

**Open statement by the Aarhus Convention Compliance Committee
regarding its findings on communication ACCC/C/2008/32 (part II)
concerning compliance by the European Union**

The Committee has seen the European Commission's proposal of 29 June 2017 for a Council decision concerning the findings on communication ACCC/C/2008/32 (Part II).

At the express invitation of the Council of the European Union, two members of the Compliance Committee and a representative of the secretariat attended the session of the Council Working Party on International Environmental Issues held on 22 March 2017. The purpose of the meeting was to answer any questions that Council Members may have concerning the content and implications of the Committee's findings on communication ACCC/C/2008/32 (Part II).¹

In keeping with the spirit of the exchange between representatives of the Committee and Council members on 22 March and in order to clarify any misunderstandings, the Committee considers it appropriate to reiterate and clarify certain points it made during that meeting.

The Explanatory Memorandum (EM) to the Commission's proposal asserts that:

“The Union secondary legislator may not amend the rules provided for in Article 263(4) TFEU and has to respect the case-law developed by the Union judicature which determines the correct interpretation of the Treaty.”

On this point, the Committee does not suggest amendment of Article 263(4) or any other provision of the TFEU. Thus, the Committee's recommendations do not call, either expressly or implicitly, for the Treaty to be amended.² It is surprising that the Commission suggests this, since, in fact, the Committee members emphasised several times at the meeting on 22 March 2017 that the Committee did not recommend or require Treaty change.

The EM also asserts that “the Committee findings challenge constitutional principles of EU law that are so fundamental that it is legally impossible for the EU to follow and comply with the findings”. First, as is clear from the conclusion of the Committee's findings attached hereto, the Committee's findings do not challenge constitutional principles of EU law at all; rather, the findings address specific provisions of EU secondary law and jurisprudence on standing. Furthermore, under international law, a Party's constitutional order is no excuse for failure to perform its obligations under a treaty. This is clearly set out in Article 27 of the Vienna Convention on the Law of Treaties:

“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. ...”

This rule of international law has been considered by the Committee in other findings:

“[R]eview of the Parties' compliance with the Convention is an exercise governed by international law. As a matter of general international law of treaties... a State may not invoke its internal law as justification for failure to perform a treaty. This includes internal divisions of powers ... between the legislative, executive and judicial branches of government. Accordingly, the internal division of powers is no excuse for not complying with international law.”³

¹ See http://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-57/ece.mp.pp.c.1.2017.7_for_web.pdf

² For ease of reference, the complete text of the Committee's finding and recommendations are annexed to this statement.

³ ECE/MP.PP/C.1/2006/4/Add.2, para. 41.

In this context, the Committee stresses that it treats all Parties equally and does not grant special status to the constitutional principles of regional economic integration organisations.

The Commission asserts that the Committee did not have regard to the EU's Declaration upon accession.⁴ On the contrary, it has been duly considered and taken into account by the Committee in its findings on all communications in which it was legally relevant (in addition to Part I of the present case, see also the recently adopted findings on communications ACCC/C/2014/101 and ACCC/C/2014/123). The extent of a regional economic integration organisation's obligations under the Convention is a matter of international law, and as such falls within the mandate of the Compliance Committee.

As regards the Commission's assertion regarding preliminary rulings,⁵ in 2011 the Committee already found in Part I of its findings on ACCC/C/2008/32, that:

“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, [...] 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”⁶

Finally, the Commission complains about not having had the opportunity for a second hearing. On this point, the Committee's modus operandi does not envisage multiple hearings and no other Party has ever made such a request. Moreover, as is evident from the text of the findings, the Committee had all the information necessary and carefully took into account the comments received from the Party concerned on the draft findings. The Committee made a number of amendments to its findings to address those comments. Having fully taken into account the EU's comments, the Committee decided no second hearing was required.

The Committee's recommendations are made as non-exhaustive alternatives – the EU is entirely free to decide whether to implement the recommendations via CJEU case-law⁷ or by amending the Aarhus Regulation,⁸ or by taking any other measures it considers appropriate.⁹ They do not either explicitly or implicitly require an amendment to the Treaty.

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⁴ EM, p. 4.

⁵ EM, pp. 4 and 5.

⁶ ECE/MP.PP/C.1/2011/4/Add.1, para. 90.

⁷ Para. 123 (c).

⁸ Para. 123 (b).

⁹ Para. 123 (a).

“IV. Committee’s conclusions and recommendations

A. Main findings with regard to non-compliance

121. The Committee recalls part I of its findings on the communication, namely that if the jurisprudence of the European Union courts on access to justice were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraphs 3 and 4, of the Convention.¹⁰ Having considered the main jurisprudence of the European Union courts since part I, the Committee finds there has been no new direction in the jurisprudence of the European Union courts that will ensure compliance with the Convention and that the Aarhus Regulation does not correct or compensate for the failings in the jurisprudence (paras. 79 and 120 above).

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.

B. Recommendations

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.

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

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

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

¹⁰ Part I, para. 94.