

Advice by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3

I. Introduction

1. At its sixth session (Budva, Montenegro, 11-13 September 2017), the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) agreed to include the following text in the report of its sixth session:

In the spirit of reaching consensus, considering exceptional circumstances, the Meeting of the Parties decided by consensus to postpone the decision-making on draft decision VI/8f concerning the European Union to the next ordinary session of the Meeting of the Parties to be held in 2021. The European Union recalled its willingness to continue exploring ways and means to comply with the Convention in a way that was compatible with the fundamental principles of the European Union legal order and with its system of judicial review.

2. Through paragraph 63 of its report of the sixth session, the Meeting of the Parties requested the Compliance Committee to review any developments that had taken place regarding the matter and to report to the Meeting of the Parties accordingly. In that context, the European Union stated that it reaffirmed its commitment to implement decision V/9g.¹

3. In accordance with the Compliance Committee's procedure, the request of the Meeting of the Parties was given the case reference: request ACCC/M/2017/3.

4. On 30 September 2020, the Party concerned submitted its final progress report on request ACCC/M/2017/3.

5. On 30 September 2020, the secretariat forwarded the final progress report to the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and registered observers, inviting their comments thereon by 29 October 2020.

6. On 14 October 2020, the Party concerned submitted an update to its final progress report, including a legislative proposal to amend the Aarhus Regulation and a Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on improving access to justice in environmental matters.

7. On 26 October 2020, the communicant of communication ACCC/C/2010/54 submitted comments on the Party concerned's final progress report and legislative proposal.

8. Also on 26 October 2020, the Council of Bars and Law Societies of Europe provided comments on the Party concerned's final progress report and legislative proposal.

9. On 28 October 2020, the communicant of communication ACCC/C/2008/32 provided comments on the Party concerned's final progress report and legislative proposal.

10. On 5 November 2020, the Party concerned requested the Committee to provide it with advice on its legislative proposal to amend the Aarhus Regulation.

11. By letter of 12 November 2020, the Committee confirmed its willingness to provide the requested advice. With a view to preparing its draft advice, the Committee also indicated its intention to hold a videoconference regarding request ACCC/M/2017/3 at its upcoming sixty-eighth meeting (23-27 November 2020) in order to hear the views of the Party concerned, communicants and observers on the extent to which the legislative proposal, and accompanying Communication, would fulfil the requirements of the Committee's findings on communication ACCC/C/2008/32 (Part II).

¹ ECE/MP.PP/2017/2.

12. On 25 November 2020, in the context of its sixty-eighth meeting, the Committee held the videoconference with the participation of representatives of the Party concerned, the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and observers.
13. On 25 and 26 November 2020 respectively, the communicant of communication ACCC/C/2008/32 and the Party concerned provided practical examples, at the Committee's request, of provisions of acts explicitly requiring implementing measures at the national level.
14. On 29 and 30 November 2020 respectively, the communicant of communication ACCC/C/2010/54 and the communicant of communication ACCC/C/2008/32 provided comments on the practical examples provided by the Party concerned.
15. On 30 November 2020, the Party concerned provided comments on the practical examples provided by the communicant of communication ACCC/C/2008/32.
16. On 19 December 2020, the Party concerned informed the Committee that the Council of the European Union had adopted its general approach on the Commission's legislative proposal of 14 October 2020.
17. The Committee prepared its draft advice and agreed it through its electronic decision-making procedure on 18 January 2021. In accordance with paragraph 34 of the annex to decision I/7, the draft advice was forwarded on that date to the Party concerned, the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and registered observers with an invitation to provide comments by 1 February 2021.
18. Comments on the Committee's draft advice were received on 31 January 2021 from the communicant of communication ACCC/C/2010/54 and on 1 February 2021 from the Party concerned, the communicant of communication ACCC/C/2008/32 and the European Environmental Bureau as an observer.
19. After taking into account the comments received, the Committee finalized its advice and adopted it through its electronic decision-making procedure on 12 February 2021. It requested the secretariat to send the advice to the Party concerned, the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and registered observers.

II. Summary of facts, evidence and issues²

A. Existing legal framework

20. 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 on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (the Aarhus Regulation) states:

“Article 2: Definitions

1. For the purpose of this Regulation:
 - (a) ‘applicant’ means any natural or legal person requesting environmental information;
 - (b) ‘the public’ means one or more natural or legal persons, and associations, organisations or groups of such persons;
 - (c) ‘Community institution or body’ means any public institution, body, office or agency established by, or on the basis of, the Treaty except when acting in a judicial or legislative capacity. However, the provisions under Title II shall apply to Community institutions or bodies acting in a legislative capacity;

² 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.

(d) 'environmental information' means any information in written, visual, aural, electronic or any other material form on:

- (i) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
- (ii) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i);
- (iii) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements;
- (iv) reports on the implementation of environmental legislation;
- (v) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in point (iii);
- (vi) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures in as much as they are or may be affected by the state of the elements of the environment referred to in point (i) or, through those elements, by any of the matters referred to in points (ii) and (iii);

(e) 'plans and programmes relating to the environment' means plans and programmes,

- (i) which are subject to preparation and, as appropriate, adoption by a Community institution or body;
- (ii) which are required under legislative, regulatory or administrative provisions; and
- (iii) which contribute to, or are likely to have significant effects on, the achievement of the objectives of Community environmental policy, such as laid down in the Sixth Community Environment Action Programme, or in any subsequent general environmental action programme.

General environmental action programmes shall also be considered as plans and programmes relating to the environment.

This definition shall not include financial or budget plans and programmes, namely those laying down how particular projects or activities should be financed or those related to the proposed annual budgets, internal work programmes of a Community institution or body, or emergency plans and programmes designed for the sole purpose of civil protection;

(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;

(g) '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;

(h) 'administrative omission' means any failure of a Community institution or body to adopt an administrative act as defined in (g).

2. 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)."

Article 10: Request for internal review of administrative acts

1. 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.

Such a request must be made in writing and within a time limit not exceeding six weeks after the administrative act was adopted, notified or published, whichever is the latest, or, in the case of an alleged omission, six weeks after the date when the administrative act was required. The request shall state the grounds for the review.

2. The Community institution or body referred to in paragraph 1 shall consider any such request, unless it is clearly unsubstantiated. The Community institution or body shall state its reasons in a written reply as soon as possible, but no later than 12 weeks after receipt of the request.

3. Where the Community institution or body is unable, despite exercising due diligence, to act in accordance with paragraph 2, it shall inform the non-governmental organisation which made the request as soon as possible and at the latest within the period mentioned in that paragraph, of the reasons for its failure to act and when it intends to do so.

In any event, the Community institution or body shall act within 18 weeks from receipt of the request.

Article 11: Criteria for entitlement at Community level

1. A non-governmental organisation shall be entitled to make a request for internal review in accordance with Article 10, provided that:

- (a) it is an independent non-profit-making legal person in accordance with a Member State's national law or practice;
- (b) it has the primary stated objective of promoting environmental protection in the context of environmental law;
- (c) it has existed for more than two years and is actively pursuing the objective referred to under (b);
- (d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.

2. The Commission shall adopt the provisions which are necessary to ensure transparent and consistent application of the criteria mentioned in paragraph 1.

Article 12: Proceedings before the Court of Justice

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.”

B. Relevant excerpts from the Committee’s findings on communication ACCC/C/2008/32 (Part II)

21. Concerning the compliance of the Aarhus Regulation with article 9(3) and (4) of the Convention, in its findings on communication ACCC/C/2008/32 (Part II), the Committee held:

“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;³ acts not adopted under environmental law;⁴ acts not having legally binding and external effects;⁵ arbitrary exemptions to the administrative acts definition;⁶ and the adequacy and effectiveness of the internal review procedure.⁷

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.⁸ 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.

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.⁹ 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.

³ Communicant’s comments of 23 February 2015, paras. 42-49.

⁴ *Ibid.*, paras. 50-60.

⁵ *Ibid.*, paras. 61-71.

⁶ *Ibid.*, paras. 72-81.

⁷ *Ibid.*, paras. 82-84.

⁸ Communication, p. 3.

⁹ See findings on communication ACCC/C/2006/18 (Denmark) (ECE/MP.PP/2008/5/Add.4), paras. 30-31).

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 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”.¹⁰ 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 requirement¹¹ and argues that the “legally binding and external effect” criterion

¹⁰ See definition of “environmental law” in article 2(2)(f), of the Aarhus Regulation.

¹¹ See communicant’s comments of 23 February 2015, paras. 62-68, citing examples of refusals by the Commission on this basis.

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,¹² 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 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

¹² Ibid.

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.

...

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.

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.”¹³

C. Proposed legal framework

22. The legislative proposal adopted by the Party concerned on 14 October 2020 states:

“Article 1

Regulation (EC) No 1367/2006 is amended as follows:

1. Article 2(1)(g) is replaced by the following:

‘(g) ‘administrative act’ means any non-legislative act adopted by a Union institution or body, which has legally binding and external effects and contains provisions that may, because of their effects, contravene environmental law within the meaning of point (f) of Article 2(1), excepting those provisions of this act for which Union law explicitly requires implementing measures at Union or national level;’

2. Article 10 is amended as follows:

(a) paragraphs 1 and 2 are replaced by the following:

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

Where an administrative act is an implementing measure at Union level required by another non-legislative act, the non-governmental organisation may also request the review of the provision of the non-legislative act for which that implementing measure is required when requesting the review of that implementing measure.

Such a request must be made in writing and within a time limit not exceeding eight weeks after the administrative act was adopted, notified or published, whichever is the latest, or, in the case of an alleged omission, eight weeks after the date when the administrative act was required. The request shall state the grounds for the review.

2. The Union institution or body referred to in paragraph 1 shall consider any such request, unless it is clearly unsubstantiated. The Union institution or body shall state its reasons in a written reply as soon as possible, but no later than 16 weeks after receipt of the request.’

(b) in paragraph 3, the second subparagraph is replaced by the following:

‘In any event, the Union institution or body shall act within 22 weeks from receipt of the request.’

3. Throughout the text of the Regulation, references to provisions of the Treaty establishing the European Community (EC Treaty) are replaced by references to the corresponding provisions of the Treaty on the Functioning of the European Union (TFEU) and any necessary grammatical changes are made.

4. Throughout the text of the Regulation, including in the title, the word ‘Community’ is replaced by the word ‘Union’ and any necessary grammatical changes are made.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union.

¹³ ECE/MP.PP/C.1/2017/7.

This Regulation shall be binding in its entirety and directly applicable in all Member States.”

III. Consideration and evaluation by the Committee

23. In order to fulfil request ACCC/M/2017/3 with respect to the Committee’s findings on communication ACCC/C/2008/32 (part II), the Party concerned would need to provide the Committee with evidence 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(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(3) and (4) of the Convention:

(i) The Aarhus Regulation is amended, or any new European Union legislation is drafted, so that it is clear to the Court of Justice of the European Union (CJEU) that that legislation is intended to implement article 9(3) of the Convention;

(ii) New or amended legislation implementing the Aarhus Convention uses 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.

(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(3) and (4) of the Convention are implemented, the CJEU:

(i) Assesses the legality of the European Union’s implementing measures in the light of those obligations and acts accordingly;

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

24. The Committee welcomes the proactive approach taken by the Party concerned with respect to its request for advice of 5 November 2020.

25. The Committee provides the present advice to the Party concerned in accordance with paragraphs 14, 36(a) and 37(a) of the annex to decision I/7.¹⁴

26. In preparing this advice, the Committee has taken into account the explanations provided by the Party concerned as well as comments received from the communicants of communications ACCC/C/2008/32 and ACCC/C/2010/54 and observers on the Commission’s legislative proposal of 14 October 2020 to amend the Aarhus Regulation (“the Commission’s legislative proposal”).

27. The Committee limits the present advice to the specific points of noncompliance identified in its findings on communication ACCC/C/2008/32 (Part II). Thus, the Committee does not examine whether the Commission’s legislative proposal, if adopted, would meet each of the requirements in article 9(4) of the Convention since all the various requirements of that article were not examined in either Part I or Part II of those findings.

28. Bearing in mind the foregoing, the Committee considers that it is possible for paragraphs 122 and 123 of its findings on communication ACCC/C/2008/32 (Part II) to be addressed through appropriate amendments to the Aarhus Regulation. For that reason, the

¹⁴ ECE/MP.PP/2/Add.8.

Committee does not expect the Party concerned to set up a separate regime for access to justice in environmental matters.¹⁵

29. Given the above, the Commission's legislative proposal is a significant positive development, as is the explicit reference in that proposal to article 9(3) of the Convention and the concerns expressed by the Committee in the above findings.

30. The Committee also welcomes the adoption by the Council of the European Union on 17 December 2020 of its general approach on the Commission's legislative proposal. The Committee considers the present advice equally applicable to the content of the general approach.

31. The Committee urges all relevant institutions of the Party concerned to continue their constructive efforts to ensure that the legislative process to amend the Aarhus Regulation is completed in time for the Committee to take the adopted amendments into account in the preparation of its report on developments regarding request ACCC/M/2017/3 (European Union) to the seventh session of the Meeting of the Parties (18-21 October 2021).¹⁶

Preliminary ruling procedure

32. Before examining the content of the Commission's legislative proposal, the Committee considers it important to clarify certain remarks that have been made by the Party concerned.¹⁷ The Party concerned claims that the Committee disregards fundamental elements of the EU legal order, including the important role of national courts and the preliminary ruling procedure. It asserts that the Committee considers that, in order to comply with the Convention, the EU must further centralise its powers, instead of ensuring that powers are exercised as close to the citizen as possible in Member States where members of the public, including NGOs, can challenge measures before a national court.¹⁸

33. The above comments appear to show a misunderstanding of the present advice and also of the Committee's findings and recommendations on communication ACCC/C/2008/32 (Part II). Those findings, and the present advice, concern access for members of the public to challenge acts and omissions by institutions and bodies of the European Union that contravene EU law relating to the environment. They do not concern acts or omissions at the Member State level at all.

34. In its findings on communication ACCC/C/2008/32 (Part I), the Committee considered whether the preliminary ruling procedure met the requirements of article 9(3) of the Convention with respect to access for members of the public to challenge acts and omissions by institutions and bodies of the European Union which contravene EU law relating to the environment. After examining the preliminary ruling procedure, the Committee concluded that:

90. 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.¹⁹

35. In the light of the above, the Committee underlines that, while the preliminary ruling procedure is an important element of the EU legal order, it cannot in its present form address

¹⁵ C.f. Party's comments on the Committee's draft advice, 1 February 2021, p. 1.

¹⁶ ECE/MP.PP/2017/2/Add.1, para. 63.

¹⁷ Party's comments on the Committee's draft advice, 1 February 2021, pp. 1 and 2.

¹⁸ Ibid.

¹⁹ ECE/MP.PP/C.1/2011/4/Add.1, para. 90.

the noncompliance found in paragraph 122 of the Committee's findings on communication ACCC/C/2008/32 (Part II). In contrast, as the recommendation in paragraph 123(b) of those findings makes clear, the Committee considers that the Party concerned can remedy its noncompliance through appropriate amendments to the Aarhus Regulation. The Committee accordingly examines the extent to which the Commission's legislative proposal may do so in paragraphs 36-68 below.

Entities other than NGOs

36. As the Committee held in part I of its findings on communication ACCC/C/2008/32, "the consequences of applying the Plaumann test to environmental and health issues is that in effect no member of the public is ever able to challenge a decision or a regulation in such case before the ECJ".²⁰

37. In part II of those findings, the Committee held that, having considered the main jurisprudence of the EU courts since part I of its findings, there had been no new direction in the jurisprudence of the CJEU that would ensure compliance with article 9(3) and consequently article 9(4) of the Convention.²¹ The Committee went on to hold, in paragraph 93 of its findings on part II, 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".²²

38. The current proposal to amend the Aarhus Regulation maintains the current situation by reserving the right to invoke the administrative review procedure to NGOs. Accordingly, the Committee cannot see how, if adopted in its current form, the Commission's legislative proposal would address the shortcomings identified in paragraph 93 of the Committee's findings on communication ACCC/C/2008/32 (Part II).

39. As the Committee made clear in part I of its findings,²³ article 9(3) of the Convention does not require an *actio popularis* allowing any natural or legal person to have access to review procedures. However, between an approach limiting administrative review to NGOs only, and an *actio popularis*, it is possible to establish a legal framework - such as those in place in many of the Member States of the European Union - which allows access to review procedures to persons satisfying certain criteria, for example, persons demonstrating a "sufficient interest" in the contested act.

40. The Committee recalls its findings in communication ACCC/C/2005/11 (Belgium) in which it held:

... the phrase "the criteria, if any, laid down in national law" indicates a self-restraint 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 ("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.²⁴

41. It is for the Party concerned to determine which measures may be most feasible and appropriate, bearing in mind its special character as a regional economic integration organisation. The Committee, however, makes clear that access to review procedures under article 9(3) of the Convention cannot be limited to NGOs only.

42. Accordingly, the Committee considers that the Commission's legislative proposal should be amended, or other measures taken, to ensure that access to a review procedure to challenge acts and omissions by institutions and bodies of the European Union which contravene EU law relating to the environment is provided not only to NGOs, but also to other members of the public, even if subject to certain criteria in accordance with the Convention.

²⁰ ECE/MP.PP/C.1/2011/4/Add.1, para. 86.

²¹ ECE/MP.PP/C.1/2017/7, para. 79.

²² ECE/MP.PP/C.1/2017/7, para. 93.

²³ ECE/MP.PP/C.1/2011/4/Add.1, para. 77. See also ECE/MP.PP/C.1/2006/4/Add.2, para. 36.

²⁴ ECE/MP.PP/C.1/2006/4/Add.2, para. 36.

Acts of individual scope

43. The Committee considers that the legislative proposal, if adopted, would resolve the concerns raised in paragraph 51 of its findings on communication ACCC/C/2008/32 (Part II) regarding acts of individual scope.

Acts not adopted under environmental law

44. The Committee considers that the legislative proposal, if adopted, would resolve the points raised in paragraph 100 of its findings on communication ACCC/C/2008/32 (Part II) regarding acts not adopted under environmental law.

45. Subject to the considerations in paragraphs 46-55 below, the Committee welcomes the proposed definition of “administrative act” in article 2(1)(g) of the Council’s general approach as positive progress building upon the definition proposed in the Commission’s legislative proposal.

46. The Committee notes that the proposed definition of “administrative act” in article 2(1)(g) means any non-legislative act “adopted” by a Union institution or body. The Committee is concerned about the implications of the use of the term “adopted” in this context and whether it limits the scope of acts that may be subject to challenge under article 9(3) of the Convention.

Acts not having legally binding and external effects

47. As stated earlier, in paragraph 101 of its findings on communication ACCC/C/2008/32 (Part II), the Committee held:

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.

48. Continuing on, in paragraph 104 of those findings, the Committee held:

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.

49. The current legislative proposal limits the scope of its application by continuing to exclude acts not having “legally binding and external effects” from the scope of review.

50. Article 9(3) of the Convention applies to any act or omission which may contravene national law relating to the environment. Parties cannot introduce or apply any additional criteria which will limit the type of act or omission that can be challenged. It is therefore necessary to consider the effect of the words “has legally binding and external effects”.

51. The Committee recognizes that in order to contravene national (or in the present case, EU) law relating to the environment, an act or omission must have some “effect”. Provided that the requirement to have “external effect” is not interpreted to require anything more than that the act or omission has the potential to contravene EU law relating to the environment, the Committee does not consider the reference to “external effects” to be problematic.

52. The Committee is however concerned that the requirement to have “legally binding effects” may limit the type of act or omission that may be challenged. While it is self-evident that the acts or omissions to be challengeable under article 9(3) of the Convention must have some legal implications – i.e. they must be capable of contravening environmental law – that may be very different from having legally *binding* effects.

53. As to whether a requirement for an act or omission to have legal – albeit not legally binding – effects would also be too restrictive, the Committee notes that no examples have to date been put before it of any acts or omissions by the Party concerned that do not have any legal effects but that may, nevertheless, contravene EU law relating to the environment.

On this point, the Committee takes into account the special character of the Party concerned as a regional economic integration organization and the implications this has for the types of acts it may take.

54. Bearing in mind the foregoing, provided that a reference to legal effects is not interpreted to require anything more than that the act or omission is capable of contravening EU law relating to the environment, the Committee does not consider that a reference to acts having “legal effects” would be problematic.

55. The Committee is convinced, however, that there is no legal basis in the Convention to limit the scope of acts in article 9(3) to acts with “binding” legal effects. The Committee accordingly considers that the Party concerned should remove the word “binding” from the proposed amendment so the relevant wording would state “has legal and external effects” only.

New exception

56. The Commission’s legislative proposal introduces a new exception to the possibility of requesting review of an administrative act by excluding those provisions of the act “for which Union law explicitly requires implementing measures at Union or national level”.

Implementing measures at Union level

57. According to the Party concerned, the only effect of the proposed exception is to postpone the possibility of challenging provisions for which EU law explicitly requires implementing measures at EU level until such time as the implementing measures have been taken.

58. Provided that this is indeed the case and the exception will not delay the outcome of administrative review in such a way that will undermine the requirement in article 9(4) of the Convention to provide adequate, timely and effective remedies, and so long as all other provisions of the act are immediately challengeable, the Committee does not consider the exception of those provisions for which EU law explicitly requires implementing measures at EU level to be problematic.

Implementing measures at Member State level

59. The discussions at the videoconference at the Committee’s sixty-eighth meeting, as well as the examples provided by the Party concerned²⁵ and the communicant of communication ACCC/C/2008/32,²⁶ lead the Committee to question the exact scope of the exception from review for provisions of acts for which Union law explicitly requires implementing measures at the Member State level.

60. According to the Party concerned, the only provisions which would be excluded from the administrative review procedure would be those which *themselves* explicitly require the Member States to adopt an implementing measure. No other provision would be caught by the exception.

61. To support its interpretation, the Party concerned cites article 6(1) of Regulation 2019/124,²⁷ which states that: “The TACs [Total Allowable Catches] for certain fish stocks shall be determined by the Member State concerned. Those stocks are identified in Annex I”. According to the Party concerned, under the Commission’s legislative proposal, all other provisions of Regulation 2019/124 apart from article 6(1), such as the TACs determined by the Council under article 5, would be immediately open to review under the Aarhus Regulation.

²⁵ Practical examples provided by the Party concerned, 26 November 2020.

²⁶ Practical examples provided by the communicant of communication ACCC/C/2008/32, 25 November 2020.

²⁷ Council Regulation (EU) 2019/124 of 30 January 2019 fixing for 2019 the fishing opportunities for certain fish stocks and groups of fish stocks, applicable in Union waters and, for Union fishing vessels, in certain non-Union waters.

62. As a further example, the Party concerned cites article 4(1) of Commission Decision 2011/278/EU,²⁸ which states that: “Member States shall make the appropriate administrative arrangements, including designation of the competent authority or authorities in accordance with Article 18 of Directive 2003/87/EC, for the implementation of the rules of this Decision”. According to the Party concerned, under the Commission’s legislative proposal, all of the Decision’s provisions apart from article 4(1), would be immediately open to review under the Aarhus Regulation.

63. The communicant of communication ACCC/C/2008/32 argues that the interpretation given by the Party concerned is not consistent with existing CJEU caselaw on the term “entails implementing measures”.²⁹ It submits, moreover, that the CJEU has made clear that the requirements for unity and consistency in the EU legal order mean that terms in the same sector must be given the same meaning, unless the EU legislature has expressed a different intention.³⁰ In the light of existing caselaw, the communicant contends that the scope of the exception may be read to exclude from review all provisions of an act that require implementation at the level of the Member State in order to have effect.³¹ In contrast to the Party concerned’s assertion,³² the communicant fears, for example, that the TACs set by the Council in Annex 1 of Regulation 2019/124 may only become subject to review once Member States allocate those TACs among their vessels under article 5 of that Regulation.³³

64. The communicant provides several other examples, including the approval of glyphosate, an “active substance”, under article 1 of Commission Implementing Regulation 540/2011.³⁴ The communicant notes that article 1 of Regulation 540/2011 does not itself explicitly require implementing measures. However, pursuant to Regulation 1107/2009,³⁵ an active substance cannot be placed on the market until the final product has been approved by the Member State in whose territory it will be marketed. The communicant submits that it is unclear if an NGO could challenge article 1 of Regulation 540/2011 by way of internal review or whether it would be considered a provision for which Union law (i.e. Regulation 1107/2009) requires implementing measures at national level.

65. The Committee considers there is a meaningful distinction between the review of an implementing measure taken by a Member State and the possibility to review the provision of the act for which EU law requires an implementing measure to be taken.

66. The Committee acknowledges that, under the law of the Party concerned, national implementing measures must be challenged at the national level and the Committee does not expect administrative review under the Aarhus Regulation to cover the implementing measures taken by Member States.

67. However, the Committee considers problematic the proposal that the provision of the act itself will only be challengeable indirectly through the preliminary ruling procedure. The Committee already made clear in paragraph 90 of its findings on communication ACCC/C/2008/32 (Part I) that the preliminary ruling procedure does not meet the requirements of article 9 of the Convention. Given this fact, the Committee cannot see how the exclusion from review of provisions for which EU law requires implementing measures at the national level can meet the requirements of article 9(3) of the Convention. The

²⁸ Commission Decision 2011/278/EU of 27 April 2011 determining transitional Union-wide rules for harmonized free allocation of emission allowances pursuant to Article 10a of Directive 2003/87/EC of the European Parliament and of the Council.

²⁹ Comments from the communicant of communication ACCC/C/2008/32 on the practical examples provided by the Party concerned, 30 November 2020, paras. 15-18.

³⁰ *Ibid.*, para. 17.

³¹ *Ibid.*, para. 16.

³² Practical examples provided by the Party concerned, 26 November 2020, p. 1.

³³ Comments from the communicant of communication ACCC/C/2008/32 on the practical examples provided by the Party concerned, 30 November 2020, para. 16.

³⁴ Commission Implementing Regulation (EU) 540/2011 of 25 May 2011 implementing Regulation (EC) 1107/2009 of the European Parliament and of the Council as regards the list of approved active substances.

³⁵ Regulation (EC) 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC.

Committee considers that such provisions must also be immediately open to review at EU level.

68. The Committee considers that the possibility to review such provisions at the EU level would not affect the special legal order of the European Union and the Party concerned has not provided evidence that it would do so. The Committee thus considers that the Party concerned should amend the proposed exception from the scope of review of those provisions of an act for which Union law explicitly requires implementing measures at Member State level so that such provisions are indeed immediately open to review.

Committee's draft findings on communication ACCC/C/2015/128

69. On 18 January 2021, the Committee agreed its draft findings and recommendations on communication ACCC/C/2015/128. The deadline for the parties to provide their comments on the Committee's draft findings is 1 March 2021. After taking into account the comments received on the draft findings, the Committee will finalise and adopt its findings as soon as possible thereafter. The Committee notes the relevance of these findings and recommendations for the current legislative process to amend the Aarhus Regulation.

70. In the light of the above, the Committee considers that the Party concerned should also bear in mind the Committee's findings and recommendations on communication ACCC/C/2015/128 in the context of the current legislative process to amend the Aarhus Regulation.

IV. Conclusions

71. The Committee considers the proposal to amend the Aarhus Regulation to be a significant positive development and it welcomes the constructive approach taken by the Party concerned. In order, however, to address the concerns identified in part II of the Committee's findings on communication ACCC/2008/32, the Party concerned should:

(a) Ensure that access to review procedures to challenge acts and omissions by institutions and bodies of the European Union which contravene EU law relating to the environment is provided not only to NGOs, but also to other members of the public, even if subject to certain criteria in accordance with the Convention;

(b) Remove the word "binding" from the proposed amendment so the relevant wording would state "has legal and external effects" only;

(c) Amend the proposed exception from the scope of review of those provisions of an act for which Union law explicitly requires implementing measures at Member State level so that such provisions are indeed immediately open to review (the Committee does not expect administrative review under the Aarhus Regulation to cover the implementing measures taken by Member States); and

(d) Also bear in mind the Committee's findings and recommendations on communication ACCC/C/2015/128 in the context of the current legislative process to amend the Aarhus Regulation.