

## **Economic Commission for Europe**

### **Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters**

#### **Task Force on Access to Justice**

#### **Twelfth meeting**

Geneva, 28 February- 1 March 2019

Item 4 of the provisional agenda

**Stocktaking of recent and upcoming developments**

#### **Information paper N3**

### **SELECTED CONSIDERATIONS, FINDINGS AND RECOMMENDATIONS OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE WITH REGARD TO THE IMPLEMENTATION OF ARTICLE 9, PARAGRAPHS 2-5, OF THE CONVENTION**

Background paper<sup>1</sup>  
Prepared by the secretariat

This background paper is not intended to be exhaustive but to outline a selection of considerations, findings and recommendations of the Aarhus Convention Compliance Committee<sup>2</sup> (hereinafter – the Committee) with regard to the implementation of article 9, paragraphs 2-5, of the Aarhus Convention.

Participants are invited to consult this document in advance of the meeting in order to gain an overview of issues to be discussed under agenda item 4, the challenges encountered by the Parties in implementation, and to discuss good practices and further needs to be addressed under the auspices of the Task Force on Access to Justice and potential input to the preparations of the thematic session of the twenty-fourth meeting of the Working Group of the Parties planned for 2020.

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<sup>1</sup> The document was not formally edited.

<sup>2</sup> Available from <http://www.unece.org/env/pp/cc.html>

Reports / cases	Reports on general issues of compliance (to MoPs) /Consideration and evaluation by the Committee (for cases)	Findings and recommendations of the Committee
<b>Reports of the Compliance Committee to the Meeting of the Parties</b>		
<p>Report by the Committee to the third session of the Meeting of the Parties (Document ECE/MP.PP/2008/5)</p> <p><i>Standing (article 9, paragraph 3)</i></p>	<p>Some of the communications referred to alleged failures by Parties to comply with article 9, paragraph 3, i.e. to ensure the communicants' opportunities to challenge acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment. One issue dealt with by the Committee was the scope of discretion given to the Parties in defining criteria for standing for member of the public. While article 9, paragraph 3, refers to "the criteria, if any, laid down in national law", the Convention neither defines these criteria nor sets out the criteria to be avoided. Rather, the Convention is intended to allow a great deal of flexibility in defining which members of the public have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action (actio popularis) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, Parties should not take the clause "where they meet the criteria, if any, laid down in its national law" as an excuse for introducing or maintaining criteria that are so strict that they effectively bar all or almost all environmental organizations or other members of the public from challenging acts or omissions that contravene national law relating to the environment. The Convention does not prevent a Party from applying general criteria of a legal interest or requiring demonstration of an individual interest, provided the application of these criteria does not lead to effectively barring all or almost all members of the public from challenging acts and omissions and from availing of effective remedies. Accordingly, the phrase "the criteria, if any, laid down in national law" implies the exercise of self-restraint by the Parties.</p> <p>When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, i.e. to whether national law effectively has such blocking consequences for members of the public in general,</p>	

	<p>including environmental organizations, or if there are remedies available for them to challenge the act or omission in question. In this evaluation, article 9, paragraph 3, should be read in conjunction with articles 1 to 3, and in the light of the purpose reflected in the preamble that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced”. The Committee found support for this interpretation in paragraph 16 of decision II/2 of the Meeting of the Parties on promoting effective access to justice, which invites those Parties which choose to apply criteria in the exercise of their discretion under article 9, paragraph 3, “to take fully into account the objective of the Convention to guarantee access to justice”.</p> <p>In some countries, a special category of NGOs operating in the public interest has been created and only those NGOs falling in this category have standing in administrative cases, including in matters related to the environment. However, even where such a special category of legal status has been in place for a long time, very few NGOs actually achieve it.</p> <p>The Committee has also given consideration to what is to be understood by “national law” in article 9, paragraph 3, with regard to the European Union (EU) Member States. The Committee notes that, in different ways, European Community legislation constitutes a part of national law of the EU Member States. It also notes that article 9, paragraph 3, applies to the European Union as a Party, and that the reference to “national law” should therefore be understood as the domestic law of the Party concerned. While the impact of European Union law in the national laws of the EU Member States depends on the form and scope of the legislation in question, in some cases national courts and authorities are obliged to consider EC directives relating to the environment even when they have not been fully transposed by a Member State. For these reasons, in the context of article 9, paragraph 3, applicable European Union law relating to the environment should be considered to be part of the domestic, national law of a Member State.</p>	
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<p><i>Financial and other obstacles to access to justice for non-governmental organizations (article 9, paragraphs 4 and 5)</i></p>	<p>Many general efforts to support environmental NGOs through establishment of general financial support schemes or simplification of the registration processes have been reported, inter alia, in the national implementation reports. However, certain specific obstacles exist, in particular in relation to access to justice. While general legal aid schemes appear to exist in many countries, often only natural persons can benefit from them. With costs remaining one of the significant obstacles to access to justice, Parties may wish to consider how to resolve difficulties which NGOs experience in obtaining access to support schemes.</p> <p><i>(See document ECE/MP.PP/2008/5, paragraphs 62-66)</i></p>	
<p>Report by the Committee to the fourth session of the Meeting of the Parties (Document ECE/MP.PP/2011/11)</p> <p><i>The nature of actions challenged (article 9, paragraph 3)</i></p>	<p>The Committee was called to review the nature of actions challenged under article 9, paragraph 3, of the Convention. It noted that that provision, as opposed to article 9, paragraph 2, of the Convention does not explicitly refer to either substantive or procedural legality. Instead it refers to “acts or omissions [...] which contravene its national law relating to the environment”. Clearly, the issue to be considered in such a review procedure is whether the act or omission in question contravened any provision — be it substantive or procedural — in national law relating to the environment. (ACCC/C/2008/33, para. 124)</p> <p>In addition, the Committee considered that the application of a “proportionality principle” by the courts could provide an adequate standard of review in cases within the scope of the Aarhus Convention. A proportionality test requires a public authority to provide evidence that the act or decision pursued justifies the limitation of the right at stake, is connected to the aim(s) which that act or decision seeks to achieve and that the means used to limit the right at stake are no more than necessary to attain the aim(s) of the act or decision at stake. While a proportionality principle in cases within the scope of the Aarhus Convention may go a long way towards providing for a review of substantive and procedural legality, the Party concerned must make sure that such a principle does not generally or prima facie exclude any issue of substantive legality from a review. (ACCC/C/2008/33, para. 126).</p> <p><i>(See document ECE/MP.PP/2011/11, paragraphs 104-105)</i></p>	

<p><i>Minimum standards applicable to access to justice procedures and remedies</i> (article 9, paragraph 4 and 5)</p>	<p>One issue dealt with by the Committee with respect to several communications submitted during the last intersessional period was on minimum standards applicable to access to justice procedures and remedies in article 9, paragraph 4, of the Convention, including fair and equitable procedures, injunctive relief and costs.</p> <p>The Committee notes that, while injunctive relief is theoretically available in a national system, it is not always available in practice to the citizens. In one case relating to changes in the urbanization plan and the implementation of a construction project (ACCC/C/2008/24, paras. 103–104), the national court held that the request for suspension of the modification was too early and that there would be no irreversible impact on the environment, because the construction could not start without an additional decision. Later, when the decision on the urbanization project was approved and the applicants requested suspension of the decision until the court hearing was completed, the national court ruled that the request for suspension was too late, because neither of the courts in the previous instances had suspended the decision. This kind of reasoning creates a system where citizens cannot actually obtain injunctive relief early or late. While the laws provide for the possibility of suppressive effect, this is not easily awarded by national courts.</p> <p>Similarly with costs derived from the use of national remedies, while national legislation in some cases does not appear to prevent decisions concerning the cost of appeal from taking fully into account the requirements of article 9, paragraph 4, i.e., that procedures be fair, equitable and not prohibitively expensive, in practice natural or legal persons may be charged with high costs. For instance, in one case (ACCC/C/2008/24, para. 110), a non-governmental organization lost in the court of first instance against a public authority and on appeal, it lost again, and the related costs were imposed on the appellant. In a different case (ACCC/C/2009/36, para. 66), the system of legal aid was such that in practice</p>	
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	<p>small NGOs would hardly ever qualify to benefit from the assistance mechanisms available.</p> <p>The Committee also stresses that “fairness” of remedies in judicial review cases under article 9, paragraph 4, refers to what is fair for the claimant, not the defendant, a public body. The Committee, moreover, finds that in determining fairness in cases of judicial review where a member of the public is pursuing environmental concerns that involve the public interest and loses the case, the fact that the public interest is at stake should be accounted for in allocating costs (ACCC/C/2008/27, para. 45).</p> <p>The Committee is of the view that it is not sufficient if the Parties merely to ensure that the requirements of article 9, paragraphs 4 and 5, are reflected in national legislation. The Parties, in keeping with the objective of the Convention to provide effective access to justice, should also look carefully at how these provisions are actually implemented. In that regard, while the requirements set by law may not as such be problematic under the Convention, the Party concerned cannot rely on judicial discretion of the courts to ensure that the rules for timing of judicial review applications, for instance, meet the requirements of article 9, paragraph 4 (see ACCC/C/2008/33, paras. 138–139). In the view of the Committee, reliance of such discretion may result in inadequate implementation of the provisions of the Convention and clear time limits should be set by the Party concerned. (See document ECE/MP.PP/2011/11, paragraphs 106-110)</p>	
<p>Report by the Committee to the fifth session of the Meeting of the Parties (Document ECE/MP.PP/2014/9)</p> <p><i>Standing</i> (article 9, paragraph 2)</p>	<p>While Parties retain some discretion in defining the scope of the public entitled to standing, this determination must be consistent “with the objective of giving the public concerned wide access to justice within the scope of the Convention”. Hence, in exercising their discretion, Parties may not interpret these criteria in a way that significantly narrows standing and runs counter to their general obligations under articles 1, 3 and 9 of the Convention (ACCC/C/2010/50, recalling its findings on ACCC/C/2005/11).</p>	

<p><i>Standing</i> (<i>article 9, paragraph 3</i>)</p>	<p>In defining standing under article 9, paragraph 2, the Convention provides guidance to the Parties on how to interpret the “sufficient interest” of NGOs. Hence, the interest of NGOs meeting the requirements of article 2, paragraph 5, of the Convention should be deemed sufficient and should be deemed to have rights capable of being impaired. Moreover, the rights of such NGOs under article 9, paragraph 2, of the Convention are not limited to the EIA procedure only, but apply to all stages of the decision-making to permit an activity subject to article 6. A requirement that an NGO must have exercised its right to participate during the EIA procedure or other procedures prior to the decision/authorization in order to have standing to access review procedures regarding the final decisions permitting proposed activities, such as building permits, fails to comply with article 9, paragraph 2, of the Convention (ACCC/C/2010/50).</p> <p>The Committee has noted that if the courts systematically interpret the relevant legislation in such a way that the “rights” that have been “created, nullified or infringed” by the administrative procedure refer only to property rights and do not include any other possible rights or interests of the public relating to the environment (including those of tenants), this may hinder wide access to justice and run counter to the objectives of article 9, paragraph 2, of the Convention (ACCC/C/2010/50). (<i>See document ECE/MP.PP/2014/9, paragraph 31</i>)</p> <p>In one case, the Committee considered the situation of a standing requirement which requires the person seeking standing to be “directly and individually concerned”, where to be “individually concerned” is interpreted to require that the legal situation of that person is affected because of a factual situation that differentiates him or her from all other persons. Under this requirement, persons cannot be individually concerned if the decision or regulation takes effect by virtue of an objective legal or factual situation, which means that in effect no member of the public would ever be able to challenge a decision or a regulation relating to environment or health issues. The Committee held that it was clear that such an interpretation was too strict to meet the criteria of article 9, paragraph 3, of the Convention (ACCC/C/2008/32). (<i>See document ECE/MP.PP/2014/9, paragraph 97</i>)</p>	
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<p>Report by the Committee to the sixth session of the Meeting of the Parties (Document ECE/MP.PP/2017/32)</p> <p><i>National law relating to the environment (article 9, paragraph 3)</i></p> <p><i>One procedure to meet all requirements (article 9, paragraphs 3 and 4)</i></p>	<p>The Convention does not define the term “national law relating to the environment”. The text of the Convention does not refer to “environmental laws”, but to “laws relating to the environment”, and consequently article 9, paragraph 3, is not limited to “environmental laws”, e.g., laws that explicitly include the term “environment” in their title or provisions.<sup>83</sup> In this regard, the Committee agrees with the Aarhus Convention Implementation Guide that “national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment”. (See document ECE/MP.PP/2017/32, paragraph 56)</p> <p>The Committee does not consider that the possibility for members of the public to report alleged nuisances to the responsible administrative authorities (regulators) and then subsequently to complain to an ombudsman provides for adequate alternatives to private nuisance proceedings. These possibilities are not connected with any procedural rights enabling members of the public to effectively commence a procedure to review the act or omission allegedly causing the nuisance, to actively participate in such proceedings, or to enforce adequate remedies. Furthermore, an ombudsman cannot deal with the alleged nuisance as such, but may only review the actions of the regulator and provide recommendations. (See document ECE/MP.PP/2017/32, paragraph 58)</p> <p>It is apparent to the Committee that if the legal system of the Party concerned provides for more than one procedure through which members of the public can challenge a particular act or omission contravening national law related to environment, it is sufficient for compliance with the Convention that at least one of these procedures meets all the requirements of article 9, paragraphs 3 and 4. The Committee points out, however, that it would be in keeping with the goals</p>	



<p><i>Standing</i> (article 9, paragraph 3)</p> <p><i>Fair review procedures</i> (article 9, paragraph 4)</p> <p><i>Injunctive relief</i> (article 9, paragraph 4)</p> <p><i>Timeliness of review procedures</i> (article 9, paragraph 4)</p>	<p>and spirit of the Convention to maintain several such procedures meeting all these requirements.</p> <p>The Committee points out that, for any procedure to be considered as a fully adequate alternative to another, it must be available to at least the same scope of members of the public, enable them to challenge at least the same range of acts and omissions, provide for at least as adequate and effective remedies, and meet all the other requirements of article 9, paragraphs 3 and 4, of the Convention. (See document ECE/MP.PP/2017/32, paragraphs 59-60)</p> <p>It is also important to note that 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 laws. (See document ECE/MP.PP/2017/32, paragraph 62)</p> <p>It is clear to the Committee that the requirement in article 9, paragraph 4, for review procedures to be “fair” should be read as a requirement to ensure that claimants are able to know the reasons for the decision of the review body, inter alia, to enable the claimants to challenge that decision where they so choose. (See document ECE/MP.PP/2017/32, paragraph 64)</p> <p>The Committee confirms that the requirement in article 9, paragraph 4, that injunctive relief and other remedies be “effective” includes, inter alia, an implicit requirement that those remedies should prevent irreversible damage to the environment. (See document ECE/MP.PP/2017/32, paragraph 66)</p> <p>...The Committee notes that a number of the Parties to the Convention impose explicit deadlines for public authorities to reconsider a refusal of an information request. While article 4, paragraphs 2 and 7, do not directly apply to such reconsideration, the Committee sees no reason why a public authority should need more time to reconsider its decision at the request of an ombudsman, a court or the original applicant, than when deciding a request for information by a member</p>	
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	<p>of the public in the first place. Accordingly, when considering in these contexts whether the procedure is “expeditious” or “timely” under article 9, paragraphs 1 and 4, respectively, the time limits set out in article 4, paragraphs 2 and 7, are indicative.</p> <p><i>(See document ECE/MP.PP/2017/32, paragraph 71)</i></p>	
<b>Relevant opinions, findings and recommendations of the Compliance Committee with regard to individual communications</b>		
<p>ACCC/C/2004/06 (Document ECE/MP.PP/C.1/2006/4/Add.1)</p> <p><i>Adequate and effective remedy (article 9, paragraphs 3, 4)</i></p>	<p>The Committee also finds that the failure to communicate the court decision to the parties, as described in paragraph 15, constitutes a lack of fairness and timeliness in the procedure.</p> <p><i>(See document ECE/MP.PP/C.1/2006/4/Add.1, paragraph 29)</i></p> <p>It is the Committee’s opinion that the procedures fall under article 9, paragraph 3, of the Convention, triggering also the application of article 9, paragraph 4. Furthermore, it appears that there were significant problems with enforcement of national environmental law. Even though the communicants had access to administrative and judicial review procedures on the basis of the existing national legislation, this review procedure in practice failed to provide adequate and effective remedies and, therefore, was out of compliance with article 9, paragraph 4, in conjunction with article 9, paragraph 3, of the Convention.</p> <p><i>(See document ECE/MP.PP/C.1/2006/4/Add.1, paragraph 31)</i></p> <p>The Committee finds that the failure by the Party concerned to provide effective remedies in a review procedure concerning an omission by the public authority to enforce environmental legislation as well as failure to ensure that courts properly notify the parties of the time and place of hearings and of the decision taken constitutes a failure to comply with the requirements of article 9, paragraph 4, in conjunction with article 9, paragraph 3, of the Convention.</p> <p><i>(See document ECE/MP.PP/C.1/2006/4/Add.1, paragraph 35)</i></p>	<p>Found, that:</p> <p>....the failure by the Party concerned to provide effective remedies in a review procedure concerning an omission by the public authority to enforce environmental legislation as well as failure to ensure that courts properly notify the parties of the time and place of hearings and of the decision taken constitutes a failure to comply with the requirements of article 9, paragraph 4, in conjunction with article 9, paragraph 3, of the Convention.</p> <p><i>(See document ECE/MP.PP/C.1/2006/4/Add.1, paragraph 35)</i></p>

<p>ACCC/C/2004/08 (Document ECE/MP.PP/C.1/2006/2/Add.1)</p> <p><i>Access to judicial review and ouster clauses in law (article 9, paragraphs 2-4)</i></p>	<p>The lawsuit challenging the legality of the decrees and petitioning for a writ to declare them null and void was dismissed by the district court for lack of jurisdiction. The decision of the court points out that the Civil Procedure Code prevents courts from declaring null and void for any reason decisions whose constitutionality is subject to review by the Constitutional court. It further notes that the Constitution of the Party concerned provides for a review of the constitutionality of government decisions by the Constitutional Court only. However, as the communicants point out, only three institutions have standing in the Constitutional Court (see para. 15 above). Two of these represent the executive that issues government decrees, and the third constitutes a large proportion of the national legislative body. In the Committee's opinion, such an approach does not ensure that members of the public have access to review procedures.</p> <p>However, in the Committee's opinion, the problem is not so much with the issue of jurisdiction or standing. Rather, it is connected to the fact that planning decisions whose subject matter is regulated by environmental legislation, and decisions on specific activities which, in accordance with the Convention, should be subject to an administrative or judicial review, were taken through a procedure that provides no possibility for the public to participate and no remedies. The Committee acknowledges that national legislature, as a matter of principle, has the freedom to protect some acts of the executive from judicial review by regular courts through what is known as ouster clauses in laws. However, to regulate matters subject to articles 6 and 7 of the Convention exclusively through acts enjoying the protection of ouster clauses would be to effectively prevent the use of access-to-justice provisions. Where the legislation gives the executive a choice between an act that precludes participation, transparency and the possibility of review and one that provides for all of these, the public authorities should not use this flexibility to exempt from public scrutiny or judicial review matters which are routinely subject to administrative decisions and fall under specific procedural requirements under domestic law. Unless there are compelling reasons, to do so would risk violating the principles of the Convention. In this case, the Committee has not been made aware of any compelling reason justifying the choice of this form of decision-making.</p>	<p>Found, among other things, that:</p> <p>... by failing to ensure that members of the public concerned had access to a review procedure and to provide adequate and effective remedies, the Party concerned was not in compliance with article 9, paragraphs 2–4, of the Convention.</p> <p><i>(See document ECE/MP.PP/C.1/2006/2/Add.1, paragraph 44)</i></p> <p>Recommended, among other things, that the Party concerned:</p> <p>...undertake appropriate practical measures to ensure effective access to justice, including the availability of adequate and effective remedies to challenge the legality of decisions on matters regulated by articles 6 and 7 of the Convention...</p> <p><i>(See document ECE/MP.PP/C.1/2006/2/Add.1, paragraph 45 (e))</i></p>
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	<p>The Committee finds this approach to be out of compliance with the obligations to ensure that members of the public concerned have access to a review procedure and to provide adequate and effective remedies in accordance with article 9, paragraphs 2–4, of the Convention.</p> <p><i>(See document ECE/MP.PP/C.1/2006/2/Add.1, paragraphs 37-39)</i></p>	
<p>ACCC/C/2005/11 (Document ECE/MP.PP/C.1/2006/4/Add.2)</p> <p><i>Standing (article 9, paragraph 3)</i></p>	<p>Article 9, paragraph 3, is applicable to all acts and omissions by private persons and public authorities contravening national law relating to the environment. For all these acts and omissions, each Party must ensure that members of the public “where they meet the criteria, if any, laid down in its national law” have access to administrative or judicial procedures to challenge the acts and omissions concerned. Contrary to paragraph 2 of article 9, however, paragraph 3 does not refer to “members of the public concerned”, but to “members of the public”.</p> <p>When determining how to categorize a decision under the Convention, its label in the domestic law of a Party is not decisive. Rather, whether the decision should be challengeable under article 9, paragraph 2 or 3, is determined by the legal functions and effects of a decision, i.e. on whether it amounts to a permit to actually carry out the activity.</p> <p>Relevant in this case is also article 9, paragraph 4, according to which the procedures for challenging acts and omissions that contravene national law relating to the environment shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.</p> <p><i>(See document ECE/MP.PP/C.1/2006/4/Add.2, paragraphs 28-30)</i></p> <p>While referring to “the criteria, if any, laid down in national law”, the Convention neither defines these criteria nor sets out the criteria to be avoided. Rather, the Convention is intended to allow a great deal of flexibility in defining which environmental organizations have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action (“<i>actio popularis</i>”) in their national laws with the effect that anyone can challenge any decision, act or</p>	<p>The Committee recommended to the Party concerned to:</p> <p>(a) Undertake practical and legislative measures to overcome the previous shortcomings reflected in the jurisprudence of the Council of State in providing environmental organizations with access to justice in cases concerning town planning permits as well as in cases concerning area plans; and</p> <p>(b) Promote awareness of the Convention, and in particular the provisions concerning access to justice, among the judiciary.</p> <p><i>(See document ECE/MP.PP/C.1/2006/4/Add.2, paragraph 49)</i></p>

	<p>omission relating to the environment. On other the hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging act or omissions that contravene national law relating to the environment.</p> <p>Accordingly, the phrase “the criteria, if any, laid down in national law” indicates a selfrestraint on the parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception. One way for the Parties to avoid a popular action (“action popularis”) in these cases, is to employ some sort of criteria (e.g. of being affected or of having an interest) to be met by members of the public in order to be able to challenge a decision.</p> <p>However, this presupposes that such criteria do not bar effective remedies for members of the public. This interpretation of article 9, paragraph 3, is clearly supported by the Meeting of the Parties, which in paragraph 16 of decision II/2 (promoting effective access to justice) invites those Parties which choose to apply criteria in the exercise of their discretion under article 9, paragraph 3, “to take fully into account the objective of the Convention to guarantee access to justice.”</p> <p>When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, namely to what extent national law effectively has such blocking consequences for environmental organizations, or if there are remedies available for them to actually challenge the act or omission in question... This evaluation is not limited to the wordings in legislation, but also includes jurisprudence. <i>(See document ECE/MP.PP/C.1/2006/4/Add.2, paragraphs 35-37)</i></p> <p>The Convention does not explicitly refer to federations of environmental organizations. If, in the jurisdiction of a Party, standing is not granted to such federations, it is possible that, to the extent that member organizations of the federation are able to effectively challenge the act or omission in question, this may suffice for complying with article 9, paragraph 3. If, on the other hand, due to the criteria of a direct and subjective interest for the person, no member of the</p>	
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	<p>public may be in a position to challenge such acts or omissions, this is too strict to provide for access to justice in accordance with the Convention. This is also the case if, for the same reasons, no environmental organization is able to meet the criteria set by the Council of State.</p> <p><i>(See document ECE/MP.PP/C.1/2006/4/Add.2, paragraph 39)</i></p>	
<p>ACCC/C/2006/16 <i>(Document ECE/MP.PP/2008/5/Add.6)</i></p> <p><i>Requirements for initiating review procedure (article 9, paragraph 2)</i></p>	<p>The Committee wishes to note however that whatever time period for informing the public about the decision is granted by domestic legislation, it should be “reasonable” and in particular bearing in mind the relevant time frames for initiating review procedures under article 9, paragraph 2. Moreover, the manner in which the public is informed and the requirements for documenting the reasons and considerations on which the decision is based should be designed bearing in mind the relevant time frames and other requirements for initiating review procedures under article 9, paragraph 2, of the Convention.</p> <p><i>(See document ECE/MP.PP/2008/5/Add.6, paragraph 84)</i></p>	<p>The Committee, among other things, recommended to the Party concerned ... to take the necessary legislative, regulatory, administrative and other measures to ensure that there is a clear correlation between the time period(s) for informing the public about the decision and making available the text of the decision together with the reasons and considerations on which it is based with the time frame for initiating review procedures under article 9, paragraph 2, of the Convention.</p>
<p>ACCC/C/2005/17 <i>(Document ECE/MP.PP/2008/5/Add.10)</i></p> <p><i>Effective access to justice (article 9, paragraph 2)</i></p> <p><i>General issues of transposition (article 3, paragraph 1)</i></p>	<p>The communicant makes the point that it is meaningless to provide access to justice in relation to a public participation procedure that takes place after the construction starts. While the Committee does not accept that access to justice at this stage is necessarily meaningless, if there were no opportunity for access to justice in relation to any permit procedures until after the construction has started, this would definitely be incompatible with article 9, paragraph 2, of the Convention. Access to justice must indeed be provided when it is effectively possible to challenge the decision permitting the activity in question.</p> <p><i>(See document ECE/MP.PP/2008/5/Add.10, paragraph 56)</i></p> <p>The Committee notes the point made by the Party concerned (para. 23) that under European Community law, an international agreement concluded by the Community is binding on the Community institutions and the Member States, and</p>	

	<p>takes precedence over legal acts adopted by the Community. According to the Party concerned, this means that Community law texts should be interpreted in accordance with such an agreement. In this context, the Committee wishes to stress that the fact that an international agreement may be given a superior rank to directives and other secondary legislation in European Community law should not be taken as an excuse for not transposing the Convention through a clear, transparent and consistent framework into European Community law (cf. article 3, paragraph 1, of the Convention).</p> <p><i>(See document ECE/MP.PP/2008/5/Add.10, paragraph 58)</i></p>	
<p>ACCC/C/2006/18 (Document ECE/MP.PP/2008/5/Add.4)</p> <p><i>National law relating to the environment</i></p> <p><i>Standing (article 9, paragraph 3)</i></p>	<p>It is not for the Committee to consider the culling of birds as such. However, the right of members of the public to challenge acts and omissions concerning wildlife is indeed covered by article 9, paragraph 3, of the Convention, to the extent that these amount to acts or omissions contravening provisions of national law relating to the environment.</p> <p><i>(See document ECE/MP.PP/2008/5/Add.4, paragraph 24)</i></p> <p>Although the opportunity to challenge acts and omissions set out in article 9, paragraph 3, pertains to a broad spectrum of acts and omissions, the challenge must refer to an act or omission that contravenes provisions in the national law relating to the environment.</p> <p>The Committee must first consider whether in a case concerning compliance by the Party concerned, i.e. an EU member state, European Community legislation is covered by article 9, paragraph 3, of the Convention. The Committee notes that, in different ways, European Union legislation does constitute a part of national law of the EU member states. It also notes that article 9, paragraph 3, applies to the European Union as a Party, and that the reference to “national law” therefore should be understood as the domestic law of the Party concerned. While the impact of European Union law in the national laws of the EU member states depends on the form and scope of the legislation in question, in some cases national courts and authorities are obliged to consider EC directives relating to the environment even when they have not been fully transposed by a member state. For these reasons, in the context of article 9, paragraph 3, applicable</p>	

	<p>European Union law relating to the environment should also be considered to be part of the domestic, national law of a member state.</p> <p>Access to justice in the sense of article 9, paragraph 3, requires more than a right to address an administrative agency about the issue of illegal culling of birds. This part of the Convention is intended to provide members of the public with access to adequate remedies against acts and omissions which contravene environmental laws, and with the means to have existing environmental laws enforced and made effective. Thus, the Party concerned is obliged to ensure that, in cases where administrative agencies fail to act in accordance with national law relating to nature conservation, members of the public have access to administrative or judicial procedures to challenge such acts and omissions.</p> <p>As the Committee has pointed out in its findings and recommendations with regard to communication ACCC/C/2005/11 (ECE/MP.PP/C.1/2006/4/Add.2, paras. 29-37), while article 9, paragraph 3, refers to “the criteria, if any, laid down in national law”, the Convention neither defines these criteria nor sets out the criteria to be avoided. Rather, the Convention is intended to allow a great deal of flexibility in defining which members of the public have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action (“actio popularis”) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On other the hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations or other members of the public from challenging act or omissions that contravene national law relating to the environment. This interpretation of article 9, paragraph 3, is clearly supported by the Meeting of the Parties, which in paragraph 16 of decision II/2 (promoting effective access to justice) invites those Parties which choose to apply criteria in the exercise of their discretion under article 9, paragraph 3, “to take fully into account the objective of the Convention to guarantee access to justice”.</p>	
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	<p>When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, i.e. to what extent national law effectively has such blocking consequences for members of the public in general, including environmental organizations, or if there are remedies available for them to actually challenge the act or omission in question. In this evaluation article 9, paragraph 3, should be read in conjunction with articles 1 to 3 of the Convention, and in the light of the purpose reflected in the preamble, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced.”</p> <p>The Convention does not prevent a Party from applying general criteria of a legal interest or of demonstrating a substantial individual interest of the sort found in Danish law, provided the application of these criteria does not lead to effectively barring all or almost all members of the public from challenging acts and omissions related to wildlife protection. (See document ECE/MP.PP/2008/5/Add.4, paragraphs 26- 31)</p>	
<p>ACCC/C/2007/22 (Document ECE/MP.PP/C.1/2009/4/Add.1)</p> <p><i>Review of permitting waste treatment installations (article 9, paragraph 2)</i></p>	<p>Waste treatment installations such as the one are listed in annex I, paragraph 5, of the Convention and thus decisions on whether to permit such installations are subject to the requirement for public participation in article 6 of the Convention. Moreover, decisions, acts and omissions related to permit procedures for such installations are subject to the review procedure set out in article 9, paragraph 2, of the Convention. (See document ECE/MP.PP/C.1/2009/4/Add.1, paragraph 28)</p>	
<p>ACCC/C/2008/23 (Document ECE/MP.PP/C.1/2010/6/Add.1)</p> <p><i>Private nuisance proceedings (article 9, paragraphs 3 and 4)</i></p>	<p>Article 9, paragraph 3, of the Convention requires each Party to ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment...</p> <p>Private nuisance is a tort (civil wrong) under the common law system. A private nuisance is defined as an act or omission generally connected with the use or occupation of land which causes damage to another person in connection with</p>	<p>In respect of the requirements of article 9, paragraph 4, for procedures referred to in paragraph 3 to be fair and equitable, related to the fact that in the above circumstances where the communicants were ordered to pay the whole of the costs while the operator was not ordered to contribute at all, the Committee finds that this constitutes</p>

	<p>that other's use of land or interference with the enjoyment of land or of some right connected with the land. The Committee finds that in the context of the present case, the law of private nuisance is part of the law relating to the environment of the Party concerned, and therefore within the scope of article 9, paragraph 3, of the Convention.</p> <p>The Committee, having found that article 9, paragraph 3, of the Convention is applicable to the law of private nuisance in the context of the present case, also finds that article 9, paragraph 4, requiring that the procedures referred to in paragraph 3 shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive, is thereby also applicable. (See document ECE/MP.PP/C.1/2010/6/Add.1; paragraphs 44-46)</p>	<p>stricto sensu noncompliance with article 9, paragraph 4. (See document ECE/MP.PP/C.1/2010/6/Add.1, paragraph 58)</p>
<p>ACCC/C/2008/24 (Document ECE/MP.PP/C.1/2009/8/Add.1)</p> <p><i>Injunctive relief</i> (article 9, paragraph 4)</p> <p><i>Appeal of an unfavourable court decision</i> (article 9, paragraph 4)</p>	<p>The Committee finds that this kind of reasoning creates a system where citizens cannot actually obtain injunctive relief early or late; it indicates that while injunctive relief is theoretically available, it is not available in practice. As a result, the Committee finds that the Party concerned is in non-compliance with article 9, paragraph 4, of the Convention, which requires Parties to provide adequate and effective remedies, including injunctive relief. (See document ACCC/C/2009/8/Add.1, paragraph 105)</p> <p>The Committee emphasizes that article 9, paragraph 4, of the Convention applies also to situations where a member of the public seeks to appeal an unfavourable court decision that involves a public authority and matters covered by the Aarhus Convention. Thus the Party concerned is obliged to implement the Convention in an appropriate way so as to prevent unfair, inequitable or prohibitively expensive cost orders being imposed on a member of the public in such appeal cases. (See document ACCC/C/2009/8/Add.1, paragraph 108)</p> <p>The Committee emphasizes that article 9, paragraph 4, of the Convention applies also to situations where a member of the public seeks to appeal an unfavourable court decision that involves a public authority and matters covered by the Aarhus Convention. Thus the Party concerned is obliged to implement the Convention in</p>	<p>Found, among other things, that: ... if the trend reflects a general practice of court of appeals in Spain regarding costs, this would also constitute non-compliance with article 9, paragraph 4. (see document ACCC/C/2009/8/Add.1, paragraph 117)</p> <p>Recommended, among other things, that the Party concerned: To take the necessary legislative, regulatory, and administrative measures and practical arrangements to ensure that adequate, timely, and effective remedies, including injunctive relief, which are fair, equitable, and not prohibitively expensive be made available at first and second instance in administrative</p>

<p><i>Timely remedies</i> (article 9, paragraph 4)</p>	<p>an appropriate way so as to prevent unfair, inequitable or prohibitively expensive cost orders being imposed on a member of the public in such appeal cases. (See document ACCC/C/2009/8/Add.1, paragraph 110)</p> <p>Regarding the requirement of timely remedies, a decision on whether to grant suspension as a preventive measure should be issued before the decision is executed. In the present case, it took eight months for the court to issue a decision on whether to grant the suspension sought for the Project. Even if it had been granted, the suspension would have been meaningless as construction works were already in process. The Committee has already held that “if there were do opportunity for access to justice in relation to any permit procedures until after the construction has started, this would definitely be incompatible with article 9, paragraph 2, of the Convention. Access to justice must indeed be provided when it is effectively possible to challenge the decision permitting the activity in question” (ECE/MP.PP/2008/5/Add.10, para. 56). In the present case, since no timely, adequate or effective remedies were available, the Party concerned is in non-compliance with article 9, paragraph 4. (See document ACCC/C/2009/8/Add.1, paragraph 112)</p>	<p>appellate courts for members of the public in environmental matters (see document ACCC/C/2009/8/Add.1, paragraph 119 (vi))</p>
<p>ACCC/C/2008/27 (Document ECE/MP.PP/C.1/2010/6/Add.2)</p> <p><i>Fair review procedure</i> (article 9, paragraph 4)</p>	<p>The Committee in this respect also stresses that “fairness” in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant, a public body. The Committee, moreover, finds that fairness in cases of judicial review where a member of the public is pursuing environmental concerns that involve the public interest and loses the case, the fact that the public interest is at stake should be accounted for in allocating costs. The Committee accordingly finds that the manner in which the costs were allocated in this case was unfair within the meaning of article 9, paragraph 4, of the Convention and thus, amounted to non-compliance. (See document ECE/MP.PP/C.1/2010/6/Add.2, paragraph 45)</p>	



<p><i>Standing and scope of review (article 9, paragraphs 2 and 3)</i></p>	<p>order to determine whether the line of interpretation by courts or other national authorities nevertheless meets the requirements of the Convention. Under such circumstances, the Committee may conclude that the Party concerned does not fail to comply with the Convention notwithstanding the wording of the national legislation. (See document ECE/MP.PP/C.1/2014/8, paragraphs 64-67)</p> <p>It follows from article 2, paragraph 5, that NGOs “promoting environmental protection” shall be deemed to have an interest in environmental decision-making. According to article 9, paragraph 2, of the Convention, any NGO meeting the requirements referred to in article 2, paragraph 5, should be deemed to have sufficient interest and thus granted standing in the review procedure. Hence, a criterion in national law that NGOs, to have standing for judicial review, must promote the protection of the environment is not inconsistent with the Convention per se. However, in order to be in accordance with the spirit and principles of the Convention, such requirements should be decided and applied “with the objective of giving the public concerned wide access to justice” (see findings on communications ACCC/C/2006/11 (ECE/MP.PP/C.1/2006/4/Add.2), para. 27, and ACCC/C/2009/43 (ECE/MP.PP/2011/11/Add.1), para. 81). This means that any requirements introduced by a Party should be clearly defined, should not cause excessive burden on environmental NGOs and should not be applied in a manner that significantly restricts access to justice for such NGOs. The criterion in the law of the Party concerned that environmental NGOs must demonstrate that their objectives are affected by the challenged decision amounts to a “requirement under national law”, as set out in article 2, paragraph 5, of the Convention. The criterion is sufficiently clear and does not seem to put an excessive burden on environmental NGOs, since this can be easily proven by the objectives stated in its by-laws. Moreover, NGOs have the possibility to (re-)formulate their objectives from time to time as they see fit. No information was submitted to the Committee to show that the authorities and courts of the Party concerned use this criterion in such a manner so as to effectively bar environmental NGOs from access to justice.</p>	<p>specifically laid down in sectoral environmental laws, in addition to any existing criteria for NGO standing in the national laws. (See document ECE/MP.PP/C.1/2014/8, paragraph 103)</p>
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	<p>Since the application of this requirement by the Party concerned does not seem to contravene the objective of giving the public concerned wide access to justice, the Party concerned does not fail to comply with article 9, paragraph 2, of the Convention in this respect not transposed into domestic law. (See document ECE/MP.PP/C.1/2014/8, paragraphs 71-73)</p> <p>The fact that the exact wording of any provision of the Convention has not been transposed into national legislation is in itself not sufficient to conclude that the Party concerned fails to comply with the Convention. The communicant's allegations concerning the impacts of the Party concerned not explicitly transposing the "substantive and procedural legality" requirement into German law have not been substantively corroborated by relevant practice. Therefore, the Committee does not conclude that the Party concerned fails to comply with article 9, paragraph 2, of the Convention in this respect. (See document; ECE/MP.PP/C.1/2014/8, paragraph 75)</p> <p>As mentioned above, the Party concerned is not obliged to literally transpose the text of the Convention into its national legislation. However, when using its discretion in designing its national law, the Party concerned should not impose additional requirements that restrict the way the public may realize the rights awarded by the Convention, if there is no legal basis in the Convention for imposing such restrictions.</p> <p>Article 9, paragraph 2, requires each Party to ensure access to review procedures in relation to any decision, act or omission subject to article 6 of the Convention. The range of subjects who can challenge such decisions may be defined (limited) by the Party in accordance with the provisions of article 2, paragraph 5, and article 9, paragraph 2 (a) and (b), of the Convention. However, the Party may not through its legislation or practice add further criteria that restrict access to the review procedure, for example by limiting the scope of arguments which the applicant can use to challenge the decision. While the Convention relates to environmental matters, there may be legal provisions that do not promote protection of the environment, which can be violated when a decision under article 6 of the Convention is adopted, for instance, provisions concerning conditions for</p>	
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	<p>building and construction, economic aspects of investments, trade, finance, public procurement rules, etc. Therefore, review procedures according to article 9, paragraph 2, of the Convention should not be restricted to alleged violations of national law “serving the environment”, “relating to the environment” or “promoting the protection of the environment”, as there is no legal basis for such limitation in the Convention.</p> <p>When there is a clear contradiction between the provisions of national law and the requirements of the Convention, as in the present case, it is for the Party concerned to bring evidence to show that its courts interpret those provisions in conformity with the Convention (see para. 67). However, this has not been shown by the Party concerned with respect to the requirement of “serving the environment”. The Party concerned, in its comments on the draft findings, referred to a number of court decisions that it claimed showed that the term “serving the environment” is interpreted in a broad manner. These cases show that the courts include, for example, protection of human health or flood protection in their considerations. These issues are, however, within the scope of what relates to the environment. The Committee is thus not convinced that these cases show that issues other than those relating to environmental concerns can be successfully raised under the clause “serving the environment”.</p> <p>For these reasons, the Committee finds that by imposing a requirement that an environmental NGO to be able to file an appeal under the EAA must assert that the challenged decision contravenes a legal provision “serving the environment” (dem Umweltschutz dienen), the Party concerned fails to comply with article 9, paragraph 2, of the Convention.</p> <p>The Committee recalls that article 9, paragraph 2, of the Convention is directly linked to article 6, which grants the rights of the public concerned to participate in permitting procedures for specific activities. The Parties must ensure that in such procedures, members of the public concerned can fully exercise their participatory procedural rights set out in article 6 of the Convention.</p>	
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	<p>Article 9, paragraph 2, in conjunction with article 9, paragraph 4, of the Convention requires Parties to provide members of the public concerned with access to effective judicial protection should their procedural rights under article 6 be violated. Therefore, it would not be compatible with the Convention to allow members of the public to challenge the procedural legality of the decisions subject to article 6 of the Convention in theory, while such actions were systematically refused by the courts in practice, as either not admissible or not well founded, on the grounds that the alleged procedural errors were not of importance for the decisions (i.e., that the decision would not have been different, if the procedural error had not taken place). <i>(See document; ECE/MP.PP/C.1/2014/8, paragraphs 77-83)</i></p> <p>The possibility for national courts to evaluate whether the allegedly infringed provisions could be of any importance for the merits of the case, is not, in general, contrary to the requirements of article 9, paragraph 2, and to the objectives of the Convention. This possibility, as such, would not prevent environmental NGOs from challenging both substantive and procedural legality of the decisions.</p> <p>The Committee nevertheless raises a concern about the lack of clarity of the legal system of Party concerned as to whether a violation of the procedural rights prescribed under article 6 would be considered as a fundamental error of procedure to allow for fulfilment of the rights prescribed under article 9, paragraph 2, of the Convention. The Committee emphasizes that if German courts in practice were to deny review of the appeals and/or arguments of members of the public concerned, including environmental NGOs, regarding the procedural legality of decisions subject to article 6, this would amount to non-compliance with article 9, paragraph 2. <i>(See document ECE/MP.PP/C.1/2014/8, paragraphs 87 and 90)</i></p> <p>Unlike article 9, paragraphs 1 and 2, article 9, paragraph 3, of the Convention applies to a broad range of acts or omissions and also confers greater discretion on Parties when implementing it. Yet, the criteria for standing, if any, laid down in national law according to this provision should always be consistent with the objective of the Convention to ensure wide access to justice. The Parties are not</p>	
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	<p>obliged to establish a system of popular action (<i>actio popularis</i>) in their national laws to the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining such strict criteria that they effectively bar all or almost all members of the public, including environmental NGOs, from challenging acts or omissions that contravene national law relating to the environment. Access to such procedures should be the presumption, not the exception, as article 9, paragraph 3, should be read in conjunction with articles 1 and 3 of the Convention and in the light of the purpose reflected in the preamble, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced” (findings on communications ACCC/C/2005/11, paras. 34–36; ACCC/C/2006/18, paras. 29-30; and ACCC/C/2010/48 (ECE/MP.PP/C.1/2012/4), paras. 68–70).</p> <p>The Committee, when evaluating the compliance of the Party concerned with article 9, paragraph 3, of the Convention, considers the “general picture” described by the communicant and the Party concerned, i.e., both the relevant legislative framework and its application in practice (see para. 64 above). Therefore, the Committee takes into account whether national law effectively blocks access to justice for members of the public, including environmental NGOs, and considers if there are remedies available for them to actually challenge the act or omission in question.</p> <p>Article 9, paragraph 3, does not distinguish between public or private interests or objective or subjective rights, and it is not limited to any such categories. Rather, article 9, paragraph 3, applies to contraventions of any provision of national law relating to the environment. While what is considered a public or private interest or an objective or subjective right may vary among Parties and jurisdictions, access to a review procedure must be provided for all contraventions of national law relating to the environment. (<i>See document ECE/MP.PP/C.1/2014/8, paragraphs 92-94</i>)</p>	
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	<p>For these reasons, the Committee finds that, by not ensuring standing of environmental NGOs in many of its sectoral laws to challenge acts or omissions of public authorities or private persons which contravene provisions of national law relating to the environment, the Party concerned fails to comply with article 9, paragraph 3, of the Convention.</p> <p><i>(See document ECE/MP.PP/C.1/2014/8, paragraph 100)</i></p>	
<p>ACCC/C/2008/32 (Documents ECE/MP.PP/C.1/2011/4/Add.1 (Part I) and ECE/MP/PP/2017/7 (Part II))</p> <p><i>Standing</i> <i>(article 9, paragraph 3)</i></p> <p><i>Implementation through the legislation or relying on the jurisprudence</i> <i>(article 9, paragraph 3)</i></p>	<p>Article 9, paragraph 3, of the Convention refers to review procedures relating to acts or omissions of public authorities which contravene national law relating to the environment. This provision is intended to provide members of the public access to remedies against such acts and omissions, and with the means to have existing environmental laws enforced and made effective. In this context, when applied to the EU, the reference to “national law” should be interpreted as referring to the domestic law of the EU (cf. ACCC/C/2006/18 (ECE/MP.PP/2008/5/Add.4, para 27)).</p> <p>As the Committee has pointed out in its findings with regard to communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2, paras. 29-37) and communication ACCC/C/2006/18 (Denmark) (ECE/ MP.PP/2008/5/Add.4, paras. 29-31), while article 9, paragraph 3, refers to “the criteria, if any, laid down in national law”, the Convention does not set these criteria nor sets out the criteria to be avoided. Rather, the Convention allows a great deal of flexibility in defining which members of the public have access to justice. On the one hand, the Parties are not obliged to establish a system of popular action (“actio popularis”) in their domestic laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations or other members of the public from challenging acts or omissions that contravene national law relating to the environment.</p> <p>In communication ACCC/C/2005/11 (ECE/ MP.PP/C.1/2006/4/Add.2, para. 36), the Committee further observed that “the criteria, if any, laid down in national</p>	<p>The Committee recalls part I of its findings on the communication, namely that if the jurisprudence of the Party concerned courts on access to justice were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraphs 3 and 4, of the Convention....</p> <p>Accordingly, the Committee finds that the Party concerned fails to comply with article 9, paragraphs 3 and 4, of the Convention with regard to access to justice by members of the public because neither the Regulation, nor the jurisprudence of the Party concerned implements or complies with the obligations arising under those paragraphs.</p> <p>Recommended to the Party concerned that:</p> <p>(a) All relevant institutions within their competences take the steps necessary to provide the public concerned with access to justice in environmental</p>

	<p>law” should be such so that access to a review procedure is the presumption and not the exception, and suggested that one way for the Parties to avoid popular action (“actio popularis”) in these cases, is to employ some sort of criteria (e.g. of being affected or of having an interest) to be met by members of the public in order to be able to challenge a decision. However, this presupposes that such criteria do not bar effective remedies for members of the public.</p> <p>When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, i.e. to what extent the domestic law of the party concerned effectively has such blocking consequences for members of the public in general, including environmental organizations, or if there are remedies available for them to actually challenge the act or omission in question. In this evaluation, article 9, paragraph 3, should be read in conjunction with articles 1 to 3 of the Convention, and in the light of the purpose reflected in the preamble, that “effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced” (cf ACCC/C/2005/11, para. 34; and ACCC/C/2006/18 para. 30).</p> <p>The Convention does not prevent a Party from applying general criteria of a legal interest or of demonstrating a “direct or individual concern”, provided the application of these criteria does not lead to effectively barring all or almost all members of the public from challenging acts and omissions related to domestic environmental laws (cf. ACCC/C/2006/18, para. 31). (See document ECE/MP.PP/C.1/2011/4/Add.1 (Part I), paragraphs 76-80)</p> <p>The Committee reiterates that, 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 laws. (See paragraph 78 of document ECE/MP/PP/2017/7)</p> <p>The Committee notes that article 9, paragraph 3, may not be used to effectively bar almost all members of the public from challenging acts and omissions.<sup>78</sup> The</p>	<p>matters in accordance with article 9, paragraphs 3 and 4, of the Convention.</p> <p>(b) If and to the extent that the Party concerned intends to rely on the Regulation or other legislation to implement article 9, paragraphs 3 and 4, of the Convention: (i) The Regulation be amended, or any new legislation be drafted, so that it is clear to the courts that that legislation is intended to implement article 9, paragraph 3, of the Convention; (ii) New or amended legislation implementing the Aarhus Convention use wording that clearly and fully transposes the relevant part of the Convention; in particular it is important to correct failures in implementation caused by the use of words or terms that do not fully correspond to the terms of the Convention.</p> <p>(c) If and to the extent that the Party concerned is going to rely on the jurisprudence of the the court to ensure that the obligations arising under article 9, paragraphs 3 and 4, of the Convention are implemented, the Court: (i) Assess the legality of the implementing measures of the Party concerned in the light of those obligations and act accordingly; (ii) Interpret law of the Party concerned in a way which, to the fullest extent possible, is consistent with the</p>
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	<p>term “members of the public” in the Convention includes, but is not limited to, NGOs. (See document ECE/MP/PP/2017/7, paragraph 93)</p> <p>Article 9, paragraph 3, of the Convention requires Parties to ensure members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which “contravene” provisions of its national law relating to the environment.</p> <p>... requirement of article 9, paragraph 3, is to provide a right of challenge where an act or omission — any act or omission whatsoever by a institution or body, including any act implementing any policy or any act under any law — contravenes law relating to the environment.</p> <p>It is clear that, under the Convention, an act may “contravene” laws relating to the environment without being “adopted” under environmental law within the [established] meaning... So it is not consistent with article 9, paragraph 3, of the Convention to exclude from the scope of the provision in question, any act or omission made under Party’s legislation which does not “contribute to the pursuit of the objectives of policy on the environment”. Depending on the circumstances, such an act or omission may contravene a law relating to the environment. The correct test is not whether an act is adopted under law of any description.</p> <p>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 that may be excluded from implementing laws. (See document ECE/MP/PP/2017/7, paragraphs 98-101)</p> <p>Article 9, paragraph 3, of the Convention provides for access to administrative or judicial procedures, but the tail to article 2, paragraph 2, of the Convention excludes from the definition of “public authority” “bodies acting in a judicial or legislative capacity”, but not bodies acting in the capacity of an administrative review body. The conclusion that must be drawn is clear: the Convention</p>	<p>objectives of article 9, paragraphs 3 and 4, of the Convention.</p>
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	<p>distinguishes between judicial and administrative procedures, and excludes public authorities only when they act in a judicial capacity, but not when they act by way of administrative review. (See document ECE/MP/PP/2017/7, paragraph 110)</p> <p>Had the internal review procedure been the only available remedy, the Committee would have questioned whether the procedure met the requirements of the Convention; it would need to examine whether the procedure was adequate, effective, fair and equitable as required by the Convention. (See document ECE/MP/PP/2017/7, paragraph 114)</p>	
<p>ACCC/C/2008/33 (Document ECE/MP/PP/C.1/2010/6/Add.3)</p> <p><i>Scope of review (article 9, paragraphs 2 and 3)</i></p> <p><i>Assistance mechanism to remove or reduce financial barriers (article 9, paragraph 4)</i></p>	<p>Article 9, paragraph 2, of the Convention addresses both substantive and procedural legality. Hence, the Party concerned has to ensure that members of the public have access to a review procedure before a court of law and/or another independent body established by law which can review both the substantive and procedural legality of decisions, acts and omissions in appropriate cases.</p> <p>Article 9, paragraph 3, of the Convention, as opposed to article 9, paragraph 2, of the Convention, does not explicitly refer to either substantive or procedural legality. Instead it refers to “acts or omissions [...] which contravene its national law relating to the environment”. Clearly, the issue to be considered in such a review procedure is whether the act or omission in question contravened any provision — be it substantive or procedural — in national law relating to the environment.</p> <p>The Committee finds that the Party concerned allows for members of the public to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to article 9, paragraphs 2 and 3, of the Convention, including, inter alia, for material error of fact; error of law; regard to irrelevant considerations and failure to have regard to relevant considerations; jurisdictional error; and on the grounds of Wednesbury unreasonableness (see paras. 87–89 above). The Committee, however, is not convinced that the Party concerned, despite the above-mentioned challengeable aspects, meets the standards for review required by the Convention as regards substantive legality.</p>	<p>Found, among other things, that:</p> <p>.....The Committee finds that by failing to ensure that the costs for all court procedures subject to article 9 are not prohibitively expensive, and in particular by the absence of any clear legally binding directions from the legislature or judiciary to this effect, the Party concerned fails to comply with article 9, paragraph 4, of the Convention (see paras. 128–135). (See <i>document ECE/MP/PP/C.1/2010/6/Add.3, paragraph 141</i>)</p> <p>The Committee also finds that the system as a whole is not such as “to remove or reduce financial [...] barriers to access to justice”, as article 9, paragraph 5, of the Convention requires</p>

	<p>... A proportionality test requires a public authority to provide evidence that the act or decision pursued justifies the limitation of the right at stake, is connected to the aim(s) which that act or decision seeks to achieve and that the means used to limit the right at stake are no more than necessary to attain the aim(s) of the act or decision at stake. While a proportionality principle in cases within the scope of the Aarhus Convention may go a long way towards providing for a review of substantive and procedural legality, the Party concerned must make sure that such a principle does not generally or prima facie exclude any issue of substantive legality from a review. (See document ECE/MP/PP/C.1/2010/6/Add.3, paragraph 123-126)</p> <p>When assessing the costs related to procedures for access to justice in the light of the standard set by article 9, paragraph 4, of the Convention, the Committee considers the cost system as a whole and in a systemic manner. (See document ECE/MP/PP/C.1/2010/6/Add.3, paragraph 128)</p> <p>The Committee also notes the limiting effect of reciprocal cost caps which, as noted in Corner House, in practice entail that “when their lawyers are not willing to act pro bono” successful claimants are entitled to recover only solicitor’s fees and fees for one junior counsel “that are no more than modest”. The Committee in this respect finds that it is essential that, where costs are concerned, the equality of arms between parties to a case should be secured, entailing that claimants should in practice not have to rely on pro bono or junior legal counsel.</p> <p><u>A particular issue before the Committee are the costs associated with requests for injunctive relief. Under the domestic law, courts may, and usually do, require claimants to give cross-undertakings in damages... This leads to the situation where injunctive relief is not pursued, because of the high costs at risk, where the claimant is legitimately pursuing environmental concerns that involve the public interest. Such effects would amount to prohibitively expensive procedures that are not in compliance with article 9, paragraph 4.</u> (See document ECE/MP/PP/C.1/2010/6/Add.3, paragraphs 132-133)</p>	<p>a Party to the Convention to consider (see para. 136). (See <i>document ECE/MP/PP/C.1/2010/6/Add.3, paragraph 142</i>)</p> <p>In addition, the Committee finds that by not ensuring clear time limits for the filing of an application for judicial review and by not ensuring a clear date from when the time limit starts to run, the Party concerned fails to comply with article 9, paragraph 4. (See <i>document ECE/MP/PP/C.1/2010/6/Add.3, paragraph 143</i>)</p> <p>Recommended, among other things, that the Party concerned:</p> <p>.....</p> <p>(a) Review its system for allocating costs in environmental cases within the scope of the Convention and undertake practical and legislative measures to overcome the problems identified in paragraphs 128–136 above to ensure that such procedures:</p> <p>(i) Are fair and equitable and not prohibitively expensive; and</p> <p>(ii) Provide a clear and transparent framework;</p> <p>(b) Review its rules regarding the time frame for the bringing of applications for judicial review identified in</p>
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	<p>The Committee concludes that, despite the various measures available to address prohibitive costs, taken together they do not ensure that the costs remain at a level which meets the requirements under the Convention. At this stage, the Committee considers that the considerable discretion of the courts of the Party concerned in deciding the costs, without any clear legally binding direction from the legislature or judiciary to ensure costs are not prohibitively expensive, leads to considerable uncertainty regarding the costs to be faced where claimants are legitimately pursuing environmental concerns that involve the public interest. The Committee also notes the Court of Appeal’s judgement in a case which held that the principles of the Convention are “at most” a factor which it “may” (not must) “have regard to in exercising its discretion”, “along with a number of other factors, such as fairness to the defendant”. The Committee in this respect notes that “fairness” in article 9, paragraph 4, refers to what is fair for the claimant, not the defendant.</p> <p>In the light of the above, the Committee concludes that the Party concerned has not adequately implemented its obligation in article 9, paragraph 4, to ensure that the procedures subject to article 9 are not prohibitively expensive. In addition, the Committee finds that the system as a whole is not such as “to remove or reduce financial [...] barriers to access to justice”, as article 9, paragraph 5, of the Convention requires a Party to the Convention to consider. (See document ECE/MP/PP/C.1/2010/6/Add.3, paragraphs 135-136)</p> <p>However, the Committee considers that the courts of the Party concerned have considerable discretion in reducing the time limits by interpreting the requirement under the same provision that an application for a judicial review be filed “promptly” (see paras. 113–116). This may result in a claim for judicial review not being lodged promptly even if brought within the three-month period. The Committee also considers that the courts of the Party concerned, in exercising their judicial discretion, apply various moments at which a time may start to run, depending on the circumstances of the case (see para. 117). The justification for discretion regarding time limits for judicial review, the Party concerned submits, is constituted by the public interest considerations which generally are at stake in such cases. While the Committee accepts that a balance needs to be assured</p>	<p>paragraph 139 above to ensure that the legislative measures involved are fair and equitable and amount to a clear and transparent framework. (See document ECE/MP/PP/C.1/2010/6/Add.3, paragraph 145)</p>
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	<p>between the interests at stake, it also considers that this approach entails significant uncertainty for the claimant. The Committee finds that in the interest of fairness and legal certainty it is necessary to (i) set a clear minimum time limit within which a claim should be brought, and (ii) time limits should start to run from the date on which a claimant knew, or ought to have known of the act, or omission, at stake.</p> <p>As was pointed out with regard to the costs of procedures (see para. 134 above), the Party concerned cannot rely on judicial discretion of the courts to ensure that the rules for timing of judicial review applications meet the requirements of article 9, paragraph 4. On the contrary, reliance on such discretion has resulted in inadequate implementation of article 9, paragraph 4. The Committee finds that by failing to establish clear time limits within which claims may be brought and to set a clear and consistent point at which time starts to run, i.e., the date on which a claimant knew, or ought to have known of the act, or omission, at stake, the Party concerned has failed to comply with the requirement in article 9, paragraph 4, that procedures subject to article 9 be fair and equitable.</p> <p><i>(See document ECE/MP/PP/C.1/2010/6/Add.3, paragraphs 138-139)</i></p>	
<p>ACCC/C/2009/36 (Document ECE/MP.PP/C.1/2010/4/Add.2)</p> <p><i>Legal aid and appropriate assistance mechanisms (article 9, paragraphs 4 and 5)</i></p>	<p>The Committee notes that the present system of legal aid, as it applies to NGOs (see para. 15 above), appears to be very restrictive for small NGOs. The Committee considers that by setting high financial requirements for an entity to qualify as a public utility entity and thus enabling it to receive free legal aid, the current system of the Party concerned is contradictory. Such a financial requirement challenges the inherent meaning of free legal aid, which aims to facilitate access to justice for the financially weaker. The Committee finds that instituting a system on legal aid which excludes small NGOs from receiving legal aid provides sufficient evidence to conclude that the Party concerned did not take into consideration the establishment of appropriate assistance mechanisms to remove or reduce financial barriers to access to justice. Thus, the Party concerned failed to comply with article 9, paragraph 5, of the Convention and failed to provide for fair and equitable remedies, as required by article 9, paragraph 4, of the Convention.</p>	<p>Finally, the Committee finds that, by failing to consider providing appropriate assistance mechanisms to remove or reduce financial barriers to access to justice to a small NGO, the Party concerned failed to comply with article 9, paragraph 5, of the Convention, and failed to provide for fair and equitable remedies, as required by article 9, paragraph 4, of the Convention (see para. 66 above); and also stresses that maintaining a system that would lead to prohibitive expenses would amount to non compliance with</p>



	<p>In addition, with regard to the rule of dual representation (“abogado” and “procurador”; see para 16 above), for those seeking judicial review on appeal in the Party concerned, the Party concerned did not oppose that this rule applies after the first instance (one judge). The Committee further notes that citizens therefore have to pay the fees for two lawyers after the first instance, and also the fees for the two lawyers of the winning party in the event that they lose their case (loser pays principle). The Committee observes that the system of compulsory dual representation may potentially entail prohibitive expenses for the public. However, the Committee does not have detailed information on how high the costs of the dual representation may be, while it recognizes that such costs may vary in the different regions of the country. The Committee therefore stresses that maintaining a system that would lead to prohibitive expenses would amount to noncompliance with article 9, paragraph 4, of the Convention. (See document ECE/MP.PP/C.1/2010/4/Add.2, paragraphs 66-67)</p>	<p>article 9, paragraph 4, of the Convention (see para. 67 above). (See document ECE/MP.PP/C.1/2010/4/Add.2, paragraph 74)</p> <p>Recommended, among other things, that the Party concerned:</p> <p>(c) To change the legal system regulating legal aid in order to ensure that small NGOs have access to justice; To examine the requirements for dual legal representation for the court of second instance in the light of the observations of the Compliance Committee in paragraph 67 of the present document. (See document ECE/MP.PP/C.1/2010/4/Add.2, paragraph 75)</p>
<p>ACCC/C/2010/45 and ACCC/C/2011/60 (Document ECE/MP.PP/C.1/2013/12)</p> <p><i>Appeal before an executive body (article 9, paragraph 2)</i></p>	<p>As mentioned above, the outcome of an EIA screening decision is a determination under article 6, paragraph 1 (b), of the Convention. These determinations thus are subject to the requirements of article 9, paragraph 2, of the Convention. This entails that members of the public concerned, as defined in article 9, paragraph 2, of the Convention, “shall have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6.”</p> <p>The Committee notes that the right of an applicant to appeal to the Secretaries of State are not procedures under article 9, paragraph 2, of the Convention. They are instead procedures by way of which an applicant whose planning decision has been refused may appeal that decision before an executive body, not constituting</p>	

	<p>a court of law or independent and impartial body established by law. This is so even though in the course of such an appeal members of the public concerned may be heard. If the procedure results in a retaking of the decision at stake, then, depending on the proposed activity under consideration, it engages article 6 of the Convention. Similarly, the latter would be the case if the Secretary of State calls in an application for its own determination.</p> <p><i>(See document ECE/MP.PP/C.1/2013/12, paragraphs 83 and 84)</i></p>	
<p>ACCC/C/2010/48 (Document ECE/MP.PP/C.1/2012/4)</p> <p><i>Standing</i> (article 9, paragraph 2 and 3)</p>	<p>In defining standing under article 9, paragraph 2, the Convention allows a Party to determine within the framework of its national legislation, whether members of the public have “sufficient interest” or whether they can maintain an “impairment of a right”, where the administrative procedural law requires this as a precondition. While for NGOs the Convention provides some further guidance on how the “sufficient interest” should be interpreted, for persons, such as “individuals”, the Convention requires that “sufficient interest” and “impairment of a right” be determined “in accordance with the requirements of national law”. Parties, thus, retain some discretion in defining the scope of the public entitled to standing in these cases; but the Convention further sets the limitation that this determination must be consistent “with the objective of giving the public concerned wide access to justice within the scope of the Convention” (see ECE/MP.PP/C.1/2006/4/Add.2, para. 33). This means that the Parties in exercising their discretion may not interpret these criteria in a way that significantly narrows down standing and runs counter to its general obligations under articles 1, 3 and 9 of the Convention.</p> <p><i>(See document ECE/MP.PP/C.1/2012/4, paragraph 61)</i></p> <p>The Committee understands that the Party concerned allows individuals to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to article 9, paragraph 2, of the Convention, when their rights relating to property or well-being have been violated, and that in such situations, individuals may also raise issues of general environmental concern. However, the Committee understands that it is up to the courts to consider whether they will in fact take up such more general environmental issues... However, the information provided does not sufficiently substantiate, e.g., by reference to recent case-law, that this</p>	<p>Found, among other things, that....</p> <p>the Party concerned, by not ensuring access to a timely review procedure for access to requests for information, is not in compliance with article 9, paragraph 4, of the Convention</p> <p><i>(See document ECE/MP.PP/C.1/2012/4, paragraph 79)</i></p> <p>The Committee finds that the Party concerned, in not ensuring standing of environmental NGOs to challenge acts or omissions of a public authority or private person in many of its sectoral laws, is not in compliance with article 9, paragraph 3, of the Convention</p> <p><i>(See document ECE/MP.PP/C.1/2012/4, paragraph 80)</i></p> <p>Recommended, among other things, to the Party concerned take the necessary legislative, regulatory, administrative and other measures to ensure that: ...</p>

	<p>indeed reflects the general court practice. Therefore, the Committee does not conclude whether the Party concerned is in a state of non-compliance with article 9, paragraph 2, of the Convention. The Committee nevertheless raises a concern with respect to the line of reasoning by the Administrative Court, and notes that if this was the line generally adopted by Austrian courts, this would amount to non-compliance with article 9, paragraph 2.</p> <p><i>(See document ECE/MP.PP/C.1/2012/4, paragraph 66)</i></p>	<p>(iii) Criteria for NGO standing to challenge acts or omissions by private persons or public authorities which contravene national law relating to the environment under article 9, paragraph 3, of the Convention be revised and specifically laid down in sectoral environmental laws, in addition to any existing criteria for NGO standing in the EIA, IPPC, waste management or environmental liability laws.</p> <p><i>(See document ECE/MP.PP/C.1/2012/4, paragraph 81f)</i></p>
<p>ACCC/C/2010/50 (Document ECE/MP.PP/2012/11)</p> <p><i>Standing (article 9, paragraph 2)</i></p> <p><i>Fair review procedure (article 9, paragraph 2)</i></p>	<p>While the national law of the Party concerned may not be fully clear and consistent in all respects as regards standing of NGOs, the Committee notes that NGOs are not able to participate during the entire decision-making procedure, since for NGOs standing after the conclusion of the EIA stage is linked to the exercise of their rights during the EIA procedure or other procedures prior to the decision/authorization. The Committee finds that this feature of the national legislation limits the rights of NGOs to access review procedures regarding the final decisions permitting proposed activities, such as building permits. In this respect the Party concerned fails to comply with article 9, paragraph 2, of the Convention.</p> <p><i>(See document ECE/MP.PP/2012/11, paragraph 78)</i></p> <p>Article 9, paragraph 2, of the Convention requires Parties to provide the public access to a review procedure to challenge the procedural and substantive legality of any decision, act or omission subject to the provisions of article 6. This necessarily also includes decisions and determinations subject to article 6, paragraph 1 (b). The Committee thus finds that, to the extent that the EIA screening process and the relevant criteria serve also as the determination</p>	<p>Found, among other things, that</p> <p>..... The rights of NGOs meeting the requirements of article 2, paragraph 5, to access review procedures regarding the final decisions permitting proposed activities, such as building permits, are too limited, to the extent that the Party concerned fails to comply with article 9, paragraph 2, of the Convention.</p> <p>(d) By limiting the right of NGOs meeting the requirements of article 2, paragraph 5, to seek review only of the procedural legality of decisions under article 6, the Party concerned fails to</p>

	<p>required under article 6, paragraph 1 (b), members of the public concerned shall have access to a review procedure to challenge the legality of the outcome of the EIA screening process. Since this is not the case under the national law, the Committee finds that the Party concerned fails to comply with article 9, paragraph 2, of the Convention.</p> <p><i>(See document ECE/MP.PP/2012/11, paragraph 82)</i></p> <p>While article 9, paragraph 3, of the Convention accords greater flexibility to Parties in its implementation as compared with paragraphs 1 and 2 of that article, the Committee has previously held (<i>ibid.</i> and findings on communication ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2) that the criteria for standing may not be so strict that they effectively bar all or almost all environmental organizations or members of the public from challenging acts of omissions under this paragraph. It is clear from the oral and written submissions of the parties, that if an operator exceeds some noise limits set by law, then no member of the public can be granted standing to challenge the act of the operator (private person) or the omission of the authority to enforce the law. In addition, it is evident that in cases of land-use planning, if an authority has issued a land-use plan in contravention of urban and land-planning standards or other environmental protection laws, a considerable portion of the public, including NGOs, cannot challenge this act of the authority. The Committee finds that such a situation is not in compliance with article 9, paragraph 3, of the Convention.</p> <p>The Committee notes in particular the jurisprudence that excludes members of the public, including NGOs, from challenging operating permits on the ground; that it is not mandatory for the public to participate in nuclear safety matters; and the ruling which specifically excludes NGOs on the ground that they do not have rights to life, privacy or a favourable environment that could be affected. If indeed standing to challenge nuclear operation permits is limited because public participation is limited, then there are serious concerns of non-compliance not only with article 9, paragraph 2, of the Convention, but also with article 6 of the Convention.</p> <p><i>(See document ECE/MP.PP/2012/11, paragraphs 85-86)</i></p>	<p>comply with article 9, paragraph 2 of the Convention</p> <p>(e) To the extent that the EIA screening conclusions serve also as the determination required under article 6, paragraph 1 (b), members of the public should have access to a review procedure to challenge the legality of EIA screening conclusions. Since this is not the case under Czech law, the Party concerned fails to comply with article 9, paragraph 2, of the Convention (see para. 82 above);</p> <p>(f) By not ensuring that members of the public are granted standing to challenge the act of an operator (private person) or the omission of the relevant authority to enforce the law when that operator exceeds some noise limits set by law, the Party concerned fails to comply with article 9, paragraph 3.</p> <p><i>(See document ECE/MP.PP/2012/11, paragraph 89)</i></p>
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<p>ACCC/C/2011/57 (Document ECE/MP.PP/C.1/2012/7)</p> <p><i>Fee to appeal (article 9, paragraph 4)</i></p>	<p>With regard to the communicant’s first allegation, the Committee holds that the requirement for fair procedures means that the process, including the final ruling of the decisionmaking body, must be impartial and free from prejudice, favouritism or self- interest. While the requirement for fair procedures applies equally to all persons, the Committee nevertheless considers that a criterion that distinguishes between individuals and legal persons — like the differentiated fee in the present case — is not in itself necessarily unfair. The Committee does not find that the Party concerned fails to comply with article 9, paragraph 4, on this ground. <i>(See document ECE/MP.PP/C.1/2012/7, paragraph 44)</i></p> <p>The rights granted to the public by the Convention and its three pillars aim not only at the protection of the individual right to a healthy environment, but also at improving the environment (preambular para. 7) and enhancing the quality and the enforcement of environmental decisions (preambular para. 9). The Convention explicitly recognizes the importance of the role that environmental NGOs can play in environmental protection (preambular para. 13). The Committee also considers that, in keeping with the objective set out in preambular paragraph 7 and article 1 to protect and improve the environment for the benefit of present and future generations, concomitant implementation of the rights under the Convention, in general, should be strengthened over time <i>(See document ECE/MP.PP/C.1/2012/7, paragraph 46)</i></p> <p>When assessing if the new fees regime is “prohibitively expensive”, apart from the amount of the fee as such, the Committee considers the following aspects of the system as a whole to be particularly relevant: (a) the contribution made by appeals by NGOs to improving environmental protection and the effective implementation of the legislation; (b) the expected result of the introduction of the new fee on the number of appeals by NGOs; and (c) the fees for access to justice in environmental matters as compared with fees for access to justice in other matters in the Party concerned. <i>(See document ECE/MP.PP/C.1/2012/7, paragraph 48)</i></p>	<p>Found among other things that:</p> <p>..... by introducing a fee of XXX for NGOs to appeal, the Party concerned has failed to comply with the requirement in article 9, paragraph 4, of the Convention, that access to justice procedures not be prohibitively expensive (para. 52 above). <i>(See document ECE/MP.PP/C.1/2012/7, paragraph 55)</i></p> <p>Recommended, among other thing, to the Party concerned to take the necessary legislative, regulatory, administrative and other measures to ensure that:</p> <p>.....the fees for NGOs to appeal environmental decisions are not prohibitively expensive <i>(See document ECE/MP.PP/C.1/2012/7, paragraph 57)</i></p>
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	<p>The Committee has been provided information by the Party concerned regarding the cost to appeal administrative decisions before other similar quasi-judicial bodies in the Party concerned, including those concerned with patients' rights (health), consumer issues, energy supply and tax matters. The Committee notes that such appeals are either free of charge or have fees of considerably less than 3,000, whereas higher fees are charged for appeals concerning matters regarding primarily commercial interests, such as competition, patent and trademark rights. The Committee also notes that NGO before the Board appeals have more the nature of appeals to the first group of bodies than appeals regarding primarily commercial interests.</p> <p>Based on the above three considerations, the Committee finds that the fee of 3,000 for NGOs to appeal to the Board is in breach of the requirement in article 9, paragraph 4, that access to justice procedures not be prohibitively expensive. (See document ECE/MP.PP/C.1/2012/7, paragraphs 51-52)</p>	
<p>ACCC/C/2011/58 (Document <i>ECE/MP.PP/C.1/2013/4</i>)</p> <p><i>Access to justice in Strategic Environmental Assessments statements, Detailed Spatial Plans (article 9, paragraphs 2 and 3)</i></p>	<p>When evaluating the compliance of the Party concerned with article 9 of the Convention in each of these areas, the Committee pays attention to the general picture on access to justice, in the light of the purpose also reflected in the preamble of the Convention, that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced" (Convention, preambular para. 18; cf. also findings on communication ACCC/C/2006/18 (ECE/MP.PP/2008/5/Add.4), para. 30). Therefore, in assessing whether the Convention's requirement for effective access to justice is met by the Party concerned, the Committee looks at the legal framework in general and the different possibilities for access to justice, available to members of the public, including organizations, in different stages of the decision-making ("tiered" decision-making).</p> <p>In addition, in examining access to justice with respect to the different types of acts before it (SEA statements, spatial plans or construction and exploitation permits), the Committee bears in mind that whether a decision should be challengeable under article 9 is determined by the legal functions and effects of a decision, not by its label under national law (c.f. findings on communication</p>	<p>Found, among other things, that:</p> <p>(a) By barring all members of the public, including environmental organizations, from access to justice with respect to General Spatial Plans (para. 66), the Party concerned fails to comply with article 9, paragraph 3, of the Convention;</p> <p>(b) By barring almost all members of the public, including all environmental organizations, from access to justice with respect to Detailed Spatial Plans (para. 70), the Party concerned fails to comply with article 9, paragraph 3, of the Convention;</p>

	<p>ACCC/C/2005/11 (ECE/MP.PP/C.1/2006/4/Add.2), para. 29 and findings on communication ACCC/C/2006/16 (ECE/MP.PP/2008/5/Add.6), para. 57). (See document ECE/MP.PP/C.1/2013/4, paragraphs 52-53)</p> <p>In cases where the SEA procedure substitutes the EIA procedure for annex I activities (and consequently, an SEA statement is issued instead of an EIA decision), the SEA procedure should be considered as an integral part of the decision-making procedure in the sense of article 6 of the Convention. Consequently, the members of the public concerned should have access to judicial review of the SEA statement under the conditions of article 9, paragraph 2, of the Convention.</p> <p>In other cases, the SEA procedure forms a part of the process for the preparation of a plan relating to the environment according to article 7 of the Convention. The possibility of members of the public to challenge the SEA statement should then be ensured in accordance with article 9, paragraph 3, of the Convention.</p> <p>At the same time, the fact that the SEA statement cannot be reviewed separately does not amount to non-compliance with the requirements of article 9, paragraphs 2 and 3, of the Convention, provided that members of the public can actually challenge the SEA statement together with the decision adopting the subsequent plan or programme (e.g., spatial plan). (See document ECE/MP.PP/C.1/2013/4, paragraphs 58-59 and 60)</p> <p>... the characteristics of the General Spatial Plans indicate that that these plans are binding administrative acts, which determine future development of the area. They are mandatory for the preparation of the Detailed Spatial Plans, and thus also binding, although indirectly, for the specific investment activities, which must comply with them. Moreover, they are subject to obligatory SEA and are related to the environment since they can influence the environment of the regulated area. Consequently, the General Spatial Plans have the legal nature of acts of administrative authorities which may contravene provisions of national law related to the environment and the Committee reviews access to justice in respect to these plans in the light of article 9, paragraph 3, of the Convention.</p>	<p>(c) By not ensuring that all members of the public concerned having sufficient interest, in particular environmental organizations, have access to review procedures to challenge the final decisions permitting activities listed in annex I to the Convention, (paras. 79–81), the Party concerned fails to comply with article 9, paragraph 2, in conjunction with article 9, paragraph 4, of the Convention. (See document ECE/MP.PP/C.1/2013/4, paragraph 83)</p> <p>Recommended, among other things, to the Party concerned: To take the necessary legislative, regulatory, and administrative measures and practical arrangements to ensure that: ..... (a)Members of the public, including environmental organizations, have access to justice with respect to General Spatial Plans, Detailed Spatial Plans and (either in the scope of review of the spatial plans or separately) also with respect to the relevant SEA statements; (b)Members of the public concerned, including environmental organizations, have access to review procedures to challenge construction and exploitation</p>
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	<p>While referring to “the criteria, if any, laid down in national law” in article 9, paragraph 3, the Convention neither defines these criteria nor sets out the criteria to be avoided and allows a great deal of flexibility in this respect. On the one hand, the Parties are not obliged to establish a system of popular action (<i>actio popularis</i>) in their national laws with the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause “where they meet the criteria, if any, laid down in its national law” as an excuse for introducing or maintaining such strict criteria that they effectively bar all or almost all members of the public, especially environmental organizations, from challenging acts or omissions that contravene national law relating to the environment. The phrase “the criteria, if any, laid down in national law” indicates that the Party concerned should exercise self-restraint not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception (cf. findings on communication ACCC/C/2005/11, paras. 34–36).</p> <p>As mentioned above, the SDA explicitly prevents any person from challenging the General Spatial Plans in court (see para. 21 above). Such explicit provision can hardly be overcome by jurisprudence. Therefore, the Committee concludes that national legislation of the Party concerned effectively bars all members of the public, including environmental organizations, from challenging General Spatial Plans. As a result, members of the public, including environmental organizations, are also prevented from challenging the SEA statements for General Spatial Plans, as these statements are considered as “preliminary acts”, which are not subject to judicial review in a separate procedure (see paras. 58–60 above). Therefore, the Party concerned fails to comply with article 9, paragraph 3, of the Convention. (See document ECE/MP.PP/C.1/2013/4, paragraphs 64-66)</p> <p>Under the law of the Party concerned, the Detailed Spatial Plans do not have the legal nature of “decisions on whether to permit a specific activity” in the sense of article 6 of the Convention, as a specific permit (construction and/or exploitation</p>	<p>permits for the activities listed in annex I to the Convention. (See document ECE/MP.PP/C.1/2013/4, paragraph 84)</p>
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	<p>permit) is needed to implement the activity (project). Therefore, article 9, paragraph 2, of the Convention, is not applicable.</p> <p>Bearing in mind their characteristics, as summarized above, the Committee considers Detailed Spatial Plans as acts of administrative authorities which may contravene provisions of national law related to the environment. In this respect, article 9, paragraph 3, of the Convention applies also for the review of the law and practice of the Party concerned on access to justice with respect to the Detailed Spatial Plans. It follows also that for Detailed Spatial Plans the standing criteria of national law must not effectively bar all or almost all members of the public, especially environmental organizations, from challenging them in court (cf. findings on communication ACCC/C/2005/11).</p> <p>The SDA provides standing to challenge Detailed Spatial Plans to the directly affected owners of real estate. Environmental organizations and other members of the public do not have the possibility of challenging these plans in court. The case-law presented by the communicant confirms this approach. Besides, members of public have no possibility to challenge the SEA statements for the Detailed Spatial Plans within the scope of an appeal challenging these plans: they can challenge neither the fact that an SEA statement was not issued prior to approval of the Detailed Spatial Plan nor the disrespect of conditions set out in the SEA statement. This situation constitutes non-compliance of the Party concerned with article 9, paragraph 3, of the Convention.</p> <p>The communicant also alleges that, under certain conditions, the SEA statements for the “small scale” Detailed Spatial Plans can substitute individual EIA decisions for specific activities and that this includes activities listed in annex I. In such a situation, the SEA statement together with the small scale Detailed Spatial Plan has the legal function of a decision whether to permit an activity listed in annex I to the Convention. If such is the case, and the scope of persons entitled to challenge the Detailed Spatial Plan excludes environmental organizations, this also implies a failure to comply with article 9, paragraph 2, of the Convention. (See document ECE/MP.PP/C.1/2013/4, paragraphs 68-71)</p>	
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	<p>If activities listed in annex I to the Convention are permitted by a number of tiered decisions, it may not be necessary to allow members of the public concerned to challenge each such decision separately in an independent court procedure. Accordingly, if one or more of the decisions have a preliminary character and are in some way integrated into a subsequent decision, a Party may remain in compliance with the Convention if the previous decision is subject to judicial review upon appeal of the final decision. Nevertheless, the system of judicial review as a whole must comply with the requirements of article 9, paragraph 4, of the Convention, also with respect to each of the tiered decisions.</p> <p><i>(See document ECE/MP.PP/C.1/2013/4, paragraph 76)</i></p>	
<p>ACCC/C/2011/61 (Document ECE/MP.PP/C.1/2013/13)</p>	<p>Article 9, paragraph 2, of the Convention requires Parties to ensure access to procedures for review of decisions, acts and omissions subject to article 6. This provision addresses standing, as well as the scope of review, that should comprise the substantive and procedural legality of the act.</p> <p><i>(See document ECE/MP.PP/C.1/2013/13, paragraph 60)</i></p>	<p>Found that the decision of the Court, by declaring that the environmental NGO did not have standing, failed to meet the standards set by the Convention. Thus the Party concerned failed to comply with article 9, paragraph 2, of the Convention</p>
<p>ACCC/C/2011/62 (Document ECE/MP.PP/C.1/2013/14)</p> <p>Standing (article 9, paragraphs 2 and 3)</p>	<p>The Committee notes that the communicant is an NGO under article 2, paragraph 5, of the Convention and as such it should be granted access to review procedures under article 9, paragraph 2.</p> <p>The Committee finds that while the wording of the national legislation does not run counter to article 9, paragraph 2, the decision of the Court by declaring that the environmental NGO did not have standing, failed to meet the standards set by the Convention. Thus the Party concerned failed to comply with article 9, paragraph 2, of the Convention.</p> <p><i>(See document ECE/MP.PP/C.1/2013/14, paragraphs 34 and 36)</i></p> <p>Unlike article 9, paragraph 2, article 9, paragraph 3, of the Convention applies to a broader range of acts and omissions. Namely, this paragraph provides for the</p>	<p>Found that the decision of the Court, by declaring that the environmental NGO did not have standing, failed to meet the standards set by the Convention. Thus the Party concerned failed to comply with article 9, paragraph 2, of the Convention.</p> <p><i>(See document ECE/MP.PP/C.1/2013/14, paragraph 40)</i></p> <p>Recommended to the Party concerned that it: (a) Review and clarify its</p>

	<p>possibility of members of the public to review acts and omissions which allegedly contravene provisions of national law relating to the environment, and not only public participation provisions. In implementing paragraph 3, Parties are granted more flexibility in defining which environmental organizations have access to justice. The Committee has already considered implementation of article 9, paragraph 3, of the Convention (cf. findings on communications ACCC/C/2005/11 (ECE/MP.PP/C.1/2006/4/Add.2); ACCC/C/2006/18 ECE/MP.PP/2008/5/Add.4; and ACCC/C/2010/48 ECE/MP.PP/C.1/2012/4) and has in general determined that, while Parties are not obliged to establish a system of popular action in their national laws, Parties may not take the clause “where they meet the criteria, if any, laid down in its national law”, as an excuse for maintaining or introducing criteria that effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment. (See document ECE/MP.PP/C.1/2013/14, paragraph 37)</p>	<p>legislation, including the law on NGOs and administrative procedures, so as to ensure compliance with article 9, paragraph 2, of the Convention with regard to standing; (b) Take the measures necessary to raise awareness among the judiciary to promote implementation of domestic legislation in accordance with the Convention. (See document ECE/MP.PP/C.1/2013/14, paragraph 41)</p>
<p>ACCC/C/2011/63 (Document ECE/MP.PP/C.1/2014/3)</p> <p><i>National law relating to the environment (article 9, paragraph 3)</i></p> <p><i>Access to justice and effective (article 9, paragraphs 3 and 4)</i></p>	<p>... the Committee recalls that “the criteria, if any, laid down in national law” in accordance with article 9, paragraph 3, should not be seen as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations or other members of the public from challenging acts or omissions that contravene national laws relating to the environment (see findings on communication ACCC/C/2005/11 (ECE/MP.PP/C.1/2006/4/Add.2, paras. 35–37) and ACCC/C/2006/18 (ECE/MP.PP/C.1/2008/5/Add.4, paras. 29–31).</p> <p>Article 9, paragraph 3, is intended to provide members of the public with access to adequate remedies against acts and omissions which contravene laws relating to the environment, and with the means to have existing laws relating to the environment enforced and made effective (see also findings on ACCC/C/2005/11, para. 34). Importantly, the text of the Convention does not refer to “environmental laws”, but to “laws relating to the environment”. Article 9, paragraph 3, is not limited to “environmental laws”, e.g., laws that explicitly include the term “environment” in their title or provisions. Rather, it covers any law that relates to the environment, i.e. a law under any policy, including and not</p>	<p>Found, among other things, that:</p> <p>... because members of the public, including environmental NGOs, have in certain cases no means of access to administrative or judicial procedures to challenge acts and omissions of public authorities and private persons which contravene provisions of national laws, including administrative penal laws and criminal laws, relating to the environment, such as contraventions of laws relating to trade in wildlife, nature conservation and animal protection, the Party concerned fails to comply with article 9, paragraph 3, in conjunction with paragraph 4, of the Convention (See ECE/MP.PP/C.1/2014/3, para 65)</p>

	<p>limited to, chemicals control and waste management, planning, transport, mining and exploitation of natural resources, agriculture, energy, taxation or maritime affairs, which may relate in general to, or help to protect, or harm or otherwise impact on the environment.</p> <p>The scope of “national laws” also extends to the applicable EU law in a member State. In this regard, acts and omissions that may contravene EU regulations or directives, but not national laws implementing those instruments, may as well be challenged under paragraph 3 (see findings on ACCC/C/2006/18, para. 27).</p> <p>The broad understanding of “environment” under the Convention is drawn from the broad definition of “environmental information” under article 2, paragraph 3, which also extends to “biodiversity and its components, including genetically modified organisms”. The fact that components of biodiversity have been removed from their habitat does not necessarily mean that they lose their property as biodiversity components.</p> <p>Laws on the protection of wildlife species and/or trade in endangered species (including marketing in the domestic market, import and export) are also “laws relating to the environment”, because they are not limited to the regulation of trade relations but include obligations on how the animals/species are to be treated and protected. Accordingly, these laws help protect or otherwise impact on the environment. In addition, to the extent the laws of the Parties relating to the environment apply to acts and omissions of a transboundary or extraterritorial character or effect, these acts and omissions are also subject to article 9, paragraph 3, of the Convention.</p> <p>In its findings on communication ACCC/C/2006/18 the Committee noted that the lack of opportunity for the communicant in that case to initiate penal proceedings did not in itself amount to non-compliance with 9, paragraph 3, as long as there were other means for challenging those acts and omissions. In the present case, the Committee therefore looks also at whether the system of the Party concerned provides for any other means for challenging acts and omissions by private</p>	
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	<p>persons and public authorities that contravene provisions of its national law relating to the environment. (See document ECE/MP.PP/C.1/2014/3, paragraphs 51-56)</p> <p>The Committee concludes that in certain cases members of the public, including environmental NGOs, have no means of access to administrative or judicial procedures to challenge acts and omissions of public authorities and private persons which contravene provisions of national law, including administrative penal law and criminal law, relating to the environment, such as contraventions of laws relating to trade in wildlife, nature conservation and animal protection. Whereas lack of access to criminal or administrative penal procedures as such does not amount to non-compliance, the lack of any administrative or judicial procedures to challenge acts and omissions contravening national law relating to the environment such as in this case amounts to non-compliance with article 9, paragraph 3, in conjunction with article 9, paragraph 4, of the Convention. For these reasons, the Committee holds that the Party concerned fails to comply with article 9, paragraph 3, in conjunction with paragraph 4, of the Convention.</p> <p>... In this respect, the Committee reminds the Party concerned that in proceeding with any amendments it should take into account that access to justice under article 9, paragraphs 3 and 4, requires more than a right of members of the public to address an administrative authority or the prosecution about an illegal activity. Members of the public should also have access to administrative or judicial procedures to challenge acts or omissions by private persons or public authorities when they consider that such acts or omissions amount to criminal acts or administrative offences. This may be pursued through avenues within or beyond penal/criminal law procedures. (See document ECE/MP.PP/C.1/2014/3, paragraphs 63-64)</p>	
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<p>ACCC/C/2012/76 (Document ECE/MP.PP/C.1/2016)</p> <p><i>Adequate and effective remedies to prevent environmental damage (article 9, paragraph 4)</i></p>	<p>The Committee notes that it is not disputed between the parties that review procedures regarding EIA/SEA decisions are subject to the requirements of article 9, paragraph 4, of the Convention (. As an order for preliminary enforcement of an EIA/SEA decision is a measure for injunctive relief regarding a decision subject to article 9, paragraph 4, it is likewise subject to the requirements set out in article 9, paragraph 4, of the Convention to be, inter alia, fair and equitable.</p> <p>The Committee considers that the requirement in article 1 of the Convention for Parties to guarantee the rights of information, participation and justice “in order to contribute to the right of every person to live in an environment adequate to his or her health and well-being”, makes it clear that the protection of the environment is to be treated as an important public interest. <i>(See document ECE/MP.PP/C.1/2014/3, paragraphs 62-63)</i></p> <p>The Committee confirms that, as submitted by the communicant, the requirement in article 9, paragraph 4, of the Convention that injunctive relief and other remedies be “effective” includes, inter alia, an implicit requirement that those remedies should prevent irreversible damage to the environment.</p> <p>In this respect, it is important to note that the Party concerned is bound to guarantee access to justice in accordance with the objective set out in article 1 of the Convention, that is, in order to contribute to the right of every person to live in an environment adequate to his or her health and well-being. Therefore, the protection of the environment must, in the language of article 60, paragraph 1, of the Administrative Procedure Code, be treated as a “particularly important public interest” for the purposes of that provision. <i>(See document ECE/MP.PP/C.1/2014/3, paragraphs 69-70)</i></p> <p>In the view of the Committee, the above facts reveal the existence of a certain trend, condoned by the Party concerned: when considering an appeal of an order for preliminary enforcement of a challenged EIA/SEA decision, instead of reviewing the extent to which the criteria in article 60, paragraph 1, of the Administrative Procedure Code are met in the light of the proportionality principle (APC, art. 6) and the requirement to assess all the facts and arguments</p>	<p>Found, among other things, that:</p> <p>..... with respect to appeals under article 60, paragraph 4, of the Administrative Procedure Code of orders for preliminary enforcement challenged on the ground of potential environmental damage, a practice in which the courts rely on the conclusions of the contested EIA/SEA decision rather than making their own assessment of the risk of environmental damage in the light of all the facts and arguments significant to the case, taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm, does not ensure that such procedures provide adequate and effective remedies to prevent environmental damage. Therefore, the Party concerned fails to comply with article 9, paragraph 4, of the Convention. <i>(See document ECE/MP.PP/C.1/2016, paragraph 82)</i></p> <p>Recommended, among other things, that the Party concerned:</p> <p>a) Instead of relying on the conclusions of the contested EIA/SEA decision, the courts in such appeals make their own assessment of the risk of environmental</p>
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	<p>significant for the case (APC, art. 7), the courts rely heavily on the conclusions contained in the EIA/SEA decision, despite the fact that the legality of that decision is being challenged in the main proceeding. The Committee considers that the courts' approach is not in accordance with the requirement in article 9, paragraph 4, of the Convention to provide adequate and effective remedies.</p> <p>More precisely, with respect to appeals under article 60, paragraph 4, of the Administrative Procedure Code of orders for preliminary enforcement challenged on the ground of potential environmental damage, the Committee finds that a practice in which the review bodies rely on the conclusions of the contested EIA/SEA decision, rather than making their own assessment of the risk of environmental damage in the light of all the facts and arguments significant to the case, taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm, does not ensure that such procedures provide adequate and effective remedies to prevent environmental damage. Therefore, the Party concerned fails to comply with article 9, paragraph 4, of the Convention. <i>(See document ECE/MP.PP/C.1/2016, paragraphs 76-77)</i></p>	<p>damage in the light of all the facts and arguments significant to the case, taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm;</p> <p>(b) The courts in their decisions on such appeals set out their reasoning to clearly show how they have balanced the interests, including the assessment they have undertaken of the risk of environmental damage in the light of all the facts and arguments significant to the case taking into account the particularly important public interest in the protection of the environment and the need for precaution with respect to preventing environmental harm;</p> <p>(c) Training and guidance is provided for judges and public officials in relation to how to carry out the above-mentioned balancing of interests in environmental cases, including on how to properly reflect that balancing in their reasoning. <i>(See document ECE/MP.PP/C.1/2016, paragraph 83)</i></p>
<p>ACCC/C/2013/85 ACCC/C/2013/86</p>	<p>As a preliminary matter, the Committee stresses that the terms used in the Convention, as an international agreement, must be interpreted in the context of international law and the Convention itself, in the light of its object and</p>	<p>Found, among other things, that:</p>

<p>(Document ECE/MP.PP/C.1/2016/10)</p> <p><i>National law relating to the environment (article 9, paragraph 3)</i></p> <p><i>Adequate alternative review procedures (article 9, paragraphs 3 and 4)</i></p>	<p>purpose.<sup>28</sup> To this end, what constitutes “national law relating to the environment” must be interpreted in accordance with the object and purpose of the Convention.</p> <p>The Convention does not define the term “national law relating to the environment”. Article 2, paragraph 3, does, however, contain a definition of “environmental information”. This definition is broad and includes, inter alia, “factors such as noise”, “conditions of human life”, and “built structures”. As the Committee pointed out in its findings on communication ACCC/C/2011/63, this also implies a broad understanding of the term “environment” in article 9, paragraph 3.</p> <p>In this vein, in those findings, the Committee found that “the text of the Convention does not refer to ‘environmental laws’, but to ‘laws relating to the environment’”, and consequently that “article 9, paragraph 3, is not limited to ‘environmental laws’, e.g., laws that explicitly include the term ‘environment’ in their title or provisions”. The Aarhus Convention Implementation Guide states that “the provisions on access to justice essentially apply to all matters of environmental law” and that “national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment.” The Committee finds that a broad interpretation of the term “national law relating to the environment” should likewise be applied when considering whether article 9, paragraph 3, of the Convention applies to private nuisance proceedings.</p> <p>In its findings on communication ACCC/C/2008/23 (United Kingdom), the Committee concluded that, in the context of that case, which related to offensive odours from a waste composting site, the law on private nuisance was part of the law relating to the environment of the Party concerned, and therefore was within the scope of article 9, paragraph 3, of the Convention. The Committee considers that the same conclusion should apply to cases of private nuisance resulting from</p>	<p>... that, by failing to ensure that private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention, and for which there is no fully adequate alternative procedure, are not prohibitively expensive, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.</p> <p>(See <i>document ECE/MP.PP/C.1/2016/10, paragraph 117</i>)</p> <p>The Committee, recommends, among other things, that the Party concerned review its system for allocating costs in private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention and undertake practical and legislative measures to overcome the problems to ensure that such procedures, where there is no fully adequate alternative procedure, are not prohibitively expensive.</p> <p>(See <i>document ECE/MP.PP/C.1/2016/10, paragraph 118</i>)</p>
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	<p>noise, odours, smoke, dust, vibrations, chemicals, waste or other similar pollutants. ...</p> <p>The Committee therefore concludes that, in general, private nuisance proceedings should be considered as judicial procedures aimed to challenge acts or omissions by private persons and public authorities that contravene national law relating to the environment in the sense of article 9, paragraph 3, of the Convention. This does not mean that the Convention must necessarily apply to each and every private nuisance proceeding. In practice, the principal criteria for assessing the Convention's applicability to a specific private nuisance case would be whether the nuisance complained of affects the "environment", in the broad meaning of this term (see paras. 70–71 above). The number of people affected, the claimant's motivation for bringing private nuisance proceedings or the proceedings' possible significance for the public interest are not decisive to an assessment of whether the procedure falls within the scope of national law relating to the environment. <i>(See document ECE/MP.PP/C.1/2016/10, paragraphs 69-73)</i></p> <p>The Committee must therefore determine whether the requirements of article 9, paragraph 4, must be met for all procedures falling within the ambit of paragraph 3, or whether the Party concerned can achieve compliance with the Convention so long as members of the public have access to even one alternative procedure through which they could challenge a particular act or omission, and which would provide for adequate and effective remedies.</p> <p>In past findings, the Committee has repeatedly held that, when evaluating compliance with article 9, it pays attention to the general picture regarding access to justice in the Party concerned, in the light of the purpose reflected in paragraph 18 of the preamble of the Convention that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced". For example, in its findings on communication ACCC/C/2006/18, the Committee noted that the lack of opportunity for the communicant in that case to initiate penal proceedings did not in itself amount to non-compliance with 9, paragraph 3, so long as there were other means for challenging those acts and omissions.</p>	
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	<p>Similarly, in its findings on communication ACCC/C/2011/63, the Committee found that “whereas lack of access to criminal or administrative penal procedures as such does not amount to non-compliance, the lack of any administrative or judicial procedures to challenge acts and omissions contravening national law relating to the environment such as in this case amounts to non-compliance with article 9, paragraph 3, in conjunction with article 9, paragraph 4, of the Convention.”</p> <p>Following this line of reasoning, it is apparent to the Committee that if the legal system of the Party concerned provides for more than one procedure through which members of the public can challenge a particular act or omission contravening national law related to environment, it is sufficient for compliance with the Convention that at least one of these procedures meets all the requirements of article 9, paragraphs 3 and 4. The Committee points out, however, that it would be in keeping with the goals and spirit of the Convention to maintain several such procedures meeting all these requirements.</p> <p>The Committee stresses that, for any procedure to be considered as a fully adequate alternative to another, it must be available to at least the same scope of members of the public, enable them to challenge at least the same range of acts and omissions, provide for at least as adequate and effective remedies, and meet all the other requirements of article 9, paragraphs 3 and 4, of the Convention.</p> <p>In this regard, the Committee refers back to the definition of private nuisance set out in paragraph 15 above. It follows from this definition that the scope of the members of the public entitled to bring private nuisance proceedings is limited to the users or occupiers of land or to those entitled to enjoy the land or some right connected with that land. The range of acts and omissions which can be subject to a private nuisance claim is wide and includes various kinds of interferences, often related to different aspects of the environment. Moreover, private nuisance claims can be used to challenge acts and omissions infringing the rights of the applicant in various situations: continuous and long-lasting interference; “one-off” activities causing serious harm;<sup>36</sup> disturbing activities ongoing for a certain</p>	
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	<p>period and subsequently ceased;<sup>37</sup> or even in cases when the harm has not yet commenced, but there is a reasonable presumption that if the activity goes ahead it will result in “substantial and imminent damage”.<sup>38</sup> The remedies available in the private nuisance proceedings include injunctions, inter alia, to terminate or limit the nuisance or to take some other action to redress the nuisance and, under some circumstances, the award of damages.</p> <p>The Committee must determine whether the administrative and judicial procedures presented by the Party concerned (see para. 34 above), individually or collectively, represent adequate alternatives to private nuisance proceedings, bearing in mind the characteristics summarized in the above paragraph. <i>(See document ECE/MP.PP/C.1/2016/10, paragraphs 75-81)</i></p> <p>As the Committee stated in its findings on communication ACCC/C/2006/18, article 9, paragraph 3, requires more than a right to address an administrative agency about an illegal activity. It is intended to provide members of the public with access to adequate remedies regarding acts and omissions which contravene environmental law, and with the means to have environmental laws enforced and made effective. Parties to the Convention are therefore obliged to ensure that members of the public meeting the criteria, if any, laid down in national law, have access to administrative or judicial procedures to directly challenge the acts and omissions of private persons or public authorities which they allege contravene national environmental law.</p> <p>The right to ask a public authority to take action does not amount to a “challenge” in the sense of article 9, paragraph 3, and especially not if the commencement of action is at the discretion of the authority, as is the case in the Party concerned. Rather, members of the public must be able to actively participate in the process of reviewing the acts or omissions, the legality of which they question.<sup>40</sup> The process must also meet all the requirements of article 9, paragraph 4, of the Convention. If the Party opts to provide for access to justice through administrative review procedures, those procedures must fully compensate for any absence of judicial procedures.</p>	
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	<p>The Committee does not consider that the possibility for members of the public to report alleged nuisances to the responsible administrative authorities (regulators), and then subsequently to complain to the ombudsman, provide for adequate alternatives to private nuisance proceedings. These possibilities are not connected with any procedural rights enabling members of the public to effectively commence a procedure to review the act or omission allegedly causing the nuisance, to actively participate in such proceedings, or to enforce adequate remedies. Furthermore, the ombudsman cannot deal with the alleged nuisance as such, but may only review the actions of the regulator and provide recommendations.</p> <p><i>(See document ECE/MP.PP/C.1/2016/10, paragraphs 83-85)</i></p> <p>It follows from the above examination that with respect to the requirements of article 9, paragraphs 3 and 4, of the Convention, only statutory nuisance proceedings may be considered to be a viable alternative to a private nuisance claim. However, in a number of respects, statutory nuisance does not provide an adequate alternative either (see para. 102 above). The Committee thus finds that the administrative and judicial procedures presented by the Party concerned do not either individually or collectively provide for a fully adequate alternative to private nuisance proceedings.</p> <p><i>(See document ECE/MP.PP/C.1/2016/10, paragraph 104)</i></p> <p>Despite the different characteristics of private nuisance proceedings and challenges to acts and omissions by public authorities, to the extent that each is within the scope of article 9, paragraph 3, of the Convention, the requirements of article 9, paragraph 4, apply to both. The Committee therefore considers that the above findings on communication ACCC/C/2008/33 are relevant also for private nuisance proceedings within the scope of article 9, paragraph 3.</p> <p>The Committee accordingly finds that, by failing to ensure that private nuisance proceedings within the scope of article 9, paragraph 3, of the Convention, and for which there is no fully adequate alternative procedure, are not prohibitively expensive, the Party concerned fails to comply with article 9, paragraph 4, of the Convention.</p>	
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	<i>(See document ECE/MP.PP/C.1/2016/10, paragraphs 109 and 114)</i>	
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