

Observer Comments on the EU Progress Report on Review Request ACCC/M/2021/4 (EU), by Alison Hough on behalf of Environmental Justice Network Ireland (EJNI).

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Introduction

This Observer Comment offers feedback on the EU Progress Report submitted 26/09/2023 on the EU Action Plan submitted on the 31st July 2022, on the Request by the Meeting of the Parties ACCC/M/2021/4 (EU) to review compliance arising out of the postponement of the findings and recommendations in Case ACCC/C/ 2015/128 (EU) (adopted by the Compliance Committee on 17/03/2021) at the 2021 Meeting of the Parties, and specifically concerning the implementation the recommendation at para 131 of that finding, concerning the failure to include State Aid decision making within the remit of the review process under the revised Aarhus [Regulation \(EC\) 1367/2006](#) as amended by [Regulation \(EU\) 2021/1767](#)¹.

The EU Action Plan was filed in July 2022. From the progress report it appears the steps taken since then include a public consultation & call for evidence held from July to Oct 2022. A stakeholder meeting was held on 09/09/2022, and a Meeting of Member State Experts (Government Representatives) on 12/09/2022. An analysis of the Consultation and a Communication summarizing it were issued in May 2023.

The EJNI welcomes the filing of the Action Plan and this Progress Report, acknowledges the above-mentioned steps taken towards developing a solution to the issue, and in particular commends the ongoing engagement by the EU Commission with these matters before the Committee. We strongly encourage continued efforts to bring the EU into compliance with the Aarhus Convention.

The main issue arising from the above communications, findings and requests for review and advice, are that the EU is in longstanding breach of international law (the Aarhus Convention) in failing to provide for access to review of administrative decisions for the public on grounds of non-compliance with environmental law, as required by Art 9(3) of the Aarhus Convention ('the Convention'). This case specifically relates to the ongoing exclusion of State Aid decisions by the EU Commission ('EU Com') from the scope of the environmental review (for some eighteen years now) through the mechanism established by the Aarhus Regulation through which citizens and NGOs can review administrative decisions on grounds that they breach environmental legislation. An important piece of environmental governance, oversight and democracy remains missing from the EU legal regime at a crucial time in the fight against the climate crisis, and the public continue to be denied their international law and basic democratic rights to transparency in administrative decisions that affect the environment in which they reside.

Para 131 of ACCC/C/2015/128 ('C128') quite clearly required the EU to take measures to either (i) amend the Aarhus Regulation ('*take the necessary legislative, regulatory and other measures to ensure that the Aarhus Regulation in amended*') or (ii) introduce other legislation to allow for the review of State Aid decisions on environmental grounds.

¹ Unofficial Consolidation available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02006R1367-20230429>

On the 12th July 2021 The EU made a [Political Commitment](#)² in the final trilogue on the conclusion of the negotiations on the revision of the Aarhus Regulation where they committed to consult on the options and to issue a communication on the options by the end of 2022 and to bring forward measures by the end of 2023. However, it is the case that the end of 2023 approaches and only very limited work has been achieved towards developing measures for consultation. No detailed measures have been developed or consulted only, and the matters put to consultation so far remain in vague outline.

Despite the extremely clear parameters for compliance with international law in this context, and the already extensive history of delay and denial of rights to the public in this area, it is disappointing that the EU Progress Report continues the trend of slow or very little progress in this area, and as yet no concrete or detailed proposals for remedying the issue have been proposed.

Comments on the content of the EU Progress Report on Request

The EU Commission Progress Report highlights the public consultation undertaken to date and the report on the consultation and the Commission [Communication COM \(2023\) 307 Final 2](#) in May 2023 summarising the outcomes and options.

EJNI welcomes the steps that were taken to engage with these issues, in particular the public consultations. However, there some issues with the steps taken that are highlighted below. Further, given the long history of this matter and the significance of these issues for environment and climate action, as well as for the integrity of the Convention, it is felt that the issues here should be approached with greater urgency than has been the case to date.

Several things are considered notable from these matters reported in the Progress Report.

1. The public consultation highlighted (summarized in the COM(2023) 307 Final Communication) in the Progress Report was in the form of a highly directed questionnaire that curtailed the possibility for response via tightly constructed questions and restrictive text character limits. The questions were highly technical particularly at the beginning of the questionnaire, and covered matters that were not on target for the issues under discussion. E.g. Consultees were asked at the outset whether they had taken challenges to State Aid decisions before national courts and whether they had engaged with the complaints procedures around State Aid, and if they had not, the questionnaire demanded to know why not. It is not clear how this information was relevant to the matter consulted on, and it could have (perhaps unintentionally) given non-expert participants the impression that the consultation was only intended for those who were “frequent fliers” of such a system and had highly specialized knowledge and experience. If this data was necessary and relevant, its necessity and relevance should have been explained clearly. Also, the most relevant questions regarding the options should have been asked first to avoid giving participants the impression that this was not a general public consultation.
2. As highlighted above, the questionnaire focused so heavily on Member State level challenge of the State Aid decision, and this focus is reiterated in the Communication COM(2023) 307 Final where, at page 7, there is a discussion of interested parties that does not highlight or make clear the fact that environmental NGOs cannot be interested parties as they will not

² The Commission statement was announced at the third and final political trilogue on the Proposal for the revised Aarhus Regulation and is available at https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/ENVI/DV/2021/08-31/Commissionstatement-stateaid_EN.pdf

have an interest capable of being affected by the State Aid decision, and at page 8 where the EU Com states that environmental NGOs can review the State Aid decision at Member State level and then request an Art 267 reference to the CJEU to challenge the underlying EU level decision. The issue of Member State level access to justice is entirely separate to EU level access to justice, and conflating these two different layers of the multilevel governance system creates confusion as to the process.

3. No evidence is available in the Progress Report of any substantial progress in this matter since May 2023 when the Commission Communication was published summarizing the results of consultation.
4. The Commission has as yet not produced any detailed proposals for consultation, which has been hampering the provision of detailed analytical insight by NGOs and experts. The proposals for legislative amendments and guideline changes remain one paragraph summary's and this has been the case since these summaries were first produced in July 2022 for the initial consultation. It is difficult to assess proposals like amendment of the Procedural Regulation or amendment of the Best Practice Guidelines without indications of how exactly this would work in practice. The absence of any detailed proposals for any of these options at this stage of proceedings is extremely worrying.
5. It is a positive development that the one of the original options, maintenance of the status quo, is no longer proposed as a course of action here, as pointed out previously by many observers such as McGlone, this was a proposal to remain in non-compliance with international law. It is even more worrying that this was one of the most popular options among Member State respondents, suggesting defects in how this option was presented. The acknowledgement in the Commission Communication COM(2023) 307 Final that this is not a valid option represents a step in the right direction in this regard.

Procedural Background and Extensive Delay

The fact remains that the EU's failure to resolve this longstanding non-compliance with the Convention has resulted in eighteen years of denial of individual/NGO rights, and lack of democratic oversight of EU decision making. The continued (and repeated) non-compliance in relation to Art 9(3) also undermines the effectiveness of the Convention and its mechanisms. This also detracts from the EU's self-proclaimed status as a global leader³ on environmental governance and the rule of law. It also raises issues with the Treaty obligations to comply with the EU's international law obligations, as well as environmental and policy consistency obligations under Art 7 and 11 TFEU. It is inconsistent with the commitment to implement Aarhus rights in the [8th Environmental Action Plan](#). It is urgent that this be resolved. The current progress that has been made since the findings handed down in 2021 by the Compliance Committee, and since the Action Plan was filed in 2022, while representing welcome engagement with the Convention's mechanisms, does not represent a response that meets the seriousness of the issues here. The process has to date been unduly protracted, despite the requirements for complying with the Convention in this matter being clear and obvious.

The protracted history and background of this issue are well known to the Committee and the Secretariat. However, in order to underscore the depth and scale of the delay in addressing this matter, it is important to briefly outline the key events in the procedural history behind NGO

³ Section 3 "The EU as Global Leader", the [EU Green Deal](#).

communications on the Aarhus Regulation, which date back to its earliest days and with a major complaint being brought before the Aarhus Convention Compliance Committee in 2008.

As is well established, the EU applies the provisions of the Aarhus Convention to its own institutions and bodies via the Aarhus Regulation, which in particular implements the access to justice provisions of Article 9(3) of the Convention. It does this by creating a right for NGOs (and more recently in the revised regulation) individuals to request internal review of the administrative decisions of EU institutions and bodies for compliance with environmental law. The creation of a mechanism by which an NGO or individual can have a decision addressed to them, grants them standing to challenge that decision before the CJEU directly, which is generally a way around the historically restrictive standing rules of the CJEU for individuals and NGOs when it came to environmental review.

The original strict drafting of the Aarhus Regulation led to a successful complaint against the EU before the ACCC in ACCC/C/2008/32 (EU) (Parts I & II), which found the regime was excessively restrictive in terms of the range of decisions that were challengeable and the failure to provide standing for individuals. In particular, the ACCC stated in paragraph 101 of its findings on communication [ACCC/C/2008/32 \(Part II\)](#): '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.'

This finding was adopted by the ACCC on the 17/03/2017 and it was therefore already clear in early course that the position of excluding categories of decisions such as State Aid on a categorical basis rather than on an individual case by case basis was not compatible with the requirements of Article 9(3) of the Convention.

Findings adopted in 2021 in a separate Communication dealt specifically with State Aid decision making under the Aarhus Regulation. Communication ACCC/C/2015/128 EU which resulted in a [finding](#) that Art 2(2)(a) of the Aarhus Regulation which excluded State Aid decision-making from the remit of the review mechanism in the Aarhus Regulation was a breach of Art 9(3) the Aarhus Convention, and that (following logically from the findings in C32 that decisions could not be excluded on a categorical basis where they had the potential to breach environmental law) State Aid decision should be the subject of environmental review.

The delay in dealing with this matter lies not just in fulfilling the Political Commitment made on 12th July 2021 during finalization of the Aarhus Regulation Revision, or the findings and recommendations of the ACCC in the recent ACCC/M/2021/4 (EU) review process following up from the MoP request in October 2021, but extend to a longstanding breach of the Convention's requirements dating back to 2005, on EU's access to the Convention. This represents a denial of the public's rights that has been outstanding for approaches eighteen years, during which important decisions made by the EU Commission on whether States subsidize or otherwise benefit extremely large-scale energy and infrastructure projects have gone without proper review.

The area of State Aid is extremely influential in terms of its potential for impact on climate action (positive and negative). The failure to vindicate the Art 9(3) & (4) rights of the public has prevented the concerned public from calling for accountability on climate action in a manner that may have been timely and prevented the serious climate harms that have accrued as a result of high emissions from developed countries including the EU Member States. For example, high levels of fossil fuel subsidy that have been allowed to persist for all that time and recently doubled between 2021 and

2022 according to an EU Commission report on Fossil Fuel Subsidies⁴. Proposals subject to this process include benefits to projects like nuclear power plants (the issue in C128 involved State Aid to the Hinkley Point C Power Plant by the UK), which NGOs and individuals have been unable to exercise appropriate oversight over these administrative decisions with enormous environmental implications.

While the EU Commission are tasked with having regard to the environment in their decision making, this is not the only consideration at play, and they must also balance many other competing demands that may be levied on them with greater force than environmental concerns. In this matter only the public including the NGO community are motivated to speak without conflict for the environment in which they live and their right to a clean and healthy environment.

⁴ COM (2023) 651 final