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OPINION OF THE LEGAL SERVICE¹

From:	Legal Service
To:	Working Party on International Environment Issues
Subject:	Aarhus Convention - findings of the Compliance Committee: preparation for the MoP and next steps

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INTRODUCTION

1. At its meeting on 22 March 2017, the Working Party on International Environment Issues took note of a preliminary presentation by the Commission of the findings² of the Aarhus Convention Compliance Committee ("ACCC") in Case ACCC/C/2008/32 ("Case C-32"). Those findings were to the effect that the Union is not fully in compliance with its obligations under the Aarhus Convention, and in particular Article 9 thereof. **DELETED**

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² Adopted by the ACCC on 17.3.2017.

2. For the purposes of the present opinion it is assumed that, since the findings are final subject only to editorial revisions³, no useful purpose would be served in disputing particular conclusions, passages or expressions used by the ACCC. The (unverified) hypothesis is made that they are factually correct.

DETERMINING THE UNION'S RESPONSE TO THE FINDINGS IN VIEW OF THE MoP

The status of the Aarhus Convention in the Union legal order

3. The Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters ("the Convention") was signed on behalf of the Community in 1998⁴. On that occasion, a declaration was made which, in so far as material for present purposes, reads:

*"[...] Fully supporting the objectives pursued by the Convention and considering that the European Community itself is being actively involved in the protection of the environment through a comprehensive and evolving set of legislation, **it was felt important not only to sign up to the Convention at Community level but also to cover its own institutions, alongside national public authorities.**"*

³ See footnote 2 of the findings: *"This text will be produced as an official United Nations document in due course. Meanwhile editorial or minor substantive changes (that is changes that have no impact on the findings and conclusions) may take place."*

⁴ Although the Convention includes significant provisions relating to access to information and participation in decision-making in the environmental field, those provisions are not relevant here.

Within the institutional and legal context of the Community and given also the provisions of the Treaty of Amsterdam with respect to future legislation on transparency, the Community also declares that the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention.

The Community will consider whether any further declarations will be necessary when ratifying the Convention for the purpose of its application to Community institutions.” (Emphasis added).

4. The Convention was approved on behalf of the Union by the Council in 2005⁵. On that occasion, a further declaration was made, in order to comply with the obligation under Article 19 of the Convention concerning the extent of Community as opposed to Member State competence. For the purposes of the present opinion, it is worth recalling the following extract from that declaration:

*“[...] In particular, the European Community also declares that the legal instruments in force **do not cover fully the implementation of the obligations resulting from Article 9 (3) of the Convention** as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities **other than the institutions of the European Community** as covered by Article 2 (2)(d) of the Convention, and that, consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations. [...]”*

⁵ See Decision 2005/370 (OJ L124/1 of 17.5.2005).

5. Article 2(2)(d) of the Convention defines “public authority” as:

“[...]The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

This definition does not include bodies or institutions acting in a judicial or legislative capacity;”

6. Article 9(3) and (4) of the Convention reads as follows:

"3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, 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.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible."

7. Although the Commission proposed⁶ that Member States be bound by legislation adopted at Union level to implement measures concerning access to justice, that proposal was eventually withdrawn⁷ in view of the fact that it did not find support within the Council⁸. Conversely, as regards the Union’s own institutions, the Parliament and Council adopted Regulation 1367/2006⁹. That Regulation has been the subject of litigation before the Court of Justice and was also at the heart of the substance of the ACCC’s findings. Its material provisions therefore need to be recalled.

⁶ See COM(2003) 624 final, COD 2003/246.

⁷ The proposal was withdrawn in 2014. See OJ C153/3 of 21.5.2014.

⁸ See doc. 9967/05, “State of play.”

⁹ OJ L264/13 of 25.9.2006.

8. Article 1 of Regulation 1367/2006, which is entitled “*Objective*”, provides:

“1. The objective of this Regulation is to contribute to the implementation of the obligations arising under the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, hereinafter referred to as ‘the Aarhus Convention’, by laying down rules to apply the provisions of the Convention to Community institutions and bodies, in particular by:

[...]

(d) granting access to justice in environmental matters at Community level under the conditions laid down by this Regulation.”

Article 2(1)(g) provides;

*“ ‘administrative act’ means any measure of **individual scope** under environmental law, taken by a Community institution or body, and having legally binding and external effects;”* (Emphasis added).

9. Title IV of Regulation 1367/2006, encompassing Articles 10 to 12, is entitled “*Internal review and access to justice*”. Article 10(1) provides: “*Any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act.*”

10. In its judgment in Joined Cases C-401/12P- C-403/12P *Council of the European Union and others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*¹⁰, the Court of Justice held that the Aarhus Convention is **not** an instrument in the light of which the legality of acts of the Union may be reviewed. This was because the obligations contained in Article 9(3) and (4) of the Convention are not sufficiently precise and unconditional to be of direct effect in the Union’s legal order¹¹ and, moreover, Regulation 1367/2006 cannot be regarded as having been intended to implement a “particular” obligation under the Convention within the meaning of the Court’s judgments in the *Fediol* and *Nakajima* cases¹².
11. On that basis, the Court of Justice upheld the appeals and set aside the judgment of the General Court, which had held not only that the Aarhus Convention could be used to assess the validity of Union legislation, but also that Articles 2(1)(g) and 10(1) of Regulation 1367/2006 were invalid in the light of the Convention. **DELETED**

¹⁰ ECLI:EU:C:2015:4. These cases were appeals from the judgments of the General Court in Cases T-338/08, ECLI:EU:T:2012:300, and T-396/09, ECLI:EU:T:2012:301. As explained by the note of the Council Legal Service to Coreper (I), doc. 12664/12, the reason for bringing the appeals was not so much to do with the Aarhus Convention in particular, but rather the “*broad questions of principle concerning the extent to which the legality of the Union's acts may be reviewed in the light of international conventions to which the Union is a party.*”

¹¹ See paragraph 55 of the judgment.

¹² See paragraphs 56 to 61 of the judgment. The *Fediol* and *Nakajima* cases are further explained at paragraphs 33-35, below, and in the aforementioned note from the Legal Service, doc. 12664/12. The case references are, respectively, 70/87, ECLI:EU:C:1989:254, and C-69/89 ECLI:EU:C:1991:186.

12. As regards Member States' rules on access to justice in the field covered by the Convention, the Court has held that, although the Convention does not have direct effect, national courts must "[...] interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation, [...] to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law."13

13. **DELETED**

The legal status of the MoP and the ACCC

14. Article 15 of the Convention, entitled "Review of compliance", provides:

"The Meeting of the Parties shall establish, on a consensus basis, optional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention."

13

DELETED

15. The ACCC was duly established by Decision I/7 adopted by the first MoP, in 2004. The preamble to that decision begins “[the meeting], determined to promote and improve compliance with the convention on access to information, public participation in decision-making and access to justice in environmental matters and recalling its article 15,” before stating that the ACCC is established “for the review of compliance by the Parties with their obligations under the Convention.”
16. Section III of Decision I/7 is entitled “*Functions of the Committee*”. In accordance with paragraphs 13 and 14, which are contained in that section:

“13. The Committee shall:

(a) Consider any submission, referral or communication made in accordance with paragraphs 15 to 24 below;

(b) Prepare, at the request of the Meeting of the Parties, a report on compliance with or implementation of the provisions of the Convention; and

(c) Monitor, assess and facilitate the implementation of and compliance with the reporting requirements under article 10, paragraph 2, of the Convention; and act pursuant to paragraphs 36 and 37.

14. The Committee may examine compliance issues and make recommendations if and as appropriate.”

17. Paragraph 37, in section XII entitled “*Consideration by the Meeting of the Parties*”, provides:

*“37. The Meeting of the Parties may, upon consideration of a report and any recommendations of the Committee, **decide** upon appropriate measures to bring about full compliance with the Convention. The Meeting of the Parties may, depending on the particular question before it and taking into account the cause, degree and frequency of the non-compliance, **decide** upon one or more of the following measures:*

- (a) Provide advice and facilitate assistance to individual Parties regarding the implementation of the Convention;*
- (b) Make recommendations to the Party concerned;*
- (c) Request the Party concerned to submit a strategy, including a time schedule, to the Compliance Committee regarding the achievement of compliance with the Convention and to report on the implementation of this strategy;*
- (d) In cases of communications from the public, make recommendations to the Party concerned on specific measures to address the matter raised by the member of the public;*
- (e) **Issue declarations of non-compliance;***
- (f) Issue cautions;*
- (g) **Suspend, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention;***
- (h) Take such other non-confrontational, non-judicial and consultative measures as may be appropriate.” (Emphasis added).*

18. In accordance with Article 11 of the Convention, each party has one vote. However, the Union has a number of votes equal to the number of its members which are also parties to the Convention¹⁴. There are currently **47** parties to the Convention (including the Union). Decision I/1, establishing the rules of procedure for the MoP, provides, in Rule 35:

“1. The Meeting of the Parties shall make every effort to reach its decisions by consensus.

¹⁴ All Member States are parties to the Convention.

2. If all efforts to reach consensus have been exhausted and no agreement reached, decisions on substantive matters shall, as a last resort, be taken by a three- fourths majority vote of the Parties present and voting, except where the Convention or rule 47 provides otherwise.

[...]

5. For the purposes of these rules, "Parties present and voting" means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall be considered as not voting."

19. **DELETED**

20. **DELETED**

Article 218(9) TFEU

21. Article 218(9) TFEU provides: *"The Council, on a proposal from the Commission [...], shall adopt a decision [...] establishing the positions to be adopted on the Union's behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement."*
