

To: Environment Ministers of EU Member States

Brussels, 4 July 2017

Dear Minister,

Open Letter: Addressing the EU's non-compliance with the Aarhus Convention

We are writing to seek your support in a matter of the utmost importance that could have far-reaching implications for the credibility of the EU as a promoter of democratic norms and the rule of law.

On 17 March 2017, the Aarhus Convention Compliance Committee concluded a long-running investigation of a complaint against the European Union with the [finding](#) that the EU was in non-compliance with Convention due to the lack of effective access to justice at the level of the EU institutions.

On 29 June, in an extraordinary move, the European Commission adopted a [proposal for a Council Decision](#) whereby the EU would reject the Committee's findings when they are presented for endorsement at the sixth session of the Meeting of the Parties (Montenegro, 11-14 September 2017).

The significance of this proposal is enormous. Since the establishment of the compliance mechanism in 2002, the findings of the Committee have always been endorsed by the MoP, with the support of the EU and its Member States. For the EU to abuse its voting power to secure a rejection of the Committee's findings of non-compliance in the one case where the EU is the subject of those findings would set a dangerous precedent and send a stark message to its citizens, other non-EU Parties to the Convention and the rest of the world that the EU considers itself above the rule of law.

This proposal, if it were to be accepted by the EU Member States, would have devastating consequences. It would seriously weaken the status of the Convention's exemplary compliance mechanism, emboldening other countries in the wider region with poor human rights records to challenge the findings of the Committee when they are found in non-compliance. It would thereby severely weaken the implementation of the Convention itself, setting back almost two decades of progress in promoting environmental democracy throughout the continent of Europe and Central Asia. And it would destroy the EU's credibility as a bloc that claims leadership in relation to democratic accountability and respect for the rule of law. Furthermore, within the EU it would foster Eurosceptic sentiments by making a clear statement that the EU institutions do not need to provide the same levels of access to justice, and therefore public accountability, as EU Member States are required to and reinforcing the image of the European Commission as an unelected, unaccountable bureaucracy.

The legal argumentation in the Commission proposal is so weak as to be an embarrassment. The Compliance Committee itself, in a clarifying note issued on 30 June (attached), has refuted several of the

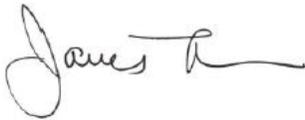
Commission's key arguments, having to explain in one place some basic principles of how international treaty law works. But the Commission's argumentation is not just weak: it is highly misleading, even to the point of verging on dishonesty. Behind the argumentation and spin, it is clear that what is at issue here is a bureaucratic institution putting its own interests above the interests of the European public it is supposed to represent, in a shameless attempt to resist public accountability. We expand on these points in the enclosed annex.

In summary, it is crucial that EU Member States reject the Commission's proposal, support endorsement of the Committee's findings and commit to amending the relevant EU legislation without delay to bring it in line with the Convention.

We take this opportunity to draw your attention to the fact that the coordinators of the different political parties within the Environment Committee of the European Parliament have called upon the European Commission to support the endorsement of the findings at the MoP and to ensure compliance by the EU with the access to justice provisions of the Aarhus Convention (letter attached).

We hope that you will take the above concerns into account and stand ready to provide any further information as necessary.

Yours sincerely,



James Thornton
CEO, ClientEarth



Jeremy Wates
Secretary General
European Environmental Bureau



Siim Vahtrus
Chairman
Justice and Environment

Annex

Key considerations concerning the Commission proposal to reject the Aarhus Compliance Committee's finding of EU non-compliance

The claim of a 'special legal order' and constitutional principles of EU law

The European Commission's proposal argues that it is legally impossible for the EU to follow and comply with the findings. The Commission invokes the institutional specificities and the autonomy of the EU legal order to conclude that "it has no option except that of casting a negative vote on the endorsement of these findings". This argument must be rejected outright. There are no legal obstacles to the implementation of the findings. First, the findings do not challenge any constitutional principles of EU law. Second, as pointed out by the Compliance Committee, the Vienna Convention on the Law of Treaties (Article 27) very clearly prevents parties to an international convention to use their national laws as an excuse not to perform their obligations under a treaty to which they are party. The principle applies at EU level as well with regard to the implementation of EU Directives. The European Commission does not hesitate to reject similar lines of argumentation from national governments when it comes to the EU Directives implementation. The European Commission has not addressed this point of law either in their written statements or orally when being asked during a meeting between the NGOs and the EU Member States and Commission on the occasion of the meeting of the Council Working Party on International Environmental Issues (WPIEI) on 3 July. Yet, it is central to this case. The declaration the EU made upon signature and approval of the Aarhus Convention in which are mentioned "the institutional and legal context of the Community" has no bearing on obligations of the EU under international law. This declaration, as recognised by the European Commission, is not a reservation and is drafted in such a general manner that is not relevant in this case. The point made in the declaration is true for all States parties to the Convention; it is applied within the institutional and legal context of each State.

The Commission is purely and simply asking to be exempted from certain provisions of the Aarhus Convention. However, by ratifying the Convention, these provisions have become legally binding upon all EU institutions (Article 216(2) TFEU) and the EU legal order's specificities do not justify any different treatment than the one applicable to national legal orders.

No need to amend the EU Treaties

The Commission has repeatedly claimed or implied that the endorsement of the Committee's findings would require the EU to amend the EU Treaties. This is not true, and seems to be a ploy to build up opposition to the findings among EU Member States. In relation to the part of the findings on the interpretation of the Court of Justice of the EU (CJEU) of the Treaty (the Plaumann test), the European Commission's proposal is missing the point. There is no doubt that the principles of separation of powers and of institutional balance need to be upheld and applied. The European Commission and the Member States are therefore not required to take any action in relation to the Court's case-law. However, the findings are also addressed to the EU Courts. The Courts are like any other institutions subject to

international law and consequently to the Aarhus Convention. It will therefore be to the Courts themselves to make their jurisprudence evolve in light of the Aarhus Convention.

Additionally, compliance with the findings would be largely if not fully achieved by revising Regulation 1367/2006 on the implementation of the Aarhus Convention (the so-called Aarhus Regulation), an initiative that falls under the competence of the European Commission, given that the main obstacle to access to justice is the individual scope criteria applied to administrative acts. There is no justification to limit the categories of acts that should be subject to the courts' scrutiny to these. Article 9(3) of the Aarhus Convention provides that "acts and omissions" should be challengeable.

Access via national courts

The Commission's proposal insists on the fact that access to justice is provided through Article 267 TFEU which provides for the system of referral for preliminary rulings before the CJEU. The Compliance Committee has carefully assessed that argument already in its findings for Part I of this case, and again with respect to Part II, recognising that the possibility to request a preliminary ruling was a significant element for ensuring consistent application and proper implementation of EU law in its Member States but that it did not meet the requirements of access to justice in Article 9 of the Convention. The European Commission makes the possibility to refer a question to the CJEU sound easy and accessible to all in every Member States. However, this is far from being the case. As recognised by the Commission itself in the [roadmap on access to justice](#) and in the recently adopted [Communication providing interpretative guidance on access to justice](#) addressed to the Member States, there are still many obstacles to access to justice in several Member States with regard to legal standing of NGOs, costs and scope of judicial review. In some States, asking national courts to refer a question to the CJEU will therefore simply not be possible. Another hurdle is that there is no obligation for lower courts to refer a question; it is only obligatory for last resort courts. It is therefore a very lengthy and costly route. Moreover, some of the courts refuse to refer questions even when the relevant conditions are fulfilled. When the court does refer a question, the applicants are not involved in the proceeding, the questions are decided and asked by the court, there is no hearing before the CJEU and no assessment of the facts of the case at hand. The whole process is therefore very remote from access to courts for the purpose of Article 9(3) of the Aarhus Convention and not in any way comparable with direct access to the CJEU.

Double standards: national authorities' versus EU institutions' obligations

Member States should have good reason to be critical of the Commission's proposal because of the double standards applied by the EU institutions in this area. The Member States are required by the Commission and the CJEU to strive and adopt the necessary measures to implement and comply with the access to justice provisions of the Aarhus Convention. Only two months ago, the Commission issued [interpretative guidance](#) to the Member States on how to implement the access to justice provisions of the Convention within their own jurisdictions, and the Court of Justice of the EU has similarly in the past few years handed down rulings obliging Member States to provide effective access to justice in their jurisdictions – yet these same institutions have resisted similar levels of access to justice in relation to

themselves. These double standards are neither justified legally nor politically. The EU is bound by the Convention in the same way as the Member States.

Risk of a flood of litigation

The Commission proposal warns that to broaden the scope of the access to justice right as envisaged by the Committee would (not 'could') open the judicial review mechanism to 'an enormous pool of potential litigants': Leaving aside the fact that this claim has no relevance to the question of legal compliance and seems to have been included purely for scaremongering purposes, the Commission does not provide any evidence to support this claim and in fact the available evidence points in precisely the opposite direction. The Commission's own Impact Assessment carried out in connection with the Interpretative Communication on Access to Justice in Environmental Matters states that:

".. the studies and evidence collected by DG ENV shows, **each time a Member State opened standing possibilities, there was no significant increase in environmental court cases** (this was clearly stated by national judges during the consultation process. In particular, environmental cases are only a fraction of all administrative cases; the German experience following the *Trianel* Judgment ... also indicates no dramatic change in the courts workload following the opening of standing rules)."¹ [the emphasis in bold is in the Impact Assessment text]

Prima facie, there is no reason to believe that this should be different at EU level in particular since the number of judges at the General Court has doubled last year. A further indication of the extent to which the Commission's claim is exaggerated is provided by the relatively modest numbers of cases actually taken by NGOs even before it was known that the EU institutions would fail to meet their obligations under the Convention. Moreover, even supposing that there were a remote possibility of a significant increase in litigation, which we dispute, there exist potential mechanisms for dealing with or concentrating cases.

The widening of the standing rules by the Lisbon Treaty

The Commission's proposal argues that the Lisbon Treaty has widened the rules on standing in actions for annulment brought by private parties. However, that is a completely misleading statement. The General Court has ruled in a case brought by the NGO Pesticide Action Network that environmental NGOs were not directly concerned for the purpose of Article 263(4) last limb TFEU.² Therefore, it is very clear that the widening of the rules does not benefit NGOs or citizens. It benefits businesses to defend their financial and economic interests, which is a legitimate right that we are not challenging. But the imbalance in representation of economic and financial interests on the one hand and public interests such as environmental protection and public health on the other needs to be addressed. No other entities than environmental NGOs are as well-placed to represent the environment before the Courts. They need to be given the necessary legal tools to do so otherwise these public interests will simply remain unrepresented before the EU courts.

¹ Commission staff working document, Impact Assessment on a Commission Initiative on Access to Justice in Environmental Matters, 28.6.2017, SWD(2017) 255 final, page 45.

² Case T-600/15, Pesticide Action Network Europe (PAN Europe) and Others v European Commission.

'Law relating to the environment' versus 'environment law'

The Commission claims that the Committee's findings would open up the possibility of litigation in 'areas going beyond the scope of environment' and implies that the Committee's interpretation (that the range of potentially challengeable acts and omissions cover those contravening 'law relating to the environment', as opposed to acts 'under environmental law') is somehow an expansion or radical interpretation. Again, this seems to be pure scaremongering aimed at gaining political support for its position. The Committee is simply relying on the language which is directly used in Article 9(3) of the Convention and refers explicitly to 'law relating to the environment' and nothing in its findings suggests to go beyond that to law that is not relating to the environment. The fact that this is broader than 'under environmental law' has always been the case since the text of the Convention was adopted in 1998. The EU accepted this when it became a Party to the Convention in 2005 and it is more than surprising that the Commission questions this now.

The empirical facts about access to justice at EU level

Aside from legal argumentation about access to justice at EU level, the stark fact remains that since the setting up of the European Community, virtually no citizens or environmental NGOs have succeeded in getting access to challenge decisions of EU institutions except in access to documents cases, mainly due to the limitation of types of measures that may be challenged under the Aarhus Regulation to 'measures of individual scope'. The Commission claims that amending the EU's secondary legislation as suggested by the Committee 'would risk creating a significant imbalance in the system of judicial protection as envisaged by the Treaties'. In reality, what we have now is a significant imbalance, with businesses having access to the Court to protect commercial interests but NGOs not able to protect the environment. Amending the legislation is necessary to redress that imbalance.
