenge the national implementing measures in national courts. This makes sense, as national courts will be closest to where the consequences take place and can take the adequate remedial measures.

This brings us to the communication and its role in ensuring compliance with the Aarhus Convention.

4. Why did the Commission adopt a communication asking EU Member States to improve access to justice in their national courts in environmental matters covered by EU laws?

Not only the national implementing measures referred to above, but also many EU environmental and non-environmental laws require implementation by the Member States and the taking of measures, which – if not adequately calibrated – can contravene EU environmental laws. Examples include permits for infrastructure projects or industrial installations, which are a regular part of administration by Member State authorities at national, regional and local level. Without these national decisions – or omissions, there will be no effects.

The CJEU has held, "*[…] the possibility for individuals to have their rights protected by means of an action before the national courts, which have the power […] to make a reference for a preliminary ruling […] constitutes the very essence of the Community system of judicial protection.*"[1] Therefore, national judges are part of the general EU framework of legal protection. The rights enshrined in the Convention's Article 9(3) are therefore safeguarded by the combination of the relevant CJEU competences defined by the Treaty provisions, the administrative review defined by the Aarhus Regulation and the judicial review provided by national courts as EU courts.

It is recognised that – contrary to EU law requirements – there are still too many obstacles to safeguard these rights in national courts. This is why the communication draws political attention to the imperative of action by national authorities and courts in Member States, asking these to contribute – to the extent of their competences – to fulfilling the requirements of Article 9(3) of the Aarhus Convention, in order to live up to their obligation defined by Art. 10 TEU: "*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*".

The Commission – and the Court of Justice of the EU – take the need to dismantle such obstacles very seriously. Further measures for the improvement of some of the national systems of access to justice are needed, different from a Member State to another. The Commission has acted on such obstacles already by exercising its role as guardian of the Treaties and will continue to exercise this role in combination with other measures, such as rendering public in 2021 its assessment of the situation in each Member State in this respect.

We see significant value in training, information sharing and capacity building. It will not deliver results over night. It is a continuous change of cultures and practices in public administrations and the judiciaries. We also need to take Member States to court, if in blatant breach of EU law. In the communication, we make a clear statement that this will continue to happen. To further ensure legal certainty, and building on case law of the Court of Justice, we aim to strengthen EU legislation on access to justice in Member States.

[1] See e.g. Order of the Court of 1 February 2001 in Case C-301/99 P, Area Cova SA and others v Council and Commission, ECLI:EU:C:2001:72, paragraph 46.

5. Opening access to administrative review under the Regulation beyond environmental NGOs?

The explanatory memorandum to the legislative proposal provides detailed elements in response to the question of standing as raised by the Committee. In short, individuals and many other organisations, members of the public, have already opportunities under EU and national laws to have their say, protect their rights and act against harm, notably through national courts. These are the most effective ways to ensure that EU law is upheld and effectively implemented. In addition, individuals and some other members of the public also have direct access to the Court of Justice of the European Union when the decision directly concerns them. As already stated, we know there are obstacles on the ground, but the rules are clear.

We all agree that the Convention does not require *actio popularis*, so beyond NGOs, which other members of the public should have this entitlement?

- We cannot allow standing for some individuals or organisations but not others, unless there is an objective reason and clear delineation, as is the case for NGOs.
- How could we say that one individual, organisation or city has a right to challenge an act of general scope at EU level that is applicable to, say, air quality, while excluding others from the same right?
- Any attempt to provide additional eligibility criteria beyond NGOs, representing the public interest, no matter how well-intentioned, could only result in a de facto '*actio popularis*'.

The Convention requires access to 'administrative or judicial procedures' to members of the public, not '*actio popularis'*. This is exactly what we deliver whilst recognizing that further improvements are needed, not with the legislation, but its application on the ground. The Aarhus Regulation gives special rights to NGOs because they can effectively represent civil society concerns with well-founded and substantiated argumentation. The review of the Aarhus Regulation makes it possible for them to carry out this crucial role more fully, ensuring thereby full compliance with Article 9(3) of the Convention.

Although individuals do not have access to administrative review under the Aarhus Regulation, even amended as proposed, this does not mean that they cannot challenge non-legislative acts adopted by EU institutions.

If such acts are of direct and individual concern to them, they have access to judicial review in front of the CJEU in accordance with the TFEU and there they can raise arguments about their contrariety with EU environmental laws and obtain relief.

If such non-legislative acts are of general concern to them as being contrary to EU environmental laws, they can challenge in national courts their implementation by the national authorities as being contrary to EU environmental laws, because such laws are an integral part of the national legal order of the Member States, and can raise questions about the validity of such non-legislative acts which the national court is obliged to refer to the CJEU. The remarks, priorities and approaches outlined in the communication commented upon in section 4 above are fully relevant in this respect.

6. Acts devoid of legally binding and external effects

The Committee also raised the issue that the EU does not allow challenges to non-binding and purely internal EU acts.

The EU Treaties do not allow review of non-binding acts. What is more, exactly because of their non-binding character, they cannot breach EU environmental law. Similarly, purely internal EU acts – such as nominations or other organisational decisions of the institutions – cannot contravene EU environmental rules either.

These may be decisions made by an administrative body, and they are subject to specific forms of review, including in front of the Court of Justice of the EU, but they do not produce effects on third parties in the sense in which non-legislative acts of the EU do produce. We have also not seen any evidence that any of these purely internal decisions would be capable of contravening environmental law.

We are aware that there may have been instances in the early days of the Aarhus Regulation, where the Commission interpreted the requirement of 'external effects' in particular, more restrictively than what we would today. To our knowledge, these cases have not been tested before the courts and such a restrictive interpretation will have no place in today's administration[2].

[2] See, in particular, Commission Decision C(2007)6367 adopting the operational programme Transport for Community assistance from the European Regional

Finally, as also explained in the explanatory memorandum, the notion of external effect must be interpreted in light of the jurisprudence of the Court of Justice regarding 'legal effects vis-à-vis third parties', and it is clear that what matters is not the name of the act but its effects, objective and content.

Therefore, any act intended to produce legally binding and external effects which would be adopted under the disguise of soft law would fall automatically under the scope of administrative review permitted by the Aarhus Regulation if such effects are demonstrated by the applicant.

7. Conclusion

To conclude, in order to assess the EU's compliance with the findings, a holistic approach is warranted by the nature of the EU as regional economic integration organisation, by the nature of its multi-layered system of governance and by its legal order integrating EU-level and national-level courts in a providing a single and complete system of judicial redress.

The compliance with the Convention is comprehensive based on: (i) the system of judicial review construed by the Treaties, where the Court of Justice of the EU takes authoritative and independent decisions on the interpretation of EU law, (ii) the amendments proposed to the Aarhus Regulation, and (iii) the national level access to courts, where the national courts have an obligation based on the Treaties to safeguard rights of individuals and NGOs under EU law.

Therefore, the amendments proposed to the Aarhus Regulation, combined with the implementation by the Member States of the actions identified in the communication, will bring the EU in compliance with its obligations under the Convention, as undertaken at the time of ratification. Therefore, we can say with confidence that the proposal and the communication, taken together, address all issues raised by the Committee in its findings to the extent allowed by the EU legal order.

Development Fund and the Cohesion Fund under the Convergence objective in the Czech Republic, which was challenged under the Aarhus Regulation by an NGO in 2008 and was rejected as it was found to be an act not producing external effects. Reference number in repository: 3.