

CLIENTEARTH's comments on the European Commission's submission made on behalf of the European Community in relation to communication ACCC/C/2008/32

ClientEarth would like to take the opportunity to comment the submission of the European Commission (the Commission) made on behalf of the European Community concerning Communication ACCC/C/2008/32.

We would like to recall that the main point of the communication is the interpretation by the Community judicature of article 230 paragraph 4 of EC Treaty (the Treaty).

1. On the interpretation of article 230 paragraph 4 (section 3 and 4 of the Commission's reply)

We refer to our reply to question 4 asked to the Commission by the Compliance Committee.

Contrary to what the Commission argues, the Community judicature is not free to interpret the provisions of the Treaty without any legal boundaries. The Judicature is, according to article 300(7) of the Treaty, bound by the Convention. It is also bound by international law which provides that the judiciary branch is bound by the international agreements that are concluded by its State.

In relation to the argument of the Commission in paragraph 156, the Commission confuses the interpretation by the Community judicature of the provisions of the Treaty with the allocation of powers between the EU institutions. Changing the powers of the judicature is not the issue and would not necessarily improve the access to justice at EU level. It is the interpretation by the courts of article 230 (4) that needs to be changed. The ratification of the Convention by the EU entails and requires that change. The Community judicature has already in numerous cases, as recalled by the Commission, made its jurisprudence evolve and interpreted the provisions of the Treaty in a purposive way. The Court of First Instance has already interpreted article 230(4) differently from settled case-law in the *Jégo -Quéré*¹ case. It is one of the powers of the judicature to evolve the interpretation of the Treaty as needed by changes in circumstances. When it does not do so and holds onto an outdated interpretation that contravenes the provisions of an international convention such as the Aarhus Convention, it acts *ultra vires*.

2. On the fact that article 230 and 234 of the Treaty suffice to comply with article 9 paragraph 3 of the Convention (paragraphs 52 and following paragraphs of the Commission's reply)

We agree with the Commission that article 230(4) of the Treaty could suffice to provide access to justice but only if it was interpreted by the Community judicature in compliance with article 9(3) of the

¹ Case T-177/01, *Jégo-Quéré et Cie SA v Commission*, [2002] REC II-369.

Convention. In relation to the reasons why article 230(4) of the Treaty, as interpreted by the Courts, may not be considered as providing access to justice in compliance with article 9(3) of the Convention, we refer to the section of the communication on the Community judicature case-law p. 6 - 13 and to the Appendix 1 to the communication. Evidence of the courts' misinterpretation is the fact that no NGO or individual have ever had standing before the Courts in an environmental matter.

In relation to the reasons why the procedure established under article 234 of the Treaty does not provide access to justice in compliance with article 9(3) of the Convention, we refer to our arguments in the sections of the Appendix 1 to the communication on the appeal in the Greenpeace case and on the Danielsson case.

We would also like to add the following arguments:

First, decisions of EU institutions that do not require any implementing measures at national level because they are only applied at EU level, as the refusal to organize a public consultation, may not be challenged through the procedure established by article 234.

Second, it is settled case-law that the Community legal order and national legal orders of the Member States are distinct from each other. However, in relation to access to justice, the Commission argues that both orders should merge and form only one order through article 234 of EC Treaty. This contradicts settled case-law and the very structure of the European Community.

In addition, article 234 provides at most what might be called an indirect access to justice before national courts. Article 9(3) of the Convention is not satisfied by indirect access to justice but imposes on the Parties to the Convention to provide access to justice in their national legal systems. The European Community cannot therefore rely on the Member States to ensure access to the European Court of Justice. Moreover, access to courts is not provided in the same way in all Member States. There are no minimum harmonized standards on access to the courts throughout the Community. Because the proposal for a Directive on access to justice has still not been adopted by the Council, the third pillar of the Convention has not been transposed at Member States level. Access to judicial procedures is thus still an issue in numerous Member States such as in Germany (because of lack of standing for NGOs) and in the UK (because of the prohibitive costs) for example. Where access to courts is still not provided in conformity with the Convention the procedure established under article 234 of the Treaty cannot be used.

Article 234 of the Treaty may not therefore be considered as providing access to justice in compliance with article 9(3) of the Convention.

3. On the transposition of article 6 and 9(2) of the Convention (paragraphs 48-51 and 136 and the following of the Commission's reply)

We have provided arguments on that point in our reply to the questions of the Committee, p 3-6.

We would also like to stress the point that article 6(1) (a) and 6(1) (b) of the Convention are different provisions and do not apply to the same activities.

4. On the Aarhus Regulation

4.1 On the administrative procedure established by article 11 of the Aarhus Regulation (paragraphs 98-99 of the Commission's reply)

The Commission argues that an administrative review procedure suffices to comply with the Convention. However, recital 18 of the Convention's preamble provides that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced", making clear that access to the courts should be provided to the public.

Nevertheless, even if establishing an administrative procedure was to be considered as enough to comply with article 9(3) of the Convention, the procedure established under article 11 of the Aarhus Regulation would still not constitute such a procedure. The procedure only allows the NGO applicant to request an internal review of an act to the institution that adopted the contested act. The body to which the internal review request is made is thus not independent from the one which adopted the contested act. In the vast majority of cases, the institution will thus refuse reviewing its own act and consider the act in compliance with all the relevant pieces of legislation. For example, according to the European Commission's rules of procedures, it is "the member of the Commission responsible for the application of the provisions on the basis of which the administrative act concerned was adopted" that decides whether or not the act whose review is sought is in breach of environmental law². The procedure is therefore not fair since the decision-making body cannot be impartial, nor is it adequate or effective in the meaning of article 9(4) of the Convention.

Finally, the procedure does not provide any injunctive relief. The procedure established under article 11 of the Aarhus regulation does not therefore comply with article 9(4) of the Convention.

In addition, the judicial procedure established under article 12 of the Regulation which the NGO applicant may resort to if unsatisfied with the outcome of the administrative procedure, might not allow challenging the initial act adopted by the institution and forming the object of the review. If the internal review request has been considered inadmissible, the measure that will be subject of the judicial proceedings established under article 12 of the Aarhus Regulation will be the "written reply" from the

² Commission Decision 2008/401/EC, EURATOM of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 140, 2008, p.22, article 5 (2).

institution not the original act. The court will thus only examine the way the institution has dealt with the internal review request and whether it complied with the procedural requirements of the Aarhus regulation leaving the initial act unexamined.

4.2 On the exclusion from the review mechanism of normative acts of general scope (paragraphs 100-105 of the Commission's reply)

According to the Commission, article 2(2) of the Convention would not allow legislative acts to be challenged under article 9(3) of the Convention. However, as the Commission rightly mentions, the Convention allows Parties to adopt more stringent rules and to allow legislative acts to be challenged. In case, as in the present case, where the national legal system allows legislative acts to be challenged before the courts, the Convention should not be interpreted as restricting the scope of the challengeable acts. It would be contrary to the spirit and aim of the Convention.

Indeed, the ECJ has affirmed in numerous judgments that “all measures adopted by the institutions, whatever their nature or form which are intended to have legal effects” could be challenged under article 230(4) of the Treaty³.

In addition, as recalled by the Commission, article 234 of the Treaty allows, through the indirect mechanism of the referral to the ECJ for a preliminary ruling, to contest “legislative acts,” that is directives and regulations. It is thus clear that nothing prevents legislative acts from being challenged under article 230 and 234. Access to judicial proceedings under article 12 of the Aarhus Regulation should thus be allowed against legislative acts as well since article 12 of this Regulation refers to “the relevant provisions of the Treaty” among which is article 230. It follows that in allowing to challenge only administrative acts of individual scope, the Aarhus Regulation restricts unduly the scope of the acts that may be challenged by NGOs in environmental matters.

Moreover, only the acts adopted with the participation of the European Parliament should be considered to be of a legislative nature. Indeed, the European Parliament is the only institution that has its members elected and is therefore the only one to represent the will of the European citizens. The other acts adopted through other procedures (for ex: through Comitology or Council Regulations) even though they are called “regulations” are not legislative acts. They are for some of them acts that are adopted to apply other legislative acts. It is the substance of an act not its form or appellation that has to be taken into account to qualify an act (see pages 11-15 of ClientEarth's reply to the Committee's questions).

³ Case 22/70, *Commission v Council*, [1971] ECR 263, paras. 39-41. See also case C-309/89, *Cordoniu SA v Commission* [1994] ECR I-1853; Joined cases T- 172/98 and T-175/98 to T-177/98, *Salamander AG and others v European Parliament and Council*, [2000] REC II 2487, paras. 27-30; Case T-84/01, *Association contre l'heure d'été v Council* [2002] ECR II-99, paragraph 23; Case T-94/04, *EEB and others v Commission* [2005] ECR II 4919, paragraphs 34-36 and para 53.

5. On ClientEarth's recommendations (section 6 of the Commission's reply)

The European courts on their own motion can always examine applicants' standing. However, if the Commission refrained from routinely arguing that NGOs lack standing before the Courts, it would assist the judges in adopting a new position on standing. The Commission should show its willingness to act in compliance with the Aarhus Convention and stop opposing the right of standing of environmental NGOs before the European Courts.