Comments by Justice and Environment to the
Report from the Commission – Aarhus Convention Implementation Report
2017

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. In the framework of the consultation period, we would like to submit the following comments on the European Union's 4th Implementation Report to the Aarhus Convention. At the same time, we would like to encourage the Commission to publish the details of the consultation period, including statistics of the process and insight into details of comments submitted by stakeholders.

3. The comments of J&E were prepared by legal experts of the Aarhus Convention Topic Team of J&E in a cooperative manner reflecting diverse views and a supportive approach to more enhanced implementation of the Convention on the EU level.

COMMENTS ON THE REPORT

A. Comments on Section III. "Legislative, regulatory and other measures implementing the general provisions in Article 3, paragraphs 2, 3, 4, 7 and 8

4. With respect to Article 3, paragraph 2, we first point out that the duty to assist and provide guidance is not limited to the issue of access to information. Yet – apart from the bare reference to Article 1(2) of the Aarhus Regulation 1367/2006 – the Report focuses only on access to information.

5. Regarding the Report's reference that the Aarhus Regulation "implements the Convention for the EU institutions", we would like to shed light on the controversy between the interpretation of the Commission here and the one of the CJEU in its judgment in the case Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht, where the Court found that by the adoption of the Aarhus Regulation the EU did not intend to transpose the Convention obligations into EU law[1]. At least a mention of this controversy would be needed here in the Report.

6. With regard to Article 3, paragraph 7, the statement that the "Commission representatives strive to enable the participation of a wide circle of interested parties" was not verified whatsoever by the conduct of the Commission in relation to the negotiations with the US relating to the TTIP. In the latter case, the level of secrecy of documents and the lack of any meaningful access to and

[1] Joined Cases C‑401/12 P to C‑403/12 P, "60. In that regard, it cannot be considered that, by adopting the regulation referred to, which concerns only EU institutions and moreover concerns only one of the remedies available to individuals for ensuring compliance with EU environmental law, the European Union intended to implement the obligations, within the meaning of the case-law cited in paragraph 56 of this judgment, 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 (see, to that effect, judgment in Lesoochranárske zoskupenie, EU:C:2011:125, paragraphs 41 and 47)."

participation in international negotiations questions the optimistic statement used by the Commission in this current Implementation Report.

7. Regarding Article 3, paragraph 8, we observe that the Report only speaks to any decision "by EU institutions" that would penalize, persecute or harass activists. Yet the EU additionally has the duty to establish a framework for and to monitor the actual practice in Member States.[2] Here there is evidence of a growing number of problems in several Member States (notably in Poland, Hungary, Bulgaria, e.g.). We find an acknowledgement of the EU's special role in this context important and information as to how it fulfills this role would be appropriate to include as well.

B. Comments on Section IV. "Obstacles encountered in the implementation of Article 3" and V. "Further information on the practical application of the general provisions of Article 3"

8. There are significant Article 3, paragraph 1 issues for the EU. These pertain both to cases of the EU's established noncompliance[3] as well as pending cases. Though these issues need not be dealt with in detail here, we find at a minimum a quick reference and acknowledgment of these framework issues would be appropriate.

C. Comments on Section XIII. on "Further information on the practical application of the provisions of Article 5"

9. Active information provision is a key concept that should gain more and more ground and should enable the public to access environmental information in an easy and cheap manner. In this respect, a recent judgment of the EU Court not specifically connected to Article 5 of the Aarhus Convention but still related should have been mentioned. In this judgment, the Court established that chemicals that are part of products are also released into the environment, therefore their presence in the respective products are considered as emissions. This interpretation is a major step towards active information dissemination with special regard to chemicals.[4]

D. Comments on Section XV. on "Legislative, regulatory and other measures implementing the provisions on public participation in decisions on specific activities in Article 6"

10. Particularly the reference to Article 6, paragraph 1 of the Convention makes a mention of the Industrial Emissions Directive. As it is well known, there is a case before the ACCC initiated by J&E Spain (i.e. IIDMA) on the restricted public participation provided by the IED when an update and review of a permit takes place. We believe that this case will have serious implications on whether the EU law implements the Convention properly.

E. Comments on Section XIX. on "Practical and/or other provisions made for the public to participate during the preparation of plans and programmes relating to the environment pursuant to Article 7"

[2] In addition to the ACCC case law we cite below in support of this point, we note the EU itself acknowledges this special role in Section II. of the Report

[3] ACCC/C/2010/54 (EU) (henceforth C-54 (EU))

[4] Case C-442/14, *Bayer CropScience and Stichting De Bijenstichting*

11. In the Section devoted to the provisions to implement Article 7 of the Aarhus Convention, the Report does not mention the IED. Specifically, our concern relates to the lack of public participation in the preparation and update of TNPs under Article 32 of the IED. In fact, the Commission has sustained its view that public participation was not necessary in such procedures although TNPs are plans related to the environment. This has not been mentioned among the obstacles of implementation.

F. Comments on Section XXI. "Obstacles encountered in the implementation of Article7"

12. While there is a reference in the Report to the ACCC cases that were initiated against the EU, the lack of presentation of their outcomes makes this part of the Report strikingly insufficient. J&E is convinced that the public having access to the Implementation Report would be interested in reading outcomes of cases before the ACCC that raise the issue of Article 7 implementation.

G. Comments on Section XXVIII. "Legislative, regulatory and other measures implementing the provisions on access to justice in Article 9"

1. Access to Justice with respect to EU institutions and bodies

Article 9, paragraph 3

13. At the outset we note that the Report makes no mention of either the pending case of J&E Austria (i.e. OEKOBUERO), which concerns a lack of access to justice to challenge the Commission's approval of state aid for the planned nuclear facilities at Hinkley Point C,[5] nor a ClientEarth case,[6] for which the Compliance Committee has already issued Draft Findings. Yet both seem highly relevant to understanding the full picture of the EU's implementation in this context.

14. Contrary to the Report's suggestion at page 27, Article 263 TFEU does not widen the possibilities for access to justice for natural or legal persons in a manner that implements Article 9 of the Convention. The provision's first two limbs quite obviously do not provide the requisite access to justice; nor does its newly-created "third limb", which provides that natural and legal persons can challenge a regulatory act which is of direct concern to them and does not entail implementing regulations. This follows from how this provision has been interpreted by the CJEU.[7]

15. First, the CJEU's interpretation of "a regulatory act" to include only "acts of general application other than legislative acts" wrongfully excludes a large number of acts including, notably, state aid decisions.[8] Yet there is no basis in Article 9, paragraph 3 for such a restriction. Nor is there a basis for limiting access to justice to non-legislative acts. Second, the "direct concern" criterion has been interpreted to mean the challenging party's legal position must be directly affected by the act at

[5] ACCC/C/2014/128 (EU)

[6] ACCC/C/2008/32 Part II

[7] See, in particular Case C-583/11 P, *Inuit Tapiriit Kanatami v. European Parliament, Council of the EU* (the *Inuit* case) and Case T-262/10, *Microban International Ltd v. Commission* (the *Microban* case)

[8] Case T-57/11, *Castelnou Energia SL v. Commission*; Case T-382/15 *Greenpeace Energy eG a.o. v. Commission*

issue.[9] This can never happen in the case of an NGO or individual acting to protect the environment, so these claims will always be denied. Finally, there is no basis in the Convention for the limitation to acts which do not require implementing regulations.

16. The definitions in Article 2 (1) of the Aarhus Regulation, cited in the Report at page 28, are problematic in several respects, especially when read in conjunction with the Regulation's Articles 10-12. The definition of an "administrative act"[10] as "any measure of individual scope under environmental law that has legally binding and external effects" has meant that virtually no acts taken by an EU institution or body can be challenged. On the basis of this definition the Commission has refused to accept requests for internal review of *inter alia* its approvals of TNPs pursuant to the IED;[11] its approval of a National Investment Plan pursuant to the ETS Directive;[12] and its Guidelines on State Aid for environmental protection and energy.[13] Yet Article 9, paragraph 3 is neither limited to acts of "individual scope" nor those having "legally binding and external effects." Nor is there anything in the Convention to suggest the act must have an environmental law as its legal base.

17. As the Report observes on page 28, the Aarhus Regulation furthermore limits any potential challenges to NGOs. Yet it is quite clear that Article 9, paragraph 3 includes, but is in no way limited to these. Others, notably individuals, also are "members of the public," meaning they should also be given access to justice.[14] We would add that the Regulation contains a number of arbitrary exclusions, such as where the Commission acts as an administrative review body, as is the case for state aid decisions and infringement proceedings, none of which is justified by the Convention.

18. Finally, the internal review procedure outlined in Articles 10-12 of the Regulation is deficient on multiple levels. For one there is the obvious question of neutrality; the body charged with review is the very same body that undertook the act in the first place, namely the Commission. Moreover, the General Court recently interpreted Article 12 in a way that only permits the court to review the Commission's decision to reject the request for internal review, not the substance of the underlying act for which the internal review was sought.[15] Mention of this important case would be appropriate.

19. On the whole we express regret regarding the clear divergence between the standard the EU applies to its Member States on the one hand,[16] and the standard it applies to itself on the other. The Report's statement that "the obligations deriving from Article 9(3)...fall primarily within the scope of Member States" fails to acknowledge the simple fact that the EU, too, is a Party to the Convention.

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[9] *Microban;* see also Case T-600/15, *PAN Europe e.a. v. Commission*

[10] Article 2 (1)(g) of the Aarhus Regulation

[11] Decision C(2014) 2317513 of 11 July 2014; Decision C(2914) 1915757 of 12 June, 2014; Decision C(2015) 2853803 of 7 July 2015; Decision C(2015) 3874494 of 18 September 2015

[12] Decision C(2012) 8382 of 12 November 2012

[13] Decision C(2014) 104829 of 23 October 2014

[14] ACCC/C/2006/18 (Denmark), paras. 30-31; ACCC/C/2010/48 (Austria), paras. 68-70

[15] Case T-177/13, *TestBioTech eV v. Commission*

[16] To that effect see Case C-240/09, *Lesoochranárske zoskupenie* (the "*Slovak Brown Bears Case*")

Article 9, paragraph 4

20. J&E is monitoring the legal cases both at the national and the EU levels that raise the issue of access rights in environmental matters. Based on this experience, we are convinced that the lack of procedural rules on the EU level is primarily liable for the high level of uncertainty as regards to how cases on the EU level are decided. An EU level administrative procedural code could ensure more clarity and could be at the same time a safeguard to meet the requirements of Article 4, paragraph 4 of the Convention on the EU level.

21. The foreseen date of the adoption of the Interpretative Guidance / Commission Communication on access to justice should be corrected to 2017.

2. Implementation with respect to the Member States

Article 9, paragraph 1

22. Article 6 of the Environmental Information Directive, cited on page 29 of the Report notwithstanding, we note that there have been difficulties in this area, particularly in Austria,[17] with respect to adequate review mechanisms for access to information requests. Despite Findings of noncompliance, and despite the MOP's endorsement, to date these difficulties have not been entirely resolved at the level of the federal provinces (*Bundesländer*). We find a more thorough monitoring of the Member States by the EU could have been helpful, and that the Report should address this issue.

Article 9, paragraphs 2-5

23. We note with concern that no reference is made in this Section to J&E's pending case against the EU concerning this very issue.[18]

24. Significantly, of the eight EU Member States that have been found to be in non-compliance with the Convention, seven have been found noncompliant specifically with regard to access to justice.[19] In actual practice the number of noncompliant Member States is likely higher, but due to legal, financial, and other hurdles, cases proving this have not been brought. For example, Poland is likely a further case where, as in Austria, Germany, and Bulgaria, the national system applies too strict standing criteria for both individuals and NGOs.

25. Implementation of Article 9 (particularly its paragraph 3) at the level of the Member States is fragmented, incoherent, and in many cases, falls far short of ensuring the necessary access to justice. This basic reality has been demonstrated through expert studies,[20] as well as in statements and

[17] These, among other problems gave rise to ACCC/C/2010/48 (Austria) (henceforth "C-48 (Austria)"), endorsed by Decision V/9b

[18] ACCC/C/2014/123 (EU)

[19] Austria, Bulgaria, Czech Republic, Germany, Romania (stemming from ACCC/2012/69 (Romania)), not yet reported to MOP); Spain, United Kingdom. For the complete list of noncompliant countries and associated documents, see http://www.unece.org/env/pp/ccimplementation.html

[20] Milieu and Darpö Reports, e.g.

documents by the EU's own institutions and bodies. As recently as 2016 the Commission expressly acknowledged in a letter to the EEB, for example, that "there are disparities within the EU" and "Member States are not doing enough" and that "the best way forward would be to take an EU level initiative on access to justice in environmental matters in order to remove existing national barriers of accessing national court."[21]

26. It is clear that these disparities and the failures by the Member States can only be resolved through EU action. The EU is, moreover, obliged to take such action. As made clear in ACCC/C/2012/70 (Czech Republic) and ACCC/C/2010/54 (EU), the EU bears both the responsibility for having in place a *proper regulatory framework* and/or *clear instructions* to ensure Member State implementation of the Convention, and the *monitoring* responsibility to ensure such implementation actually takes place.

27. While the CJEU has contributed to many significant positive developments with regard to Member State implementation of Article 9, it can in no way be seen as a substitute for clear regulatory/legislative steps. Nor can it constitute "clear instructions". The jurisprudence generally lacks the necessary clarity,[22] and, as is evident from a comparison of the CJEU judgments as applied to the Member States as opposed to its own institutions, it is not consistent, either.

28. We note also that the scattered individual instruments – such as the Mediation Directive, the Environmental Liability Directive, etc. – cited in the Report also fail to put a proper regulatory framework into place. This is particularly so when considering the breadth of Article 9, paragraph 3.

29. Nor do we consider the Commission's proposed Interpretative Communication, cited on page 31 as fulfilling the EU's duties in this area. This is merely a guidance document and thus lacks the legal status to be either a "proper regulatory framework" or "clear instructions". A document that "will aim at providing a clear idea of what the Commission expects at national level" is clearly insufficient. What is needed, rather, is a binding legal instrument, such as a directive.

30. Additionally, as the Report indicates, the Interpretive Communication is to be based on the case law of the CJEU, not of the Compliance Committee. We find this omission truly regrettable, as the latter has developed an extensive and consistent body of case law. Accordingly, inclusion of this case law in any EU instrument would provide much-needed clarity on a wide range of issues.

H. Comments on Section XXIX. on "Obstacles encountered in the implementation of Article 9"

31. While the Commission mentions a number of infringement actions against Member States, it is painfully missing from this Section how such cases ended and where they stand now. This should indeed be complemented in the final version of the Implementation Report.

I. Comments on Section XXX. "Further information on the practical application of the provisions of Article 9"

[21] Available at: http://www.unece.org/fileadmin/DAM/env/pp/compliance/C2015123_European_Union/frCommC123_24.02.2016_Annex_Letter_from_the_EC_to_the_European_Environmental_Bureau.pdf

[22] As to the significant problems associated with relying on jurisprudence, see in particular ACCC/C/2008/33 (UK)

32. Absent from this Section is any reference to the jurisprudence relating to implementation for acts and omissions of EU institutions and bodies.[23] For the reasons explained above, we think a full picture of the state of the EU's implementation of the Convention requires discussion of this jurisprudence as well, either in this Section of the Report, or in either of its Sections XXVII. or XXIX.

33. We would also like to add that we find the issue of the *scope of review* as presented in the Report's discussion of Case C-137/14, *Commission v. Germany*, raises a concern as to compliance. We see no basis in the Article 2, paragraph 5 in conjunction with Article 9, paragraph 2 of the Convention to limit the scope of arguments, that is, *what* may be challenged. Any discretion the Parties enjoy under these provisions pertain, rather, to the question of *who* may bring the challenge. We would add that the same conclusion holds with respect to Article 2, paragraph 4 of the Convention in conjunction with Article 9, paragraph 3. In either case, where an individual or NGO has standing, they should (also) be able to bring claims alleging violations of laws, even where such violations do not themselves impair or infringe upon their rights.[24]

J. Comments on Section XXXVII. "Follow-up on issues of compliance"

34. With respect to follow-up on Decision V/9g (EU), we do not share the Report's suggestion that the measures the EU has taken are a proper regulatory framework or clear instructions for implementing Article 7 of the Convention in relation to the Member States' NREAPs. We also are concerned about a lack of adequate monitoring. Generally, we note that this Section is not very informative.

35. Regarding amendments to 2010 NREAPs, the measures taken largely consist of sending letters to its Member States, in which the EU merely "reminded" them of their duties to provide public participation. This cannot be seen as clear instructions to the Member States on how to actually make arrangements to ensure proper implementation of Article 7. We also find that these letters do not provide sufficient evidence that the EU is undertaking proper monitoring. According to the Commission services' own assessment, 10 Member States did not provide any explanation at all in response to the letters and a further 6 did not provide a fully satisfactory reply.[25] The Commission signaled in its 3rd Progress Report that it intends to ask these 16 Member States specific questions to determine if the national framework sufficiently implements the Convention. Yet, we find these efforts to be far too little, far too late.

36. Regarding the adoption of post-2020 plans, we note that the 2015 Communication cited at page 37 of the Report does not include detailed provisions which would ensure each element of Article 7 is met, and thus also falls short of being clear instructions that would satisfy paragraph 3 of Decision V/9g. Moving forward, proper monitoring of these plans must also be ensured.

[23] In particular, the *Inuit case*, the *Microban case*, and the state aid decisions cited above.

[24] C-48 (Austria); ACCC/C/2008/31 (Germany)

[25] See Commission's Reply to the ACCC's questions, dated 09.12.2016; available at http://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP5decisions/V.9g_EU/frPartyV9g_09.12.2016_email.pdf

CONCLUSIONS

37. J&E is committed to enhancing the implementation of access rights, both on the Member State and the EU levels. Pursuant to our mandate and mission, we want to highlight both the achievements and the shortcomings in ensuring transparency and inclusiveness in the decision-making procedures either by Member State Competent Authorities or by EU institutions and bodies.

38. Based upon a decade-long experience of J&E on the EU level and an even longer experience of J&E member organizations on the Member State level, we believe that there are major achievements in implementing the Aarhus Convention while also very significant gaps are to be revealed in this matter.

39. In our understanding, the Implementation Report to the Aarhus Convention of the EU is a fair evaluation of the situation in terms of those achievements that the Report mentions, however, it remains silent on a number of missing legislative instruments, wrongly construed provisions and practice that results in a limited exercise of access rights by the public.

40. For the above reason we call the attention of the Commission to complement the Implementation Report with the above suggestions and comments of J&E and only after that process, submit the report to the Convention Secretariat and to the Meeting of the Parties to be convened in September 2017.

Yours Faithfully,

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