23 February 2015

Communication ACCC/C/2008/32 (Part II) - Update on Court of Justice rulings in cases C-401/12 P to C- 405/12 P

1. In 2011, the Compliance Committee decided to stay its proceedings and the adoption of its findings with regard to the second part of Communication ACCC/C/2008/32 on the non-compatibility of Articles 2(1)(g)(h) and 10 of Regulation 1367/2006 (the "Regulation") with Article 9(3) of the Aarhus Convention until the Court of Justice of the EU adopted its rulings in joined cases C-401/12 P to C- 403/12 P[1] and joined cases C-404/12P and C-405/12P.[2] The Court of Justice adopted its rulings on January 13th 2015. We hereby provide the Committee with our analysis of these judgments as well as the way in which the Commission has interpreted the relevant provisions of the Regulation.

2. Section 4.2 of the communication raises the non-compatibility of the definition of administrative acts provided under Article 2(1)(g) of Regulation 1367/2006 with Article 9(3) of the Aarhus Convention, we therefore refer to it and do not repeat the arguments made therein.

Rulings in joined cases C-401/12P to C-403/12P and joined cases C-404/12P and C-405/12P: the lack of proper implementation of Article 9(3) of the Aarhus Convention

3. In Joined Cases C-401/12 P to C-403/12 P the NGO applicants had submitted a request to the Commission for internal review, under Article 10 of Regulation 1367/2006, of the decision of the Commission to grant the Netherlands an exemption under Directive 2008/50 on ambient air quality. The Commission rejected the NGOs' request as inadmissible on the ground that its decision was not a measure of individual scope and that it could therefore not be considered an "administrative act" within the meaning of Article 2(1)(g) of Regulation 1367/2006. Only an administrative act could be the subject of an internal review procedure provided under Article 10 of the Regulation. The NGOs sought the annulment of that decision before the General Court.

4. In joined cases C-404/12 P and C-405/12 P, the decision the NGO applicants sought to annul was Regulation 149/2008 of 29 January 2008, amending Regulation 396/2005 by establishing Annexes II, III and IV setting maximum (pesticides) residue levels for products covered by Annex I. The Commission also rejected this request for the same reason given in joined Cases C-401/12 P to C-403/12 P.

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[1] Joined cases C-401/12 P to C-403/12 P, *Council, European Parliament, Commission v Vereniging Milieudefensie, Stichting Stop Luchtverontreiniging Utrecht*, ECLI:EU:C:2015:4.

[2] Joined cases C-404/12 P and C-405/12 P, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, ECLI:EU:C:2015:5.

5. In all cases refered to above, the General Court annulled the Commission's decision.

General Court's ruling

6. The applicants alleged that Article 10(1) of Regulation 1367/2006 was incompatible with Article 9(3) of the Aarhus Convention. Article 10 (1) in conjunction with Art 2(1) (g) of the Regulation restricts the categories of acts that can be challenged within the internal review procedure to administrative acts, which are defined as "acts of individual scope", whereas Article 9(3) of the Aarhus Convention provides that members of the public can challenge "acts and omissions" by private persons and public authorities.

7. The General Court recalled settled case-law and noted that the Aarhus Convention prevailed over acts of secondary EU legislation and stated that the courts of the EU may examine the validity of a provision of a regulation in the light of an international treaty only where the provisions of the treaty are unconditional and sufficiently precise.

8. However, referring to the *Fediol* and *Nakajima* cases, the General Court also stated that where an EU regulation implements international law to impose obligations on EU institutions, the courts must be able to review the legality of that regulation in the light of the international agreement. This is the case even where the rules of that agreement are not capable of conferring on the individual concerned the right to invoke it before the courts.

9. It concluded that Regulation 1367/2006 had been adopted to meet the EU's obligations under Article 9(3) of the Aarhus Convention, as was clear from both Article 1(1) of Regulation 1367/2006 and recital 18 of its preamble. It followed that Article 10(1) of the Regulation, in so far as it provides for an internal review procedure only in respect of acts defined as "measures of individual scope", is incompatible with Article 9(3) of the Aarhus Convention. It consequently annulled the Commission's decisions.

10. This ruling was welcome, as it would have brought the Regulation into compliance with the Aarhus Convention by providing access to justice in line with Article 9(3) of the Convention. Much broader categories of decisions breaching environmental law could then have been challenged.

11. The Commission, the Council and the Parliament appealed the ruling. The three institutions unanimously claimed that the General Court erred in holding that Article 9(3) of the Aarhus Convention may be relied on in order to assess the compliance of Article 10(1) of Regulation 1367/2006 with that provision.

Appeal ruling

12. The Court of Justice of the EU confirmed the ruling of the General Court in that it referred to the case-law according to which provisions of an international agreement need to be unconditional and sufficiently precise to be relied upon in support of an action for annulment of an act of secondary EU law. It held that Article 9(3) of the Aarhus Convention did not contain any unconditional and sufficiently precise obligation capable of directly regulating the legal position of individuals. Since only members of the public who "*meet the criteria, if any,*

laid down in ... national law" are entitled to exercise the rights provided for in Article 9(3), this required the adoption of a subsequent measure and was not, therefore, unconditional and sufficiently precise.

13. Also, the Court rejected the application of the *Fediol* and the *Nakajima* cases, holding that "*those two exceptions were justified solely by the particularities of the agreements [WTO and GATT] that led to their application*"[3]. Article 10(1) of Regulation 1367/2006 neither made direct reference to specific provisions of the Aarhus Convention nor conferred rights on individuals to rely on Article 9(3)[4]. In addition, Article 10(1) did not implement specific obligations stemming from Article 9(3) of the Aarhus Convention since the parties to the Convention had a broad margin of discretion when defining the rules for the implementation of "*the administrative or judicial procedures*" provided[5].

14. Finally, the Court ruled that it cannot be considered that, by adopting Regulation 1367/2006, the EU intended to implement obligations that 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*" and refered to the *Lesoochranarske zoskupenie* case (EU:C:2011:125, paragraphs 41 and 47)[6].

15. The Court concluded that Article 9(3) of the Aarhus Convention could not be relied on in order to assess the legality of Article 10(1) of Regulation 1367/2006. Consequently, the question of whether limiting administrative and judicial challenges to acts of individual scope is compatible with Article 9(3) of the Convention remains unanswered.

The non-implementation of Article 9(3) of the Aarhus Convention

16. In these rulings, the Court avoids tackling the legal issue at stake: the compatibility of the definition of the acts that can be challenged within the internal review procedure set out under Article 10(1) of Regulation 1367/2006 and before the Courts with Article 9(3) of the Aarhus Convention.

17. In neither case has the Court decided that the European Commission's decisions are legally correct.

18. The Court has not ruled either that Regulation 1367/2006 is legally sound nor that the Aarhus Convention is correctly implemented into European law. The Court has based its rulings on technical legal arguments setting the main question aside, the concrete result being that the Regulation continues to be applied in breach of Article 9(3) of the Aarhus Convention.

19. This ruling raises a question about the way the EU applies the international conventions it ratifies, in this case the Aarhus Convention. Refusing to review the legality of EU secondary legislation in the light of provisions of the Aarhus Convention, which is ratified by the EU, is

[3] Cases C-404/12P and C-405/12P, para. 49
[4] Cases C-404/12P and C-405/12P, para. 50
[5] Cases C-404/12P and C-405/12P, para. 51
[6] Cases C-404/12P and C-405/12P, para. 52.

in direct contradiction with Article 216(2) of the Treaty on the Functioning of the EU (TFEU) which provides that international conventions are binding upon the EU institutions and with settled case-law which states that these conventions prevail over EU secondary law.

20. It is clear from the wording of Article 9(3) of the Convention that its material scope is "acts and omissions" without restrictions except for decisions adopted within the legislative and judicial capacity of public authorities.

21. The Aarhus Convention Compliance Committee (ACCC) decided that Article 9(3) of the Aarhus Convention is applicable to all acts and omissions by private persons and public authorities contravening national law relating to the environment. For all these acts and omissions, each Party must ensure that members of the public "*where they meet the criteria, if any, laid down in its national law*" have access to administrative or judicial procedures to challenge the acts and omissions concerned[7].

22. The Committee also held that "*when determining how to categorize a decision under the Convention, its label in the domestic law of a Party is not decisive. Rather, whether the decision should be challengeable under article 9, paragraph 2 or 3, is determined by the legal functions and effects of a decision, i.e. on whether it amounts to a permit to actually carry out the activity*."

23. It follows that contrary to Article 9(2), Article 9(3) of the Convention does not only apply to permits but to all acts and omissions. However, in limiting the possibility to resort to the internal review request procedure under Article 10 of Regulation 1367/2006 to acts of individual scope, the Aarhus Regulation in fact limits it to permits and authorisations. The reasoning is that acts of general scope do not fall under the scope of Article 10. Article 10(1) of the Regulation does not therefore implement Article 9(3) correctly. Moreover, not all permits and authorisations are considered as administrative acts. Only those addressed to one operator/manufacturer/producer are considered to be such. As a result, very few decisions adopted in environmental matters can be challenged.

24. Evidence of that is provided by the number of internal review requests made by NGOs to the Commission considered as inadmissible by the latter (see below).

An alternative legal reasoning

25. As demonstrated below, the Court could have clearly taken another legal route and proceeded to the examination of the compatibility of the Regulation with the Convention. An alternative legal reasoning existed as advised by the Advocate General in joined cases C-401/12P to C-403/12P.

26. Contrary to what the Court asserts, despite the sentence "*where they met the criteria, if any, laid down in its national law*", Article 9(3) of the Aarhus Convention is unconditional as it does not require national measures to be adopted but simply refers to the possibility for the parties to the Convention to set these out. Indeed, a contracting party could decide not to adopt specific criteria in relation to access to justice. This would amount to providing an actio

[7] Belgium ACCC/C/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 28.

popularis. Parties to the Convention may avoid doing this in adopting national measures, however they are not obliged to do so.

27. Even if that part of the provision was to be considered as not directly applicable, the rest of the provision defining the challengeable measures should have been deemed as having direct effect. Article 9(3) is sufficiently precise and unconditional as to the types of acts that can be challenged: "*acts and omissions by private persons and public authorities*".

28. Even if that was not the case, the Court still should have ensured the effet utile of Article 9(3) of the Convention. In the *Lesoochranarske zoskupenie* case, the Court had ruled that although Article 9(3) of the Convention does not have direct effect, national courts had to interpret national rules in accordance with Article 9(3) and the objectives of effective judicial protection to enable environmental NGOs to challenge decisions liable to be contrary to EU environmental law before a court. The Court thus adopted different standards in the implementation of Article 9(3) of the Convention, one for Member States' courts in which access to courts must be granted, and one for itself barring access to justice.

29. This is not acceptable as the EU is itself a party to the Convention and consequently its institutions, including the Courts, are subject to all the Convention's provisions. This is set out specifically in Article 2(2)(d) of the Convention.

30. The Court could also and more specifically have relied on the *Biotech*[8] case referred to by the Advocate General in his opinion. However, the ruling completely ignores the opinion of the Advocate General, which supported the ruling of the General Court as to the non-compatibility of Article 10(1) of Regulation 1367/2006 with Article 9(3) of the Aarhus Convention. He had proposed another legal basis for a decision than the *Fediol* and *Nakajima* cases, which he agreed were specific to the WTO agreements. He had proposed to rely instead on the *Biotech* case, in which the Court had ruled that the lack of direct effect of a provision of an international agreement did not prevent the EU courts from examining the validity of EU secondary legislation with that international agreement[9]. The Court did not address this point.

31. Moreover, contesting that Article 10 of the Regulation was adopted to implement Article 9(3) of the Convention is unreasonable. Recital 18 of the preamble and Article 1(1) explicitly provide that the aim and objective of the Regulation is to implement the Convention and so does the title of the Regulation. More specifically, the purpose of Title IV "Internal review and access to justice" is the implementation of the access to justice pillar of the Convention. Requesting that provisions of EU law systematically refer to the provisions of the international convention they implement, so that they can be considered as an implementing measure, is stretching the interpretation of the case-law beyond reason.

[8] Case C-377/98, *Kingdom of the Netherlands v European Parliament and Council*, ECLI:C:2001:523.

[9] Opinion of Advocate General Jääskinen delivered on 8 May 2014 joined cases C-401/12 P, C-402/12 P and C-403/12 P *Council of the EU, European Parliament, European Commission v Vereniging Milieudefensie, Stichting Stop Luchtverontreiniging Utrecht, paragraphs 67-68.*

32. The refusal by the Court to analyse whether Regulation 1367/2006 correctly transposed Article 9(3) of the Convention reinforces the barrier to access to justice instead of aligning EU law with the Convention.

33. Furthermore, since the findings of the Compliance Committee in 2011, the Court, as illustrated in the *Inuit* case, has not changed its interpretation of the individual concern criteria as set out in Article 263(4) TFEU which was the subject of the first part of the communication[10].

34. Although the case does not deal with environmental matters, it is still relevant to demonstrate that the Court's jurisprudence has not changed. The Court reasserted the *Plaumann* case-law which had been deemed too restrictive and barring all access to justice by the Compliance Committee in their findings of 2011[11]. The Court found that "*none of the appellants are distinguished individually by the contested regulation just as in the case of the person addressed, within the meaning of the settled case-law since Plaumann v Commission. The prohibition on the placing of seal products on the market laid down in the contested regulation is worded in general terms and applies indiscriminately to any trader falling within its scope*"[12].

35. Moreover, in reply to the appellants' arguments that the interpretation of the Court of the individual and direct concern criteria was too restrictive, the Court repeated that "*the conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU must be interpreted in the light of the fundamental right to effective judicial protection, but such an interpretation cannot have the effect of setting aside the conditions expressly laid down in that Treaty*". It concluded that "*It is therefore for the Member States to establish a system of legal remedies and procedures which ensure respect for the fundamental right to effective judicial protection*"[13].

36. Therefore, the Court continues to apply exactly the same criteria to establish legal standing as those considered to be in non-compliance by the Compliance Committee.

37. As a consequence, access to justice is still not provided through this legal route either.

38. Article 263(4) TFEU last indent providing the right to challenge regulatory acts which do not entail implementing measures to natural and legal persons being directly concerned cannot be regarded as providing access to justice either. Although this provision has not been applied to NGOs yet, it is already possible to say that if the Courts were to apply their existing interpretation of the direct concern criteria to NGOs, none of the latter would ever have legal standing.

39. Indeed, the Court has reasserted its interpretation of this criteria and held that "*the Community measure must directly affect the legal situation of the individual and, secondly, it must leave no discretion to its addressees, who are entrusted with the task of implementing*

[10] Case C-583/11 P, *Inuit Tapiriit Kanatami v European Parliament*, *Council of the EU*, para. 72.

[11] Ibid, para.72.

[12] Ibid, para.73.

[13] Ibid, paras 98 and 100

it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules."[14]

40. A decision adopted by an EU institution in environmental matters will never affect the legal situation of an NGO. Therefore, for Article 263(4) TFEU to provide standing to NGOs and bring about compliance with Article 9(3) of the Aarhus Convention, the court must change its interpretation of the direct concern criteria as well.

41. The interpretation by the Commission of Article 2(1)(g)(h) and 10(1) of Regulation 1367/2006 in other cases than the ones that gave rise to the judgments at stake also shows that the Regulation does not implement Article 9(3) of the Convention properly.

Acts of individual scope

42. The main ground used by the Commission to reject requests for internal review as inadmissible is the individual scope criterion. Out of the 27 requests for internal review made to the Commission, only 3 have been deemed admissible by the Commission, all of which were decisions authorising the placing on the market of GMOs.18 out of the 27 were rejected as not being of individual scope. All the requests made to the Commission as well as its replies can be found through this link. http://ec.europa.eu/environment/aarhus/requests.htm

43. We have not analysed the requests made to the other EU institutions.

44. Addressing the application of the individual scope criterion would already be a major step forward but would not resolve all the obstacles faced in applying for an internal review. As demonstrated below, administrative acts must also fulfil other criteria to be considered as such by the Commission, namely that they were adopted "under environmental law" and have "legally binding and external effects". These criteria are further examples of barriers to access to justice in breach of Article 9(3) of the Convention.

45. The majority of Commission decisions challenged under the internal review request procedure have been Commission implementing regulations. These decisions are adopted to implement, supplement and amend directives and regulations. They can for example approve a substance or a product. Most of these requests are considered as inadmissible by the Commission on the grounds that the provisions of these implementing regulations are applicable to all operators manufacturing or placing on the market the concerned products, as well as the operators using or selling them. The Commission claims with regard to regulations approving plant protection products that "The conditions of approval of the substances are valid for any operator having an authorisation or intending to apply for authorisation for the placing on the market of plant protection products containing any of these active substances. Therefore these regulations must be regarded as an act of general application addressed to all operators and cannot be considered an administrative act within the meaning of Article 2(1)(g) of Regulation 1367/2006". It holds the exact same reasoning for regulations approving substances.

[14] Case T-262/10, *Microban International Ltd v commission*, para.27.

46. It follows that even decisions applying to one substance are not considered as being of individual scope.

47. Moreover, it seems that only acts addressed to companies can qualify as administrative acts. Decisions addressed to Member States have not been considered as such. The Commission argues that the acts address to Member States do not address objectively determined situations and entail legal effects for individual beneficiaries. In one of its replies the Commission stated that: "A decision addressed to a specific Member State may, however, be of general scope by reason of the fact that it is designed to approve a scheme which applies to one or several categories of persons defined in a general and abstract manner.15" In other words, decisions addressed to Member States are not of individual scope because they are not addressed to individual installation operators.

48. The concrete result of this interpretation is that decisions which have a crucial impact on the environment and human health, such as the ones at stake in cases C-401/12 setting maximum limits for pesticides residues and C-404/12 exempting a State from complying with its obligations under a directive, are not challengeable.

49. Decisions authorising substances used in insecticides, pesticides and as nanomaterials or products and decisions accepting Member States' decisions to exempt plants from compliance with emission limit values for pollutants as set out in a directive are neither administrative acts put under scrutiny of administrative review mechanisms nor of the Courts.

Acts not adopted under environmental law

50. The Commission has also rejected requests on the ground that the contested act was not adopted under environmental law for the purpose of Article 2(1)(g) of Regulation 1367/2006.

51. Article 2(1)(f) of Reg. 1367/2006 defines "*environmental law*" as "*Community legislation which,* **irrespective of its legal basis***, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty...*". However, the Commission still bases its decision to consider some requests as inadmissible on the legal basis of the regulation at the origin of the contested decision.

52. In one of its replies to a request[16], the Commission notes that the contested measures had been adopted on the basis of Article 172 TFEU which constitutes the legal basis for Union measures on Trans-European Networks, notably in the area of energy infrastructures. The Commission concludes that the measures aim at achieving the energy policy objectives and were therefore not adopted under environmental law and did not contribute to the pursuit of the objectives of the Community policy on the environment. Energy and environmental

[15] Reply to internal review request from Verenging Milieudefensie and Stop Luchtverontreiniging Utrecht of Decision C(2009)2560 on the notification by the Netherlands of a postponement of the deadline for attaining the limit values for NO2 and an exemption from the obligation to apply the limit values for PN10.

[16] Commission's reply of 7 February 2014 to request made by Justice &Environment requesting the review of the Commission delegated Regulation concerning the Union list of projects of Common interest.

matters are therefore clearly distinct matters for the Commission and the decisions relating to energy are not subject to review under Regulation 1367/2006.

53. Article 9(3) of the Convention applies to "acts which contravene provisions of its national law relating to the environment" which encompass many more types of acts than only measures "adopted under environmental law" and "contributing to the pursuit of the objectives of Community policy on the environment" as required by Regulation 1367/2006.

54. The environmental impacts of the measures that were contested in the request are beyond doubt. This is evidenced by the fact that they are subjected to environmental impact assessments as explained by the Commission in its letter. In turn, the fact that the projects at stake in this case are subject to other pieces of environmental law such as the Environmental Impact Assessment Directive make them likely to contravene the law relating to the environment for the purpose of Article 9(3) of the Convention.

55. Moreover, the distinction between energy and environmental matters is contrary to the definition in Article 2(1)(g) of Regulation 1367/2006 which provides that the legal basis of the measure is irrelevant and cannot constitute a criteria to exclude measures from the internal review request procedure.

56. Such reasoning is also not in line with the TFEU provisions. Article 194(1) TFEU devoted to "Energy" provides that "*In the context of the establishment and functioning of the internal market and with regard for the need* **to preserve and improve the environment***, Union policy on energy shall aim…to promote the interconnection of energy networks*". It follows that energy decisions are intrinsically linked to the protection of the environment and must also concur with the protection and the improvement of the environment, which is one of the objectives of Community policy on the environment as set out in Article 191 TFEU on the environment.

57. Moreover, factors such as energy are comprised in the definition of environmental information in Article 2(3)(b) of the Aarhus Convention as well as in Article 2(1)(d) of Regulation 1367/2006. The fact that information on energy matters is covered by the access to information provisions of the Convention and of the Regulation demonstrates that they are environmental matters. Not subjecting measures adopted on the same issues to the access to justice rights would constitute a superficial distinction leading to leaving a whole category of decisions out of the administrative review mechanisms and courts' scrutiny.

58. The Commission has also an incorrect interpretation of what legislation, which "*contributes to the pursuit of the objectives of Community policy on the environment*", means for the purpose of Article 2(1)(f) of Regulation 1367/2006. In the same case, it argues that the contested regulation "*is not based on Article 192 TFEU which constitutes the legal basis for the Union environmental policy and does not state that it is to contribute to that policy*". However, it is not because a measure does not state expressly that its aim is to contribute to environmental policy that it does not in fact do so.

59. Even more surprisingly the Commission states that "*it cannot be determined whether (and to which extent) the PCIs included in the Union list will contribute to (or at least have positive effects on) the Union environmental policy*." This is extremely puzzling as the Commission

considers that we ought to wait and see what the positive contribution of the projects to the environmental policy will be to decide whether they are adopted under environmental law and can be subject to review. However, whether an act is adopted under environmental law does not depend on whether the projects subject to that act have an impact on the environment and even less whether this impact is positive. Additionally, NGOs are more likely to want to challenge projects having negative impacts than the contrary.

60. Article 9(3) of the Convention provides for the right to challenge acts which may contravene environmental law without necessarily contributing to the objectives of environmental policy. The criterion "under environmental law" as provided under Article 2(1)(f)(g) of the Regulation is therefore also not in line with Article 9(3) of the Convention as it constitutes a clear barrier to access to justice.

Acts not having legally binding and external effects

61. The Commission has also applied Articles 2(1)(g) of the Regulation requiring that acts have "*legally binding and external effects*" to reject requests for internal review. Please see examples of decisions provided on the Commission's webpage. The Commission's assessment of these criteria also results in preventing administrative and judicial scrutiny of certain acts.

62. The Commission has considered that its decision adopting the list of candidates to be proposed by the Commission to the Management Board of the European Chemicals Agency for the appointment by the latter of the Executive Director of the Agency did not have external effects. The Commission argues that this decision forms an integral part of the procedure whereby the Executive Director of ECHA is appointed by the Management Board thereof. It thus considers that "*such staff related decisions are by their very nature to be regarded as internal to the institution or body concerned and thus incapable of having "external effects" within the meaning of the Regulation*".[17]

63. The fact that a decision forms part of an internal procedure does not preclude it from having external effects. The NGO alleged that the decision should have included a wider range of eligible candidates and that suitable candidates had been arbitrarily eliminated in the course of the selection procedure. Deciding which candidates are eligible to become the Executive Director of an EU agency such as ECHA inevitably has external effects. The background and prior and existing commitments of these persons directly influences their strategic and political choices which, given their mandate, impacts on the environment. Furthermore, the decision not to include certain candidates in the list prevents these people from being nominated as Director, and that is a concrete legal external effect.

64. The Commission has also considered that decisions approving Operational Programme Transport for certain Member States do not have external effects[18]. The Commission argues that these decisions are addressed to Member States and that it is their responsibility and competence to implement them. However, this does not imply that they do not have external effects, just that they will do so at national level. Moreover, the Commission explains itself

[17] Commission's reply of 12 December 2007 to EEB request.

[18] Commission's reply of 06/08/2008 on request made by Ekologicky Pravni Service.

that these programmes set out a development strategy with a coherent set of priorities and that these decisions enable the Commission to make commitments on the Community's budget to complement national actions, integrating into them the priorities of the Community. The decisions to approve these programmes do therefore have external effects. The decision, not to approve such programmes would definitely have external effects, the contrary therefore must also be true.

65. According to the Commission, one of its proposals to implement a directive does not have external effects either[19].The NGO was challenging the omission to submit the proposal for the implementation measures of a provision of the Fuel Quality Directive, in particular the fuel baseline standard and greenhouse gas emissions calculation methologies. The adoption of a Commission proposal to implement a directive clearly has external effects in that it starts the procedure to adopt an implementing or delegated act, and can trigger the European Parliament and Council to act in the relevant case, either using their veto or supporting the proposal. It will also trigger interventions from the industrial sectors concerned. Non-legally binding acts can indeed have external effects.

66. Guidelines issued by the Commission on state aid for environmental protection and energy 2014-2020 is another example of a decision not having external effects according to the Commission[20]. This assessment is in complete contradiction with the reasoning of the Commission in its reply which explains that, according to the Court, Commission guidelines should be considered as measures that set out rules of practice that are binding to the Commission and that the latter may not depart from these rules when assessing an individual measure without giving reasons that do not counter the principle of equal treatment. Moreover, "*they limit the Commission's discretion when assessing the compatibility of state aid measure with the internal market*".

67. These guidelines therefore dictate the way the Commission will assess the compatibility of a state aid measure which can potentially lead to banning the measure. The powers and discretion as well as the limitations that the guidelines provide to the Commission therefore have external effects. Surprisingly in this case the Commission stated that, although the guidelines are binding upon the Commission, they should be considered as not having a legally binding character within the internal review request context.

68. Lastly, according to the Commission, its statement concerning the implementation of a provision of the EU ETS Directive specifying the way Member States may use revenues generated from auctioning of allowances to support the construction of certain plants does not have external effects[21]. Yet, the Commission's statement is clearly giving the authorisation to Member States to use these revenues in a certain way and sets a specific implementing rule concerning new installations meeting certain criteria under EU law. Member States can thus rely on this statement to justify the way they implement the EU ETS Directive.

[19] Commission's reply of 7/04/2014 to Greenpeace, Transport&Environment, Friends of the Earth Europe.

[20] Commission's reply of 13/10/2014 to Friends of the Earth England, Wales and Northern Ireland

[21] Commission's reply of 27/4/2009 of ClientEarth.

69. The "legally binding and external effect" criterion provided in Article 2(1)(g) of the Regulation constitutes another barrier to the right to challenge decisions and does not have a basis in Article 9(3) of the Convention.

70. It follows that the current application of the Regulation, the decisions of the Commission to declare most requests inadmissible and lastly the rulings of the Court of 13 January 2015 have had a chilling effect on NGOs. Since the Court's ruling of 13 January, to our knowledge, three NGOs have decided to withdraw cases they had already lodged with the Court because the criterion of individual scope of the decisions at issue cannot be met. Other NGOs have decided not to challenge Commission decisions before the Court in view of the interpretation of the Regulation by the Commission.

71. The application of the Regulation clearly prevents NGOs from challenging EU institutions' decisions by either administrative or judicial means.

Arbitrary exemptions to the administrative acts definition

72. In addition to the very restrictive definition of an administrative act, Article 2(2) of Regulation 1367/2006 provides that these acts "*shall not include measures taken or omissions by a Community institutions or body in its capacity as an administrative review body, such as under:*

(a) Articles 81, 82, 86 and 87 of the Treaty (competition rules)[new Articles 101, 102, 106 and 107];

(b) Articles 226 and 228 of the Treaty (infringement proceedings)[new Articles 258 and 260];"

73. However, Article 2(2)(d) of the Convention only excludes decisions of public authorities when acting in their legislative and judicial capacity, not in their administrative capacity. The fact that the institutions act as an administrative review body when adopting these decisions cannot justify their exemption from review.

74. These exemptions are completely discretionary and do not rely on any legal grounds.

75. Regarding decisions granting state aids, Article 107 TFEU prohibits Member States from granting state aid to undertakings unless the aid aims at achieving one of the objectives mentioned in section 2 and 3 of Article 107 TFEU. Only the European Commission can decide whether one of the exemptions applies. Contrary to section 2, section 3 leaves very wide discretion to the European Commission in its decision whether or not a state aid falls within one of the exemptions mentioned therein.

76. The European Commission’s ultimate decision with regard to a certain state aid is a binding decision addressed to the Member State that notified the aid to the European Commission. If the Member State does not agree with the decision, it can challenge it before the European Court.

77. Decisions adopted by the Commission in competition matters are already subject to the scrutiny of the Court. Legal or natural persons wanting to challenge them need to fulfil the criteria of "direct and individual concern" laid down in Article 263(4) TFEU and State aid beneficiaries and their competitors have frequently been granted standing. In general, the Commission's decisions under the competition rules give rise to a very important number of the Court's decisions.

78. By excluding these decisions from the scope of the definition of the acts that can be contested under Article 10, the Regulation prevents NGOs from challenging them. This means that no citizen or NGO will ever be able to challenge these decisions on the ground that they violate EU environmental law. And since companies only challenge these decisions to protect their commercial interests, the negative impacts on the environment they may have will never be scrutinised and remedied. Additionally, this creates an obvious discrepancy between the right of companies and Member States which have the right to challenge them to protect their economic and commercial interests and the NGOs which cannot use the similar legal means to protect the environment.

79. Yet, state aid measures do not only have an impact on competition but they can also harm the achievement of environmental policies. Although the European Commission, in principle, assesses whether a state aid measure does not violate other EU policies, it is still the case that many state aid measures are approved that may damage the achievement of EU environmental policies. Preventing environmental NGOs from challenging these decisions therefore impede civil society from representing environmental interests in competition matters and has no basis in Article 9(3) of the Aarhus Convention.

80. The Commission's decisions related to infringement proceedings under Article 258 and 260 TFEU are also excluded from the scope of the administrative review process. These decisions, in particular the ones not to open or to close an infringement proceeding, have always been deemed by the Commission and the EU courts as being discretionary and not challengeable before the Courts. However, there is no specific and sound legal ground to exclude them from the scope of an administrative review mechanism or from the Court's scrutiny. These decisions are legally binding and may contravene provisions of EU environmental law just as any other decisions adopted by the Commission. The decision from the Commission to close such a proceeding often means that citizens do not have other means to ensure the correct implementation of environmental law. These decisions should therefore be subject to Courts' scrutiny.

81. It follows that these two exemptions provided by Article 2(2) of Regulation 1367/2006 unduly restrict the categories of acts that may be challenged under Article 10 of Regulation 1367/2006 and are therefore not in compliance with Article 9(3) of the Aarhus Convention.

The internal review procedure: not an adequate and effective remedy

82. We refer to our arguments in our comments on the European Commission's submission made on behalf of the European Community in relation to communication ACCC/C/2008/32

(point 4.1). The internal review procedure set out in Article 10 of Regulation 1367/2006 does not constitute an administrative review mechanism for the purpose of Article 9(3) and (4) as it is neither adequate nor effective and fair.

83. The fact that it is to the EU institution that adopted the contested decision to decide whether it wants to review its own decision does not ensure the independence and the impartiality of the remedy. It is only natural that the institution will be biased and consider that all the legal and due diligence checks have been made when adopting the decision in the first place.

84. The institution will also find it more difficult to recognise that the decision is illegal than an external and independent body would.

85. For an administrative review mechanism to be an alternative to a judicial one or to fully compensate access to a judicial review mechanism, it cannot be only an internal review process but needs to be external and independent to the institution that adopted the decision.

Conclusion

86. These decisions demonstrate that the Commission has had an extremely restrictive interpretation of the criteria provided under Article 2(1)(g) of Regulation 1367/2006 to reject most of the requests made by NGOs. Out of all the decisions that have been challenged only decisions authorising GMOs have been considered as admissible by the Commission. This means in practice that NGOs cannot fulfil their role of protecting the environment by resorting to EU courts and that decisions violating environmental law and impacting the environment are not under the scrutiny of any review mechanisms.

87. Evidence shows that Articles 2(1)(g)(h), 2(2) and 10(1) of Regulation 1367/2006 do not comply with Article 9(3) and (4) of the Aarhus Convention as they constitute a genuine barrier to access to justice in limiting to a very limited category of decisions the right to resort to the administrative review mechanism.

88. The lack of access to justice observed by the Committee in their findings of 2011 has therefore not been fully compensated by adequate administrative review procedures.

89. The Court of Justice has decided not to provide their interpretation of the regulation in light of the Convention.

90. We therefore respectfully request the Compliance Committee to decide that Articles 2(1)(g)(h), 2(2) and 10 of Regulation 1367/2006 should be reviewed accordingly and to recommend to the EU that the Courts change their interpretation of Article 263(4) TFEU, including the criterion "direct" concern, last limb of the sentence in a way to provide standing to NGOs.

Communication ACCC/C/2008/32 (Part II) - Update on Court of Justice ruling in cases C-401/12 P to C-405/12 P

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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