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## 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

### Compliance Committee

#### Fifty-seventh meeting

Geneva, 27–30 June 2017

Item 9 of the provisional agenda

#### Communications from members of the public

### Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union<sup>1</sup>

Adopted by the Compliance Committee on 17 March 2017\*

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<sup>1</sup> The present communication originally concerned non-compliance by the European Community. As of 1 December 2009, the European Union succeeded the European Community in its obligations under the Convention (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community). The present findings systematically refer to European Union law, institutions and bodies, even if they refer to the status before the entry into force of the Lisbon Treaty.

\* This document was submitted late owing to additional time required for its finalization.



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## I. Background

1. On 1 December 2008, the non-governmental organization (NGO) ClientEarth (the communicant), supported by a number of entities and a private individual,<sup>2</sup> submitted a communication to the Compliance Committee under the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) alleging a failure by the European Union to comply with its obligations under article 3, paragraph 1, and article 9, paragraphs 2, 3, 4 and 5, of the Convention.<sup>3</sup>

2. That communication is summarized in paragraphs 2 and 3, of the Committee's findings and recommendations with regard to communication ACCC/C/2008/32 (part I) concerning compliance by the European Union,<sup>4</sup> as adopted by the Committee at its thirty-second meeting (Geneva, 11-14 April 2011).

3. Part I of the findings focused on the communicant's main allegation, examining the jurisprudence of the Court of Justice of the European Union (CJEU) on access to justice in environmental matters generally. The Committee considered whether in the *WWF* case<sup>5</sup> the CJEU had accounted for the fact that the Aarhus Convention had entered into force for the Party concerned. The Committee decided not to make specific findings on whether the case in itself amounted to non-compliance with the Convention. In addition, while awaiting the outcome of the *Stichting Milieu* case<sup>6</sup> still pending before the CJEU, the Committee refrained from examining whether Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies (the Aarhus Regulation)<sup>7</sup> or any other relevant internal administrative review procedure of the European Union met the Convention's requirements on access to justice.

4. The Committee's findings in part I are set out in more detail in paragraphs 41-42 below.

5. On 23 July 2012, the communicant informed the Committee of the European Commission's decision to appeal the General Court's judgment of 14 June 2012 in the *Stichting Milieu* case. At its thirty-eighth meeting (Geneva, 25-28 September 2012), the Committee decided to stay its proceedings with regard to part II of the communication until the Court of Justice adopted its final ruling on the case.<sup>8</sup>

6. On 23 February 2015, the communicant informed the Committee that the Court of Justice had issued its judgment on the appeal proceedings in the *Stichting Milieu* case on 13 January 2015<sup>9</sup> and provided its comments thereon. At the Committee's invitation, the Party concerned provided observations on the communicant's comments on 11 June 2015.

<sup>2</sup> See ECE/MP.PP/C.1/2011/4/Add.1, footnote 2.

<sup>3</sup> The communication and further correspondence and documents are available from <http://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html>.

<sup>4</sup> ECE/MP.PP/C.1/2011/4/Add.1.

<sup>5</sup> Case T-91/07, *WWF-UK Ltd v. Council of the European Union*, 2008 E.C.R. II-81; and case C-355/08, *WWF-UK Ltd v. Council of the European Union and the Commission of the European Communities*, 2009 E.C.R. I-73.

<sup>6</sup> Case T-338/08, *Stichting Natuur en Milieu and Pesticides Action Network Europe v. Commission*, ECLI:EU:T:2012:300.

<sup>7</sup> OJ L 264/13, 25.09.2006.

<sup>8</sup> ECE/MP.PP/C.1/2012/8, para. 11.

<sup>9</sup> Joined cases C-404/12 P and C-405/12 P, *Council and Commission v. Stichting Natuur en Milieu and Pesticide Action Network Europe*, ECLI:EU:C:2015:5.

7. The Committee held a hearing to discuss the substance of the communication at its forty-ninth meeting (Geneva, 30 June-3 July 2015), with the participation of representatives of the Party concerned, the communicant and observers.<sup>10</sup> The Committee reconfirmed the admissibility of the communication and commenced deliberations on its draft findings in closed session.

8. The Committee agreed its draft findings on part II of the communication at its fifty-third meeting (Geneva, 21-24 June 2016). In accordance with paragraph 34 of the annex to decision I/7, the draft findings were forwarded to the Party concerned and the communicant on 27 June 2016 for comments by 25 July 2016.

9. On 30 June 2016, the Party concerned requested an extension of the commenting deadline, which was granted by the Chair of the Committee on 13 September, after considering the communicant's views dated 27 July and the clarification by the Party concerned of 29 July.

10. On 17 July 2016, the communicant informed the Committee that it had no comments on the draft findings. On 18 October 2016, the Party concerned submitted its comments on the Committee's draft findings requesting, *inter alia*, a second hearing on part II.

11. At its fifty-fifth meeting (Geneva, 6-9 December 2016), the Committee considered the request of the Party concerned and decided that it had not put forward any grounds that justified a second hearing.

12. After taking into account the comments received, the Committee finalized its findings in closed session and adopted them through its electronic decision-making procedure on 17 March 2017. The Committee agreed that the findings should be published as a formal pre-session document for its fifty-seventh meeting.

## **II. Summary of facts, legal framework and issues<sup>11</sup>**

### **A Legal framework**

13. Paragraphs 16 to 19 of part I analyse the procedures and remedies for natural and legal persons.

14. In addition, an applicant can plead illegality under article 277 of the Treaty on the Functioning of the European Union (TFEU) (ex article 241 of the Treaty establishing the European Community) of any act of general application adopted by a European Union institution, body, office or agency.<sup>12</sup> Illegality under article 277 can only be invoked as an ancillary plea and is not a cause of action in its own right.

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<sup>10</sup> Several observers also provided written statements (see <http://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html>).

<sup>11</sup> This section summarizes only the main facts, evidence and issues considered to be relevant to the question of compliance, as presented to and considered by the Committee.

<sup>12</sup> Observations by the Party concerned on the communicant's comments on the judgments by the Court of Justice, 11 June 2015, paras. 43 and 46.

## B. Substantive issues

### Submissions by the communicant

15. The communicant alleges there is a general failure of the Party concerned to comply with its obligations under article 9, paragraph 3, of the Convention with respect to standing of NGOs before the CJEU, claiming that the Court has avoided tackling the key legal issue: the compatibility of article 10, paragraph 1, of the Aarhus Regulation and article 9, paragraph 3, of the Convention.<sup>13</sup>

16. The communicant submits that it is clear from the wording of article 9, paragraph 3, that its scope is “acts and omissions” without restrictions except for decisions adopted within the legislative and judicial capacity of public authorities.

17. The communicant submits that, in contrast to article 9, paragraph 2, article 9, paragraph 3, of the Convention does not apply only to permits but to all acts and omissions. However, in limiting the possibility to resort to the internal review request procedure under article 10 of the Aarhus Regulation to acts of individual scope, the Regulation in fact limits the review procedure to permits and authorizations. Moreover, not all permits and authorizations are considered as administrative acts, but only those addressed to one operator, manufacturer or producer. As a result, very few decisions adopted in environmental matters can be challenged.<sup>14</sup> Therefore, according to the communicant, article 10, paragraph 1, of the Regulation does not implement article 9, paragraph 3, correctly.

18. The communicant submits that the Court could have taken another legal route and proceeded to examine the compatibility of the Regulation with the Convention, either by acknowledging that article 9, paragraph 3, of the Convention is sufficiently precise and unconditional to have direct effect<sup>15</sup> or by relying on different case law, such as the *Biotech* case<sup>16</sup> referred to by the Advocate General in his opinion.<sup>17</sup>

19. The communicant submits that, since part I of the Committee’s findings were issued, the jurisprudence of the Court, as illustrated in the *Inuit* case,<sup>18</sup> has not changed its interpretation of the individual concern criterion as set out in article 263, paragraph 4, of the TFEU.<sup>19</sup> The Court reasserted the *Plaumann* case law,<sup>20</sup> which had been deemed too restrictive and barring all access to justice by the Committee in part I of its findings.<sup>21</sup>

<sup>13</sup> Communicant’s comments on the judgments by the Court of Justice in cases C-401/12 P to C-405/12 P, 23 February 2015, para. 16.

<sup>14</sup> *Ibid.*, para. 23.

<sup>15</sup> *Ibid.*, paras. 26-27.

<sup>16</sup> Case C-377/98, *Kingdom of the Netherlands v. European Parliament and Council*, 2011 E.C.R. I-7079.

<sup>17</sup> Communicant’s comments of 23 February 2015, para. 30, referring to Opinion of Advocate General Jääskinen, 8 May 2014, joined cases C-401/12 P, C-402/12 P and C-403/12 P.

<sup>18</sup> Case C-583/11 P, *Inuit Tapiriit Kanatami v. European Parliament and Council of the European Union*, ECLI:EU:C:2013:625, para. 72.

<sup>19</sup> Communicant’s comments of 23 February 2015, para. 33.

<sup>20</sup> The Court held that: “Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed”. See Case 25/62, *Plaumann & Co v. Commission of the European Economic Community*, 1963 E.C.R. 95.

<sup>21</sup> Communicant’s comments of 23 February 2015, para. 34.

20. In addition, the communicant alleges that the criterion “under environmental law” in article 2, paragraph 1 (f), of the Aarhus Regulation, is not in line with article 9, paragraph 3, of the Convention as it constitutes a clear barrier to access to justice.<sup>22</sup>

21. Also, the communicant asserts that the “legally binding and external effects” criterion in article 2, paragraph 1 (g), of the Aarhus Regulation constitutes another barrier to the right to challenge decisions and does not have a basis in article 9, paragraph 3, of the Convention.<sup>23</sup>

22. The communicant alleges that article 2, paragraph 2 (d), of the Convention only excludes decisions of public authorities when acting in their legislative and judicial capacity, not in their administrative capacity. The fact that the institutions act as an administrative review body when adopting these decisions cannot justify their exemption from review.<sup>24</sup>

23. According to the communicant, decisions adopted by the Commission in competition matters are already subject to the Court’s scrutiny. Legal or natural persons wanting to challenge them need to fulfil the criteria of “direct and individual concern” in TFEU article 263, paragraph 4, and State aid beneficiaries and their competitors have frequently been granted standing.<sup>25</sup> The communicant maintains that this creates an obvious discrepancy between the right of companies and member States — which have the right to challenge such decisions to protect their economic and commercial interests — and NGOs, which cannot use similar legal means to protect the environment.<sup>26</sup>

24. The communicant reaffirms its arguments on the internal review procedure in article 10 of the Aarhus Regulation as neither adequate, effective or fair.<sup>27</sup> Also, the fact that it is for the European Union institution that adopted the contested decision to decide whether it wants to review its own decision does not ensure an independent or impartial remedy. The communicant submits it is only natural that the institution will be biased and consider that all the legal and due diligence checks were made.<sup>28</sup>

#### **Submissions of the Party concerned**

25. The Party concerned does not agree with the communicant’s allegations.

26. The Party concerned maintains that the refusal decisions by the European Commission to allow review of Decision C(2009)2560 and Commission Regulation 149/2008<sup>29</sup>, quashed by the General Court, were re-established *ex tunc* precisely because the acts that were requested to be reviewed were considered to be of general application, and thus outside the scope of the Aarhus Regulation.<sup>30</sup>

27. The Party concerned stresses that the “alternative legal reasoning” evoked by the communicant arguing that the Court of Justice “could have clearly taken another legal route” disregards these judgments and cannot replace what the Court found.<sup>31</sup>

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<sup>22</sup> Ibid., para. 60.

<sup>23</sup> Ibid., para. 69.

<sup>24</sup> Ibid., para. 73.

<sup>25</sup> Ibid., para. 77.

<sup>26</sup> Ibid., para. 78.

<sup>27</sup> Ibid., para. 82.

<sup>28</sup> Ibid., para. 83.

<sup>29</sup> OJ L 58/1, 01.03.2008.

<sup>30</sup> Observations by the Party concerned, 11 June 2015, para. 20.

<sup>31</sup> Ibid., para. 53.

28. According to the Party concerned, it did not fail to comply with article 9, paragraph 3, of the Convention, because that provision cannot be used as a parameter to assess the validity of the Aarhus Regulation. Parties to the Convention have a margin of appreciation as to how they implement article 9, paragraph 3, in their national legal orders, and the European Union institutions have exercised this margin in the context of the Aarhus Regulation.<sup>32</sup>

29. Concerning the implementation of article 9, paragraph 3, the Party concerned states that the European Union aligned its system; article 12 of the Aarhus Regulation gives environmental NGOs legal standing before the European Union courts to ask for review of decisions.<sup>33</sup>

30. In addition, the Party concerned points out that other pieces of European Union legislation contain express provisions on access to justice for members of the public (NGOs and individuals, under certain conditions) within the meaning of the Convention.<sup>34</sup> In this regard, the Party concerned cites a number of CJEU judgments in which the Court recognized the importance of standing for NGOs to ensure the application of European Union legislation and the conditions of standing.<sup>35</sup>

31. The Party concerned underlines that since the European Union has not adopted specific legislation intended to implement article 9, paragraph 3, of the Convention, it remains the responsibility of the European Union member States to implement their obligations under article 9 of the Convention, which, by virtue of TFEU article 216, is part of European Union law.<sup>36</sup>

32. The Party concerned also points to the *Slovak Bears* case<sup>37</sup> where the CJEU held that the national judge should interpret the national procedural law in the light of the Convention to the fullest extent possible and in the light of the principle of effective judicial protection.<sup>38</sup>

33. According to the Party concerned, natural or legal persons who are unable, because of the conditions governing admissibility laid down in TFEU article 263, paragraph 4, to challenge a regulatory act of the European Union directly before the European Union judicature are protected against the application of such an act by the ability to challenge the implementing measures which the act entails.<sup>39</sup> Judicial review of compliance with the European Union legal order is ensured, as can be seen from article 19, paragraph 1, of the Lisbon Treaty and from TFEU article 277, on the one hand, and TFEU article 267, on the other. The Party concerned maintains that acts of European Union institutions are subject to judicial review of their compatibility with, in particular, the treaties, the general principles of law and fundamental rights, as enshrined in the Charter of Fundamental Rights of the European Union.<sup>40</sup>

34. In its comments on the draft findings, the Party concerned argued that a number of the communicant's arguments on the Aarhus Regulation were inadmissible. It submitted that the Committee's recommendations ignored the specific features of the European Union

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<sup>32</sup> Ibid., para. 21.

<sup>33</sup> Ibid., para. 24.

<sup>34</sup> Ibid., paras. 25-30, where the Party concerned cites a body of European Union legislation.

<sup>35</sup> Ibid., para. 32.

<sup>36</sup> Ibid., para. 26.

<sup>37</sup> C-240/09, *Lesoochránárske zoskupenie*, 2011 E.C.R. I-1255.

<sup>38</sup> Ibid., para. 52.

<sup>39</sup> Ibid., para. 42, citing case C-456/13 P, *T & L Sugars Ltd and Sidul Acucares v. Commission*, ECLI:EU:C:2015:284.

<sup>40</sup> Ibid., para. 51.

framework and that it was for the CJEU itself to develop its jurisprudence, which constitutes a continuous process. The Party concerned also complained that the Committee took up a number of arguments introduced by the communicant after February 2015. It submitted that the Committee should not be used for an abstract discussion and that the communicant should have exhausted internal remedies before addressing the Committee, and pointed out that the Committee itself has expressly declared that an *actio popularis* is not what the Convention requires.

35. The Party concerned added that the Aarhus Regulation is not the only means by which the European Union gives effect to the Aarhus Convention and the European Union legal order covers remedies available to individuals through other means. It also argued that the judgment of the Court of Justice in *Stichting Milieu* had to be accepted.

36. The Party concerned also challenged the Committee's draft findings on provisions of the Aarhus Regulation, including those relating to the meaning of "individual scope", "under environmental law", "not having legally binding and external effects" and "measures taken or omissions by a community institution or body in its capacity as an administrative review body". The Party concerned also challenged the draft finding on the effectiveness of the internal review procedure and the scope of judicial review.

37. The communicant responded that the specific features of the European Union legal framework do not allow the Party concerned to ignore the obligations flowing from ratification of the Convention, and that the list of preliminary reference procedures provided by the Party concerned is irrelevant to part II of the findings because they do not compensate for the lack of standing before the European Union courts. The communicant also disagreed with a number of points made by the Party concerned with respect to the Aarhus Regulation.

### **III. Consideration and evaluation by the Committee**

#### **A. Legal basis and scope of considerations of the Committee**

38. The European Union signed the Convention on 25 June 1998 and approved it through Council Decision 2005/370/EC of 17 February 2005.<sup>41</sup> The European Union has been a Party to the Convention since 17 May 2005.<sup>42</sup>

#### **The Committee and the CJEU**

39. The Committee's role is to review compliance by Parties with their obligations under the Convention.<sup>43</sup> To this end, it may examine compliance issues and make recommendations if and as appropriate.<sup>44</sup> The Committee reports on its activities at each ordinary meeting of the Parties.<sup>45</sup> The Meeting of the Parties may then, upon consideration of the Committee's report and any recommendations, decide upon appropriate measures to bring about full compliance with the Convention.<sup>46</sup> It is, however, for the Parties themselves to implement the obligations under the Convention within their own legal systems.

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<sup>41</sup> OJ L 124, 17 May 2005, pp. 1–3.

<sup>42</sup> See part I, paras. 57 and 58.

<sup>43</sup> Decision I/7, annex, para. 1.

<sup>44</sup> *Ibid.*, para. 14.

<sup>45</sup> *Ibid.*, para. 35.

<sup>46</sup> *Ibid.*, para. 37.



40. The CJEU is an institution of the Party concerned and as such is subject to the Committee's review. Here, the Committee considers the effect of the CJEU jurisprudence on the obligations of the European Union arising under the Convention at the time these findings are adopted, without speculating about future changes in that jurisprudence, and without challenging the unquestioned right of the CJEU, as for the courts of any Party, to develop its own jurisprudence, provided it meets the requirements of the Convention.

#### **Scope of the Committee's considerations**

41. Part II must be read alongside part I; the two parts form the whole of the Committee's findings on communication ACCC/C/2008/32. While part I must be read in its entirety, the following findings from part I are particularly important for the purposes of understanding this part:

For at least some acts and omissions by [European Union (EU)] institutions, the Party concerned must ensure that members of the public have access to administrative or judicial review procedures, as set out in article 9, paragraph 3.<sup>47</sup>

The cases referred to by the communicant [in part I] reveal that, to be individually concerned, according to the [European Court of Justice (ECJ)], the legal situation of the person must be affected because of a factual situation that differentiates him or her from all other persons. Thus, persons cannot be individually concerned if the decision or regulation takes effect by virtue of an objective legal or factual situation.<sup>48</sup>

The jurisprudence established by the ECJ [and examined in part I] is too strict to meet the criteria of the Convention.<sup>49</sup>

If the examined jurisprudence of the EU 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, paragraph 3, of the Convention.<sup>50</sup>

While the system of judicial review in the national courts of the EU member States, including the possibility to request a preliminary ruling, is a significant element for ensuring consistent application and proper implementation of EU law in its member States, it cannot be a basis for generally denying members of the public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies.<sup>51</sup>

The Committee refrains from any speculation on whether and how the EU Courts will consider the jurisprudence on access to justice in environmental matters on the basis of [article 263, paragraph 4, of] the TFEU.<sup>52</sup>

If the jurisprudence of the EU Courts examined in [part I] were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would ... fail to comply with article 9, paragraph 4, of the Convention.<sup>53</sup>

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<sup>47</sup> Part I, para. 74.

<sup>48</sup> Ibid., para. 86.

<sup>49</sup> Ibid., para. 87.

<sup>50</sup> Ibid., para. 88.

<sup>51</sup> Ibid., para. 90.

<sup>52</sup> Ibid., para. 91.

<sup>53</sup> Ibid., para. 92.

The allegations concerning costs were not sufficiently substantiated by the communicant.<sup>54</sup>

42. The recommendations in part I were as follows:

97. While the Committee is not convinced that the Party concerned fails to comply with the Convention, given the evidence before it, it considers that a new direction of the jurisprudence of the EU Courts should be established in order to ensure compliance with the Convention.

98. Therefore, the Committee, pursuant to paragraph 36 (b) of the annex to decision I/7, recommends to the Party concerned that all relevant EU institutions within their competences take the steps to overcome the shortcomings reflected in the jurisprudence of the EU Courts in providing the public concerned with access to justice in environmental matters.<sup>55</sup>

43. It follows from paragraph 97 of Part I that, in order to examine whether the Party concerned is in compliance with article 9, paragraphs 3 and 4, of the Convention, the Committee's first task in part II of its findings is to consider whether there is a new direction in the jurisprudence of the European Union courts. Secondly, the Committee needs to consider whether any other steps have been taken to overcome or compensate for the shortcomings reflected in that jurisprudence.

44. In this context, the Committee notes the comment of the Party concerned that "the development of CJEU jurisprudence relating to the Aarhus Convention is a continuous process".<sup>56</sup> The Committee emphasizes that this is not an accepted reason for not complying with the Convention. All Parties to the Convention are required to implement the Convention from the date it enters into force for them.

45. In considering the two issues outlined in paragraph 43 above, the Committee will not assess in detail every possible form of challengeable decision-making by European Union institutions, nor each decision by the European Union courts referred to by the communicant and the Party concerned. Nor will the Committee consider all applicable European Union law that purports to implement the Convention. Instead the Committee will focus on the most important allegations of the communicant,<sup>57</sup> and examine first the most important trends in the jurisprudence of the European Union courts on access to justice in environmental matters since the adoption of part I of its findings. After that, the Committee will consider the effect of the Aarhus Regulation.

## **B Substantive issues**

### **Jurisprudence of the CJEU: *Stichting Milieu***

#### *The significance of Stichting Milieu*

46. In part I, the Committee refrained from examining whether the Aarhus Regulation or any other relevant internal administrative review procedure of the European Union met the requirements on access to justice in the Convention because it was waiting for the outcome of the *Stichting Milieu* case.<sup>58</sup>

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<sup>54</sup> Ibid., para. 93.

<sup>55</sup> Ibid.

<sup>56</sup> Comments of the Party concerned on the draft findings, para. 31.

<sup>57</sup> The Committee took a similar approach in part I (see part I, para. 63).

<sup>58</sup> Part I, para. 10.

47. The Committee instead considered and evaluated the established practice of the European Union courts in the light of the Convention's provisions on access to justice; this was on the basis that even if the European Union jurisprudence initiated before the entry into force of the Convention was not consistent with the Convention, that would not lead to the conclusion that the Party concerned was in non-compliance, although it might reveal that the Party concerned would be in non-compliance if the jurisprudence remained the same.<sup>59</sup>

48. The Committee therefore now considers the Court of Justice's judgment in *Stichting Milieu* to determine whether it represents a change in the direction of its jurisprudence, and in particular whether it brings the European Union into compliance with the Convention.

*The Stichting Milieu case*

49. In *Stichting Milieu*, the General Court considered the effect of article 9, paragraph 3, of the Convention and whether article 10, paragraph 1, of the Aarhus Regulation implemented the Convention. The Court considered it appropriate to examine the validity of article 10, paragraph 1, of the Aarhus Regulation in the light of the Convention. The Court held:

72. The term 'acts', as used in Article 9(3) of the Aarhus Convention, is not defined in that convention. According to well-established case-law, an international treaty must be construed by reference to the terms in which it is framed and in the light of its objectives. ...

73. It is appropriate first of all to recall the objectives of the Aarhus Convention.  
...  
...

76. It must be held that an internal review procedure which covered only measures of individual scope would be very limited, since acts adopted in the field of the environment are mostly acts of general application. In the light of the objectives and purpose of the Aarhus Convention, such limitation is not justified.

77. Also, as regards the terms in which Article 9(3) of the Aarhus Convention is framed, it should be noted that, under those terms, the Parties to that Convention retain a certain measure of discretion with regard to the definition of the persons who have a right of recourse to administrative or judicial procedures and as to the nature of the procedures (whether administrative or judicial). Under Article 9(3) of the Aarhus Convention, only 'where they meet the criteria, if any, laid down in [the] national law, [may] members of the public have access to administrative or judicial procedures'. However, the terms of Article 9(3) of the Aarhus Convention do not offer the same discretion as regards the definition of the 'acts' which are open to challenge. Accordingly, there is no reason to construe the concept of 'acts' in Article 9(3) of the Aarhus Convention as covering only acts of individual scope.

78. Lastly, so far as the wording of the other provisions of the Aarhus Convention is concerned, it should be noted that, under Article 2(2) of that convention, the concept of 'public authority' does not cover 'bodies or institutions acting in a judicial or legislative capacity'. Accordingly, the possibility that measures adopted by an institution or body of the European Union acting in a judicial or legislative capacity may be covered by the term 'acts', as used in Article 9(3) of the Aarhus Convention, can be ruled out. That does not mean, however, that

<sup>59</sup> Ibid., para. 64.

the term ‘acts’ as used in Article 9(3) of the Aarhus Convention can be limited to measures of individual scope. There is no correlation between measures of general application and measures taken by a public authority acting in a judicial or legislative capacity. Measures of general application are not necessarily measures taken by a public authority acting in a judicial or legislative capacity.

79. It follows that Article 9(3) of the Aarhus Convention cannot be construed as referring only to measures of individual scope.

80. That finding is not undermined by the argument, raised by the Council at the hearing, that limiting ‘administrative acts’ to measures of individual scope is justified in the light of the conditions laid down in Article 230 EC. In that regard, it should be noted that, under Article 12(1) of Regulation No 1367/2006, a non-governmental organisation which has made a request for internal review pursuant to Article 10 of Regulation No 1367/2006 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty, hence in accordance with Article 230 EC. However, whatever the scope of the measure covered by an internal review as provided for in Article 10 of Regulation No 1367/2006, the conditions for admissibility laid down in Article 230 EC must always be satisfied if an action is brought before the Courts of the European Union.

81. Moreover, the conditions laid down in Article 230 EC — and, in particular, the condition that the contested act must be of direct and individual concern to the applicant — apply also to measures of individual scope which are not addressed to the applicant. A measure of individual scope will not necessarily be of direct and individual concern to a non-governmental organisation which meets the conditions laid down in Article 11 of Regulation No 1367/2006. Contrary to the assertions made by the Council, limiting the concept of ‘acts’ exclusively to measures of individual scope does not ensure that the condition laid down in Article 230 EC — that the contested act must be of direct and individual concern to the applicant — will be satisfied.

82. Accordingly, the Council’s argument that limiting ‘administrative acts’ to measures of individual scope is justified in the light of the conditions laid down in Article 230 EC must be rejected.

83. It follows from the above that Article 9(3) of the Aarhus Convention cannot be construed as referring exclusively to measures of individual scope. Consequently, in so far as Article 10(1) of Regulation No 1367/2006 limits the concept of ‘acts’, as used in Article 9(3) of the Aarhus Convention, to ‘administrative act[s]’ defined in Article 2(1)(g) of Regulation No 1367/2006 as ‘measure[s] of individual scope’, it is not compatible with Article 9(3) of the Aarhus Convention.<sup>60</sup>

50. The Committee agrees with the above paragraphs of the General Court’s judgment, both as to the effect of article 9, paragraph 3, of the Convention and the failure of article 10, paragraph 1, of the Aarhus Regulation to implement article 9, paragraph 3.

51. In particular, the Committee agrees with the General Court’s analysis that “there is no reason to construe the concept of ‘acts’ in article 9, paragraph 3, of the Convention as covering only acts of individual scope” and that “there is no correlation between measures of general application and measures taken by a public authority acting in a judicial or legislative capacity”. It follows that article 10, paragraph 1, of the Aarhus Regulation fails

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<sup>60</sup> Case T-338/08, *Stichting Milieu*.

to correctly implement article 9, paragraph 3, of the Convention insofar as the former covers only acts of individual scope.

52. 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,<sup>61</sup> it does not allow Parties any discretion as to the acts or omissions that may be excluded from implementing laws.

53. The Council of the European Union and the European Commission appealed the General Court's judgment, asking the Court of Justice to set the judgment aside. The Court of Justice neither agreed nor disagreed with the General Court's reasoning in the paragraphs quoted above. Rather, the Court of Justice found:

52. ... it cannot be considered that, by adopting Regulation No 1367/2006, which concerns only EU institutions and moreover concerns only one of the remedies available to individuals for ensuring compliance with EU environmental law, the European Union was intended to implement the obligations, within the meaning of the case-law cited in paragraph 48 of this judgment, which derive from Article 9(3) of the Aarhus Convention with respect to national administrative or judicial procedures, which, as EU law now stands, fall primarily within the scope of Member State law (see, to that effect, judgment in *Lesoochránárske zoskupenie*, EU:C:2011:125, paragraphs 41 and 47).

53. It follows from all the foregoing that, in holding that Article 9(3) of the Aarhus Convention could be relied on in order to assess the legality of Article 10(1) of Regulation No 1367/2006, the General Court vitiated its judgment by an error of law.

54. Accordingly, the judgment under appeal must be set aside, and there is no need to examine the other grounds put forward by the Council and the Commission in support of their appeals.<sup>62</sup>

54. While surprised by the above reasoning, the Committee acknowledges the ruling of the Court of Justice as an interpretation of European Union law. However, by setting aside the judgment of the General Court in this way, the Court left itself unable to mitigate the flaws correctly identified by the General Court. So it remains the case that article 9, paragraph 3, of the Convention is not adequately implemented by article 10, paragraph 1, of the Aarhus Regulation.

55. It follows that the Court of Justice's judgment in *Stichting Milieu* does not bring the Party concerned into compliance with article 9, paragraph 3, and, consequently, article 9, paragraph 4, of the Convention. The Committee will next examine other European Union jurisprudence since part I was adopted to see whether it nevertheless brings the Party concerned into compliance.

#### **Jurisprudence referred to by the Party concerned regarding national implementation**

56. At the hearing, the Party concerned drew the Committee's attention to a number of judgments by the European Union courts.<sup>63</sup> While that jurisprudence showed that the

<sup>61</sup> See findings on communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2), para. 35.

<sup>62</sup> Joined cases C-401/12 P, C-402/12 P and C-403/12 P, *Stichting Milieu*.

<sup>63</sup> Case C-240/09, *Lesoochránárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky*, E.C.R. 2011 I-1255; case C-115/09, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen v. Bezirksregierung Arnsberg*, E.C.R. 2011 I-3673; joined cases

obligations arising under the Convention for the European Union and its member States were given due weight on a number of occasions, none of the cases addressed the shortcomings identified in part I. Moreover, the subject matter of much of the jurisprudence cited concerned the enforcement of the Convention in national courts. While it is salutary to learn of the Convention's enforcement at the national level, the Committee already observed in part I that:

While the system of judicial review in the national courts of the EU member States, including the possibility to request a preliminary ruling, is a significant element for ensuring consistent application and proper implementation of EU law in its member States, it cannot be a basis for generally denying members of the public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies; nor does the system of preliminary review amount to an appellate system with regard to decisions, acts and omissions by the EU institutions and bodies. Thus, with respect to decisions, acts and omissions of EU institutions and bodies, the system of preliminary ruling neither in itself meets the requirements of access to justice in article 9 of the Convention, nor compensates for the strict jurisprudence of the EU Courts, examined ... above.<sup>64</sup>

57. The Committee reiterates its above finding that judicial review in the national courts of European Union member States cannot compensate for the strict jurisprudence of the European Union courts examined in part I, and notes that the CJEU itself has held that the system of preliminary ruling does not constitute a means of redress available to the parties to a case pending before a national court or tribunal.<sup>65</sup>

#### **Jurisprudence on Article 263, paragraph 4, of the TFEU**

58. In part I, the Committee noted that there was a debate on whether the new article 263, paragraph 4, of the TFEU provided for a possible change of jurisprudence so as to enable members of the public to have standing before the European Union courts.

59. The jurisprudence examined in part I related to the text of (now superseded) article 230, paragraph 4, of the Treaty establishing the European Community. In part I, the Committee noted that the wording of TFEU article 263, paragraph 4, introduced by the Lisbon Treaty and which superseded article 230, paragraph 4, of the Treaty establishing the European Community, is different and could lead to a change of jurisprudence so as to enable members of the public to have standing before the European Union courts. The Committee considered whether TFEU article 263, paragraph 4, could provide the basis for ensuring compliance with article 9 of the Convention. It refrained, however, from speculation on whether and how the European Union courts would consider the jurisprudence on access to justice in environmental matters on the basis of the TFEU.<sup>66</sup>

60. The Committee now considers whether, in the years that have passed since part I was adopted, there has been any sign that, in the light of the jurisprudence of the European

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C-128/09 to C-131/09, C-134/09 and C-135/09, *Boxus v. Région wallonne*, 2011 E.C.R. I-9711; case C-182/10, *Solvay v. Région wallonne*, ECLI:EU:C:2012:82; case C-416/10, *Krizan v. Slovenská inšpekcia životného prostredia*, ECLI:EU:C:2013:8; case C-260/11, *Edwards and Pallikaropoulos v. Environment Agency*, ECLI:EU:C:2013:221; case C-72/12, *Gemeinde Altrip v. Land Rheinland-Pfalz*, ECLI:EU:C:2013:712; case C-404/13, *ClientEarth v. the Secretary of State for the Environment, Food and Rural Affairs*, ECLI:EU:C:2014:2382.

<sup>64</sup> Part I, para. 90.

<sup>65</sup> Case 283/81, *CILFIT v. Ministero della Sanità*, 1982 E.C.R. 3415.

<sup>66</sup> Part I, para. 91.

Union courts, TFEU article 263, paragraph 4, ensures compliance with article 9 of the Convention.

61. Article 263, paragraph 4, of the TFEU provides:

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

62. The provision has three alternative limbs:

(a) “Any natural or legal person may ... institute proceedings against an act addressed to that person”;

(b) “Any natural or legal person may ... institute proceedings against an act ... which is of direct and individual concern to them”;

(c) “Any natural or legal person may ... institute proceedings ... against a regulatory act which is of direct concern to them and does not entail implementing measures.”

63. The first limb is unchanged by the Treaty of Lisbon, and needs no consideration by the Committee because it patently does not implement article 9, paragraph 3, of the Convention.

64. The second limb is little changed by the Treaty of Lisbon and may in any event be quickly dispatched for the purposes of this analysis. Under this limb, a person may only institute proceedings against an act which is of “direct and individual concern to them”. It follows from the Committee’s findings in part I, which considered the jurisprudence relating to direct and individual concern, that the second limb does not implement article 9, paragraph 3, of the Convention because the restrictions to access to justice imposed by the “direct and individual concern” test are too severe to comply with the Convention.

65. That leaves the third limb. This limb has been considered in the *Inuit* case and the *Microban* case.<sup>67</sup>

66. To assess whether the third limb implements article 9, paragraph 3, it is necessary to consider the meanings of “regulatory act”, “of direct concern” and “does not entail implementing measures” in European Union jurisprudence.

67. Before addressing those definitions, the Committee notes that the third limb does not require a person to be individually concerned with a regulatory act. By dropping the individual concern test, the third limb pursues an objective of opening up the conditions for bringing direct actions.<sup>68</sup>

#### *Regulatory act*

68. In the *Inuit* case, the CJEU found that the third limb of TFEU article 263, paragraph 4, enabled persons to bring “actions for annulment of acts of general application other than legislative acts”. So the Court’s interpretation of “regulatory act” is quite narrow in scope.

69. Article 9, paragraph 3, of the Convention requires Parties to give members of the public access to administrative or judicial procedures to challenge “acts and omissions by

<sup>67</sup> Case T-262/10, *Microban International Ltd v Commission*, 2011 E.C.R. II-7697.

<sup>68</sup> See, e.g., *Microban* case, para. 32; *Inuit* case, para. 35.

private persons and public authorities which contravene provisions of its national law relating to the environment”. It is clear that at least some acts and failures to act susceptible to judicial review under article 9, paragraph 3, of the Convention will not fall within the category of “acts of general application other than legislative acts”. So in the light of the reasoning of the CJEU, the third limb would be too narrow in scope to bring the Party concerned into compliance with article 9, paragraph 3, of the Convention.

70. In any event, the third limb of article 263, paragraph 4, raises other issues for the Committee, as considered below.

*Of direct concern*

71. The *Microban* case explains the “direct concern” condition in Article 263, paragraph 4, thus:

27. ... as regards the condition of direct concern as laid down in the fourth paragraph of Article 230 EC, it has been held that that condition required that, firstly, the contested Community measure must directly affect the legal situation of the individual and, secondly, it must leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules ...

72. The *Microban* case provides a practical example of an organization that met the “direct concern” condition. In that case the applicants, who were found to be directly concerned by a particular measure, bought a particular substance regulated by the measure concerned and used it to manufacture a product with particular properties, which was subsequently sold on for use in manufacture. Thus by being economically affected they were considered by the Court to be directly concerned.

73. It follows from the *Microban* case and the case law referred to therein that an NGO promoting environmental protection would not be directly concerned with a contested measure unless the measure in question directly affected the organization’s legal position. Such an organization would always be excluded from instituting proceedings under the third limb of article 263, paragraph 4, when it acted purely for the purposes of promoting environmental protection. The Committee considers that while Parties have a margin of discretion when establishing criteria for the purposes of article 9, paragraph 3, of the Convention, that margin of discretion does not allow them to exclude all NGOs acting solely for the purposes of promoting environmental protection from redress.<sup>69</sup>

74. It follows that the direct concern criterion alone prevents article 263, paragraph 4, from implementing article 9, paragraph 3, of the Convention. But even if this were not the case, the final criterion in the third limb would be problematic.

*Does not entail implementing measures*

75. In the *Microban* case, the Court reiterated that an act within the scope of the third limb of article 263, paragraph 4, must leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules.

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<sup>69</sup> See findings on communication ACCC/C/2005/11 (Belgium) (ECE/MP.PP/C.1/2006/4/Add.2), para. 35.



76. It is clear to the Committee that at least some acts that should be susceptible to administrative or judicial review under article 9, paragraph 3, of the Convention would not meet this criterion.

77. It follows that the third limb of TFEU article 263, paragraph 4, as applied by the European courts, does not implement article 9, paragraph 3, of the Convention; there is no basis in the Convention for excluding from the scope of this provision acts which include implementing measures.

78. 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 para. 52 above).

### **Concluding remarks on jurisprudence**

79. Having considered the main jurisprudence of the European Union courts since part I of these findings was adopted, the Committee finds that there has been no new direction in the jurisprudence of the CJEU that will ensure compliance with article 9, paragraph 3, and consequentially, article 9, paragraph 4, of the Convention.

80. In this regard, the Committee notes that in the *Slovak Bears* case, the CJEU made the following findings:

49. ... if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law.

50. It follows that ... it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention.

81. The Committee regrets that, despite its finding with respect to the national courts, the CJEU does not consider itself bound by this principle. If the European Union courts had been bound in the same way as the national courts, the European Union might have moved towards compliance with article 9, paragraph 3, and consequently article 9, paragraph 4.

82. In addition, according to the current jurisprudence, the European Union courts may not assess whether key provisions in the Aarhus Regulation implement or comply with article 9, paragraph 3. So the Committee must assess whether the provisions of the Aarhus Regulation are consistent with the Convention. If, however, the European Union courts had allowed themselves to rely on article 9, paragraph 3, of the Convention to assess the legality of article 10, paragraph 1, of the Aarhus Regulation that could have assisted the Party concerned to comply with its obligations under the Convention.

### **The Aarhus Regulation: introduction**

83. It now falls to the Committee to consider whether the Aarhus Regulation compensates for the shortcomings in European Union law that have been identified in the above discussion of the jurisprudence by introducing adequate review procedures. In part I the Committee did not examine the Aarhus Regulation, although it indicated that an examination of the Regulation would be forthcoming.<sup>70</sup>

<sup>70</sup> Part I, para. 88.

84. The Party concerned contends that a number of the communicant's arguments relating to the Aarhus Regulation and introduced in its comments of 23 February 2015 are inadmissible and should not have been introduced at that late stage.<sup>71</sup>

85. But it is essential to consider the effect of the Aarhus Regulation in order to determine whether the Party concerned complies with article 9, paragraphs 3 and 4, of the Convention because the Regulation may provide access to justice where the jurisprudence of the CJEU fails to do so. It is thus not possible to make a finding in this case without considering the Regulation. That is why the Committee, in its letter of 19 June 2015, expressly asked the Party concerned and the communicant to address in their statements for the hearing on 1 July 2015 the question: "Does the Aarhus Regulation meet the requirements on access to justice in the Convention?" Therefore the comments from the Party concerned are not valid.

86. Moreover, this case was divided into two parts in order to defer consideration of those elements for which it made sense to await the outcome of the *Stichting Milieu* case. It was always envisaged that the Committee would consider new developments and arguments after that case and the Committee is ready to do so.

87. Article 10, paragraph 1, of the Aarhus Regulation provides that:

Any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act.

88. In their update on the Court of Justice's rulings in cases C-401/12 P to C-405/12 P dated 23 February 2015, the communicants complained that the Aarhus Regulation failed to implement article 9, paragraph 3, of the Convention in five particular areas: acts of individual scope;<sup>72</sup> acts not adopted under environmental law;<sup>73</sup> acts not having legally binding and external effects;<sup>74</sup> arbitrary exemptions to the administrative acts definition;<sup>75</sup> and the adequacy and effectiveness of the internal review procedure.<sup>76</sup>

90. In order to focus on the communicant's main allegations, the Committee will consider those principal complaints, rather than forensically examining every one of the alleged flaws in the Regulation. While for the most part the Committee considers whether the Regulation itself amounts to satisfactory implementation of the obligations of the Party concerned, it also takes into account any jurisprudence regarding the relevant provisions. The Party concerned is required by article 3, paragraph 1, of the Convention to take the necessary legislative, regulatory and other measures to establish and maintain a clear, transparent and consistent framework to implement the Convention, so any flaw in the Regulation may in itself amount to non-compliance.

91. The Committee will first briefly consider the communicant's further allegation that the Aarhus Regulation fails to grant to individuals or entities other than NGOs, such as regional and municipal authorities, access to internal review.<sup>77</sup> The Party concerned is not required to establish an *actio popularis*, but the current jurisprudence of the European Union does not provide access to justice in accordance with article 9, paragraph 3.

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<sup>71</sup> Comments of the Party concerned on the draft findings.

<sup>72</sup> Communicant's comments of 23 February 2015, paras. 42-49.

<sup>73</sup> *Ibid.*, paras. 50-60.

<sup>74</sup> *Ibid.*, paras. 61-71.

<sup>75</sup> *Ibid.*, paras. 72-81.

<sup>76</sup> *Ibid.*, paras. 82-84.

<sup>77</sup> Communication, p. 3.

*Entities other than NGOs*

92. It is clear that article 10, paragraph 1, of the Aarhus Regulation only entitles NGOs that meet particular criteria to make a request for an internal review; yet article 9, paragraph 3, requires “members of the public” that meet the criteria, if any, laid down in the law, to be given access to administrative or judicial procedures.

93. 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 term “members of the public” in the Convention includes, but is not limited to, NGOs. It follows that, by barring all members of the public except NGOs meeting the criteria of its article 11, the Aarhus Regulation fails to correctly implement article 9, paragraph 3.

*Acts of individual scope*

94. As the Committee has already found in paragraph 51 above, article 10, paragraph 1, of the Aarhus Regulation fails correctly to implement article 9, paragraph 3, of the Convention because the former provision covers only acts of individual scope.

*Acts not adopted under environmental law*

95. Under article 2, paragraph 1 (g), of the Aarhus Regulation:

“Administrative act” means any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects.

96. Under article 2, paragraph 1 (f):

“Environmental law” means Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems.

97. The combined effect of these provisions is too narrow.

98. 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.

99. This is not implemented by the Aarhus Regulation, which simply provides for internal review where a Community institution or body has “adopted an act under” environmental law. But article 9, paragraph 3, is broader than that; its requirement is to provide a right of challenge where an act or omission — any act or omission whatsoever by a Community institution or body, including any act implementing any policy or any act under any law — contravenes law relating to the environment.

100. It is clear that, under the Convention, an act may “contravene” laws relating to the environment without being “adopted” under environmental law within the meaning of article 10, paragraph 1, of the Regulation. So it is not consistent with article 9, paragraph 3, of the Convention to exclude from the scope of article 10, paragraph 1, any act or omission

<sup>78</sup> See findings on communication ACCC/C/2006/18 (Denmark) (ECE/MP.PP/2008/5/Add.4), paras. 30-31).

made under European Union legislation which does not “contribute to the pursuit of the objectives of Community policy on the environment as set out in the Treaty”.<sup>79</sup> 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.

*Acts not having legally binding and external effects*

101. 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.

102. The communicant complains that article 2, paragraph 1 (g), of the Aarhus Regulation requires a measure to have “legally binding and external effects” before that measure falls within the definition of “administrative act”, and thus within the scope of article 10, paragraph 1. The communicant gives evidence that on a number of occasions administrative review of an act has been refused because of this requirement<sup>80</sup> and argues that the “legally binding and external effect” criterion constitutes another barrier to the right to challenge decisions and does not have a basis in article 9, paragraph 3, of the Convention.

103. The Aarhus Regulation does not provide much explanation for the use of this criterion. While recital (11) is related to the issue, it simply contains the following bald assertion: “Administrative acts of individual scope should be open to possible internal review where they have legally binding and external effects.” In this context the reasoning used by the Committee to find that the “individual scope” criterion is invalid (see para. 51 above) applies by analogy. The Committee is not convinced that generally excluding all acts that do not have legally binding and external effects is compatible with article 9, paragraph 3, of the Convention. It appears that some acts by the Party concerned that do not have legally binding or external effect, including some or all of those referred to by the communicant,<sup>81</sup> might be covered by article 9, paragraph 3.

104. It follows that article 10, paragraph 1, of the Aarhus Regulation fails to implement article 9, paragraph 3, of the Convention insofar as it covers only administrative acts, or omissions to adopt such acts, that have legally binding and external effects.

*The exemption of administrative review*

105. Article 2, paragraph 2, of the Aarhus Regulation provides:

Administrative acts and administrative omissions shall not include measures taken or omissions by a Community institution or body in its capacity as an administrative review body, such as under:

- (a) Articles 81, 82, 86 and 87 of the Treaty (competition rules);
- (b) Articles 226 and 228 of the Treaty (infringement proceedings);
- (c) Article 195 of the Treaty (Ombudsman proceedings);
- (d) Article 280 of the Treaty (OLAF proceedings).

106. It is important to note that the list of provisions in article 2, paragraph 2 (a) to (d), of the Regulation do not amount to an exhaustive list of measures taken in the capacity of a

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<sup>79</sup> See definition of “environmental law” in article 2, para. 2 (f), of the Aarhus Regulation.

<sup>80</sup> See communicant’s comments of 23 February 2015, paras. 62-68, citing examples of refusals by the Commission on this basis.

<sup>81</sup> Ibid.

review body; the list is simply illustrative (as indicated by the words “such as” in the chapeau to the provision) and the Committee will not investigate each individual subparagraph. Yet, it follows from the chapeau that article 2, paragraph 2, excludes from the scope of article 10, paragraph 1, all measures taken in the capacity of an administrative review body; and subparagraphs (a) to (d) simply include examples of such measures.

107. Article 2, paragraph 2, should be read in the light of recital (11) to the Aarhus Regulation, which says:

Given that acts adopted by a Community institution or body acting in a judicial or legislative capacity can be excluded, the same should apply to other inquiry procedures where the Community institution or body acts as an administrative review body under provisions of the Treaty.

108. There is, however, no express exemption from the Convention of measures taken in the capacity of an administrative review body and, notwithstanding the wording of recital (11), it is difficult to imagine how a Community institution or body acting as an administrative review body could be acting in a legislative capacity.

109. The exemption in article 2, paragraph 2, of the Regulation relies on the proposition that acting as an administrative review body is somehow acting in a judicial capacity. Yet, the wording of the Convention provides no support for such a proposition; indeed the wording of the Convention leads to the opposite conclusion.

110. 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 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.

111. While the Committee is not convinced that acts or omissions of all of the review bodies indicated in article 2, paragraph 2, of the Aarhus Regulation, such as the Ombudsman, should be subject to review under article 9, paragraph 3, of the Convention, it doubts that the general exclusion of all administrative acts and omissions by institutions acting in the capacity of administrative review bodies complies with article 9, paragraph 3. Without, however, having any concrete examples of breaches before it, the Committee does not go so far as to find non-compliance in this respect.

*Is the internal review procedure an adequate and effective remedy?*

112. The communicant argues that the internal review procedure set out in article 10 of the Aarhus Regulation does not constitute an administrative review mechanism for the purpose of article 9, paragraphs 3 and 4, of the Convention as it is neither adequate, effective or fair.

113. The communicant points out that under article 10 the European Union institution that adopted a contested decision conducts an internal review; the communicant submits that it is only natural that the institution will be biased and consider that all the legal and due diligence checks have been made when adopting the decision.

114. 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.

115. The internal review, however, is supplemented by article 12 of the Regulation, which provides:

(1) The non-governmental organisation which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.

(2) Where the Community institution or body fails to act in accordance with Article 10(2) or (3) the non-governmental organisation may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.

116. Article 12 of the Regulation should be read in the light of the following recitals to the Aarhus Regulation:

(19) To ensure adequate and effective remedies, including those available before the Court of Justice of the European Communities under the relevant provisions of the Treaty, it is appropriate that the Community institution or body which issued the act to be challenged or which, in the case of an alleged administrative omission, omitted to act, be given the opportunity to reconsider its former decision, or, in the case of an omission, to act.

(20) Non-governmental organisations active in the field of environmental protection which meet certain criteria, in particular in order to ensure that they are independent and accountable organisations that have demonstrated that their primary objective is to promote environmental protection, should be entitled to request internal review at Community level of acts adopted or of omissions under environmental law by a Community institution or body, with a view to their reconsideration by the institution or body in question.

(21) Where previous requests for internal review have been unsuccessful, the non-governmental organisation concerned should be able to institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.

117. The communicants argue that the judicial procedure established under article 12 might not allow challenging the initial act adopted by the institution and forming the object of the review; if the internal review request has been considered inadmissible, the measure that will be the subject of the judicial proceedings established under article 12 of the Regulation will be the “written reply” from the institution not the original act. The communicant fears that the Court will thus only examine the way the institution has dealt with the internal review request and whether it complied with the procedural requirements of the Regulation, leaving the initial act unexamined.

118. It is for the European Union courts to interpret article 12 of the Aarhus Regulation. For the time being the Committee notes that, while proceedings under article 12, paragraph 2, of the Aarhus Regulation may relate only to the failure of a Community institution or body to act in accordance with article 10, paragraphs 2 or 3, article 12, paragraph 1, appears to provide for proceedings that could have a broader remit and that could go to the substance of an act and to whether there was compliance with article 10, paragraph 2 or 3. It would be consistent with this interpretation to construe article 12, paragraph 1, in the light of recitals (20) and (21), and article 12, paragraph 2, in the light of recital (19).

119. It therefore seems to the Committee that it is possible for the European Courts to interpret article 12 of the Aarhus Regulation in a way that would allow them both to consider failure to comply with article 10, paragraphs 2 and 3, and also the substance of an act falling within article 10, paragraph 1. On that basis, unless and until there is a contrary interpretation by the European Union courts, the Committee does not conclude that article 12 of the Regulation is inconsistent with the requirements of the Convention.

**The Aarhus Regulation: conclusion**

120. An examination of the communicant's main complaints about the Aarhus Regulation leads to the following conclusion: the Regulation does not correct or compensate for the failings in the European Union jurisprudence, and leaves the Party concerned in non-compliance with article 9, paragraphs 3 and 4, of the Convention.

**IV. Conclusions and recommendations****A. Main findings with regard to non-compliance**

121. The Committee recalls part I of its findings on the communication, namely that if the jurisprudence of the European Union 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.<sup>82</sup> Having considered the main jurisprudence of the European Union courts since part I, the Committee finds there has been no new direction in the jurisprudence of the European Union courts that will ensure compliance with the Convention and that the Aarhus Regulation does not correct or compensate for the failings in the jurisprudence (paras. 79 and 120 above).

122. 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 Aarhus Regulation, nor the jurisprudence of the CJEU implements or complies with the obligations arising under those paragraphs.

**B. Recommendations**

123. The Committee, pursuant to paragraph 35 of the annex to decision I/7, recommends the Meeting of the Parties, pursuant to paragraph 37 (b) of the annex to decision I/7, to recommend to the Party concerned that:

(a) All relevant European Union institutions within their competences take the steps necessary to provide the public concerned with access to justice in environmental matters in accordance with article 9, paragraphs 3 and 4, of the Convention.

(b) If and to the extent that the Party concerned intends to rely on the Aarhus Regulation or other European Union legislation to implement article 9, paragraphs 3 and 4, of the Convention:

(i) The Aarhus Regulation be amended, or any new European Union legislation be drafted, so that it is clear to the CJEU 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.

<sup>82</sup> Part I, para. 94.

(c) If and to the extent that the Party concerned is going to rely on the jurisprudence of the CJEU to ensure that the obligations arising under article 9, paragraphs 3 and 4, of the Convention are implemented, the CJEU:

(i) Assess the legality of the European Union's implementing measures in the light of those obligations and act accordingly;

(ii) Interpret European Union law in a way which, to the fullest extent possible, is consistent with the objectives of article 9, paragraphs 3 and 4, of the Convention.

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