EU comments on the draft advice
of the Aarhus Convention Compliance Committee
regarding the request ACCC/M/2017/3 (EU) in case ACCC/C/2008/32
1 February 2021

1. Introduction: Progress made and continued efforts to ensure compliance with the Convention

The European Union thank the Committee for its draft advice (the 'Advice') and take note of the additional clarifications and recommendations the Committee has provided with regard to the implementation of its findings.

The confirmation that the Commission Proposal to amend the Aarhus Regulation, if adopted as it is (or with the modifications contained in the Council General Approach), will satisfy the first two findings of the Committee in case ACCC/C/2008/32 (Part II), as pointed out at paras 39-41 of the Advice, is particularly welcome.

2. The EU's key concerns: disregard of the role of national courts and of the preliminary ruling procedure

Nevertheless, there are serious concerns that the Committee disregards fundamental elements of the EU legal order flowing from the special character of the EU as a Party to the Convention, which leads the Committee to draw erroneous conclusions. The EU's special character is recognised by the Convention and was further explained when the EU signed and later ratified the Convention. The EU has restated the need to take into account this specificity in the Declaration made at the Meeting of the Parties in Budva in 2017.

This disregard is regrettable, considering the detailed legal explanations, good faith efforts and constructive exchanges at the 25 November 2020 open session, where both the EU and the communicant had an opportunity to make their case to the Committee, and answer questions.

This is why, the present comments are focused on clarifying this core issue and explain, once more, the way how the integrated and complete EU system of administrative and judicial protection works and highlight the important role of national courts and the preliminary ruling procedure.

This is a crucially important matter for the EU. The general message that the Committee's Advice appears to send is of concern, the message that in order to comply with the Convention:

- the EU must set up a separate regime for access to justice in environmental matters with special rules, because the standard principles, rules and institutions of the EU, including its established system of administrative and judicial review are insufficient; and

- that 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 and NGOs can challenge measures before a national court.

3. The EU system of administrative and judicial review: an integrated and complete system of remedies

The main obstacle in the way of a genuine common understanding of what the EU should do to comply with its obligations under the Convention appears to stem from the fact that the Committee disregards the indispensable role played by the national courts and of the preliminary ruling procedure under Article 267 of the Treaty on the Functioning of the European Union (TFEU) in the EU's complete system of judicial and administrative review.

National judges are an essential part of the general EU framework of legal protection.[1] The rights enshrined in the Convention's Article 9(3) are safeguarded by the combination of the relevant CJEU competences defined by the Treaty provisions, the administrative review defined by the Aarhus Regulation and the judicial review provided by national courts as EU courts.

Disregarding the preliminary reference procedure under 267 of the TFEU, which is a fundamental element of the EU legal order, amounts to disregarding the declaration the EU made when it concluded the Aarhus Convention.[2]

The Committee recommendation to bypass by administrative action the Plaumann test raises important issues of rule of law. The Plaumann test has been regulating since 1963 the access to the Court under Article 263(4) of the TFEU by interpreting narrowly the terms *'directly and individually concerned'* with the purpose of allowing judicial review of administrative measures and preventing the clogging of the Court with mass litigation and

[1] It is useful to recall, to illustrate the important role of national courts and of the preliminary ruling procedure in the EU's system of judicial and administrative review that the CJEU has held that 'the possibility for individuals to have their rights protected by means of an action before the national courts, which have the power […] to make a reference for a preliminary ruling […] constitutes the very essence of the Community system of judicial protection.' (emphasis added). See e.g. Order of the Court of 1 February 2001 in Case C-301/99 P, Area Cova SA and others v Council and Commission, ECLI:EU:C:2001:72, paragraph 46.

[2] Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJL 124, 17.5.2005, p1. Paragraphs 13 and 17 of the Communication on access to justice of 14 October 2020 should be recalled in this context:
'13…the EU declared that "the EU institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of EU law in the field covered by the Convention." Most crucially it added that "the EU is responsible for the performance of those obligations resulting from the Convention, which are covered by EU law in force" and that "the exercise of EU competence is, by its nature, subject to continuous development". […]
17. By adopting the Aarhus Regulation, the EU complemented the existing system of review available at EU level as regards both administrative and judicial review. As a result, NGOs active in environmental protection can obtain an administrative review of non-legislative administrative acts … adopted by EU institutions and bodies. The Union, however, chose not to exercise its competence as indicated at the time of ratification and did not adopt separate provisions on administrative review for individuals, under the Aarhus Regulation at Union level, applicable to the EU institutions and bodies.'

protecting its capacity to oversee the functioning of the EU legal order. Given the proper functioning of the mechanism of the preliminary reference procedure, it is neither appropriate nor necessary for the Commission to undermine the case-law of the CJEU in order to provide access for the individuals which these already have under the Treaty and via the said procedure.

4. Allocation of responsibilities as between the EU and its Member States

While the revision of the Aarhus Regulation can play a very important role in ensuring access to justice in the EU, it would be entirely unreasonable to expect that in cases where a Member State fails to provide standing in national courts in environmental matters covered by EU law to a member of the public as required under the Aarhus Convention, this could be and should be remedied via providing disproportionately broad access to justice at EU level under the Aarhus Regulation.[3]

The responsibility for compliance with the Aarhus Convention as part of the EU legal order, with regard to issues such as adequate standing for NGOs and other members of the public before national courts and ensuring that costs are not prohibitive, belongs to the Member States as a matter of EU law. This is the only practically feasible way to ensure compliance, taken into account the broader EU system of administrative and judicial protection.

5. Respect of procedural rights and fairness is necessary

The Committee recommends the EU to take into account the draft findings in a separate case ACCC/C/2015/128 to which the EU is entitled to provide its defences and arguments by 1 March 2021 and which has yet to be adopted by the MOP.

This raises significant issues of due process and also interferes with the EU legislative process. It risks undermining the credibility of the Aarhus compliance review system.

We reserve our substantive comments in this case for our reply in case ACCC/C/2015/128, which is due by 1 March.

6. Conclusion

In order to assess the EU's compliance with the findings, a comprehensive approach is warranted by the nature of the EU as regional economic integration organisation, by the nature of its multi-layered system of governance and by its legal order integrating EU-level and national-level courts in a single and complete system of judicial redress.

The EU's compliance with the Convention is based on: (i) the system of judicial review construed by the Treaties, where the Court of Justice of the EU takes authoritative and independent decisions on the interpretation of EU law, (ii) the amendments proposed to the Aarhus Regulation, and (iii) the national level access to courts, where national courts have an obligation based on the Treaties to safeguard rights of members of the public, including

[3] See paragraph 11 of the Communication on access to justice. Besides, there is no support to underpin that the system does not deliver justice as intended. Progress has been clearly made as is documented in the Commission Notice on Access to Justice in Environmental Matters on the 28 of April 2017 where it is shown that a number of important preliminary reference procedure cases have influenced case law.

individuals and NGOs under EU law and act, in this regard, as ordinary courts of EU law, i.e. as part and parcel of the EU system of judicial protection.

Therefore, the amendments proposed to the Aarhus Regulation, combined with the implementation by the Member States of the actions identified in the Communication, will bring the EU in compliance with its obligations under the Convention, as undertaken at the time of ratification.

For this reason, it is reiterated that the Proposal and the Communication, taken together, address all issues raised by the Committee in its findings to the extent allowed by the EU legal order.