



CLIENTEARTH  
JUSTICE FOR THE PLANET

**Reply from ClientEarth to question 4) asked by the Aarhus  
Convention Compliance Committee to the European Commission  
Communication ACCC/C/2008/32**

**Mr. Jeremy Wates  
Secretary to the Aarhus Convention  
United Nations Economic Commission for Europe  
Environment and Human Settlement Division  
Room 332, Palais des Nations  
CH-1211 Geneva 10  
Switzerland**

[jeremy.wates@unece.org](mailto:jeremy.wates@unece.org)

ClientEarth would like to take the opportunity to reply to the fourth question the Compliance Committee asked the European Commission.

**4. Please explain if European Courts are under an obligation to interpret article 230 of the Treaty on the European Union in the light of the Aarhus Convention, and in particular its provisions on access to justice.**

**1. The Convention complies with article 230 paragraph 4 EC Treaty**

The Aarhus Convention (the Convention) was approved by Council's Decision 2005/370/EC<sup>1</sup>.

There is no question about the conformity of the Convention with the EC Treaty. The approval of the Convention by the Council without amending the EC Treaty confirms that fact.

Indeed, article 300, paragraph 5 EC Treaty provides that *"when the Council envisages concluding an agreement which calls for amendments to this Treaty, the amendments must first be adopted in accordance with the procedure laid down in Article 48 of the Treaty on European Union"*. The Council considered that the approval of the Convention did not call for amendments to the EC Treaty, so did the European Commission.<sup>2</sup>

Article 300 paragraph 6 EC Treaty further provides that *"the European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with article 48 of the Treaty on European Union."*

It is clear from the wording of this provision that the opinion of the Court has to be given prior to the conclusion of the international agreement. Yet, no institutions or Member States have required an opinion from the Court on the compatibility of the Convention with the provisions of the Treaty prior to the approval of the Convention. The Courts cannot therefore consider that granting NGOs access to judicial review can only be achieved by amending the Treaty in accordance with article 48 of the Treaty on the European Union as it did in case C-50/00 (UPA)<sup>3</sup>. When NGOs or individuals institute legal proceedings before the Courts, they do not seek an opinion of the Courts on the compatibility of the

---

<sup>1</sup> Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters, OJ L 124/1.

<sup>2</sup> Proposal for Regulation 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 EC institutions and bodies, COM(2003)622 final, p.16.

<sup>3</sup> Case C-50/00, *Union de Pequenos Agricultores v Council* [2002] ECR I-6677, para 45.

Convention with the EC treaty, but rather the implementation of the Convention. Now that the Convention has been approved by the Council, the European Courts are bound by its provisions.

## 2. The Convention is binding on the European Courts

According to article 300 paragraph 7 EC Treaty, “*agreements concluded under the conditions set out in this article shall be binding on the institutions and on Member States*”. The Convention is thus, an integral part of the Community legal order which makes it binding on EC institutions. And because the European Court of Justice (ECJ) is, in accordance with article 7(1) EC Treaty, one of the EC institutions, it is subject to the provisions of the Convention.

International law also places obligations on the Courts. As recalled by the Committee, “*an independent judiciary must operate within the boundaries of law, but in international law the judicial branch is also perceived as a part of the state. In this regard, within the given powers, all branches of government should make an effort to bring about compliance with an international agreement. ... the judiciary might have to carefully analyse its standards in the context of a Party’s international obligation, and apply them accordingly*”.<sup>4</sup>

In fact, the principle of consistent interpretation, a general principle of international law requires courts to interpret national law in conformity with a rule of international law, with a view to ensuring that that rule is given effect. The European court has applied that principle at Community level and it is settled case-law that Community measures must be interpreted in conformity with international agreements concluded by the European Community.<sup>5</sup>

The interpretation of article 230 paragraph 4 EC Treaty by the Courts, barring all access to justice for members of the public, through the *Plaumann* test, is thus *ultra vires* and violates article 9 paragraph 3 of the Convention.

In addition, article 5 of the Treaty on the European Union provides that:

*“The European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors shall exercise their powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the other provisions of this Treaty”.*

The Convention and Regulation 1367/2006 supplement the EC Treaty, they specify the applicable regime under article 230 paragraph 4 EC Treaty within the remit of environmental law. The Court of Justice must therefore exercise its powers under the conditions and for the purposes provided for by these acts, that is, to provide members of the public access to judicial review in environmental matters.

---

<sup>4</sup> ACCC/C/2005/11 (Belgium), ECE/MP.PP/C.1/2006/4/Add.2, para 42.

<sup>5</sup> Case C-61/94 *Commission v Germany* [1996] ECR I-3989, para 52; Case C-341/95 *Safety-Hitech* [1998] ECR I-4355, para 20.

Moreover, as stated by the Committee in its findings relating to Belgium, *“its review of the Parties’ compliance with the Convention is an exercise governed by international law. As a matter of general international law of treaties, codified by article 27 of the 1969 Vienna Convention on the Law of Treaties, a State may not invoke its internal law as justification for failure to perform a treaty”*<sup>6</sup>. The provisions of the EC Treaty may not therefore serve as justification for not complying with the Convention.

### **3. The European Community did not approve the Convention to confirm the status quo**

The European Community did not approve the Convention to confirm the status quo. In recital 6 of Decision 2005/370/EC, the Council states that *“relevant Community legislation is being made consistent with the Convention,”* recognizing that bringing EC law into compliance with the provisions of the Convention implied changes within the Community legal order. Likewise, the rulings of the Courts should be made consistent with the Convention.

The annex of Decision 2005/370/EC also states that *“the legal instruments in force do not cover fully the implementation of the obligations resulting from article 9(3) of the Convention as they relate to administrative and judicial procedures to challenge acts and omissions by private persons and public authorities other than the institutions of the European Community as covered by Article 2 (2)(d) of the Convention, and that consequently, its Member States are responsible for the performance of these obligations at the time of approval of the Convention by the European Community and will remain so unless and until the Community, in the exercise of its powers under the EC Treaty, adopts provisions of Community law covering the implementation of those obligations”*.

The European Community thus acknowledged that article 9(3) of the Convention had not been implemented at EC level at the time of approval of the Convention. However, since then, Regulation 1367/2006 has been adopted to apply the provisions of the Convention to EC institutions and bodies. However, article 12 of that regulation refers to *“the relevant provisions of the Treaty”* that is to article 230 paragraph 4. It is thus to the Courts to guarantee the proper implementation of article 9 paragraph 3 of the Convention in interpreting article 230 paragraph 4 EC Treaty in a way that grants members of the public (as defined in article 2 paragraph 4 of the Convention) standing to challenge the acts and omissions of EC institutions and bodies.

Moreover, it is not correct to consider, as the European Courts do, that NGOs and other members of the public cannot have standing under article 230, paragraph 4 as it stands. There are no legal reasons to interpret article 230 paragraph 4 EC Treaty in such a restrictive manner.

### **4. The interpretation of the European courts is *ultra vires*: there are no legal grounds requiring article 230, paragraph 4 to be interpreted so restrictively**

Because of the restrictive interpretation of article 230, paragraph 4 by the Courts, no individual or organization may be in a position to challenge any EC institutions’ acts or omissions relating to the environment. Indeed, the *Plaumann* test is so restrictive that it effectively prevents all NGOs and

---

<sup>6</sup> ACCC/C/2005/11 (Belgium), *Ibid*, para 41.

individuals from challenging EC institutions' acts that they consider to contravene EC law relating to the environment, as under article 9 paragraph 3.

Yet, the wording of article 230 paragraph 4 does not provide for such a restrictive test. Environmental NGOs and, under certain conditions, individuals should be considered as directly and individually concerned by an EC institution's act which they consider to contravene EC environmental law.

The Courts must adopt a purposive interpretation of article 230, paragraph 4 to bring the EC in compliance with article 9 paragraph 3 of the Convention. The Courts have already departed from the strict wording of article 230 paragraph 4 of the EC Treaty in numerous cases (see Communication, page 16)<sup>7</sup>. They could therefore adopt a similar line of reasoning in relation to article 230, paragraph 4 of EC Treaty.

---

<sup>7</sup> See Case C-22/70, *Commission v Council* [1971] ECR 263 paras 39 to 42; Case C-294/83 "*Les verts*" v *European Parliament* [1986] ECR 1339, paras 24-25 ; Case C-70/88 *European Parliament v Council* [1990] ECR I-2041; Case C-62/88, *Greece v Council*, [1990] ECR I-1527, para 8.