

CLIENTEARTH Comments on the European Commission’s aide-mémoire submitted on 23-9-09

1. Article 6(1) and measures of general scope

- (a) Article 6(1.a) and 6(1.b) do not apply to measures of general scope. However, if the Commission refers impliedly to the challenged regulation in the WWF-UK case, we maintain that this regulation is not a measure of general scope but is rather a decision addressed to a very precise and rather restricted group of persons, fishermen.

2. Article 6(1) and the product-related decision-making

- (b) Activities covered by article 6(1.b) are not of a type and nature similar to those activities listed in annex I to the Convention. The two provisions imply obvious differences already mentioned. Subparagraph (a) refers to “*decisions on whether to permit*” while subparagraph (b) to “*decisions on proposed activities*”. The implementing guide of the Convention makes also clear that they have a different scope. The guide states that “*the flexibility in subparagraph (b) enables article 6 to be applied to additional forms of decision-making as their environmental significance is realized*”.¹
- (c) The Commission is also wrong in assuming that activities in article 6(1.b) do not cover product-related activities. Its comparison with annex II to Directive 85/337/EEC is misleading. Indeed, this annex II contains a list of projects. This, however, is not the case of article 6(1.b), which refers to “*proposed activities*”. Thus, this provision intends to be as large as possible. As to the fact that, as the EC recalls, the Espoo Convention was one of the sources of inspiration for drafting article 6 of the Convention, the implementing guide of the Convention recalls that “*while not defined in the Aarhus Convention, the term “proposed activity” is used in the Espoo Convention, which defines it as “any activity or any major change to an activity subject to a decision of a competent authority in accordance with an applicable national procedure. art. 1(v))*”². The environmental significance of the proposed activity is therefore the main applicable criteria.

¹ UN economic Commission for Europe, The Aarhus Convention, An implementing Guide, page 94.

² Ibid, page 93.

- (d) The wording of the Strategic Plan 2009-2014, adopted in June 2008 by the Parties to the Convention, and quoted by the Commission, just demonstrate the opposite of what the Commission wishes to illustrate. Indeed, the parties to the Convention, when adopting the Strategy, were aware that participation in product-related decision-making had to be included in the strategic planning, just because it was already part of the Convention. If one were following the Commission's reasoning, such participation issues would not come under the Convention at all, so that an amendment of the Convention would be necessary to include them. Before such amendment was made and had entered into effect, there would have been no need for the Strategic Plan to address such issues.
- (e) From the wording of the Strategic Plan referred to by the Commission, it is clear that product-related decision making may not be excluded from the scope of article 6.
- (f) In relation to the amendment to the Convention concerning public participation in decision-making on GMOs, article 9(2) of the Convention should also apply to article 6bis once it will have entered into force. The object of article 9(2) is to allow the members of the public concerned to challenge the acts and decisions subject to the public-participation requirements provided in article 6. The fact that specific and different requirements apply to GMOs than to other article 6-type decisions should not withdraw the decisions adopted under article 6bis from the scope of article 9(2) and should not prevent the members of the public concerned from challenging them under this provision. There is no justifiable reason to apply a different legal regime on access to justice to GMOs related decisions.
- (g) In addition, the amendment on GMOs cannot be referred to in order to determine whether article 6 applies to product-related measures since the applicability of the Convention to GMOs has been decided separately from the rest and does not imply that other product-related decisions do not fall under the scope of article 6.
- (h) GMOs constitute an issue on their own. As the implementing guide explains "*the Aarhus convention atypically gives special treatment to decisions and to information pertaining to GMOs³*". It also explains that "*because of the controversial nature of GMOs at the time that the Convention was negotiated, the negotiating parties intentionally kept open the issue for determination in the light of future developments. While most countries were prepared to treat GMO decisions like any others, a few countries insisted on the special provision.*" The guide adds that "*a biosafety protocol to the Convention on Biological Diversity was under negotiation while the Aarhus Convention was being drafted. The wording of article 6, paragraph 11, takes into account the unclear status of those negotiations at the time, and the desire of the negotiating parties not to presuppose the final text of the biosafety protocol.*" Finally, the fifteenth paragraph of the resolution of the Signatories recognized:

³ Ibid, page 112.

“The importance of the application of the Convention to deliberate releases of genetically modified organisms into the environment, and request[ed] the Parties ...to further develop the application of the Convention by means of inter alia more precise provisions, taking into account the work done under the Convention on Biological Diversity which is developing a protocol on biosafety”.

It is therefore clear that the decision to adopt an additional provision to the Convention on GMOs was also taken because of the need for the Aarhus Convention to comply with the protocol on biosafety which was at the time being drafted and not because the issue was a product related one.

(i) Finally the preamble of the Almaty Amendment provides that:

“Believing that, notwithstanding developments in other forums, the Aarhus Convention provides an appropriate international framework for further developing access to information, public participation and access to justice with respect to GMOs”.

Access to justice is therefore intended to be provided in respect to GMO related decisions and because article 6bis is going to be a variant of article 6 only applicable to GMOs, article 9(2) should also apply to article 6bis-type decisions.

3. Article 6(1) and decisions granting financial support

(j) We are of the opinion that Article 6(1.b) also covers decisions to grant financial support. Indeed, there are such decisions in Community law which finance specific projects up to 100 percent (Regulations 1080/2006 to 1084/2006 on the Structural Funds, EIB decisions) and it is obvious that the activity which is financially supported, would not be realized without this financial support. As Article 6(1.b) refers to “decisions on proposed activities”, it is an unduly narrow interpretation of this provision to exclude decisions which give financial support.

(k) The Compliance Committee in its Findings with regards to communication ACCC/C/2007/21 stated that it was only “*in general*” that “*a decision of a financial institution to provide a loan or other financial support*” was not an article 6-type decision. The Committee thus implied that some of these decisions could be subject to article 6. The findings are far from being categorical.

(l) The sentence of the implementing guide referred to by the Commission only states that “*whereas the kinds of activities falling under subparagraph (b) might not ordinarily*” be subject to fully-developed permitting procedures. It therefore only means that *some* of the article 6 (1.b) decisions are not necessarily subject to fully developed permitting procedures but that others might be. The interpretation of the

implementing guide does not therefore withdraw decisions which are not subject to such procedures from the scope of article 6.

(m) The other sentence of the implementing guide which refers to the “*flexibility in subparagraph (b)*” of article 6 which “*enables article 6 to be applied to additional forms of decision-making as their environmental significance is realized*” makes clear that a much wider range of decision-making than permitting decisions are subject to paragraph b) of article 6. It obviously does not refer expressly to decisions granting financial support but is drafted broadly enough to include them.

(n) Contrary to what the Commission argues the decisions granting financial support determine the operating conditions of the financed activity. The European Investment Bank for example is supposed to subject the financing of projects to the requirements of EU law on environmental matters. The Bank ensures in its Statement of Environmental and Social Principles and Standards⁴ that the promoters of the financed projects have to comply with EU directives, such as those on EIA, Habitats and Birds and Environmental Liability. For instance, the Bank requires the promoters to apply mitigation measures when negative environmental impacts of projects it finances are unavoidable and for impacts that cannot be fully mitigated, to adopt compensation measures and offsets. The promoters are also required to carry out EIAs when needed and to organize the public participation that is implied thereof. In some projects when people will be resettled, the Bank requires the promoter of the project to provide a Resettlement Action Plan to be adopted before any disbursement of the funds occurs which clearly determines the operating conditions of the financed activity.

IV Relationship between Articles 6 and 7 of the Convention

(o) The distinction drawn by the Commission between article 6 and 7 of the Convention in relation to the fact that under article 7 “*the public which may participate shall be identified by the relevant public authority*” is not relevant as the “*public concerned*” in the meaning of article 6 will also have to be identified by some authority and most likely by the public authority carrying out the public-participation procedure. Indeed, article 6(2) provides that “*the public concerned shall be informed, either by public notice or individually as appropriate...*”. To inform the public individually implies that prior identification has been carried out. This distinction between the two provisions is therefore not convincing.

(p) In addition, as WWF-UK mentions there are some cases, as the WWF-UK case, where “*the public*” in the meaning of article 7 is also the “*public concerned*” in the meaning of article 6.

⁴ EIB Statement of Environmental and Social Principles and Standards, 2008, p.14

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