

To: Attachés of the Working Party on the Environment and the Working Party on International Environment Issues

Brussels, 7 September 2021

**Re: position to be taken by the EU at Aarhus Convention MoP-7 regarding compliance with the Convention.**

Dear Sir/Madam,

We are writing in connection with the [Commission's proposal](#) on the position to be taken on behalf of the European Union at the seventh session of the Meeting of the Parties (MoP-7) to the Aarhus Convention regarding compliance cases ACCC/C/2008/32 and ACCC/C/2015/128.

We welcome the positive steps towards EU compliance with the Aarhus Convention taken by the EU institutions in the revision of the Aarhus Regulation, but we have great concerns regarding the approach the Commission proposes to take at the MoP-7 and urge you not to accept the proposal in its current form.

#### **Case C-128**

The Aarhus Regulation revision did not address the findings of the Aarhus Convention Compliance Committee in case C-128 regarding access to justice in relation to state-aid decisions taken by the Commission, even though it would have been an obvious opportunity to do so. The Commission is now proposing that the MoP should not endorse the C-128 findings; rather, it should merely acknowledge them and postpone the endorsement to MoP-8 in four years' time.

The significance of this is huge. Endorsement of Compliance Committee findings makes them binding (see recital 14 of the Commission's proposal), whereas simple acknowledgment has no basis in international practice and undermines the work of the Committee. **With the sole exception of the C-32 findings, every finding of non-compliance since the Compliance Committee was established in 2002 has been endorsed by the Meeting of the Parties by consensus and therefore with the support of the EU and its Member States.** There is a good reason why this should be so: the MoP established the Compliance Committee, by consensus, for the express purpose of reviewing compliance by Parties with the obligations under the Convention. The MoP has elected the members of the Compliance Committee, being *'persons of high moral character and recognised competence in the fields to which the Convention relates'*, again always by consensus, including the active support of the EU.

When the EU blocked the endorsement of the C-32 findings at the MoP-6 in 2017, it led to the worst crisis under the Convention since its adoption in 1998 and caused considerable damage to the EU's credibility and reputation as well as to the function of the compliance mechanism under the Aarhus Convention. The EU showed it was willing to recklessly jeopardise not only the compliance mechanism but the Convention itself in its efforts to prevent greater public accountability of the EU institutions. The Commission's new proposal implies that it has learned nothing from this. If it is not amended by the Council, it will send a message to the world that the EU believes that there is one rule for the EU and another for all other Parties.

We, therefore, believe that the Commission's proposal:

- **Disregards international rule of law.**
  - The EU is a party to the Aarhus Convention and has to respect its obligations, independent of any provisions of its internal legal system. The specificity of state-aid decisions does not justify non-compliance.
  - By proposing to postpone the decision of endorsing the findings in case C-128 the EU is repeating its mistakes during the MoP-6 where it derailed the endorsement of the C-32 findings. At a time where the EU is struggling with internal rule of law challenges, disregarding the same principle in an international convention is unacceptable.

- **Damages the EU’s reputation.**
  - A statement ensuring the EU’s commitment to international obligations (Art. 2 of the Draft Decision) becomes weak if attached to procedural tricks and delaying tactics. By refusing to acknowledge its own shortcomings now, the EU is risking its reputation as a leader in international environmental fora.
  - It is established practice to endorse the findings and the Compliance Committee then aids as a facilitative body to assist Party’s in meaningful follow-up over time. The EU’s commitments, made during the trilogues of the Aarhus Regulation, to assess and propose actions to comply with case C-128 can be supported in this way, rather than risking the EU’s credibility by blocking endorsement of the findings.
- **Sets a terrible example.**
  - Legal findings should not be treated as if they were political statements. Through postponing the endorsement of the findings in case C-128, the EU would legitimise similar and worse conduct from other Parties to the Convention. The Compliance Committee’s findings in C-128 are final and will not change by MoP-8, but their endorsement now is crucial to Parties’ respect of the Compliance Committee and its role under the Convention.

### Case C-32

The Commission’s proposed two conditionalities (Art. 1 of the Draft Decision) to endorsement of the findings in Case C-32 undermine the success the co-legislators achieved in the revision of the Aarhus Regulation.

Firstly, the draft decision [VII/8f on EU compliance tabled by the Aarhus Convention Bureau](#) already clarifies that, if the Aarhus Regulation amendment enters into force, the EU will have addressed the C32 findings (see para. 6 of the Bureau’s draft). Secondly, the draft decision is silent on the topic of the EU legal order and its system of preliminary rulings. It would therefore appear that the two “preconditions” of the EU for endorsement are already addressed by the Bureau’s draft decision. **The conditions are therefore redundant and should be removed.**

Moreover, the Meeting of the Parties decisions on compliance follow an established format reproducing the Compliance Committee’s wording. An act of highlighting specific aspects of a single Party’s internal system has **never** formed part of the operational element of a draft decision. To do so in this case would set a dangerous precedent as other Parties would wish to add caveats and conditions to their decisions.

We are concerned that the Commission’s proposal neither reflects the best interest of the Union, nor the best interest of the Aarhus Convention. We ask you to revise the draft decision so that the EU and Member States endorse all the findings of the Compliance Committee. We are happy to provide further details of our concerns and potential concrete solutions upon request.

Sincerely,



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EEB



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