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Proposal for a

COUNCIL DECISION

**on the position to be adopted, on behalf of the European Union, at the sixth session of
the Meeting of the Parties to the Aarhus Convention regarding compliance case
ACCC/C/2008/32**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

(1) Introduction

In 1998, the European Union (EU) signed the Aarhus Convention. It was back then and still is of considerable importance for the EU and its Member States as well as for countries in Eastern Europe and for post-Soviet States which are parties to the Convention. The main aim of the Convention is to allow the public to become more involved in environmental matters and to actively contribute to improved preservation and protection of the environment.

The Aarhus Convention is the direct reason for the adoption of the Aarhus Regulation whilst previous EU rules on access to documents helped shape the Convention. The Aarhus Convention and the EU have therefore mutually reinforced and developed each other over the years.

The findings of the Compliance Committee case (ACCC/C/2008/32) are problematic for the EU because the findings do not recognise the EU's special legal order.

The EU continues to support the important objectives of the Aarhus Convention.

(2) The Aarhus Convention

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention")¹ is a multilateral environmental agreement under the aegis of the United Nations Economic Commission for Europe (UNECE).

It guarantees the public rights on access to information, public participation in decision-making and access to justice in environmental matters. These are essential tools which contribute to strengthen effective environmental protection policies.

The Aarhus Convention entered into force in 2001 and has currently 47 Parties, including the EU and its Member States. The European Community approved it on 17 February 2005.²

The EU made a Declaration upon signature and upon approval of the Aarhus Convention ("the EU Declaration") in which it notified the Aarhus bodies about the "*institutional and legal context of the Community*" and the repartition of tasks with its Member States in the areas covered by the Convention.³

The obligations of the Convention have been implemented, with regard to the EU institutions and bodies, notably by Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies ("the Aarhus Regulation").⁴

(3) Background of the case

¹ As published on the UNECE website, see <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

² Council Decision 2005/370/EC, OJ L 124 of 17.5.2005, p. 1.

³ The EU Declaration is published on the UNECE website under the heading "Declarations and Reservations", see https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=en

⁴ OJ L 264 of 25.9.2006, p. 13.

The Aarhus Convention Compliance Committee ("the Committee") reviews the Parties' compliance under the Convention. On 17 March 2017, it issued findings in the case ACCC/C/2008/32, brought by the non-governmental organisation (NGO) *ClientEarth*, regarding access to justice at EU level.⁵ The Committee held that the Treaty rules on access to justice before the EU Courts, as interpreted by them, and the criteria for access to administrative review under the Aarhus Regulation are in breach of the Convention.

(4) Legal context

The Committee found a breach of Article 9(3) and (4) of the Aarhus Convention. Paragraph 3 foresees that *"each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment"*. Paragraph 4 requires those procedures to be *"adequate and effective [...] fair, equitable, timely and not prohibitively expensive"*.

2. THE PROBLEM AT STAKE

(1) The findings of the Committee

According to the Committee, neither the case-law of the Court of Justice of the European Union (CJEU) which interprets the terms of the Treaty for access of private persons to the EU Courts within the meaning of Article 263(4) of the Treaty on the Functioning of the European Union (TFEU), nor the Aarhus Regulation which provides for administrative review of environmental acts by the Commission give NGOs and members of the public sufficient access to review procedures.

The Committee considered that Article 263(4) TFEU on actions for annulment by private persons, as interpreted by the CJEU, is too narrow insofar as it is limited to regulatory acts of direct concern to the person that do not entail implementing measures.⁶

The Committee added that the Aarhus Regulation cannot compensate for these shortcomings as it equally breaches the Convention on the following points:

- the Aarhus review mechanism should be opened up beyond NGOs to members of the public;
- review should encompass general acts and not only acts of individual scope;
- every administrative act that is simply "relating" to the environment should be challengeable, not only acts "under" environmental law;
- acts that do not have legally binding and external effects should also be open to review.⁷

The Committee also considered that there has been no new direction in the jurisprudence of the EU Courts that will ensure compliance with the Convention.⁸

⁵ http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/Findings/C32_EU_Findings_as_adopted_advance_unedited_version.pdf

⁶ See paragraphs 60-84 of the findings.

⁷ See paragraphs 85-121 of the findings.

⁸ See paragraphs 122-123 and 81-83 of the findings.

Finally, the Committee recommended that the jurisprudence of the CJEU should take full account of the Convention or, in the alternative, that the EU should amend the Aarhus Regulation or adopt new legislation.⁹

(2) The Commission's position on the findings

As recalled above, the Aarhus Convention bodies have been made aware in the EU Declaration of the peculiarities of the legal order of the Union.

However, the EU Declaration was not at all taken into account in the findings.

The specific nature of the system of judicial review is indeed carefully drafted in the EU Treaties, so that every Union citizen has access to justice. Access to judicial review of EU measures is not limited to direct actions to be lodged before the EU Courts but can occur also before a national court, which can – and in some circumstances must - raise a question of legality before the CJEU, which can declare the EU act or measure invalid.

In particular, with respect to actions brought before the EU Courts by natural or legal persons against EU measures adopted under environmental law, Article 263(4) TFEU provides that they may "[...] institute proceedings against an act addressed to that person or which is of direct and individual concern to them and against a regulatory act which is of direct concern to them and does not entail implementing measures."

The conditions laid down in this provision and its predecessors have been interpreted by the CJEU in its jurisprudence, the landmark case concerning the interpretation of the "individually concerned" test being *Plaumann*¹⁰, in which the CJEU ruled that "*persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed*". The CJEU developed its *Plaumann* case-law over the years and applied and adapted it to particular legal or factual circumstances, irrespective also of the nature of the applicant.¹¹

The Treaty of Lisbon widened the rules on standing in actions for annulment brought by private parties, by adding in paragraph 4 the final limb ("*...* and against a regulatory act which is of direct concern to them and does not entail implementing measures"). Where these conditions apply, there is no need for the applicant to show that he or she is individually concerned by the contested act.

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 judiciary which determines the correct interpretation of the Treaty. Neither can the Aarhus Convention allow for any derogation from Article 263(4) TFEU.¹²

⁹ See paragraphs 124-126 of the findings.

¹⁰ Case 25/62, *Plaumann v Commission*, ECLI:EU:C:1963:17.

¹¹ See, for instance, Case C-456/13 P, *T & L Sugars Ltd and Sidul Acúcares v Commission*, ECLI:EU:C:2015:284, paragraph 63; Case C-583/11 P, *Inuit Tapiriit Kanatami a.o. v Parliament and Council*, ECLI:EU:C:2013:625, paragraph 72; and C-274/12 P, *Telefónica v Commission*, ECLI:EU:C:2013:852, paragraph 46.

¹² See e.g. Case T-600/15, *PAN Europe a.o. v European Commission*, where the General Court held that "*the international agreements concluded by the European Union, including the Aarhus Convention, do not have primacy over EU primary law, with the result that derogation from the fourth paragraph of Article 263 TFEU cannot be accepted on the basis of that agreement.*" (paragraph 56 of the Order; ECLI:EU:T:2016:601).

Besides widening the direct access to EU Courts under Article 263(4) TFEU, the Treaty of Lisbon gave particular relevance to the role of national courts in Article 19(1) TFEU, second sentence, according to which "*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*". In this vein, the system of preliminary rulings by the CJEU is the keystone of the EU legal order, as indicated by the CJEU in its Opinion 2/13 on the Accession of the European Union to the European Convention for Human Rights.¹³

This is particularly relevant in EU environmental law, in which, as pointed out by the CJEU in 2015 in two judgments in Grand Chamber on the relevance of the Aarhus Convention in the EU legal order, as EU law now stands, judicial and administrative procedures concerning environmental law fall "*primarily*" within the scope of Member States law.¹⁴

In the Commission's view, the Committee findings neither acknowledge the central role of national courts as ordinary Courts of EU law,¹⁵ nor recognise the system of preliminary rulings under Article 267 TFEU as a valid means of redress.

Contrary to what the Committee held in the findings, the EU legal order offers a complete system of means of redress.¹⁶ Indeed, individuals who do not fulfil the admissibility criteria of Article 263(4) TFEU, even in the broader form of the Treaty of Lisbon, still have effective access to justice and judicial protection of their rights against measures of EU law. They are able, depending on the case, to either address the national courts by asking them to make a reference to the CJEU for a preliminary ruling on validity, as stipulated in Article 267 TFEU, or to indirectly plead the invalidity of acts of general application before the EU courts under Article 277 TFEU.

Concerning administrative review, first, the Committee asked the EU to grant review of acts of general scope in environmental matters. Still, there is no requirement under the Aarhus Convention that these acts have to undergo an administrative review, nor it is clear to which extent such a review can meaningfully take place for this particular category of acts.

Second, Article 9(3) of the Aarhus Convention cannot be construed to request administrative review of non-binding acts without external effects. Measures which have only internal legal effects within the administration and give no rights or obligations to third parties do not constitute decisions adversely affecting any person.

In this regard, it also worth recalling that the Grand Chamber of the Court in 2015 took the view that the Aarhus Regulation, which concerns only EU institutions and only one of the remedies available to individuals for ensuring compliance with EU environmental law, was not intended to implement the obligations which derive from Article 9(3) of the Aarhus Convention with respect to national administrative or judicial procedures, which, as EU law now stands, fall primarily within the scope of Member State law. Given that the Aarhus Regulation was, as a matter of EU law, not intended to implement Article 9(3) of the Aarhus Convention, compliance with that provision can be ensured, within the EU legal order, through other means than by amending the Aarhus Regulation, as however advocated by the Committee in its recommendations.

¹³ See notably paragraph 198 of Opinion 2/13.

¹⁴ Joined Cases C-401/12 P to C-403/12 P, *Council and Commission v Vereniging Milieudefensie aos*, EU:C:2015:4, paragraph 60; Joined Cases C-404/12 P and C-405/12 P, *Council and Commission v Stichting Natuur en Milieu aos*, EU:C:2015:5, paragraph 52.

¹⁵ Opinion 1/09, *Creation of a Unified Patent Litigation System*, EU:C:2011:123, paragraph 80.

¹⁶ See e.g. Case C-50/00 P, *Unión de Pequeños Agricultores v Council*, ECLI:EU:C:2002:462, paragraph 40; or Joined Cases T-236/04 and T-241/04, *EEB aos v Commission*, ECLI:EU:T:2005:426, paragraph 66.

(3) Implications of the findings

The Committee recommended that the Meeting of the Parties adopts directions that the CJEU should follow when interpreting the Aarhus Convention.

However, according to the principle of separation of powers and to the principle of institutional balance, it is not possible to implement the Committee's findings via the CJEU case-law, as the Courts are independent in their judicial function.

As to the Aarhus Regulation, the Committee considered that the criteria on who can ask for review and what can be reviewed (scope *ratione personae* and *ratione materiae*) are too narrow. To extend the scope as requested by the Committee would mean to open the judicial review mechanism – and ultimately access to the CJEU - to an enormous pool of potential litigants, to acts that do not have any legal effects and to areas going beyond the scope of environment.

Indeed, if the Aarhus Regulation were modified to widen the scope of administrative review, this solution would significantly enlarge access to the EU courts, as defined in the TFEU and consolidated in case-law. Measures that are not challengeable under Article 263(4), like for instance decisions addressed to Member States granting them an option for transitional free allocation of greenhouse emissions, would become the subject-matter of an administrative review procedure. In turn, the decision taken in reply to a request for administrative review would be challenged by an action for annulment according to Article 263(4) TFEU, in which an applicant could also raise issues of legality concerning the EU measure contested by a request for administrative review, as the General Court has already held.¹⁷

Similarly, the notion of administrative act having an "*individual scope*" (which is the condition to trigger the administrative review under Article 10 of the Aarhus Regulation) has been interpreted by the General Court so far as being a notion not substantially different from that of a challengeable act under Article 263(4) TFEU.¹⁸ It follows that widening the category of acts amenable to an administrative review would then make them indirectly challengeable under Article 263(4) TFEU.

In substance, through amendments to secondary legislation, the EU Courts would be granted jurisdiction in a whole new category of cases in which the underlying acts made subject to administrative review would not be challengeable under Article 263(4) TFEU. Such amendments would risk creating a significant imbalance in the system of judicial protection as envisaged by the Treaties.

3. FURTHER STEPS IN THE AARHUS PROCEDURE

The Committee's findings will be submitted for endorsement to the sixth session of the Meeting of the Parties to the Aarhus Convention, which will take place 11 to 14 September in Budva, Montenegro, whereby they would gain the status of official interpretation of the Aarhus Convention, therefore binding upon the Contracting Parties and the Convention Bodies.

¹⁷ Case T-177/13, *Test BioTech eV a.o.s v Commission*, EU:T:2016:736, paragraph 56, second sentence.

¹⁸ See e. g. Cases T-19/13, *Frank Bold Society v Commission*, EU:T:2015:520, paragraphs 38 and 44-45; and T-565/14, *European Environmental Bureau v Commission*, EU:T:2015:559, paragraphs 40-49.

The Meeting of the Parties generally decides by consensus. If all efforts to reach consensus have been exhausted, decisions on substantive matters are taken by a three-fourth majority vote of the Parties present and voting.¹⁹

4. CONCLUSIONS

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.

In the course of the compliance procedure, the EU has asked the Committee for a second hearing to further explain the Union's institutional framework. However, the Committee denied this request. There is no means for appeal against the Committee's findings. The sole way open for the EU to fully safeguard its institutional specificities and the autonomy of the EU legal order, it has no option except that of casting a negative vote on the endorsement of these findings in the Meeting of the Parties.

In view of these considerations, the EU should reject the findings in case ACCC/C/2008/32 at the upcoming Meeting of the Parties.

The EU position on this matter does not diminish the EU's commitment to the principles and objectives of the Aarhus Convention.

Contrary to earlier compliance findings, this specific case requires a decision by the Council within the meaning of Article 218(9) TFEU.

¹⁹ Decision I/1 on Rules of procedure (cf. notably Rule 35 on decision-making), see <http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.2.e.pdf>

Proposal for a

COUNCIL DECISION

on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention regarding compliance case ACCC/C/2008/32

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 192(1), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) On 17 February 2005, the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ("the Aarhus Convention")²⁰ was approved, on behalf of the European Community, by Council Decision 2005/370/EC.²¹
- (2) The Union implemented the obligations of the Convention with regard to its institutions and bodies notably by way of Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies ("the Aarhus Regulation").²²
- (3) Pursuant to Article 15 of the Aarhus Convention, the Aarhus Convention Compliance Committee ("the Committee") was established and is competent to review the Parties' compliance with the provisions of the Convention.
- (4) On 17 March 2017, the Union received findings in case ACCC/C/2008/32 regarding access to justice at EU level.²³ The Committee held 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."* (paragraph 123 of the Committee's Findings).
- (5) The Aarhus Convention bodies have been made aware by the Declaration that the EU made upon signature and reiterated upon approval of the Convention that *"[w]ithin the institutional and legal context of the Community [...] the Community institutions will apply the Convention within the framework of their existing and future rules on access*

²⁰ <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>

²¹ Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ L 124, 17.5.2005, p. 1).

²² OJ L 264 of 25.9.2006, p. 13.

²³ http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/Findings/C32_EU_Findings_as_adopted_advance_unedited_version.pdf

to documents and other relevant rules of Community law in the field covered by the Convention."

- (6) The findings neither acknowledge the central role of national courts for implementing Article 9(3) of the Aarhus Convention nor do they recognise the EU system of preliminary rulings to the Court of Justice of the European Union as a valid means of redress.²⁴
- (7) The findings recommend the Meeting of the Parties to take a course of action which is in clear conflict with the fundamental principles of the EU legal order and of its system of judicial review. The findings do not recognize the EU's special legal order.
- (8) The EU continues to fully support the important objectives of the Aarhus Convention.
- (9) The findings will be submitted to the sixth session of the Meeting of the Parties to the Aarhus Convention to take place in September 2017 in Budva, Montenegro, by which they would gain the status of official interpretation of the Aarhus Convention, therefore binding upon the Contracting Parties and the Convention Bodies.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken by the Union at the sixth session of the Meeting of the Parties to the Aarhus Convention regarding compliance case ACCC/C/2008/32 is as follows:

- negative vote on the endorsement of the findings.

Article 2

This Decision shall enter into force on the day of its adoption.

Done at Brussels,

*For the Council
The President*

²⁴ See notably paragraph 58 of the findings: "*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, it cannot be a basis for generally denying members of the public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies*".