



EU Implementation of the Aarhus Convention in the area of Access to Justice in Environmental Matters

June 2018

Wildlife and Countryside Link is a coalition of 48 voluntary organisations concerned with the conservation and protection of wildlife and the countryside. Its members practice and advocate environmentally sensitive land management, and encourage respect for and enjoyment of natural landscapes and features, the historic and marine environment and biodiversity. Taken together its members have the support of over 8 million people in the UK and manage over 750,000 hectares of land.

This response is supported by the following organisations:

ALERC
Bat Conservation Trust
Buglife
Friends of the Earth
Institute of Fisheries Management
RSPB
RSPCA
The Wildlife Trusts
Salmon and Trout Conservation
Whale and Dolphin Conservation
Woodland Trust
Wildfowl and Wetlands Trust
WWF-UK

Background

In case ACCC/C/2008/32, the Aarhus Convention Compliance Committee (the Committee) found that neither the Treaty on the Functioning of the EU TFEU, as interpreted by the Court of Justice of the European Union (CJEU), nor the Aarhus Regulation (1367/2006) grant sufficient administrative or judicial redress as required by the Convention. The Committee found the Commission to be in breach of the Convention on the following points:

- The Aarhus review mechanism should be opened up beyond NGOs to members of the public;
- The review should encompass general acts and not only acts of individual scope (as set out in Article 10 in conjunction with 2(1)(g) of the Aarhus Regulation);
- 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.

In the absence of a change in jurisprudence of the CJEU, the Committee recommended that the EU either amends the Aarhus Regulation (para 123(b)(i) of the Findings) or adopts new legislation to fully transpose the requirements of the Convention (para 123(b)(ii)).

At the VI Meeting of the Parties to the Aarhus Convention in Budva (Montenegro) in September 2017, we regret that no agreement was reached on the findings, and the adoption of a decision was postponed until the next MoP in 2021. During MoP VI, a number of contracting Parties expressed concern that the EU was seeking to exempt itself from its international obligations in this respect.

The European Parliament has previously expressed a preference for amending the Aarhus Regulation¹ and we understand the Council also intends to make an official request based on Article 241 TFEU to the Commission asking them to adopt a legislative proposal.

The Inception Impact Assessment (published 8th May 2018)

The Commission's Impact Assessment states:

"The [Committee's] findings do not recognise that the EU system of remedies is already complete, consisting of the EU Courts and the national courts, which are linked as ordinary courts of the EU law to the Court of Justice of the EU within the system of preliminary references under Article 267 TFEU ... Preliminary references can be used to examine the validity as well as the interpretation of EU acts. Moreover, the Committee suggested a broadening of the administrative review provided for in the Aarhus Regulation, Title IV in order to compensate a lack of proper access to justice."

In light of the above, and the "complex nature of the issues at stake", the Commission proposes to prepare a consultation strategy on the basis of targeted consultations with relevant public authorities, experts in the Member States and through existing expert groups (on access to justice and the newly established Environmental Compliance and Governance Forum). The public consultation will be open to all stakeholders for 12 weeks later in 2018.

Link does not agree that the EU system of remedies is complete. As recognised in the Committee's initial findings in 2011, the preliminary reference system under Article 267 TFEU does not meet the requirements of Article 9(3) Aarhus Convention because, *inter alia*, the procedure requires the individual or NGO to be granted standing in the Member State concerned and also requires the national court concerned to bring the case to the CJEU (see paras 89-90 of the Findings). Similarly, we note that of some 35 requests for an internal review of EU institutions, only 7 have been declared admissible. The remaining requests were denied on the basis of the requirement that an "administrative act" must be of "individual scope", "adopted under environmental law" and "have legally binding and external effects".

Conclusion

¹ European Parliament Resolution of 15 November 2017 on an Action Plan for Nature, People and Economy (2017/2819(RSP))

The EU is a contracting Party to the Aarhus Convention in its own right and, in accordance with Article 27 of the Vienna Convention of the Law of Treaties, the EU cannot avoid fulfilling its international obligations by involving internal law.

Should the Commission wish to undertake expert and public consultation on the feasibility of introducing an Access to Justice Directive in order to fully transpose the third pillar of the Aarhus Convention, Link would be pleased to respond. However, there is no need to conduct any further assessment of “how access to justice works” in order for the Commission to amend the Aarhus Regulation (which should be done whether or not the Commission subsequently consults on access to justice more widely). Link urges the Commission to amend the Aarhus Regulation without further delay in recognition of the Committee’s unequivocal recommendation and the ongoing and unsatisfactory access to justice deficit existing within the EU.

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