Pleading notes of ClientEarth to the Aarhus Convention Compliance committee in relation to communication ACCC/C/2008/32 Part II

1. In order to respect our pleading time, I will directly address the questions posed by the Committee but I look forward to responding to questions about any other points we have made in our communication.

Does the Aarhus Regulation meet the requirements on access to justice in the Convention?

2. I will first address the definition of administrative acts that can be challenged under Article 10 of the Aarhus Regulation, which presents many restrictions to NGOs seeking internal reviews, but I will focus on the individual scope criterion since it is the main problem. Second, I will address the lack of transposition of Article 6 and 9(2) of the Convention. Third, I will demonstrate that the internal review request process is not adequate, effective or fair for the purpose of Article 9(4) of the Convention.

The individual scope criterion

3. First, the Commission argues that the non-conformity of the Aarhus Regulation with the Convention, and in particular of the individual scope criterion, does not fall under the scope of the communication. In reply to that we would simply refer to section 4 of our communication, the correspondence exchanged at the time and the question asked by the Committee today to refute that claim.

4. It is clear from the wording of Article 9(3) of the Convention that its material scope is "acts and omissions" without further restrictions, with the exception of decisions adopted within the legislative and judicial capacity of public authorities in accordance with Article 2(2) last indent of the Convention.

5. In light of the objectives and purpose of the Convention, limiting the acts that can be reviewed to acts of individual scope is unduly restrictive and therefore unjustified. The protection of the environment is a diffuse interest. Therefore, acts adopted in environmental matters are by nature mostly acts of general application.

6. According to Article 9(3), the parties have some discretion in choosing the criteria to select the persons entitled to challenge acts and omissions, and also with regard to the procedures that should be put in place. However, they do not enjoy the same level of discretion in deciding which acts and omissions may be challenged. That has been confirmed by this Committee[1].

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

7. Also, it is not because the acts adopted within the legislative and judicial capacity of public authorities are excluded from Article 9(3) of the Convention that only acts of individual scope may be challenged. There is no correlation between measures having a general scope and legislative measures. Measures of general scope are not necessarily measures adopted in a legislative capacity.

8. 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 the Aarhus Regulation to acts of individual scope, the Regulation in fact limits it to permits and authorisations. Article 10(1) of the Regulation does not therefore implement Article 9(3) correctly.

9. Moreover, according to the Commission, not all permits and authorisations are considered as administrative acts. Only those addressed to one operator/manufacturer/producer and which concerns a substance or an activity that only this operator or produces carries out are considered to be of individual scope. As a result, a very limited number of decisions adopted in environmental matters can be challenged.

10. Evidence of that is provided by the number of internal review requests made by NGOs to the Commission considered as inadmissible by the latter. Indeed, the main ground used by the Commission to reject requests for internal review as inadmissible is the individual scope criterion**.** Out of the 28 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.

11. Decisions authorising substances used in insecticides, pesticides and as nanomaterials or products and decisions granting exemptions to Member States from directive provisions are neither administrative acts put under scrutiny of administrative review mechanisms nor of the Courts. 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 the Stichting Natuur en Milieu case, cannot be challenged by NGOs in any forum.

The Lack of transposition of Article 6 and 9(2) of the Convention

12. The Aarhus Regulation does not transpose Articles 6 and 9(2) of the Convention. Yet, EU institutions adopt Article 6(1)(b) type decisions. Certain pieces of EU legislation ensure the public's right to provide input within EU institutions decisions. Yet, there are no parallel provisions ensuring that access to justice is provided to the public to challenge the decisions adopted.

13. The regulation therefore fails to comply with these provisions.

The internal review procedure: not a fair, effective and adequate remedy

14. The internal review procedure set out in Article 10 of the Aarhus regulation 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.

15. The fact that the very EU institution that adopted the contested decision decides whether it wants to review its own decision does not ensure the independence and the impartiality of the remedy.

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

17. To conclude, the Aarhus Regulation does not meet the requirements on access to justice of the Convention.

18. I will now address the second question the Committee asked us to reply to.

Is Article 263(4)TFEU a means for ensuring compliance with article 9 of the Convention?

19. The Commission argues that the EU is in compliance with the Convention as there is access to the EU courts through the national courts. This argument has two obvious weaknesses. First, the Commission refuses to adopt a directive proposal to ensure that effective access to justice is guaranteed at national level. Second, and most importantly, the Committee has already ruled that the mechanism of the referral for a preliminary ruling does not ensure compliance with Article 9.

20. As argued in the first part of the communication, Article 263(4) of the Treaty could ensure compliance with Article 9(3) but only if it was not interpreted by the court in such a restrictive manner through the *Plaumann* test. Article 263 TFEU actually provides that natural and legal persons other than the Member States and institutions must be provided with the right to challenge decisions before the EU courts. However, this right has simply not been implemented by the Court.

21. Since the findings of the Compliance Committee in 2011, the Lisbon Treaty has amended Article 263 and provided the right to individual and legal persons to challenge regulatory acts which do not entail implementing measures provided they are directly concerned. This new provision could have provided the opportunity for NGOs to have legal standing since they did not have to show that they were individually concerned anymore but only directly concerned. However, 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 them would ever have legal standing.

22. Indeed, the Court has held that "*the Community measure must directly affect the legal situation of the individual*"[2] challenging the decision. A decision adopted by an EU institution in environmental matters will never affect the legal situation of an NGO.

23. It follows that, according to the case-law of the court, NGOs are not provided with legal standing to challenge institution's decisions. This is the case even when NGOs have a

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

statutory aim to protect the environment, a special consultative status and procedural rights within the process leading to the adoption of the contested decision.

24. The Court has also 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.

25. In the *Slovak bear* case, the Court has ruled that although Article 9(3) of the Convention does not have direct effect, national courts are obliged 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. Yet, the EU courts do not apply the same reasoning with regard to the right of NGOs to challenge EU acts before the EU courts.

26. Applying such a double standard is not justified as the EU is itself a party to the Convention. Its institutions, including the Courts, bodies and agencies are subject to all the Convention's provisions. This follows from Article 2(2)(d) of the Convention.

27. Making such a difference in the implementation of the Convention is in breach of the Vienna Convention (Article 27) that provides that States parties to an international convention cannot invoke their internal law not to apply the convention.

28. The Aarhus Convention needs to be applied to EU institutions in the same way that it applies to Member State authorities.

29. Because of the overly restrictive interpretation of the EU courts, Article 263(4) TFEU does not ensure compliance with Article 9 of the Convention.

Conclusion

30. 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 restricted category of decisions the right to resort to the administrative review mechanism.

31. Even when the request is admissible, the review process is still not in compliance with Article 9(3) and (4) since it is not effective, fair nor adequate.

32. 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.

33. We therefore request the Compliance Committee to decide that Articles 2(1)(g)(h), 2(2) and 10 of Regulation 1367/2006 should be reviewed accordingly.

34. We also request the Committee to recall that the EU is itself a party to the Aarhus Convention and that its institutions, agencies and bodies are therefore subject to all of the provisions of the Convention. No special treatment or double standard is justified. As a result, the Court should apply its own case-law, notably the Slovak bear case, ensuring the implementation of the Aarhus Convention, to itself as well.