

13TH MEETING OF AARHUS TASK FORCE ON ACCESS TO JUSTICE

Intervention by Francesca Carlsson on behalf of the European ECO Forum

Agenda item 2. Thematic focus: Promoting public interest litigation in environmental matters

On 12 February 2021, the Aarhus Convention Compliance Committee issued its advice on the Commission's legislative proposal to amend the Aarhus Regulation in view of making the EU compliant with access to justice provisions of the Convention. An amendment to the Regulation according to the Committee's advice would allow for decisions made by EU institutions to be challenged in the public interest.

The ECO Forum calls on the EU Member States to change the General Approach adopted by the Council so that it fully addresses the advice and recommendations of the Compliance Committee.

To avoid a repeat of the fiasco at MoP-6 in Montenegro, which damaged the reputation and standing of the EU as a proponent of the rule of law throughout the wider European and Central Asian region, it is essential that the EU revises the Aarhus Regulation in a way that fully respects the Committee's advice. It is a legal matter of compliance with international law, and therefore not a situation to seek a political compromise on, as some interventions at the December Environment Council implied. Compliance is a binary issue; a little bit of non-compliance is simply non-compliance.

Failure to revise the Aarhus Regulation in a way that is fully in line with the advice given could result in the entire process of revising the Regulation failing to achieve its central purpose, namely, to bring the EU into compliance with the Convention. It would furthermore cause damage to the standing of the Committee and indeed to the Convention itself, undermining the authority of the Convention throughout the wider region, and even globally.

The EU institution most affected by fully implementing the provisions of access to justice of the Convention at EU level is the European Commission. This could be the reason why the Commission has so vigorously sought to undermine the Committee's findings and is dragging its feet to fully implement its recommendations.

The argument that the Commission's legislative proposal should be read together with the Commission Communication on access to justice at Member State level and that somehow the latter complements the Aarhus Regulation or compensates for any lack of access to justice at EU level has no legal bearing. In essence, a Commission Communication does not have 'legally binding and external effects', so to speak, and therefore does not address any of the shortcomings of the EU's failure to grant access to justice in environmental matters.

At the heart of the EU's position in this matter is the flawed argument that its unique legal order provides the justification for the EU not to comply with certain provisions of the Convention, not why it can't - a sort of EU exceptionalism. There are two observations to be made about this: Firstly, this argument seems to have deliberately confused distinct and clear obligations that the EU and the Member States have as Parties to this Convention. There is now a common misunderstanding that

improving access to justice at EU level would somehow be burdensome to the Member States, when the exact opposite is true.

Secondly, Article 27 of the VCLT is clear that a party to a treaty may not invoke the provisions of its internal law as a justification for its failure to comply with the treaty. Thus, the interpretation of the Commission that the EU and its institutions are not subject to the Aarhus Convention in the same way as State parties cannot be accepted. In fact, the Compliance Committee's opinion and recommendations in relation to the Commission's legislative proposal are in line with the provisions of EU Treaty and the case law of the Court of Justice.

Member States should therefore press for a revision of the Council's General Approach to ensure that the EU is fully in line with the advice of the Committee, as a minimum, with a view to a revised General Approach being adopted under the Portuguese EU Presidency. In the process of revising the general approach, we encourage Member States to meet with NGOs at EU level, in line with Aarhus principles.

To conclude, while we would have wanted to see the EU in compliance before MoP-7, of utmost importance is that the outcome of this process leaves in no doubt that the EU is, or is on course to shortly be, in compliance with the Convention. A botched revision of the Aarhus Regulation would be far worse than a delayed one.