

Oral statement of CLIENTEARTH in relation to communication ACCC/C/2008/32

This communication highlights the lack of effective remedies at European level for members of the public in environmental matters which is in violation of article 9 paragraphs 2, 3, 4 and 5 of the Aarhus Convention.

I. Article 230 paragraph 4 of EC Treaty does not provide access to justice in the meaning of the access to justice provisions of the Convention

- (a) The Council, in its Common Position on the proposal for Regulation 1367/2006, and the European Commission consider that no change need be made to comply with the access to justice provisions of the Convention as article 230(4) EC Treaty suffice to ensure compliance.
- (b) Yet, the European Courts have set an overly narrow interpretation of article 230(4) of the Treaty establishing the EC which provides for the “*individual concern*” criteria that members of the public have to fulfill to have standing before the European courts. This interpretation has been set in what is called the *Plaumann* jurisprudence in 1963. Since then the courts have reasserted the jurisprudence in all environmental cases to deny standing to NGOs and individuals. As a result no NGO or individual ever had access to the European courts to challenge a decision of European institutions in environmental matters. Before or after the approval of the Aarhus Convention by the European Community.
- (c) The *Plaumann* test implies that to be able to challenge a decision of a European institution before the courts, an NGO or an individual should be the only one concerned or affected by the act. This implies that the *Plaumann* test is impossible to fulfill in environmental matters as by definition the protection of the environment is a diffuse and collective interest. There will never be only one NGO or one individual concerned and affected by an act in environmental matter.
- (d) All the cases that have been brought before the European Courts by environmental NGOs speak for themselves. They all have been dismissed as inadmissible.
- (e) The EEB and the WWF-UK cases demonstrate that the entry into force of the Aarhus Convention in the EC has not changed the situation in relation to standing. In these cases the courts have expressly said that the Aarhus Convention and Aarhus regulation did not release the NGO applicants from having to show that they were individually concerned by the acts they wanted to challenge in the meaning of the *Plaumann*

jurisprudence. The courts clearly refused to change their jurisprudence despite the entry into force of the Convention and to bring about compliance with article 9(3) of the Convention.

- (f) Of course the EC is allowed under the Aarhus Convention to use criteria to be met by members of the public in order to be able to have standing. However, the Compliance Committee has made clear in the Belgian case that the criteria used in national law by the State parties must not be so restrictive as to bar all effective remedies for members of public and that the parties had to take fully into account the objective of the Convention to guarantee access to justice. Yet the interpretation of the European courts clearly prevents all members of the public from having any remedies to actually challenge acts and omissions of EC institutions that they consider contravene EU environmental law in the meaning of article 9(3) of the Convention.
- (g) The EC argues that it is the wording of article 230(4) that creates this situation. We disagree with that statement, the lack of standing is clearly due to the narrow interpretation of the courts of article 230(4). Article 230(4) could easily be interpreted otherwise. The Court has already done so. However, it only did so when economic operators were the applicants. For instance in the *Jego-quare* case and in other cases, the *Cordoniu* and *Extramet* cases which we mentioned in the communication, it has departed from the *Plaumann* test in order to give standing to economic operators. Moreover in competition, state aid, anti-dumping and concentration cases the courts have established a jurisprudence under which corporations have automatic standing when they are granted procedural guarantees by the regulations they want to challenge. No such jurisprudence exists in favour of environmental NGOs.
- (h) The EC also argues that the Courts are the institutions to determine the correct interpretation of the provisions of the Treaty and are free to decide whether their jurisprudence should evolve or not. However, the European Courts are not free to interpret article 230(4) as they wish, they have to take into account the legal boundaries they are subject to.
- (i) These boundaries are Public International law: the Compliance Committee has recalled in the Belgian case that the judiciary branch also had to bring about compliance with the international agreements approved by the state along with the legislative branch. In addition, according to article 27 of the Vienna Convention on the law of Treaties, a state may not invoke its internal law to justify the non performance of a treaty. The EC may not therefore invoke either its institutional functioning, the allocation of powers among the institutions, the autonomy of its legal system or the independence of the European courts to justify the violation of the Aarhus Convention.

In EU law, article 300(7) of the Treaty provides that European institutions are bound by the international agreements concluded by the EC. The European court of Justice is according to article 7 of the Treaty a European institution and is therefore bound by the Aarhus Convention. It must therefore interpret the relevant provisions of the treaty as well as secondary legislation in accordance with the access to justice provisions of

the Convention. We refer to our written reply to question 4) asked by the Compliance Committee to the European Commission.

Conclusion

In conclusion, the interpretation by the courts of article 230(4) violates article 9(2) to (5) of the Convention.

It violates article 9(3) because no remedies are provided for members of the public against decisions of European institutions in environmental matters that contravene EU environmental law.

It violates article 9(4) of the Convention since no effective, fair or equitable remedies are granted and article 9(5) because the lack of standing constitute a barrier to access to justice.

II. Articles 234 EC does not provide for access to justice in compliance with Article 9(3) Aarhus Convention

1. Article 234 EC is not a procedure which promotes or allows access to justice in the sense of Article 9(3) of the Convention

- (a) Under the procedure established under article 234 no one can, under any circumstances, sue any EC institution or body directly. These are immune from any legal challenge under article 234.
- (b) The EC may not rely on the Member States to comply with the Aarhus Convention on behalf of the EC and to provide access to the ECJ through the procedure established under article 234. The EC as a party to the Convention may not benefit from a different status than the other parties and has to adopt any necessary measures or changes to bring about compliance with article 9 of the Convention.
- (c) Moreover, the procedure is very limited. The applicants in a procedure before a national court cannot oblige that court to put a preliminary question to the European Court of Justice (ECJ). National courts have a complete discretion, whether they submit a preliminary question to the ECJ or not; only for national courts, whose decisions cannot be appealed any more, is there an obligation to submit a question under Article 234 EC.
- (d) The applicants cannot decide, what question(s) should be submitted to the ECJ; rather, the formulation of the question(s) is at the discretion of the national court.
- (e) There is no sanction at all against a court or a Member State, when a question should have been submitted, but was not submitted. The Commission has never taken any action against a Member State for failure of national courts to comply with their

obligations under Article 234 EC, for example by starting infringement procedures under Article 226 EC.

- (f) The Commission has published for 30 years, in an annex to its annual report on the monitoring of application of EC law, a selection of cases where national courts were, in the Commission's opinion, obliged to submit a question to the ECJ, but have not done so; the omission to submit preliminary questions is thus not at all exceptional.
- (g) Between 1976 and 2007, only 108 environmental cases were brought to the ECJ under Article 234 EC, this means, 3.6 cases per year. The practical application of Article 234 EC is thus rather rare.
- (h) Netherlands made 20 submissions under Article 234 EC between 1976 and 2007; Germany, which is more than four times bigger and has more than four times as many courts, only made 10 submissions. Greece, Spain, Portugal and Ireland made none. These figures demonstrate how arbitrary and selective national courts are in practice.
- (i) On average, the preliminary judgments under Article 234 EC take, in environmental matters, 16 months. This is not a timely procedure as requested under Article 9(4) of the Aarhus Convention.
- (j) From all this, it can be concluded that the procedure under article 234 EC is a sort of interplay between a national court and the ECJ. The parties of the litigation before the national court cannot formulate claims. The litigation before the national court is not decided by the ECJ, costs are not attributed etc. The objective of the Aarhus Convention, to promote access to justice in environmental matters, is neither directly nor indirectly promoted by this provision.

2. The national court procedure and 234 EC together are also not sufficient to satisfy the requirements of Article 9(3) of the Aarhus Convention, for the following reasons:

- (a) The object of the litigation before the national court and the ECJ under Article 234 are not identical.
- (b) Access to national courts is not regulated in the same way in the 27 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. 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.
- (c) Where EC decisions are taken, such as in the WWF-case, there would often be no possibility to tackle the issue at national courts. For example, the German decision to

distribute the TAC-quota (total allowable catches) attributed to Germany, among the German fishermen, could, under German law, only be attacked in court by a German environmental organisation, when it can claim that the decision infringes a subjective right of that organisation (Article 42 Verwaltungsgerichtsordnung). As this is obviously not the case, the environmental organisation has no remedy under national law.

- (d) The measures adopted by EC institutions that do not require any implementing measures at national level because they are only applied at EC level, for example a decision not to organize a public consultation, may not be challenged through the procedure established under article 234. No national measures are adopted in this case which could form the basis of a referral for a preliminary ruling to the ECJ. Article 234 does not therefore allow challenging all types of measures adopted at EC level. This entails that certain types of decisions adopted by the EC institutions are completely immune from judicial review.
- (e) Finally, as the Chairman of the Committee has observed, actions by EC institutions that affect citizens in countries that are not members of the EU, for example European Investment Bank or Commission funding of a project in Albania, are not subject to an Article 234 procedure. Thus in such cases citizens are left entirely without any remedy.

III. The WWF-case (T-91/07 and C-355/08P)

1. Reassertion of the same jurisprudence by the courts despite the entry into force of the Aarhus Convention

- (a) This case demonstrates that the entry into force of the Convention into the EC does not alter the jurisprudence of the Courts on standing which still denies access to justice to NGOs in environmental matters (see paragraph 82 of the Court of First Instance's decision. The decision of the CFI has been confirmed by the ECJ). The *Plaumann* jurisprudence is still applicable. The tests set by the Courts, the *Plaumann* test and the new test set by the ECJ, are impossible to meet by environmental NGOs.
- (b) Following the ECJ's decision, no criteria will ever enable environmental NGOs to challenge EC institutions' decisions: having a statutory aim to protect the environment or having a special consultative status with European Institutions are not criteria that allow NGOs to challenge the institutions' decisions that they consider contravene EC environmental law.

2. The challenged regulation is an article 6(1.b)-type decision which entails the applicability of article 9(2) of the Convention

- (c) The EC adopts article 6-type decisions. We provided numerous examples in our reply to the questions of the Compliance Committee.

- (d) At EC level, the fixing of TACs is a decision that is taken every year, it is very specific (it sets the species and the quantities of fish allowed to be fished, the nationality of the vessels allowed to fish and the areas where it is allowed to fish), some of the provisions of the regulation also directly authorize the vessels to carry out their activities. The decision thus takes the form of a regulation but is clearly not a legislative act. It is rather a decision that implements a legislative act, the Common Fisheries Policy embodied in Regulation 2371/2002 on which it is based. This is confirmed by the fact that the European Parliament which is to be consulted on legislative measures in the fisheries sector, is not consulted when the Council fixes the TACs.
- (e) It is erroneous to assume, as the EC does, that article 6 (1.b) is identical to article 6 (1.a) as article 6(1.b) does not refer to any permitting activity but only to “decisions on proposed activities not listed in annex I which may have a significant on the environment”.
- (f) Article 6(1.b) does not leave any discretion to State Parties as to whether article 6(1.b) of the Convention should be implemented and enforced but on the contrary requires them to “*apply the provisions of this article*” and to “*determine whether such a proposed activity is subject to these provisions*”. The EC cannot therefore refuse to implement this provision of the Convention.
- (g) The objective of Article 9(2) of the Convention is to allow the procedural and substantive legality of the measure to be challenged, when the requirements of Article 6 were not respected. This finds its justification in the objective of the Convention: had the contracting party given full participation to persons and environmental organisations under article 6, the decision which was finally adopted, might have been a different one. There is thus good reason for the court to examine, under Article 9(2), whether this would indeed have been the case. Such an examination is, however, only possible, where also the substantive legality of a measure is examined. Yet the ECJ’s decision makes clear that the substantive legality of a decision may not be challenged by an NGO even when it has some procedural rights.
- (h) WWF-UK as an NGO fulfilling the requirements of article 2(5) of the Convention should have been granted standing under article 9(2).

3. The applicability of article 9(3) of the Convention

- (i) The challenged act can also amount to an article 7-type decision. The Compliance Committee has made clear in its findings that the boundaries between the two types of decisions, article 6-type decisions and article 7-type decisions, were not crystal clear. The act challenged by WWF-UK also complies with the elements of definition of plans and programmes relating to the environment as explained in the communication and reply to questions of the Committee. For this reason WWF-UK should also have

been granted standing under article 9(2) since article 7-type decisions are subject to certain provisions of article 6.

- (j) WWF-UK should also have been granted standing under article 9(3) of the Convention since article 9(3) covers article 7-type decisions.
- (k) In any case article 9(3) of the Convention clearly also applies independently from whether the challenged act is an article 6-type or article 7-type decision as the challenged act is an act adopted by a public authority which contravenes EU law on the environment.
- (l) The act adopted by the Council has not been adopted when acting in its legislative capacity. Article 2(2) of the Convention which exempts measures taken by public authorities in their legislative capacity from the field of application of the Convention, is an exception to the general provisions of the Convention and must therefore be interpreted narrowly.
- (m) In addition, it follows from Article 8(1) of the Convention that executive measures of general application do come under the Convention and are therefore not to be considered to come under the exception of its Article 2(2). It therefore demonstrates that some measure of general application fall under the scope of the Convention.
- (n) Contrary to what the EC argues, it is fundamentally wrong to ask persons and environmental organisations to tackle an EC decision not directly, but to tackle the national executive decisions. A procedure, as the one established under article 234 EC treaty, which requires persons or environmental organisations to tackle not the EC TAC-decision, but the national decision on the attribution of the quotas to the different fishermen taken in pursuance of that EC decision at national level, is neither effective nor fair or timely in the meaning of article 9(4) of the Convention.
- (o) As already mentioned such procedure is not available in all national legal systems. In addition, before national courts come to a judgment, the largest part of the application of the EC TAC-decision (which applies only for one year) will have elapsed. Finally, different decisions by national courts in different Member States cannot be excluded, and no guarantee at all exists that there would be a preliminary question addressed to the ECJ since the courts of first instance are not obliged to refer a question to the ECJ.

IV. In relation to the costs

- (p) The uncertainty about the costs the NGOs and the members of the public in general might have to bear in case they lose a case before the courts is acting as a deterrent. In case T-191/99, the *Petrie* case, on access to documents against the Commission in which the applicants were language professors and in case T-219/95R, the applicants did not appeal the decision of the Court of First Instance because they feared the costs would be too high in case they lost. The amount of the costs required by the European

Commission in cases in which it does not hire an external lawyer are not prohibitive however the Commission as well as the other institutions should guarantee that it is always the case for members of the public.

Conclusion

Because the European Courts have not altered their jurisprudence and still bar all effective remedies for NGOs the EC has breached article 9 paragraphs 2 to 5 of the Convention.