

Comments on Aarhus Convention Compliance Committee draft report regarding request ACCC/M/2017/3 (European Union)

1. As the Communicant of communication ACCC/C/2008/32 (EU), ClientEarth thanks the Compliance Committee for this opportunity to comment on its draft report on compliance by the European Union with its obligations under the Convention, issued on 12 July 2021.
2. ClientEarth fully agrees with the draft report insofar as it concerns the state of compliance with the findings on communication ACCC/C/2010/54 and has no further comments at this point.
3. Regarding the state of compliance with the Committee's findings on communication ACCC/C/2008/32, the Communicant is grateful for the opportunity to read the comments submitted by the Party Concerned on 16 July 2021, which summarise the agreement reached between the co-legislators at the trilogue of 12 July (the "Agreement"). Our ability to comment on the content of the Agreement is limited at the present time due to the lack of a publicly available text. The comments below are based on the helpful summary provided by the Party Concerned.

Definition of EU administrative acts subject to internal review

4. In its advice to the EU of 12 February 2021 (the "Advice"), the Committee noted that administrative acts or omissions capable of contravening national (in this case, EU) law relating to the environment must be susceptible to review.¹ Accordingly, it made two recommendations in relation to the definition of the EU administrative acts that can be subject to internal review in the Commission's legislative proposal. First, the word "binding" should be removed from the definition, so that it refers to "non-legislative acts with legal and external effects". Second, the exclusion of provisions of administrative acts and omissions that explicitly require national implementing measures should be removed.
5. The summary of the Agreement provided by the Party Concerned confirms that both of these recommendations have been implemented by the EU co-legislators. Therefore, upon adoption of the Regulation, the EU should come into compliance with Article 9(3) of the Convention on these points.
6. In addition to this, the summary also confirms that the exclusion from internal review of the provisions of EU administrative acts and omissions that explicitly require implementing measures at EU level has equally been deleted. We welcome this positive development.
7. The new definition of EU administrative acts represents a significant improvement on both the current Regulation and the Commission's proposal. It will allow NGOs and certain individuals to challenge a wide range of non-legislative acts of general application that contravene EU law relating to the environment. This will greatly improve accountability of the EU institutions and the availability of effective remedies to protect the environment.

¹ Advice by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3, paragraph 50.

Entities other than NGOs

8. The Committee's findings on Communication ACCC/C/2008/32² and the Advice³ were very clear that the Aarhus Regulation must extend access to the internal review procedure to certain individuals. The comments submitted by the Party Concerned confirm that the Agreement contains two alternative routes for individuals to access the internal review procedure, both of which require representation by a lawyer or an NGO:
 - a. individuals will have to demonstrate impairment of their rights caused by the alleged contravention of EU environmental law and that they are directly affected by such impairment in comparison to the public at large;
 - b. Alternatively, an individual will have to demonstrate a sufficient public interest and that the request is supported by least 4000 members of the public residing or established in at least 5 Member States, with at least 250 members of the public in each of those Member States.
9. There are also several recitals that provide further guidance as to how the criteria should be interpreted
10. The criteria elaborated by the co-legislators are clearly an improvement on the Commission's proposal, which did not afford any opportunities for individuals to access the internal review procedure. The Communicant acknowledges that Article 9(3) of the Convention affords a margin of discretion to the Contracting Parties in defining standing criteria for individuals. We also acknowledge that the task of defining standing criteria for an administrative procedure as centralised as the internal review mechanism, in a political union with almost 450 million inhabitants, is novel and challenging. In adopting the criteria set out above, it is evident that the co-legislators have endeavoured to strike a balance between compliance with the Convention, on the one hand, and the administrative burden associated with processing a high volume of requests for internal review from members of the public, on the other.
11. However, in order for compliance to be achievable, it is of the utmost importance that the criteria defined by the EU do not, in effect, bar all of almost all individuals from challenging the administrative acts and omissions of the EU institutions.⁴ This is not immediately evident from the wording of the criteria, as reported by the Party Concerned. The second criterion is inherently restrictive because it requires the organisation of support from a very large number of individuals in different Member States. Therefore, much will depend on the willingness of the EU institutions, including the Court of Justice of the EU, to provide an interpretation of the first criterion that is broad enough to ensure compliance and this should be stressed by the Committee. Without access to the actual text of the recitals described by the EU, it is difficult at this point to assess the extent to which they may contribute to ensuring such an interpretation, although we are certainly pleased to note that there is a recital to indicate that the first criterion does not require individuals to show that they are directly and individually concerned under Article 263 TFEU. Nevertheless, it is clear that the application of these criteria by

² Findings Part II on communication ACCC/C/2008/32, paragraph 90.

³ Advice by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3, paragraph 42.

⁴ ACCC/C200//31 (Germany), para. 92; ACCC/C/2006/18 (Denmark), paras 29-30; ACCC/C/2008/32 (European Community) (Part I), paras 77 – 80; ACCC/C/2010/48 (Austria), paras 51 and 68 – 70; ACCC/C/2010 (Czech Republic), para. 85 and ACCC/C/2011/58 (Bulgaria), para.65.

the EU institutions will have to be monitored closely to assess whether they are not so restrictive as to effectively bar almost all individuals from internal review.

The exception for EU State aid decisions

12. In its findings of 17 March 2021 on communication ACCC/C/2015/128, the Committee found the Party Concerned to be in breach of Article 9(3) and 9(4) of the Convention for failing to provide access to administrative or judicial procedures for members of the public to challenge decisions on state aid measures taken by the European Commission under article 108(2) TFEU which contravene EU law relating to the environment.⁵ The findings include a recommendation for the EU to ensure that the Aarhus Regulation is amended to include the Commission's decisions on State aid measures among the acts that can be subject to requests for internal review. Alternatively, the EU must enact alternative legislation to ensure compliance with the findings. The Committee's Advice also recommended that the Party Concerned should bear in mind these findings during the current legislative procedure.
13. The summary of the Agreement submitted by the EU confirms that this recommendation was not implemented by the co-legislators and the exception for State aid measures will continue to apply. While it is regrettable that the EU did not seize this opportunity to come into compliance with Article 9(3) and the Committee's findings on communication ACCC/C/2015/128, we also note that this was not part of the Committee's finding on communication ACCC/C/2008/32 and is therefore outside the scope of this draft Report. We nevertheless welcome the EU's acknowledgment of the need to address the findings on communication ACCC/C/2015/128 and look forward to their endorsement by the Meeting of the Parties and to the Commission's analysis of how best to implement them.

Costs and substantive review

14. The Communicants welcomes the addition of recitals on the need for non-prohibitive costs and the requirement for review of the procedural and substantive legality of administrative acts. We agree with the EU that these additions enhance the EU's compliance with the Aarhus Convention.

Conclusion

15. The Communicant regrets that it cannot provide more detailed comments on the amendment to the Aarhus Regulation, due to the lack of publicly available information.
16. Despite the Commission's proposal, which, if adopted, would have failed to bring the EU into compliance with the findings on communication ACCC/C/2008/32, the co-legislators have agreed on several significant amendments that will greatly improve access to justice for members of the public in the EU, at least for NGO applicants and potentially for certain individuals. This is a very positive step in the right direction for environmental protection in the EU and for the democratic accountability of EU institutions.

⁵ Findings on Communication ACCC/C/2015/128, paragraph 131.

