



Mr Jeremy Wates
Secretary to the Convention on Access to Information, Public Participation in Decision-making
and Access to Justice in Environmental Matters
United Nations Economic Commission for Europe (UNECE)
Bureau 332 - Palais des Nations
CH-1211 Geneva 10
Switzerland

1 March 2010

Dear Mr. Wates,

Re: Your letter of 21 January 2010 concerning the Communication to the Aarhus Compliance Committee concerning compliance by the European Community with provisions of the Convention in connection with access by members of the public to review procedures (ACCC/C/2008/32)

In your letter of 21 January 2010 you invited ClientEarth to submit its views on how the entry into force of the Lisbon Treaty on 1 December 2009 may impact the merits of our initial Communication to the Compliance Committee.

We submit the following comments:

1. Our initial Communication

Our initial Communication raised five points (see pp. 2 to 4):

- The restrictive interpretation of Article 230(4) EC Treaty by the Court of Justice;
- The disequilibrium arising out of this restrictive interpretation which results in wider access to the European Courts for corporations and trade associations than for individuals and NGOs;
- The fact that Regulation 1367/2006 (the Aarhus Regulation) only grants a right of judicial review to NGOs and not to individuals or other entities such as regions and municipalities; furthermore the fact that the Aarhus Regulation only allows challenges to administrative acts of individual scope;

- The uncertainty about, and the potentially prohibitive amount of costs the applicant will have to pay if he/she/it loses, which acts as a deterrent for NGOs and individuals to institute proceedings before the European Courts;
- The submission to the Compliance Committee that, if the jurisprudence of the European Courts is not altered, the European Union (this is the new title since 1 December 2009), will fail to comply with Article 9 paragraphs 2 to 5 of the Aarhus Convention by preventing NGOs and individuals from having access to justice with respect to EU institutions and bodies' decisions in environmental matters.

Furthermore, we invited the Compliance Committee to make recommendations.

ClientEarth takes the view that the entry into force of the Lisbon Treaty did not have the effect of bringing the EU into compliance with its obligations under the Aarhus Convention.

2. Article 263 of the Treaty on the Functioning of the European Union (TFEU)

Article 263 TFEU has replaced Article 230 of the EC Treaty. The fourth paragraph of Article 263 TFEU introduces the additional words "and against a regulatory act which is of direct concern to them and does not entail implementing measures". This added wording does not significantly change the present situation:

First, the words "regulatory act" obviously refer to Articles 289 and 290 TFEU which differentiate between "legislative acts" and "non-legislative acts." The latter are the regulatory acts referred to in Article 263 TFEU. All regulations, directives and decisions which are adopted by legislative procedure constitute "legislative acts" (see Article 289(3) TFEU) and therefore cannot be challenged under the new wording in Article 263 TFEU.

Second, the new wording is restricted to acts which do not entail implementing measures. This means it can only refer to regulations, as they are the only regulatory acts which do not entail implementing measures, and to decisions which were not adopted by a legislative act.

However, the vast majority of EU environmental provisions are not adopted in the form of regulations, but in the form of directives and decisions. Indeed, EU legislation on water and noise do not include any regulations. EU legislation on air, nature, and waste only contain one regulation each which concern trade in endangered species, shipment of (trade in) waste, and production of and trade in ozone-depleting substances.

Third, even the three regulations mentioned entail a considerable number of implementing measures such as the designation of national competent authorities, the issuing of permits by national authorities, the monitoring of the trade in endangered species, waste and ozone-depleting substances, etc. They are therefore normally not directly applicable, but require implementing provisions be adopted by the EU institutions or by the EU Member States.

Fourth, the majority of the environmental cases which were cited by ClientEarth had as their basis decisions by an EU institution and not regulations. This applies to the Greenpeace case¹,

¹ *Stichting Greenpeace Council and Others v. Commission*, T-585/93, ECR 1995, II-2205

the Danielsson case² and to the EEB case³. The two other cases, the WWF-UK case⁴ and the Autonomous Region of Azores case⁵, admittedly dealt with regulations in the context of the EU fisheries policy. In the WWF-UK case, the Court left open the issue of direct concern. This was correct from its own point of view, as the Court considered that WWF-UK was not individually concerned. However, the regulation which was contested in that case⁶ contained numerous implementation measures in Articles 5, 7(5), 9, 17 and Annex I which required the fish quotas for each Member State to be attributed by the Member States to the different vessels.

In the Autonomous Region of Azores case the Court discussed in detail whether the applicant was directly and individually concerned without distinguishing clearly between “direct” and “individual” concern⁷. Furthermore, it stressed on several occasions that the contested regulation⁸ did not yet have effects on the interests of the applicant⁹ which meant that further implementing measures were necessary.

Fifth, with regard to decisions, the new wording of Article 263 TFEU, read in conjunction with Article 289(3) TFEU, precludes application to the Court against decisions which were adopted by way of a legislative procedure. Furthermore, decisions which are not regulatory decisions, either because they are implementing decisions (Article 291 TFEU) or because they do not come under the notion of “non-legislative” (regulatory) acts,¹⁰ could not be challenged in Court under Article 263 TFEU as the new wording contains an explicit limitation to regulatory acts. The Commission’s understanding that “regulatory act” includes all acts which are not a “legislative act”, finds no support in the TFEU Treaty.

In conclusion, the new wording of Article 263 TFEU will only affect a small number of measures and actions taken by EU institutions or bodies. As the new text only refers to provisions of regulatory acts which are directly applicable and do not need implementation measures, it is not likely that a significant number of EU measures that affect the environment could be challenged under the new provision. Whether the EU courts will, in future, interpret the fourth paragraph of Article 263 TFEU more openly is unclear. For that reason, the first point of ClientEarth’s concerns remains valid.

The other four concerns of ClientEarth, mentioned above, are not affected by the new wording of Article 263 TFEU. They therefore also remain valid.

² *Marie-Thérèse Danielsson, Pierre Largeteau, Edwin Hooa v. Commission of the European Communities*, T-219/95R, ECR 1995, II-3051.

³ *EEB and Stichting Natuur en Milieu v. Commission*, T-236/04, 28 November 2005.

⁴ *WWF-UK Ltd v. Commission*, T-91/07, 2 June 2008

⁵ *Região Autónoma dos Açores v. Council*, T-37/04, 1 July 2008.

⁶ Regulation 41/2006, OJ 2007, L 15 p.1.

⁷ See in particular paragraph 74 of the order.

⁸ Regulation 1954/2003, OJ 2003, L 289 p.1

⁹ See case T-37/04 (n.5, above) paragraphs 60, 61, 63, and 66.

¹⁰ Examples of such decisions are Commission decisions on State aid, or the Decision in case T-219/95R (note 2, above).

3. The EU Charter of Fundamental Rights

According to Article 6 of the Treaty on European Union (TEU), the rights, freedoms and principles of the Charter shall have the same legal value as the Treaties. The Charter contains in Article 37 a provision on environmental protection and in Article 47 a right to an effective remedy and a fair trial. Article 37 of the Charter contains similar wording to Article 14 TFEU (ex Article 6 EC Treaty) which is understood as constituting a principle, a guideline or a leitmotif, for the actions by EU institutions or bodies.

In the past, the provision of Article 11 TFEU has not, it is submitted, been understood as granting individual rights to persons or bodies. As the Charter is now legally binding, it is possible to interpret its Article 37 as granting individual rights or, at least, providing principles which administrations and courts will have to optimise. The EU Courts could, in the light of the Charter, give a broader interpretation to the fourth paragraph of Article 263 TFEU and give full effect to Article 37. However, because it is not yet clear whether they will do so, ClientEarth's concern remains valid.

In the same way it is submitted that Article 47 neither intends to amend, nor actually has the effect of amending, the existing national or EU systems of access to the Court. Rather, it implicitly refers back to the provisions of the Treaty on the Functioning of the European Union on access to EU courts which have not been amended except by the change in Article 263 TFEU discussed above. Article 47 would therefore allow the EU Courts to interpret Article 263 TFEU in a broader way which facilitates justice to the environment.

4. Provisions on Democratic Principles

Articles 9 to 12 TEU introduce some democratic principles to the Treaties on European Union. In particular, the EU institutions are required to maintain an open, transparent and regular dialogue with citizens. However, these new provisions do not per se necessitate interpreting the Treaty provisions on access to the EU Courts differently.

In its initial communication to the Compliance Committee, ClientEarth argued that the Courts could interpret the provisions on access to the courts more openly if they had the political will to do so. ClientEarth argued that, particularly in light of Article 263 TFEU, a more liberal interpretation is even required under the Aarhus Convention. Nothing in the new wording of the TEU or the TFEU would prevent the Courts from interpreting these provisions more openly.

Democratic principles, in particular those of open and transparent administration and justice, call for wide access to the courts in order to avoid situations where administrative decisions cannot be challenged. In democratic societies, courts are the arbiters who determine whether decisions respect the balance of interests that was laid down in constitutions or equivalent texts. The more the European Union aspires to approach democratic principles, the more broadly the arbitral function of the EU Courts will therefore have to be understood, including by the EU Courts themselves.

For these reasons, ClientEarth fully maintains the arguments in its initial Communication that the EU Courts do not interpret the provisions contained in the Treaty on the Functioning of the

European Union on access to the courts in a way that is compliant with the provisions of the Aarhus Convention which is itself also part of European Union law.

Yours sincerely

A handwritten signature in black ink on a light green rectangular background. The signature is written in a cursive style and appears to read "James Thornton".

James Thornton
CEO and General Counsel

London, 1 March 2010