Secretary to the Aarhus Convention Compliance Committee
United Nations Economic Commission for Europe, Environment Division
Palais des Nations CH-1211 Geneva 10, Switzerland

20.02.2024

Procedure: **PRE/ACCC/C/2024/207 European Union**

Written statement by the Communicant regarding the determination of preliminary admissibility

Dear Chair,

Please find below the following written statement relative to the session on the preliminary admissibility of communication PRE/ACCC/C/2024/207 European Union held on Tuesday, 20 February, at the Compliance Committee's 82nd meeting (Geneva online, 20-23 February):

Montescola wishes to express its gratitude to the Chair, members of the Committee and Secretariat for facilitating this procedure. We also acknowledge the curators detailed introduction to the case, which makes it unnecessary for us to provide additional details. However, Montescola does wish to address the Party's statement which it considers misleading for a number of reasons.

The European's Commission claims that the use of the European Ombudsman is not a valid mean of redress. However, in its 02/06/2022 Decision (Annex 4, Communication) to Montescola's appeal (confirmatory application), page 10, the Commission stated:

> *6. MEANS OF REDRESS*
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> *Finally, I draw your attention to the means of redress available against this decision.* ***You may either bring proceedings before the General Court or file a complaint with the European Ombudsman*** *under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.*

The Party clearly indicated that both the General Court and the European Ombudsman were valid means of redress, and that **either one or the other** should be used. While Montescola had not been informed at the time that the Commission could decide to ignore the proposed solutions and decisions of the European Ombudsman, it opted to use this mean of redress given the simplicity and apparent expediency of the procedure.

The **either/or** statement should be understood on the basis of Article 263 of the Treaty on the Functioning of the European Union, that establishes that proceedings before the General Court of the EU "*shall be instituted* ***within two months*** *of the publication of the measure*". In this case, the final Decision by the European Ombudsman was issued on 17/04/2023, **584 days after the initial application**, 526 days after the confirmatory application was made and 319 days after the European Commission issued a decision regarding the confirmatory application.

By the time the Ombudsman's decision had been issued**, the two-month time limit provided to bring claims to court under article 263 TFEU had long lapsed (by 258 days),** meaning that Montescola's claims under that provision would be time-barred. Therefore, no other domestic remedy existed by the time the European Ombudsman issued its final decision in the procedure. Therefore, it must be admitted that Montescola used one of the two available means of redress indicated by the Party in its 02/06/2022 Decision, and that by the time that the redress had ended no other means of redress existed.

Even if this was not the case (i.e., that an appeal to the General Court was still possible), the ACCC has determined in a similar case (ACCC/C/2013/96, paragraph 92) that "*it would be unreasonable to expect an applicant to then bring a case to court in circumstances in which the case had already taken such a prolonged period of time*." In fact, in that case the ACCC **found a communication admissible after the use of confirmatory applications and complaints to the European Ombudsman, even if a claim was not made before the General Court**.

Regarding the possibility of requesting legal aid to present a claim at the General Court, while this is theoretically possible, case ACCC/C/2013/96 showed this is seldom granted and by no means provides for exemption if the unsuccessful party is to be ordered to pay the costs. Given recent rulings by the Court on similar matters (i.e., Case C-57/16 P, ClientEarth, supported by the Republic of Finland and the Kingdom of Sweden, v. European Commission) this was not an unlikely outcome. Legal costs at the Court can be exorbitant. In a recent case regarding a freedom of information request to one of the Commission's agencies (Case T-31/118, Luisa lzuzquiza and Arne Semsrott v. European Border and Coast Guard Agency), the Agency demanded costs of 23,700 euros[1] (the amount was later reduced to 10,000 euros).[2] Montescola is a small local NGO that would be forced to dissolve itself if such costs were imposed. In addition, the complexity of a General Court case in Luxembourg exceeds the management capacities of a local NGO, which cannot possibly be expected to initiate actions at the General Court each time the Commission fails to meet its obligations in terms of environmental information.

Finally, we wish to point out that the Ombudsman's decision reveals that lack of compliance by the Commission with the Aarhus Convention is a matter of general concern, and is not limited to isolated cases such as the one addressed in this Communication. This is particularly problematic given the Commission's role as "guardian of the treaties" while evidencing its own failure to respect and uphold its own obligations pursuant to treaties as the Aarhus Convention.

Because such disregard of the Aarhus Convention, it is hereby requested that the ACCC decides to admit this Communication and address the failures of compliance of the EU.

Yours sincerely,

Xoán Evans Pin, Director
Fundação Montescola

[1] https://fragdenstaat.de/dokumente/3834-frontex-rechnung/
[2] https://www.access-info.org/2021-04-19/eu-court-legal-costs-frontex-activists/