

To: Environment Ministers of the European Union

Brussels, 15 February 2021

Dear Minister,

### **Re: Revision of Aarhus Regulation**

We are writing to follow up on [our letter of 19 November 2020](#) concerning the revision of the [Aarhus Regulation](#) on the application of the Aarhus Convention to EU institutions and bodies. In that letter, we expressed our concern that the [Commission proposal](#) to amend the Regulation would fail to achieve one of its central purposes, namely to end the EU's longstanding non-compliance with the [Aarhus Convention](#). We listed several important respects in which the Commission proposal would need to be strengthened in order to ensure compliance.

Unfortunately, the [general approach](#) adopted at the December Environment Council failed to address these shortcomings in the Commission proposal. However, during the open debate, several Ministers stressed the importance of ensuring compliance with the Convention and the need to be ready to adapt the Council position in the light of advice on the Commission proposal that had been requested by the EU from the Aarhus Convention Compliance Committee (ACCC) on 5 November 2020. The German EU Presidency also separately underlined the importance of the Council being able to fully integrate the ACCC's advice into its preparations for the trilogue.

The ACCC, having consulted on a draft with the concerned parties, issued the final version of its [advice](#) on 12 February 2021. The Committee's advice is categorical and unambiguous: it identifies several major ways in which the Commission proposal, if not significantly revised, would fail to bring the EU into compliance with the Convention. These include the failure to provide for certain individuals to have access to justice, the exclusion of acts that require national implementing measures and the requirement that acts must have legally binding effects, none of which is provided for or permitted under the Convention. While still pending final confirmation expected in March, in separate draft findings the Committee has also deemed the exclusion of decisions on state aid as non-compliant and advised the EU to bear this in mind in the current amendment process.

The implications of this are clear: if the Commission proposal is not substantially revised through the co-decision process to integrate the Committee's advice, the entire exercise of revising the Aarhus Regulation will have failed to achieve one of its principal objectives, namely ensuring EU compliance with the Convention. **It is therefore crucial that the EU's co-decisionmakers respect the Committee's advice and ensure that the revision of the Aarhus Regulation is in line with it.**

At this point, it is worth recalling that the ACCC is an independent committee consisting of 'persons of high moral character and recognized competence in the fields to which the Convention relates' who are directly elected by the Meeting of the Parties (MoP) by consensus. Since the EU became a Party to the Convention in 2005, the EU and its Member States have been part of that consensus. Perhaps for that reason, every single ACCC finding of non-compliance up until the current EU case was endorsed by the MoP, again by consensus. The refusal of the EU to allow the MoP to endorse the finding of non-compliance by the EU at MOP-6 in September 2017 (meaning that the finding was neither endorsed nor rejected) reflected very poorly on the EU, which was seen as behaving like an undemocratic government that only accepts the findings of its own courts as long as they do not find it (the government) to be non-compliant with the law. The EU received no support from any other Party or stakeholder for its position. The scandal created by the EU's behaviour was undoubtedly the lowest point in the entire history of the Convention.

It is of the utmost importance that the EU avoids any repeat of the Montegro controversy when the MoP convenes in October 2021 and reviews the measures the EU has taken to bring about compliance. If the EU challenges the assessment of the Committee, this would be highly damaging to the standing of the Committee and indeed to the Convention itself, undermining the authority of the Convention throughout the wider Europe, including in the eyes of countries in Eastern Europe and Central Asia with varying degrees of commitment to democratic values who up to now have accepted the validity of its findings. It would also cause further damage to credibility of the EU and undermine its efforts to promote the rule of law in the neighbourhood countries.

While it is not the purpose of this letter to go into the various arguments used to defend the EU's non-compliance, one deserves particular mention. At the heart of the Commission's comments of 1 February 2021 on the ACCC's advice is the flawed argument that the EU's unique legal order justifies non-compliance with certain provisions of the Convention - a sort of EU exceptionalism. There are two observations to be made about this.

First, this argument seems to have deliberately confused the distinct and clear obligations that fall on the EU and the Member States as Parties to the Convention. This propagates a misunderstanding that improving access to justice at EU level would somehow be burdensome to the Member States, when the exact opposite is true. The logic of the Aarhus Regulation and the ACCC's advice is to ensure that unlawful EU administrative acts can be reviewed directly at EU level.

Second, Article 27 of the Vienna Convention on the Law of Treaties is clear that a party to a treaty may not invoke the provisions of its internal law as justification for its failure to comply with the treaty. Thus, the interpretation of the Commission that the EU institutions are not subject to the Aarhus Convention in the same way as State parties cannot be accepted. In fact, the Compliance Committee's advice and recommendations in relation to the Commission's legislative proposal are fully in line with the EU Treaties and the case law of the Court of Justice. The advice also firmly rebuts suggestions by the Commission in its comments on the draft findings that following the ACCC's advice would require the EU to further centralise its decision-making or to establish a separate regime for access to justice in environmental matters.

While we would have wanted to see the EU in compliance before MoP-7 in October, what is even more important is that the outcome leaves no doubt as to the EU's compliance with the Convention. The MoP-7 deadline should not be used as an excuse for a rushed and inadequate revision of the Regulation that fails to bring the EU into compliance.

The Council should now revise its general approach under the Portuguese EU Presidency to reflect the ACCC advice. In the process of doing so, it should apply the Aarhus principles by publishing any legal advice provided by the Council Legal Services and facilitating a dialogue between Member States and environmental NGOs, as has happened on many occasions in the past on the margins of Council Working Party meetings in relation to Aarhus matters.

Yours sincerely,



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Secretary General  
European Environmental Bureau



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Anais Berthier  
Head of EU Affairs  
ClientEarth



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Zeljka Gracin  
Chairwoman  
Justice & Environment