ClientEarth

25 November 2020

Statement to the Aarhus Convention Compliance Committee's 68th meeting regarding request ACCC/M/2017/3 (European Union)

1. Thank you for inviting us to provide comments on the legislative proposal to amend the Aarhus Regulation and the Communication on access to justice in national courts in environmental matters adopted by the European Commission on 14 October 2020.

2. The publication of the proposal is a welcome and crucial step to remedying the Party's non-compliance. We have consistently emphasised that the amendment of the Aarhus Regulation is the only measure within the powers of the European Commission and the co-legislators to ensure compliance with the Convention.

3. Having said that, the text of the proposal does not address all of the specific findings of non-compliance contained in Committee's findings on communication ACCC/C/2008/32.

4. Before speaking to the remaining points of non-compliance in more detail, we would like to emphasise that it is still within the powers of the EU co-legislators, the European Parliament and the Council of the EU, to improve the text of the proposal in a way that would bring the EU into compliance with the Convention. We urge the co-legislators to take the time they need to get this amendment right. This opportunity should not be lost to haste.

5. In its findings in case C-32, the committee found that the Aarhus Regulation in its current form includes certain limitations to the definition of reviewable acts and omissions that are not compatible with Article 9(3) Aarhus Convention.

6. In this regard, the Commission's proposal is positive because it removes the criteria related to "individual scope" and "under environmental law" from that definition, which were two of the elements that the Committee had addressed in its findings. However, the Commission proposes at the same time to introduce a new criterion that we believe would leave the EU in non-compliance with Article 9(3). It also fails to remove all of the existing restrictions under the Aarhus Regulation that do not comply with the Convention.

(1) New restriction: "Implementing measures"

7. Article 1(1) of the proposal would introduce new wording to the effect that those provisions of an administrative act "*for which Union law explicitly requires implementing measures at Union or national level*" could not be the subject of an internal review request.

8. For provisions of acts where the implementing measures are to be taken at Union level, these implementing measures themselves would constitute an administrative acts that could be subject to challenge. Moreover, based on Article 1(2)(a) of the proposal, as part of that internal review, the applicant NGO could request review of "*the provision of the non-legislative act for which that implementing measure is required*". We can see that in theory this system is supposed to ensure that the provisions of administrative acts that require implementing measures at Union level could

eventually be challenged. In practice though this could cause a number of problems in terms of legal certainty for NGOs. Additionally, from the point of view of environmental protection, it does not make sense that an unlawful provision must be implemented before it can be challenged.

9. The situation is markedly worse for provisions of administrative acts that require implementing measures at national level. For these provisions, an applicant NGO would be forced to seek access to the EU Member States courts, in order to then obtain a preliminary reference to the Court of Justice. As the Committee has previously made clear, the (often only theoretical) possibility of such an action does not suffice to fulfil the requirements of Art. 9(3) of the Convention.

10. The fact that the preliminary reference procedure is not an adequate alternative to direct court access is also confirmed by the study prepared for the Commission to inform the current proposal. The Study documents the problem of legal standing, as well as the many practical challenges, such as prohibitive costs, delays (of around 16 months per case) and failures by national judges to refer questions.

11. The non-binding Communication published by the Commission on access to justice at national level does not remedy the barriers that the public face in accessing national courts. Only legally binding provisions, such as a horizontal directive or access to justice provisions in sectoral EU legislation, are capable of making a real difference. The Communication is a statement of intent for the future by the Commission as well as a request to the European Parliament and the Council to follow along. It is therefore irrelevant for the considerations of the Committee, which need to be based on the legal situation as it stands when it takes its decision. Some of the intents are laudable, such as to propose access to justice provisions when adopting sectoral EU legislation. However, it is interesting to note that neither the Council nor the Commission appear to support the European Parliament's amendment to the EU Climate Law that would introduce a national access to justice provision. That in itself is a worrying indicator of the level of commitment to the intent outlined in the Communication.

12. In any event, even if barriers to national courts could be overcome, this would not remove the structural problems, identified in the Committee's findings, that are inherent in the preliminary reference procedure and that render it an inadequate alternative to direct access to an administrative or judicial review procedure. These include the fact that applicants have little influence over the decision of national judges to refer preliminary questions to the CJEU and the length of proceedings. Therefore, in our view, any condition that requires NGOs to challenge provisions of EU acts that contravene EU law relating to the environment through national courts does not comply with Article 9(3) of the Convention.

13. To make matter worse, it is not clear which provisions will be considered to "explicitly require implementing measures." The Commission's proposal certainly does not address this matter. This requirement would therefore also lead to a significant lack of legal certainty and much litigation, solely to establish the exact boundaries of this new requirement.

14. We already know that the European Court of Justice interprets the notion of implementing measures very broadly in its jurisprudence on the 4th paragraph of Article 263 TFEU, with the result that cases are declared inadmissible for this reason (see, for example, case C-456/13 T&L Sugars). Although we acknowledge that the wording is not identical, we are very concerned that the CJEU would ultimately interpret this provision in a similar way, which would have the effect of excluding a great many EU acts from internal review.

15. We have heard from the Commission in a recent meeting that the precise wording of the amendment mitigates this risk, because it only applies to the specific provisions of EU acts that explicitly require implementing measures. In our view, this different wording will not make a decisive difference. In the vast majority of internal review cases, NGOs would usually seek review of the operative articles of an EU decision. It is precisely these clauses that may not take full effect without a national implementing measure. It should also be noted that the question of whether the requirement for a national implementing measure is explicit or not would not depend solely on the act under review; the explicit nature could flow from a different provision of EU law that an NGO may not be aware of.

16. I am happy to outline this concern with reference to specific examples, should the Committee find that helpful.

(2) Existing restriction remains: "External effects"

17. Another issue that remains unaddressed is the Committee's finding in relation to the requirement that acts and omissions need to have legally binding and external effects to be reviewable by way of internal review.

18. In ClientEarth's view, the Convention is clear on this matter. Any act that is capable of contravening national (or in this case EU) law relating to the environment must be susceptible to review. This condition already implies that such acts must be capable of producing legal effects, otherwise they could not contravene laws relating to the environment. There is no need for a supplementary requirement that acts must be legally binding and have external effects. It adds a layer of cumulative criteria that have already resulted in EU officials erroneously refusing requests for internal review of acts that undoubtedly produce legal effects, as acknowledged by the Committee in its findings.

(3) Existing restriction remains: State aid decisions

19. The Commission's proposal does not address the exclusion of acts taken in the capacity of an administrative review body (Art. 2(2) Aarhus Regulation). We are specifically concerned that the Commission's decisions concerning State aids continue to be excluded from the scope of the Commission's proposal. In its findings, the Committee held that the Convention did not provide for an exemption for acts taken in the capacity of an administrative review body. It only concluded that there had been no non-compliance on this point because it had not been provided with concrete examples.

20. Since the Committee adopted its findings, it has been provided with comprehensive information in the context of communication ACCC/C/2015/128 (European Union) that the Commission's state aid decisions do indeed fall under the application of Article 9(3) Aarhus Convention, at the very least in certain circumstances. The Committee is currently considering its deliberations on this case, after having decided to stay these proceedings awaiting the judgement of the CJEU on case C-594/18 P *Austria v Commission*. In this judgement, the CJEU unequivocally confirms that the Commission's state aid decisions need to comply with EU environmental law.

21. ClientEarth acknowledges that this matter is being dealt with in a parallel communication. However, we find ourselves in the unusual situation that the Aarhus Regulation is now being amended, while the draft findings on case ACCC/C/2015/128 are imminent. It therefore considers that it would be crucial to reflect this point in the advice of the Committee.

22. Returning to the substance, the Commission has put forward the view that State aid decisions are essentially national decisions that should be challenged in national courts. For one, NGOs generally lack standing to challenge national financing decisions on the basis that they breach EU environmental law.

23. Moreover, a national court would usually also not be competent to provide an effective remedy. As clearly recalled by the CJEU in the Austria v. Commission ruling, the Commission must check that an activity complies with environmental laws and cannot authorise the grant of state aid to an activity that does not comply. This does give a responsibility to the Commission, in its decisions on the compatibility of aid measures, to perform this verification. That is not a matter national courts will be competent to decide upon. Only judicial review by the CJEU and internal review of its decisions by the Commission can correct a failure, by the Commission, to verify this compliance.

(4) Internal review and effective remedies

In its findings in case C-32, the compliance committee found that it was still possible for the European Courts to interpret article 12 of the Aarhus Regulation in a way that would allow them both to consider the procedural and substantive lawfulness of an internal review decision.

Since then the CJEU has confirmed in case T-108/17 *ClientEarth* that the Article 12 procedure can only result in the annulment of the internal review decision, and not in the underlying act that was subject to internal review. Nevertheless, we note that the CJEU has accepted that its review of internal review decisions may take into account arguments regarding the substantive unlawfulness of the underlying act to the extent that they were raised and substantiated in the request for internal review. An appeal on this case is currently pending before the CJEU regarding, among other things, the burden imposed on NGOs in demonstrating such substantive unlawfulness and the extent to which pleas before the Court can be developed to take account of the review decision.

While we acknowledge that there are limitations to what the co-legislators can do to remedy this situation, we believe that an amendment to Article 12 to clarify that the CJEU must perform a full review of the substantive and procedural legality of the review decision would be necessary in future cases to ensure that an NGO can obtain effective remedies, as required by the Convention.

Conclusion

24. In light of the foregoing, ClientEarth considers that the legislative proposal and the Communication on access to justice are insufficient to fulfil the requirements of paragraph 123 of the Committee's findings on communication ACCC/C/2008/32 (Part II). It therefore urges the EU co-legislators to consider all of the points of non-compliance very carefully and make the necessary amendments to the text before adopting the amendment to the Aarhus Regulation.