

To: Aarhus compliance
From: Robert.KONRAD [email address redacted]
Date: 03/26/2015 11:02AM
Cc: Fiona Marshall
Subject: Pre-admissibility communications concerning the European Union to be considered at 48th meeting of Compliance Committee (Geneva, 24-27 March 2015)

Dear Ms Marshall,

We refer to your message informing us that the Aarhus Convention Compliance Committee (ACCC) will consider the preliminary admissibility of Cases PRE/ACCC/C/2015/123 on access to justice and PRE/ACCC/C/2015/121 concerning permits under the Industrial Emissions Directive 2010/75/EU (IED) in its session on Friday 27 March 2015.

Whereas the European Union does not have any comments relating to the preliminary admissibility of Case PRE/ACCC/C/2015/123, the European Union considers that Case PRE/ACCC/C/2015/121 should be declared inadmissible for failing exhaustion of domestic remedies (see paragraph 21 of the Annex to Decision I/7 on Review of Compliance).

Section VI of this latter Communication regarding the "Use of domestic remedies or other international procedures" merely refers to the lack of locus standi for NGOs before the European Court of Justice. This is correct in so far as the conditions set out in Article 263 of the Treaty on the Functioning of the European Union (TFUE) have to be respected to question the validity of the IED which is a legislative act of general application that is not of individual and of direct concern to the Communicant (see Case C-583/11 P, Inuit, in particular paragraph 58).

However, the Treaty on the Functioning of the European Union (TFUE) provides under Article 277 that "any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in Article 263, second paragraph [i.e. lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers], in order to invoke before the Court of Justice of the European Union the inapplicability of that act".

Therefore, the alleged invalidity of the IED with regard to Article 6(10) of the Aarhus Convention could be questioned before a national court of a Member State of the Union by an exception of illegality, and, where the mechanism of a preliminary reference under Article 267 TFUE is indeed applied, a request for a preliminary ruling can be made to the European Court of Justice, so that the exception of illegality can be assessed in that context. This has not been done by the Communicant.

The European Union would therefore respectfully ask the ACCC to declare Case PRE/ACCC/C/2015/121 as inadmissible.

We would be grateful if you could forward this comment to the Chair of the ACCC.

Yours sincerely,

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