ClientEarth

28 October 2020

Comments on the third progress report on the implementation of request of the Meeting of the Parties ACCC/M/2017/3 (European Union)

1. On 30 September 2020, the European Union submitted its third progress report on its implementation of MOP request ACCC/M/2017/3. It further supplemented that report with additional information on 14 October 2020.

2. As the communicant of communication ACCC/C/2008/32 (European Union), ClientEarth would like to make the following comments on the report and the additional information.

Findings on communication ACCC/C/2008/32 (Parts I and II)

3. As indicated in the email of the Party concerned from 14 October, the European Commission has published a legislative proposal to amend Regulation 1367/2006/EC (the "Aarhus Regulation"). The proposal states that it "*aims to improve the implementation of the Aarhus Convention following the adoption of the Lisbon Treaty and to address the concerns expressed by the Aarhus Convention Compliance Committee (the Committee) regarding the EU's compliance with its international obligations under the Convention*."[1]

4. The publication of the proposal is a welcome and crucial step to remedy the Party's non-compliance. As ClientEarth has consistently emphasized, the amendment of the Aarhus Regulation is the only measure within the powers of the European Commission to ensure compliance with the Convention.

5. However, when considering the legislative proposal in detail, it becomes quickly apparent that, if it was adopted in its current form, it would not address the specific findings of non-compliance contained in the Committee's findings on communication ACCC/C/2008/32.

6. As the Committee stated in part II of its findings:

   "*[…] while article 9, paragraph 3, allows Parties a degree of discretion to provide criteria that must be met by members of the public before they have access to justice, it does not allow Parties any discretion as to the acts or omissions that may be excluded from implementing law*."[2]

7. On the basis of this consideration, the Committee has found that the Aarhus Regulation in its current form includes certain limitations that are not compatible with Article 9(3) Aarhus Convention. In this regard, the Commission's proposal is positive because it remove the requirement that acts need not be of "individual scope" or "under environmental law" to be subject to challenge, which were two elements that the Committee had addressed in its findings.[3] However, the Commission proposes at

[1] Annex 1 to the email of the Party concerned of 14 October 2020, Annex 1, p. 1.
[2] Committee's findings on communication ACCC/C/2008/32 (part II), paras 52 and 101.
[3] Ibid, paras. 94 and 100.

the same time to introduce a new exemption from the acts or omissions that may be subject to challenge and also does not remove all existing restrictions under the Aarhus Regulation that do not comply with the Convention.

(1) New restriction: "Implementing measures"

8. 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 subject of an internal review request.[4]

9. For provisions of acts where the implementing measures are to be taken at Union level, these implementing measures themselves would amount to 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*".[5] While not necessarily the most efficient, this system would ensure that also the provisions of administrative acts that require implementing measures at Union level could eventually be challenged.

10. The situation is markedly different 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.[6]

11. 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 concludes that "*broad legal standing is granted by law and in practice in less than half of the Member States (13 out of then 28)*" and "*the issue of legal standing is an enduring one, as demonstrated both by the legal settings in the EU-28 and the experiences of potential claimants (NGOs) and national judges*.[7] More specifically, in many Member States certain acts are effectively barred from judicial review because they are considered "internal" to the administration or to only affect an economic operator. Additionally, many practical challenges arise, which are also discussed in the Study, such as prohibitive costs,[8] delays (of around 16 months per case)[9] and failures by national judges to refer questions.[10] ClientEarth would like to emphasize that these issues will not be addressed by the non-binding Communication published by the Commission together with its legislative proposal.[11]

12. To make matter worse, it is not clear what provisions will be considered to "explicitly require implementing measures." In the preparation of its Study, Milieu consulted the relevant Commission

[4] Annex 1 to the email of the Party concerned of 14 October 2020, p. 21.
[5] Ibid.
[6] Committee findings on communication ACCC/C/2008/32, Part I, para. 90, and Part II, paras 56-57.
[7] Milieu Study, pp. 106-107.
[8].Milieu Study, pp. 170-171 and 175.
[9] Milieu Study, p. 131 and 171, referred to as hassle costs. As an example, a recent case in Belgium led to an 18 months delay of its national litigation on an urgent human health matter (review of an air quality plan), which also amounted to one third of the costs incurred in the case.
[10] See Mileu study, inter alia pp. 132-3 stating for instance that nearly 80% of preliminary references originate from only 7 of the 28 Member States, one of which has since then left the European Union.
[11] Annex 2 to the email of the Party concerned of 14 October 2020.

DGs as to whether the EU acts adopted on 481 legal bases would result in implementing measures. The Commission services provided a response for only 107 of the legal bases, i.e. less than 22%. For the remaining 78%, the Commission services left the question unanswered or replied with "don't know".[12] The Commission's proposal also fails to provide clarity on this matter.[13] 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.

(2) Existing restriction remains: "External effects"

13. 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.

14. In the explanation provided with the proposal, the Commission discusses the issue of "legally binding and external effects" and explicitly refers to the Committee's findings on this point.[14] The Commission then argues that the exclusion in the Regulation is identical to the scope of Article 263(1) TFEU, though it acknowledges that the terminology is not identical. The terminology in the case law of the CJEU is "binding legal effects".[15] According to the Commission, both the wording of the Aarhus Regulation and the different wording used by the CJEU merely ensure that only acts can be subject to review "*that are intended to produce legal effects are capable of 'contravening' environmental law, as indicated in Article 9(3) of the Convention*."[16]

15. ClientEarth agrees that only acts that are legally binding can contravene environmental law and therefore fall under Article 9(3). However, as the Committee has also held in its findings, the application of this requirement has led to considerable confusion in the past, with some acts having been considered to not have legally binding or external effects even though they may be covered by Article 9(3).[17] Given that the Commission acknowledges itself that the terminology under the CJEU's case law is different, it should have simply proposed to align the wording of the Aarhus Regulation with the case law, rather than insisting that the meaning is already the same.

(3) Existing restriction remains: State aid decisions

16. The Commission's proposal does also not address the exclusion of acts taken in the capacity of an administrative review body (Art. 2(2) Aarhus Regulation). 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.[18] The Committee therefore states that it has "*doubts that he general exclusion of all administrative acts and omissions by institutions acting in the capacity of administrative review*

[12] See Milieu Study, footnote 275 on p. 120.
[13] Proposal, pp. 14-15.
[14] Email to the email of the Party concerned of 14 October 2020, Annex 1, p. 8.
[15] See Case C-583/11 P, ECLI:EU:C:2013:625, para 56, also referred to by the Commission in footnote 27 of the proposal.
[16] Email to the email of the Party concerned of 14 October 2020, Annex 1, p. 8.
[17] Committee findings on communication ACCC/C/2008/32, Part II, paras 103-104 referring to the communicant's comments of 23 February 2015, paras. 62-68, for relevant examples.
[18] Ibid, para. 110.

bodies complies with article 9, paragraph 3."[19] It only concluded that there had been no non-compliance on this point because it had not been provided with concrete examples of breaches.[20]

17. Since the Committee has 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, which are excluded from internal review based on Article 2(2)(a) Aarhus Regulation, do indeed fall under the application of Article 9(3) Aarhus Convention, at the very least in certain circumstances. The Committee had decided to stay these proceedings awaiting the judgement of the Court of Justice of the European Union (CJEU) on case C-594/18 P *Austria v Commission*. In the meantime, the CJEU has issued its final judgement on the case on 22 September 2020.[21] In its judgement, the CJEU unequivocally confirms that the Commission's state aid decisions need to comply with rules of EU law on the environment, stating:

"It follows that, since Article 107(3)(c) TFEU applies to State aid in the nuclear energy sector covered by the Euratom Treaty, State aid for an economic activity falling within that sector that is shown upon examination to contravene rules of EU law on the environment cannot be declared compatible with the internal market pursuant to that provision."[22]

18. It is immaterial that the CJEU did not find that there had been a violation of such rules in the specific case,[23] for the purpose of the Convention the sole question is whether the Commission's state aid decisions have the potential to contravene rules of national (or, in this case, EU) law related to the environment. This judgement therefore demonstrates that Article 2(2) in its current form prevents the compliance with the Party concerned with Article 9(3). This applies both to the open-ended nature of the chapeau of the provision considered by the Committee in its findings,[24] as well as the specific exclusion of competition matters under para. (a) of the same provision.

19. Considering that the Party concerned has now proposed an amendment of the Aarhus Regulation, it will be crucial that in the context of this legislative procedure Article 2(2) is amended directly to remedy this non-compliance. Otherwise, the Party concerned would have to re-open the Regulation once again as soon as the Meeting of the Parties has introduced the Committee's findings on communication ACCC/C/2015/128.

Conclusion on case ACCC/C/2008/32 follow-up

20. In light of the foregoing, ClientEarth considers that the Party concerned has not yet fulfilled the requirements of para. 25(b) of the Committee's second progress review.

21. The CJEU's jurisprudence has equally not evolved in a way that would allow for broader standing of NGOs. The Court has rather confirmed the *status* quo in a recent judgement.[25] Accordingly, the Party concerned has also not yet fulfilled the requirements of para. 25(c) of the second progress review.

[19] Ibid, para. 111.
[20] Ibid.
[21] ECLI:EU:C:2020:742. See Annex 1 to these comments.
[22] Ibid, para. 45. See also the preceding paragraphs.
[23] Ibid, paras 48-50.
[24] Committee findings on communication ACCC/C/2008/32, Part II, paras 106 and 110.
[25] Judgemen on case C-784/18 P *Mellifera v Commission*, ECLI:EU:C:2020:630.

22. ClientEarth therefore considers that the Party concerned has not yet fulfilled request ACCC/C/M/2017/3 with respect to the Committee's findings on communication ACCC/C/2008/32.

23. In the following months, ClientEarth will engage in the legislative process to inform the European Parliament and the Member States acting through the Council, which are of course themselves Parties to the Convention in their own right, advocating for amendments that will make the Commission's proposal compliant with Article 9(3) Aarhus Convention.

Findings on communication ACCC/C/2010/54

24. To facilitate the Committee's follow-up, we have structured this section based on the Committee's second progress review.

Paragraph 3 of decision V/9g – Proper regulatory framework or clear instructions with respect to adoption of National Energy and Climate Plans (NECPs)

25. In its second progress review, the Committee analysed the provisions of the EU Governance Regulation and concluded that the Party concerned had "*not yet demonstrated that it has put in place a proper regulatory framework to ensure that he requirements of article 7 are met with respect to the adoption of the member States' NECPs*."[26] The Governance Regulation was not amended, nor has the Party concerned adopted any other regulatory or legislative measures to ensure compliance with article 7 in relation to the NECPs. ClientEarth therefore considers that the Committee's conclusion on this point is still valid.

26. Since the final NECPs have now been adopted, ClientEarth considers that the Party concerned would have to show that it adopts a proper regulatory framework or clear instructions with regard to the adoption of possible amendments to the first NECPs or the adoption of the second NECPs in 2029. However, the third progress report does not speak of any additional measures in that regard.

27. Therefore, the Party concerned failed to comply with the Committee's request in para. 59 of the second progress review provide evidence that the Party concerned has adopted a proper regulatory framework or clear instructions for implementing article 7.

Paragraph 3 of decision V/9g – Evaluation of NECPs

28. In its second progress, the Committee recalled that:

"*an assessment by the Party concerned of the information provided by member States on the public participation procedure carried out on their plans, coupled with a real possibility of infringement proceedings against any member State whose information is insufficient or reveals a failure to carry out public participation that fully met the requirements of article 7, may fulfil the final sentence of paragraph 3 of decision VI/8g*."[27]

29. In its third progress report, the Party concerned indicated that the Commission was carrying out an assessment of the final NECPs. It stated that the assessment would contain, inter alia, observations on how the obligations of the Governance Regulation (including Articles 10 and 11) have been

[26] Second progress review, para. 54.
[27] Second progress review, para. 66.

applied by Member States and how the Member States report that the public has been involved in the preparation of the final NECPs.[28]

30. The Party concerned has published an EU-wide assessment of the NECPs on 17 September 2020,[29] covering the cumulative impact of the 27 NECPs, as well as individual assessments of each of the NECPs in the form of 27 staff working documents on 12 October 2020.[30]

31. ClientEarth has considered both the EU-wide assessment and some of the individual assessments below. Based on this consideration, ClientEarth submits that the Party concerned has not delivered an adequate assessment with a view to a real possibility of infringement proceedings in the sense of para. 28 above.

(1) EU-wide assessment

32. The EU-wide assessment mentions public consultation on the NECPs only two times, merely stating that NECPs have been "*subject to extensive consultation with stakeholders, civil society and citizens*"[31], and that "*[t]he plans were also the outcome of wide consultation and participation at national and subnational level*".[32] There is no critical reflection on any shortcomings.

33. There is no specific section dedicated in the EU-wide assessment of the NECPs on how public participation obligations concerning NCPs have been fulfilled by Member States. By contrast, the multi-level dialogue required under Art. 11 of the Governance Regulation, as well as regional cooperation (Art. 12 Governance Regulation) do share a specific section (*2.4.1. Increased cooperation between Member States and multi-level dialogue*) in the EU-wide assessment of the NECPs.

(2) Individual assessments

34. The individual assessments of the NECPs published by the Commission describe in a very brief manner the public participation process followed by Member States lack any evaluation or announce follow-up steps. Moreover, these descriptions appear to be solely based on what the Member State itself reported, rather than the actual situation on the ground.

35. Two examples of such individual assessments are annexed to this submission and are shortly commented on below. ClientEarth would like to emphasize that these are mere examples, they have not been chosen for displaying the most egregious failures.

Spain

36. The Assessment of the Spanish NECP refers briefly the public participation process and notes that the Spanish Government has not submitted a summary of the public's views and of how those views have been taken into account in the final NECP.[33] This is merely stated without any evaluation or being connected to any specific request to Spain in that regard.

[28] Third progress report, para. 43.
[29] See Annex 2.
[30] Available at: https://ec.europa.eu/energy/content/individual-assessments-and-summaries_en
[31] Annex 2, p. 2.
[32] Ibid., p. 26.
[33] Annex 3, pp. 4-5.

37. The individual assessment does not mention of the lack of public participation in the preparation of the draft NECP, participation having been limited to the final version. The Commission notes that when Spain submitted its NECP, it was still carrying out an SEA on the final plan and stated that it would modify the NECP "if the results of the public consultation on the SEA required it".[34] In this regard, the Commission only states that by 1 September 2020 it had not received any such modifications.

Germany

38. In relation to Germany, the Commission states that it was unclear how those views were taken into account.[35] Once again, this is a merely observed as a fact without announcing any concrete follow-up.

Conclusion on case ACCC/C/2010/54 follow-up

39. The foregoing demonstrates that the Party concerned has not yet fulfilled the requirements of para. 3 of decision V/9g and accordingly not yet fulfilled decision ACCC/C/2017/3 of the Meeting of the Parties.

40. With a view to the amendment of the NECPs and the next iteration of NECPs, the Party concerned will need to demonstrate that it will do more both as regards giving clear instructions to the Member States on how to conduct public participation. The first step towards that goal will be an effective follow-up on failures in the first round of NECPs.

We would like to thank the Committee members and the members of the secretariat for their continued consideration of and engagement on this decision.

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[34] Ibid.
[35] Annex 4, p. 4.

List of Annexes