JUSTICE AND ENVIRONMENT
European Network of Environmental Law Organizations

Comments on the Commission's Communication on Access to Justice in Environmental Matters

Position Paper

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INTRODUCTORY REMARKS

1. Justice and Environment is an association governed by Czech law. It consists of 13 member associations, almost all of which are established in EU Member States. Its aim is the adoption and application of stronger environmental legislation to protect the environment, people and nature.

2. Although we recognize that there is no consultation being undertaken for the Commission's recently released Communication on Access to Justice in Environmental Matters ("Communication"),[1] we would nonetheless like to submit the following comments. These comments were prepared by J&E's Aarhus Convention Topic Team legal experts in a cooperative manner reflecting diverse views and a supportive approach to implementation of the Convention within the Member States.

COMMENTS ON THE COMMUNICATION

I. Overarching Comments

3. Justice and Environment **welcomes the Communication**. We recognize the **clear efforts** the creation of this document entailed, and its **potential value** in assisting Member States, the public, and stakeholders towards supporting the achievement of access to justice in the EU. We also appreciate that the Communication is **very extensive, touching upon virtually all aspects of access to justice**.

4. However, we remain convinced that a **binding instrument is still needed** for the reasons laid out in the Darpö Report, namely to "furnish a level playing field and to promote predictability and legal certainty."[2] It is also **unclear to us why the Commission's guidance was not issued in the form of a recommendation**, something which at least falls under Article 288 TFEU.

5. Moreover, while **we appreciate that some references to the Implementation Guide[3] have been included** in the Communication, we think in many instances there **should have been a greater reliance** on this. Yet more crucially, **we very much regret that the Findings of the Aarhus Convention Compliance Committee (ACCC)**

[1] http://ec.europa.eu/environment/aarhus/pdf/notice_accesstojustice.pdf
[2] This and all further references to the Darpö Report are intended to refer to Effective Justice? Synthesis report of the study on the implementation of Articles 9(3) and (4) of the Aarhus Convention in the Member States of the European Union, by Professor Jan Darpö, from 2013, which was prepared for the Commission; see p. 25 of the Report for this reference
[3] The Aarhus Convention: An Implementation Guide, UNECE, 2nd Ed., 2014

have not been included. These Findings are extensive, consistent, and detailed. Accordingly, they could be most helpful in completing the picture in this regard, addressing aspects not clearly covered, and providing much-needed depth and detail across a wide range of sectors. The draw-backs of the Communication's conservative approach by relying only on CJEU case-law and "drawing careful inferences" therefrom results in a document that is very unclear and unambitious at points. This is most evident in the sections dealing with article 9, paragraph 3 of the Convention, and with costs, as there is limited CJEU case-law in these areas. Also even having CJEU case-law that "touches on" a subject (see para. 7 of the Communication[4]), does not mean that such case-law has addressed the subject to sufficient depth. We note further that in many respects the Communication is a step back from the Darpö Report.

6. In terms of content, **we find a clear acknowledgment that there are still major hurdles in access to justice in environmental matters within the Member States should be included**. That access to justice is blocked has been demonstrated time and again by studies,[5] infringement and preliminary reference cases,[6] cases before the ACCC,[7] and even the Commission's recent Environmental Implementation Review (EIR)[8]. In some countries, such as AT[9], access is blocked almost entirely. In other countries the exercise of access rights which exist in principle are burdened by prohibitive costs (UK, DE, likely HR and BG due to recent proposed legislative changes), or rendered meaningless due to a lack of effective remedies (BG, SK, RO).

7. We also think that **a clear and unequivocal statement is needed in the Communication to the effect that it is suggesting only minimum standards, that there should be no derogations or back-sliding**. Some Member States are engaging in back-sliding due to anti-democratic trends. The recent legislative changes in CZ,[10] where members of the public, including NGOs, are being stripped of participatory (and concomitant access to justice) rights in virtually all procedures illustrates the reality and severity of this problem. What is more, many of these rights trace back to 1999 or even 1992. The recent legislative proposals for changes in the procedural rules governing costs in HR are also of concern. Finally, two developments in BG are further examples of back-sliding: First there is a legislative proposal to drastically increase the court taxes for individuals and NGOs for the second court instance (court of cassation); and second, another draft law that had been recently proposed would have stripped the cassation instance of competence on EIA cases for infrastructural projects of national importance. Therefore, a statement should be added that derogations are not permitted, neither in response to the Communication, developing CJEU case-law, nor simply for domestic political reasons. A related issue, but one that merits its own separate treatment, is that the Communication should also clearly address **environmental defenders, and make clear that they must not face harassment or penalties for exercising access to justice rights**.

8. Other gaps and points of unclarity we address below in their respective sections. **A final overarching remark is that the Communication would very much benefit from concrete examples**, perhaps presented even in a graph or other form, which would enable practitioners to understand the proper application of the

[4] All paragraphs cited are intended to refer to the Communication, unless otherwise stated
[5] See the Darpö Report, Milieu Study, and the Commission's recently issued Impact Assessment on a Commission Initiative on Access to Justice in Environmental Matters ("Impact Assessment on Access to Justice") and references cited therein, available at: http://data.consilium.europa.eu/doc/document/ST-8752-2017-ADD-1/en/pdf
[6] To cite just a few examples, see Cases C-243/15, C-570/13, C-137/14, C-72/12, C-260/11
[7] To cite just a few examples, see Austria ACCC/C/2010/48; ECE/MP.PP/C.1/2012/4, 17 April 2012 ("C-48 (Austria)"); ACCC/C/2010/50; ECE/MP.PP/C.1/2012/11, 2 October 2012 ("C-50 (Czechia)"); Bulgaria ACCC/C/2011/58; ECE/MP.PP/C.1/2013/4, 11 January 2013 ("C-58 (Bulgaria")
[8] 21 Member States are identified as failing to providing sufficient standing or prevent prohibitive costs, e.g. http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1493972666323&uri=CELEX:52017DC0063
[9] All references to Member States are indicative, and not exhaustive
[10] Specifically, changes to their domestic EIA Law, Building Act, and Law on Nature and Landscape Protection

Communication and the CJEU case-law upon which it based within their countries. Similarly, **inclusion of best practices** would be of great help for practitioners.

II. Comments on Section A "Introduction: Access to Justice in EU Environmental Law"

9. As stated above, we think the Communication needs a clearer acknowledgment of persisting access to justice problems in Member States. The Communication merely observes that "a number of problems have been identified" (at para. 8) and that there are "big gaps" in how EU environmental laws and policies are put into practice (at para. 12). This is too general, and falls short of a clear acknowledgement. We think the first few paragraphs in this Section would be the appropriate place to include more discussion about this very real and widespread problem, and to explain it is this problem that necessitates action on the part of the Commission in the first place.

10. Furthermore, we note that the Communication itself observes that "[n]ational courts are increasingly filling the gaps in national procedural law....but they cannot provide all the clarity and predictability necessary to guide investment decisions." (para. 8, 3rd bullet). We absolutely agree with this statement, both with regards to the factual observation as to what is occurring and with regards to the considerable negative effect this is having on all actors, notably also economic actors. This is widely acknowledged, for example, in AT by NGOs and industry lawyers alike. As a consequence, we regret that the Communication (at para. 9) does not, unlike perhaps later (para. 211) address itself to the Member States as a whole. This could have the advantage that, i.e., legislatures might thereby recognize the need for action on their part to achieve a greater legal certainty that would be a clear benefit for all.

11. As a related point, we are compelled to point out that Communication itself, and its reliance on judicially-made determinations regarding procedural questions concerning access to justice (namely the CJEU), exemplifies the very same problems in terms of creating a common framework[11] which is adequately clear and predictable, and this leads not only to implementation problems with regard to EU environmental law, but also the proper functioning of the internal market more generally.[12]

12. With regard to the Environmental Implementation Review ("EIR"), (para. 12), we would like to point out that this process was undertaken without sufficient engagement with the public, particularly NGOs, who – as the "end users" of access to information, public participation, and access to justice rights – could have contributed knowledge, experience, and perspective that would have enhanced the depth and overall quality of the reports.[13] We therefore call for greater participation in this process in the future. Also, we regret that the section of the reports dealing with access to justice issues focused only on standing and costs issues, omitting a range of other areas of concern, such as scope of review and adequacy of remedies. We are accordingly wary as to the effectiveness of this mechanism in assessing the state of affairs in the Member States and achieving implementation. We therefore welcome the Communication's statement

[11] See paras. 1 and 201

[12] We again refer to the Darpö Report's conclusions as to why legislative action is needed to create an adequate common framework in this context

[13] By way of illustration: The 2012-2013 country reports which were used to create the Darpö Report serve as the ostensible basis for the conclusions in the EIR country reports. Yet these reports are not even entirely accurately reflected. The DE EIR report, e.g. says absolutely nothing about costs, though this issue is flagged in the 2012-2013 DE country report, which speaks (at p. 18) quite a bit about prohibitive costs relating to lawyer's fees and the costs for expert reports. The AT EIR report says that prohibitive costs are not an issue in the country, despite the fact that the 2012-2013 AT country report explicitly cited to states (pp. 29 and 43) that NGOs and citizen groups repeatedly report the "chilling effect" that lawyer's fees and expert costs have. These are again mentioned in the Darpö Report. What is not in any of these rather out-of-date references is the fact that now the public in AT can bear additional costs by virtue of being deemed "the applicant" for a procedure in ELD cases, which can be tens of thousands of Euros and cannot be assessed beforehand, and that it is furthermore quite possible that these same rules would apply in other cases, should article 9, paragraph 3 ever be implemented in AT.

(para. 13) that it will continue to use infringement procedures to ensure Member States fulfil their obligations under the EU *acquis*.

13. Finally, we regret that the Communication does not address decisions, acts and omissions of private parties, which do indeed fall in the scope of article 9, paragraph 3. While it is conceivable that collective redress mechanisms would provide a means of addressing this aspect, brief guidance in this regard would be appropriate in this Communication as well. In this respect we must refer again to the Darpö Report, where civil actions against private parties (such as operators) and the drawbacks associated therewith, such as inequality of arms issues, are addressed in some detail.[14]

III. Comments on Section B "The Legal Context: National Courts and EU Environmental Law"

14. We note that the Communication (at para. 23) correctly observes that the "role of Article 267 may be put in doubt if access to national courts is either impossible or rendered excessively difficult." We think a clear direction to the effect that national courts really must refer is needed, as unfortunately practice has shown that this is not always occurring, even where it has been quite clear that key provisions of EU law (access to information, Habitats Directive, SEAD, e.g.) were at issue.

IV. Comments on Section C "Guaranteeing Environmental Access to Justice"

A. On Section C.1 "Public Interests. Obligations and Rights Relevant to the Exercise of Judicial Protection"

15. We find that Section C.1 offers helpful guidance in many respects. We appreciate that this section begins with and several times emphasizes the dual purposes of access to justice in environmental matters, namely both to ensure individuals and associations to exercise their rights conferred under EU environmental law, but also that the aims and obligations of EU environmental law is attained (see, e.g., the table directly under C.1.1). Though this is long-established and has been repeatedly reaffirmed by CJEU case-law (as the Communication correctly points to in its fn 29), it is vital that this message is stated simply, directly, and often. This should make clear to those Member States whose legal traditions adhere to a strict "rights-based" approach that this is simply not adequate in the context of access to justice in environmental matters.

16. We also find quite commendable that the Communication expressly recognizes the importance of "active involvement of the public" as a "concomitant environmental public interest" that supports the aims of EU environmental legislation (table directly under C.1.2), and the reasonably detailed description of procedural rights (paras. 44-47). This discussion could benefit, in our view, however, from concrete examples and/or best practices. Moreover, some mention of the impermissibility of "back-sliding" in this area would be appropriate. As discussed above, these rights are now being stripped away in CZ in a manner that runs counter to both the Convention and EU law, especially the CJEU interpretation in *Slovak Brown Bears II*. These developments are moreover deeply concerning from a pure rule of law and democracy perspective.

17. Also we find the discussion concerning procedural rights (paras. 44-47) could lead to some confusion as to when article 9, paragraph 2 rights apply, vs. paragraph 3. The Communication discusses, for example, the

[14] See pp 29-30

Kraaijeveld[15] and *Slovak Brown Bears II*[16] decisions and their relationship with other provisions of EU environmental law, notably the SEAD. This could be interpreted as suggesting that judicial review rights also as to plans, programs, and policies should flow from article 9, paragraph 2 (as well as possibly article 9, paragraph 3). Further guidance or clarity on this point, perhaps even a graph with concrete examples, could be most helpful. We note in this respect that the Implementation Guide suggests an "opt-in" might be needed for article 9, paragraph 2 to apply in such cases,[17] and the ACCC has indicated in a number of decisions that article 9, paragraph 3 is the provision for which access to justice regarding plans, programs, and policies is foreseen.[18] This is just one example where reference to the ACCC's findings would be useful.

18. Also the Darpö Report devoted an entire section[19] to analysing the relationship between article 9 paragraph 2, and its paragraph 3. A similar section, with up-to-date examples, would be highly valuable here. It could evaluate in greater detail, e.g., the extent to which the existence of a procedure in which the public could conceivably participate in is determinative or suggestive of something being covered by article 6 (and consequently article 9, paragraph 2), building on the CJEU's reasoning in *Slovak Brown Bears II*, among other sources. It could elaborate on cases of accidents and nuisances, and lay out reasoning as to why these might (or might not) fall under article 9, paragraph 2, and so on. Although the Communication goes some ways in this direction, a greater degree of elaboration and precision would be very helpful for practitioners.

19. Returning to other rights, we must observe that we find the statement (para. 37) "that it is necessary to distinguish between NGOs and individuals", in terms of having a broad right to protect the environment too strong. Although it is clear that NGOs have a special role to play, this statement, the discussion (in paras. 37-43) both in general and in terms of its analysis of *Slovak Brown Bears I*[20] and the area of nature protection could be understood to mean that individuals need not also have rights to protect the environment which national courts must uphold. We see no basis for this in the Convention, and in actual practice it may indeed be vital that individuals be accorded access rights to ensure the environment is adequately protected and EU laws observed.

20. What is more, the Communication goes on to acknowledge (para. 55) that an individual may have use rights related to the environment capable of being impaired. And both the Birds and Habitats directives refer to many possible uses of nature, including recreational pursuits (para. 57). Thus it seems that any suggestion that it is possible to exclude all individuals from having access to justice to protect the environment in general (or the inverse, that *only* NGOs have such rights) is not sustainable and should be corrected so as to dispel any confusion.[21] We also note with concern that there is no mention of these use rights in the subsequent sections dealing with standing and scope.

B. <u>On Section C.2 "Legal Standing"</u>

21. At the outset we welcome the Communication's statement that standing requirements must be interpreted in the light of the principles established in the case-law of the CJEU, even in the absence of an express access to justice provision in many pieces of EU secondary legislation (para. 59). We also think that this would be an

[15] Case C-72/95
[16] Case C-243/15
[17] Guide at 173
[18] For the clearest statement in this regard, see C-58 (Bulgaria)
[19] Namely Section 3.2.3, at pp. 28-29
[20] Case C-240/09
[21] See e.g. Denmark ACCC/C/2006/18; ECE/MP.PP/2008/5/Add.4, 29 April 2008 ("C-18 (Denmark)"), paras. 30-31

excellent point to include what was expressly acknowledged in the Commission's own Impact Assessment on Access to Justice, namely that "as 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."[22]

1. Specific activities subject to public participation requirements

22. For specific activities subject to public participation requirements, we appreciate the Communication's reiteration of the judgment in *Kraaijeveld*, that a decision, act or omission of a public authority impairing participation rights gives rise to an entitlement to seek judicial review (para. 67) also.

23. Moreover, we find it critically important that the Communication acknowledges (para. 68) that EU "secondary legislation [namely the IED, EIA, and Seveso III Directive] does not cover all decision-making processes covered by Article 6 – and by extension Article 9(2) [...] Member States are obliged to have in place a judicial review regime whenever Article 6 of the Convention foresees an obligation concerning public participation." This message must be conveyed to the Member States as clearly and unequivocally as possible, as many have long adhered to the view that such legislation fully covers Article 6 obligations. In this regard – while we note the Communication discusses *Slovak Brown Bears Case II* and suggests that the rationale of this case lends itself to be applied by analogy to decision-making processes in other sectors, such as water and waste (paras. 69-70) – we regret that the Communication did not more fully and precisely articulate a position here. See our comments concerning article 9, paragraph 2 vs. 3 above.

24. As the Communication itself recognizes,[23] the public consultation requirement in Article 6(3) of the Habitats Directive is in fact somewhat vague, and even experts in this area have had difficulties in interpreting the *Slovak Brown Bears II* judgment, and predicting its application with respect to Article 6(3) cases in their own jurisdictions, other provisions of the very same directive, to say nothing of its application in other sectors. Thus it seems that at least some of the confusion (discussed above) with regards to the question of whether article 9, paragraph 2 and/or paragraph 3 applies in any given case cannot be answered by merely saying that the former applies in cases where there are article 6 participation rights. This merely pushes the confusion back a level, since the very question of what falls in the scope of article 6, especially its paragraph 1(b), remains unclear. Accordingly, the Communication's vague suggestions regarding water and waste in this context are of limited assistance. To illustrate this point, we note that authorities and courts in AT have continued to refuse participation and access to justice rights in the area of nature protection after the *Slovak Brown Bears II* case was delivered, and even after this Communication was released.

25. The above indicates that the Member States find it challenging to comply with EU law, including judgments from the CJEU. In some instances this has been the case even where the CJEU has made rather clear what is required from the Member States concerning access to justice in environmental matters.[24] Yet in other instances Member States have arguably denied access to justice because the issues are unclear or the CJEU has not addressed certain questions with sufficient depth. Thus we must at this point again express our regret concerning the conservative approach taken in this Communication in relying only on CJEU case-law and drawing only careful inferences from this. Here, too, incorporation of ACCC findings which have touched

[22] See the Impact Assessment on Access to Justice, cited above, at p. 45. This section goes on to observe that: "In particular, environmental cases are only a fraction of all administrative law cases; the German experience following the Trianel Judgment [...] also indicates no dramatic change in the courts workload following the opening of standing rules."
[23] At fn. 67
[24] As the Darpö Report notes at p. 25, "it is noteworthy that quite a few of the Member States have not yet adapted their legislation to Janecek (Case C-237/07), despite the fact that five years have elapsed since the CJEU's judgment." These problems persist long after this report, and there are many such examples

on the subject of article 6(1)(b),[25] and might well address the issue at greater length in the future, could be most helpful.

26. Regarding article 9, paragraph 2 standing for individuals (Section 2.3.1), we note with concern that the use rights, outlined earlier in the Communication (at paras. 55-57) are not included here. For the reasons we discussed earlier, we find recognition and inclusion of these rights is needed here. By contrast, we appreciate that the Communication takes the extra step to make clear that the impermissibility of restricting legal standing established in CJEU case-law arising in the EIA context, applies also in all other article 9, paragraph 2 cases. Yet here again, it remains unclear what *else* falls within the scope of article 9, paragraph 2 (by virtue of falling in the scope of article 6).

27. We find the Communication's in-depth discussion of the recognition criteria for NGOs quite good. As a general editorial point, we recommend including specific reference in this section to articles 2, paragraph 5, and 3, paragraph 4 so that the reader knows precisely which provisions of the Convention are at issue. It should be added that these provisions are to be construed in light of the general obligations under articles 1, 3, and 9. There is also discussion of recognition criteria in the Implementation Guide,[26] and in ACCC findings,[27] all of which appears to not conflict with the observations made in this section, but rather could provide a source for further practical guidance.

28. We appreciate in particular the Communication's acknowledgement that in some jurisdictions NGOs are granted recognition despite being charitable organizations and not being membership-based, and that, where granted this recognition, such foundations have contributed significantly to the development of CJEU-case law (para. 80). We also appreciate the Communication's caution with regards to other unduly restrictive criteria, and that Member States must take into account the CJEU's interpretation in Djurgården[28] (para. 81). We think both of these paragraphs would be an excellent context for including reference to Member States illustrating best practices in this regard.[29]

29. Particularly laudable, too, is the Communication's recognition of the special challenges that can arise in the transboundary context and tentative solutions to avoid non-discrimination in this regard. We note, however, that even under the proposed solutions, challenges might possibly still arise in cases where the foreign NGO is based in a country for which there are no recognition criteria at all, due to relaxed legal standards on standing. Accordingly, it could be difficult for an NGO based in FR or IT, where there are no recognition criteria, to obtain recognition in DE, where there are.

30. We would add, moreover, that article 3, paragraph 9 prohibits not merely discrimination against foreign NGOs, but provides rather for rights, including access to justice, "in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities." Accordingly, while the primary concern and indeed most likely constellation would involve discrimination against foreign NGOs, article 3, paragraph 9 should prohibit reverse discrimination as well, that is, where a domestic NGO is accorded less recognition than a foreign NGO. Even under the proposed solution in this section, it is not clear

[25] See e.g. Armenia ACCC/C/2004/8; ECE/MP.PP/C.1/2006/2/Add.1, 10 May 2006 ("C-8 (Armenia)"); United Kingdom ACCC/C/2008/27; ECE/MP.PP/C.1/2010/6/Add. 2, November 2010 ("C-27 (UK)"), United Kingdom ACCC/C/2010/45 and ACCC/C/2011/60; ECE/MP.PP/C.1/2013/12, 23 October 2013, Czechia, C-50 (Czechia)

[26] See Guide at pp. 57-58 and 66-67

[27] See e.g. Turkmenistan ACCC/C/2004/5; ECE/MP.PP/C.1/2005/2/Add. 5, 14 March 2005; Germany ACCC/C/2008/31; ECE/MP.PP/C.1/2014/8, 4 June 2014 ("C-31 (Germany)")

[28] Case C-263/08

[29] We would point out that there is a pending case before the ACCC (ACCC/C/2015/137 (Germany)), which concerns a failure to recognize foundations such as WWF, or others with certain membership structures like Greenpeace, with a resulting loss of access to justice rights.

that reverse discrimination would be prevented. An AT-based NGO with a specific membership and voting structure might thus be accorded greater access to justice rights in DE than a domestic NGO with precisely the same structure. Finally, we note that the EIAD itself is problematic with regards to opportunities for foreign NGOs.

31. With regards to other associations, organizations and groups, we note that, as in the case for individuals cited above, some mention of use rights here would be appropriate.

32. However, we appreciate that the Communication recognizes the benefits of standing for non-recognized organizations, associations, and groups, particularly as a means to facilitate the merger of claims. Although wholly at odds with established facts and statistics, a number of Member States have refused to live up to their obligations to provide access to justice on the basis of claimed fears of opening a "floodgate" of litigation. Further discussion in the Communication quelling such fears using facts and discussion of workable mechanisms to facilitate the merger of claims, including class actions, in some greater detail, would be most helpful in this section. We would strongly recommend illustrating such a discussion with reference to best practices in certain Member States.

33. Concerning the issue of prior participation, discussed at paras. 85-86, we appreciate the Communication's reiteration that this cannot be used as an additional means to restrict standing, and its reference to the Guide and *Djurgården* in particular. We also appreciate the statement that this case-law should apply in the ELD context also (para. 89).

2. Other subject-matter

34. The Section devoted to article 9, paragraph 3 standing reveals the drawbacks of relying almost exclusively on CJEU case-law, as there is essentially only a single CJEU case on point, namely *Slovak Brown Bears I*. To contrast, the ACCC considered more than a dozen[30] article 9, paragraph 3 cases up to MOP5 in 2014 alone. Several further cases have been considered in the intersessional period since then. These cases have concerned challenges in numerous sectors, to a number of acts and omissions having diverse legal characters. Inclusion of such cases, and more discussion of the Implementation Guide, could have resolved or at least shed light on a number of the challenges outlined below.

35. That being said, we appreciate the Communication's recognition of the fact that article 9, paragraph 3 of the Convention is broader than paragraph 2 both with respect to the intended beneficiary of legal standing and in covering also acts and omissions of private persons, not only those of public authorities (para. 92). We would add that article 9, paragraph 3 has also a significantly broader scope of application in that it covers national laws "relating to the environment", as opposed to the article 9, paragraph 2, which is confined to decisions, acts, or omissions relating to specific activities listed in either annex I or having a "significant effect on the environment."[31] Although the full wording of article 9, paragraph 3 is included in this section (paragraph 91), this third aspect concerning the scope of this provision's application should be added to this paragraph (92).

[30] Kazakhstan ACCC/C/2004/6; ECE/MP.PP/C.1/2006/4/Add.1, 28 July 2006; C-8 (Armenia)); Belgium ACCC/C/2005/11, ECE/MP.PP.C.1/2006/4/Add.2, 28 July 2006; C-18 (Denmark); United Kingdom ACCC/C/2008/23; ECE/MP.PP/C.1/2010/6/Add.1, October 2010; Austria ACCC/C/2008/26; ECE/MP.PP/C.1/2009/6/Add.1, 8 February 2011; C-27 (UK); C-31 (Germany); European Union ACCC/C/2008/32 (Part I); ECE/ECE/MP.PP/C.1/2011/4/Add.1, May 2011; C-48 (Austria); C-50 (Czechia); C-58 (Bulgaria); Armenia ACCC/C/2011/62; ECE/MP.PP/C.1/2013/4, 11 January 2013; Austria ACCC/C/2011/63; ECE/MP.PP/C.1/2014/3, 13 January 2014

[31] This follows from the express wording of these provisions, but see also Darpö at p. 27

36. We are also concerned about what could be implied from the Communication's observation that article 9, paragraph 3 makes no reference to access criteria or provide for legal standing *de lege* for NGOs (para. 92, see also para. 107, second sentence). We fear this could be used as a means to continue to restrict or even backslide/reduce existing rights for NGOs in this context. It seems to us, particularly when reading the subsequent sections (paras. 93-107) that this is not the intent of the Communication. Yet, particularly in light of the fact that neither expert familiarity with access to justice issues nor EU environmental law, nor even a readiness to uphold the rule of law can be presumed of authorities, courts, and practitioners in the Member States, we think further language should be inserted (ideally at para. 92) to make the Communication's intention crystal-clear.

37. That being said, we appreciate the reaffirmation (in para. 95) that "Member States are obliged to provide for legal standing to ensure access to an effective remedy for the protection of procedural and substantive rights conferred by EU environmental law even if the EU environmental legislation at stake does not contain specific provisions on the matter."[32]

38. In terms of judicial review to protect procedural rights, we find the Communication (paras. 96-100) helpful. As indicated above, at points it seems there is some blurring between article 9, paragraphs 2 and 3. Though upon careful inspection one can see that this discussion falls under the section devoted to article 9, paragraph 3, it might be useful to simply insert a sentence clarifying that these rights, including in contexts which provide participatory rights, such as for plans, programmes, etc., are envisaged as falling under article 9, paragraph 3, if that is in fact the case. Alternatively, if this is seen as falling potentially under either provision, then this too, should be clarified.

39. The explanation of substantive rights in this section (para. 101) is problematic in multiple respects. First, this paragraph states that legal standing must be granted to both individuals and environmental NGOs to protect human health via EU environmental legislation. Yet the Communication appears to suggest that only individuals and their associations (that is, those which derive their rights from individuals) have such rights (see paras. 49-51). It is not clear from reading the Communication whether environmental NGOs can derive their rights from these individual rights, or if they have another source, i.e., that such rights to protect human health can be subsumed under an environmental NGO's general rights to protect the environment. Clarification here would be useful. Second, this paragraph (101) suggests that both individuals and NGOs should have property rights. As to NGOs, if such rights pertain, then again this should be added to the earlier sections (see paras. 53-54). Finally, as suggested above, we are convinced that there is no basis in the Convention to support the notion that only NGOs are entitled to protect the environment in general terms, and think such an approach could mean that the objectives of EU environmental law remain unfulfilled.

40. We appreciate that the Communication recognizes the problem of the impairment of rights doctrine, (paras. 103-107), and that such problems can arise also in jurisdictions which follow the "sufficient interest" doctrine. We welcome the statement that "Member States may adopt criteria that individuals and NGOs must fulfil in order to obtain legal standing, but these criteria must not make it impossible or excessively difficult to exercise substantive and procedural rights conferred by EU law."

41. However, we regret that the Communication does not make it unconditionally clear that it is not acceptable to limit access to justice for NGOs on the basis of the impairment of rights/sufficient interest doctrine. The Communication (at para. 107) says that "considering the role of environmental NGOs in protecting general environmental interests such as the quality of air and biodiversity, Member States which apply the impairment of rights doctrine need to do so in such a way as to ensure that environmental NGOs are given

[32] We note, moreover, that this statement is in keeping with the Implementation Guide at p. 197, and C-18 (Denmark)

legal standing to contest decisions, acts, and omissions which concern this role." Yet this point is made too vaguely to be of much use to practitioners.

42. To compare the ACCC stated clearly that article 9, paragraph 3 "does not distinguish between public or private interests or objective or subjective rights, and it is not limited to any such categories."[33] Accordingly, a "strict application of this principle in matters of access to justice under the Convention would imply non-compliance with article 9, paragraph 3, since many contraventions by public authorities and private persons would not be challengeable unless it could be proven that the contravention infringes a subjective right. The requirement of infringement of subjective rights would in many cases rule out the opportunity for environmental NGOs to access review procedures, since they engage in public interest litigation."[34]

43. Even if the Commission would adhere to a conservative interpretation of the single CJEU case on point, it seems to us there is nothing to prevent it from taking a clearer, more determined stance on this issue, and we regret that the Commission has failed to do so in this instance. In many Member States, this will be taken simply as a license to continue to refuse access to justice. In this respect, the Commission should actively examine and promote concrete and pragmatic solutions for ensuring access to justice for the public, and especially for NGOs.

44. One conceivable solution would be to import the definition in Article 1.1(e) of the EIAD, according to which the public concerned means the "public affected or likely to be affected by, or having an interest in" the act or omission at issue, and that "non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest". This was essentially the suggestion made in the Darpö Report[35] – and it seems from the possible blurring of EIAD and non-EIAD CJEU case-law (in particular at paras. 103-104) that the Communication takes tentative steps in this direction. Yet this option should be considered as clearly and directly as possible. This must include consideration of what are permissible "requirements under national law" (which the Communication addresses at some length in the earlier sections).

45. One must also carefully consider the concern voiced in the Darpö Report that a strict application of the impairment of rights doctrine that prevents the public concerned, including individuals, from having standing where they cannot prove a legal interest or right guaranteed by law might be impaired is too narrow. The public concerned might be affected in a number of ways by discharges, disturbances, and inconveniences – a hiker or birdwatcher's use of nature could be affected by the destruction of a natural habitat, or a fisherman's use of fishable waters could be affected by discharges into a river. Accordingly, it would be important to at a minimum, as Darpö explains, avoid the "double approach" used in the access to justice provisions in Article 11 of the EIAD. This would avoid reference to the rights- and interest-based approaches when defining "the members of the public", as both should be subsumable under the general definition "likely to be affected or having an interest in"[36] from Article 1.1(e). Notably this approach would, as Darpö acknowledges, still constitute a narrowing of standing under article 9, paragraph 3, by bringing it more or less in line with article 9, paragraph 2 standing. It is not clear to us that this approach would adequately fulfil the requirements of article 9, paragraph 3, but it might at least be a step in the right direction and could provide a clearer path towards implementation than that offered in this section of the Communication.

[33] C-31 (Germany) at para. 94
[34] Ibid. at para. 95; see also Darpö Report at pp. 31-32
[35] See pp. 31 and 45
[36] Ibid. at p. 32

46. While clearly less desirable, concrete proposals or examples could alternatively be discussed as ways to work within those systems which follow an impairment of rights (or sufficient interest) model, recognizing, i.e., that environmental NGOs can have a subjective right in ensuring that objective environmental laws are observed, and that this subjective right is capable of being impaired. Similarly, one can develop a doctrine of use rights, including social, recreation, and environmental rights which are also capable of being impaired, in the lines described above.

47. Whatever approach taken, we think further explication is needed, and that any future guidance should be supported by examples of best practices from Member States, particularly from those which have moved away from, or have never had, strict rules concerning standing, and include statistics demonstrating that this has not resulted in a glut of litigation, but has resulted in better projects which better meet the goals of EU environmental law, and greater public acceptance.

48. As a final note, we observe that, while standing for NGOs is often provided for legislatively, that for individuals is often a matter of judicial interpretation in evaluating the operative procedural provisions.[37] In that respect the judiciary enjoys discretion, and problems can arise when they fail to evaluate all relevant considerations – focusing, i.e., merely on the claimant's distance from a given project or nuisance. There is evidence from some countries (SE, e.g.), that this may be a problem.

C. On Section C.3 "Scope of Judicial Review"

49. Our overarching concern about this section is that it improperly conflates the concept of standing with that of scope of review[38] in a manner that is consistent with neither the text nor spirit of the Convention.[39] This approach will, moreover, have negative impacts on the effectiveness of judicial control of the implementation of EU law at the national level, in contravention of Article 19 TEU.[40]

50. In the context of decisions, acts and omissions related to activities that fall within the scope of article 6, article 2, paragraph 5 and article 9, paragraph 2(a) and (b) permit some discretion as to the range of subjects, that is *who* can challenge decisions, acts or omissions. But there is no basis in the Convention for allowing further criteria that restrict access to the review procedure by *inter alia*, limiting the scope arguments which the applicant can use to challenge the decision.[41] Rather, once an applicant has the key necessary to unlock the gate to court by achieving standing, this applicant should be able to challenge the substantive and procedural legality of any decision, act or omission.

51. A pure textual analysis[42] of article 9, paragraph 2, indicates that the clauses without a subject in subparagraphs (a) and (b), namely "having a sufficient interest" or alternatively "maintaining impairment of a right" can only modify the noun phrase that directly precedes them, which is "members of the public concerned." This means that having a sufficient interest/maintaining impairment of a right applies to the

[37] Ibid. at 31
[38] This conflation or confusion is directly attributable to an attempt to accommodate the strict impairment of rights doctrine followed in some jurisdictions, which limits not only the range of subjects who can sue, but also regulates the range of arguments that can then be brought forward
[39] See the Preamble, and articles 1, 3, and 9 of the Convention
[40] See Darpö Report, p. 36
[41] See C-31 (Germany), e.g.; see also C-48 (Austria)
[42] What follows explains the universally-accepted rules of the English grammar among linguists; an analysis of the Russian-language version of the Convention yields the same results; we expect but have not yet collected evidence that the same pertains as to the French-language version

standing requirements for who has access to courts in the first place. Accordingly, there is no possible interpretation under which having a sufficient interest/maintaining impairment of a right can modify or in any way restrict the following phrase "the substantive and procedural legality of *any* decision, act or omission."[43] Rather this phrase can only be interpreted as being restricted by the text immediately thereafter, namely: "subject to the provisions of article 6..." Further limitations of the scope of review on the basis of i.e., the impairment of rights doctrine thus runs counter to the express wording of these provisions.

52. This is perhaps in practice not in all cases a significant problem for NGOs in this context, as the CJEU in *Trianel*[44] has recognized their rights to plead and invoke any provision of EU environmental law,[45] and the Communication's interpretation of the *de lege* standing would seem in line with this. Yet we must insist that this approach is nevertheless highly problematic.

53. Specifically, an individual applicant who has fulfilled standing requirements to obtain a key to the gate of court should thereafter be able to challenge the substantive and procedural legality of any decision, act or omission.[46] By way of example, an individual who can obtain standing by virtue of showing damage to property or endangerment of health in connection to a mining project should then also be able to challenge an administrative body's permit for the project on the basis of violations of objective laws governing water quality. Yet in some jurisdictions (DE, e.g.) this is not permitted. Moreover, in many such cases a recognized NGO neither has the time nor resources to challenge such violations of these objective laws, meaning that an individual's inability to bring such claims will result in ineffective judicial control concerning the implementation of EU law, specifically that the aims and obligations of EU laws relating to the environment will not be enforced.

54. Similar problems arise from the Communication's treatment of subject-matter falling under article 9, paragraph 3. The most natural reading by far is that the phrase "criteria, if any, laid down in national law" modifies the phrase "members of the public", and thus pertains to potential restrictions on the subject, that is *who* has standing to sue.[47] The phrase "criteria..." should not modify the phrase "acts or omissions...which contravene provisions of national law relating to the environment". So in a manner analogous to the situation described above with respect to article 9, paragraph 2, it should be that access to justice can only possibly be delimited on the basis that the individual (or NGO) is unable to prove that they are affected in any way (by having rights capable of being impaired or otherwise). Once standing is established, they should be able to challenge the procedural or substantive legality of acts or omissions by private parties and public authorities which contravene provisions of national law relating to the environment.[48] Nothing less. So i.e., individuals who live or work near an industrial plant where an accident occurs, who are affected, should be able to also bring claims based on violations of objective laws relating to the environment.

55. Again the Communication suggests that for NGOs limitations on the scope of arguments can be overcome on the basis of "a broad right to protect the environment and invoke environmental obligations before national courts." But it seems much of the support for this recognition comes from importing CJEU case-law from

[43] Article 9, paragraph 2, emphasis added
[44] Case C-115/09, (Bund für Umwelt und Naturschutz)
[45] That being said, for a long time thereafter, NGOs in CZ were only permitted to put forward arguments based on procedural violations as a direct consequence of the impairment of rights doctrine as interpreted in that country
[46] See, e.g. C-48 at para. 66
[47] C-11 (Belgium) at para. 36
[48] This analysis is also supported by the Implementation Guide, which discusses the object of what can be reviewed as simply "acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment." See p. 197; see also C-11 (Belgium), C-18 (Denmark). By contrast all discussion of "criteria" in this provision is linked only to the question of "who can ask for review", that is, standing. See p. 198. As to the need to be able to challenge procedural and substantive legality, see p. 199

article 9, paragraph 2 context into the article 9, paragraph 3 context, and/or blurring the two considerably. This is of limited aid to practitioners.

56. Here we note the Communication (at para. 120) is a key example of where clearer guidance from the Commission is needed. In particular, it should be elaborated upon as to which provisions of EU law, precisely, can give rise to actionable rights and interests. This would be, moreover, a good section to clarify the effect of EU law, specifically recognizing that, at a minimum, NGOs should have standing to enforce both rules of national law implementing EU environmental law and EU rules that have direct effect, even where EU law is not or is badly transposed.

57. By contrast, we appreciate the Communication's clear statement to the effect that preclusion may not prevent access to justice in the article 9, paragraph 3 context. It might be useful to explain in the Communication whether preclusion within the administrative procedure itself is permitted.

58. There is, moreover, one other major issue with respect to preclusion in both the article 9, paragraph 2 and 3 contexts that we would like to highlight. The rationale for rejecting preclusion as a bar to access to justice should, it seems to us, apply with equal force in rejecting other limitations on the scope of review, particularly the issue of the permissible complaint arguments. It is claimed that preclusion may not be allowed because the object which can form the basis for a claim has to be the procedural and substantive legality of decisions,[49] acts and omissions – nothing less. Requiring prior participation would thus impermissibly limit this scope of this review. Logically, linguistically, and with an eye to both the Convention and achieving the fulfilment of EU environmental laws, the same conclusion regarding other restrictions on the scope of review, such as on the basis of the impairment of rights doctrine, should apply.

59. The remainder of the Communication's discussion of intensity of scrutiny/standard of review (at paras. 127-153), illustrates the benefits of a greater use of non-CJEU resources, namely the Implementation Guide. This section is clearly written and addresses the relevant points in quite some detail, using the Guide and CJEU case-law to provide a comprehensive review of these issues.

D. <u>On The Lack of a Section on "Fair and Equitable" Procedures</u>

60. Before we move on to other aspects (effectiveness, costs, etc.) which fall under article 9, paragraph 4 of the Convention, we would like to bring special attention to a considerable gap in the Communication. Article 9, paragraph 4 requires in addition, that procedures referred to in paragraphs 1, 2 and 3 be "fair" and "equitable". Yet there is no mention of this in the Communication. As the Implementation Guide explains, "[f]air procedures require the process, including the final ruling of the decision-making body, to be impartial and free from prejudice, favouritism or self-interest...that they must apply equally to all persons, regardless of economic or social position...and it requires that the public be fully informed about the review procedure, as well as informed about the outcome of review."[50] Though some of these aspects (i.e. those relating to non-discrimination) may be touched upon elsewhere, like in the discussion on effective remedies, we think it important that a section dedicated to fairness and equity be included.

61. By way of illustration, we note that there is no mention in the Communication of the need to provide sufficient grounds, or a real explanation as to the outcome of the review. As indicated above, standing for individuals is largely determined by judicial interpretation, in which case it is of the utmost importance that

[49] The "decisions" part pertains only to article 9, paragraph 2 of course
[50] See Guide at p. 201

judges give due weight to all relevant considerations. It is then vital that the record be sufficiently detailed, stating grounds for this consideration, so as to enable appeal of the denial of standing. There is evidence that the outcomes of standing determinations are not sufficiently detailed (i.e., in SE), despite provisions of national law which one could suppose would address such deficiencies. Accordingly, we believe this issue should be directly addressed in the Communication. One could consider adding it to Section C.4 on "Effective Remedies", but we think it also warrants treatment in a new section requiring that procedures be fair.

62. Another issue related to fairness and equity we think should be addressed here is the issue of time-limits and the Communication's discussion of *Stadt Wiener Neustadt*,[51] which is dealt with in Section 6. Time-limits have been used (i.e., in the UK), as a means to bar otherwise meritorious claims, even where the claimant neither knew, nor should have known of the violation giving rise to the complaint. This issue should be moved and/or elaborated upon in a new fairness and equity section, using in particular the Guide,[52] as well as possible CJEU case-law,[53] to explicate the relevant details.

63. Finally, we note with respect to the requirement that procedures be "equitable" per article 9, paragraph 4, that the Guide states that equitable procedures "are those which avoid the application of the law in an unnecessarily harsh and technical manner." This provision should also be taken into account when interpreting restrictive rules on standing and scope, discussed above.

E. <u>On Section C.4 "Effective Remedies"</u>

64. While we appreciate that this section contains many detailed descriptions of the sort of procedural mechanisms needed for effective remedies, we regret that there is no direct discussion ensuring that the interpretation of the rules relating to standing and scope be interpreted in such a way as to permit review of decisions, acts and omissions falling under article 9, paragraph 2 and/or 3. In a number of Member States the adherence to a strict view of the impairment of rights doctrine has led to the result that certain decisions, acts and omissions are unreviewable and/or meritorious complaint arguments cannot be brought forth, as outlined above. This is clearly a problem, too, in terms of effective remedies per article 9, paragraph 4 of the Convention.

65. Furthermore, even where some steps have been taken to permit some members of the public concerned certain limited rights – like a basic annulment right to challenge a negative EIA screening decision – the fact that these members of the public concerned (as opposed to others, who were parties) were excluded from prior participation in the procedure and could thus have no impact on that procedure itself, and who have only a very limited time to become acquainted with the files in order to mount a legal challenge that has even a reasonable chance of success, raises the question of whether such a right fulfils either the principle of effectiveness or the principle of equivalence, or article 9, paragraph 4 of the Convention.

66. It seems to us, moreover, that the CJEU in the *Slovak Brown Bears II* decision went some ways towards answering this latter question. At any event, it is clearly an article 9, paragraph 4 case. As such, its omission in the sections dealing with remedies is most problematic.

[51] Case C-348/15
[52] Ibid. at 201-202
[53] Uniplex (UK) Ltd v NHS Business Services Authority, Case C-406/08, e.g.

F. On Section C.5 "Costs"

67. We find this section illustrates the drawbacks of relying on a conservative approach based on CJEU case-law, of which there is rather little on this topic. We think elaboration based on the Guide and ACCC findings, and using best practices would be of tremendous help to practitioners.

68. At points there seems to be a blurring of the criteria that, according to the CJEU "must" be taken into account and those which only "may" be taken into account. For example, the Communication (at para. 187) lists subjective elements which *must* be taken into account – including "the financial situation of the person concerned" and "the importance of what is at stake for the claimant and for the protection of the environment", along with those which *may* be taken into account, such as "whether the claimant has a reasonable prospect of success" and "the potential frivolous nature of the claim at its various stages". This could well lead to considerable confusion for practitioners.

69. Finally, while we appreciate that the Communication acknowledges in one sentence (para. 183) that "the cost of evidence and experts' fees" is an issue related to the consideration of whether costs are prohibitive, in light of our earlier comments and the problems identified in the EIR reports for AT and DE, we think this issue merits a more detailed, engaged and forward-looking approach.

G. On Section C.6 "Time Limits, Timeliness and the Efficiency of Procedures"

70. As indicated above, we feel that the issue of time limits should be included in an entirely new and separate section devoted to fairness and equitable issues. If this issue is to also remain in this section, then we recommend adding a sentence to clarify that this is truly a separate point to the timeliness of court procedures. As written, this section (in particular paras. 197-198) could be read to suggest that the timeliness of court procedures is dependent on claimants bringing timely complaints and/or that delays or deficiencies in this regard can be attributed to the claimants, whereas this article 9, paragraph 4 issue really concerns the expediency of the court and administrative procedures, the handling of the complaint, once taken up. We are also concerned regarding the bald statement that the requirement that procedures be timely is not sufficiently clear and unconditional to be directly applicable. Should there be support for this statement, it should be included.

CONCLUDING REMARKS

71. Justice and Environment is deeply committed to achieving the full implementation of access to justice rights in environmental matters within the Member States. Pursuant to our mandate and mission, we aim with the above comments to highlight both the achievements and the shortcomings in the Commission's Communication.

72. Our comments reflect not only our knowledge of the applicable EU law and the Aarhus Convention, but also more than a decade of experience as to how these provisions are actually implemented (or not) at the Member State level. While we believe that major achievements in implementation have occurred, we have clear evidence that significant gaps remain.

73. We hope that the Communication can help to close these gaps, and can work against certain negative trends in terms of environmental democracy occurring in some Member States. In this regard, we hope that our comments can aid the Commission, Member States, stakeholders, and the public at large in ensuring that the third pillar of the Convention is finally implemented.

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