

ClientEarth's response to the EU's comments on the draft findings of the Aarhus Convention Compliance Committee in relation to communication ACCC/C/2008/32 Part II

ClientEarth hereby submits a small number of observations in relation to the EU's comments on the draft findings of the Aarhus Convention Compliance Committee in relation to communication ACCC/C/2008/32. Section 1 deals with the EU's reply regarding the "specific character of the EU framework". Part 2 deals with the case law of the Court of Justice of the European Union. Part 3 deals with the Aarhus Regulation. For the sake of expediency and because the EU mainly repeated arguments they had made in previous submissions, we have not commented on every point raised by the EU.

1. Specific character of the EU Framework

According to the EU, the Committee's recommendations "*that either the jurisprudence of the CJEU should change to take fuller account of the obligations under Article 9(3) and (4) of the Aarhus Convention when it interprets EU law and assessed the legality of EU implementing measures, or that the Aarhus Regulation is amended or new legislation implementing the Aarhus Convention is adopted*" ignore the specific features of the EU.

ClientEarth cannot agree. The findings show that the Committee has a sound understanding of the specific features of the EU. However, such specific features do not allow the EU to ignore the obligations flowing from its ratification of the Aarhus Convention.

The EU quotes from the EU Declaration, and draws the conclusion that "*when looking at the question of whether the Union has properly implemented the Convention with respect to its institutions and bodies in areas that actually fall within the Convention's scope, the ACCC cannot treat it in the same way as a State Party.*" The EU seems to think that the EU Declaration in some way derogates the EU from having to comply with the obligations on access to justice.

On the contrary, ClientEarth submits that the EU Declaration shows that in ratifying the Aarhus Convention, the EU undertook to fulfil its obligations despite its particular institutional framework. Perhaps a fuller quotation from the EU Declaration aids this interpretation:

"Fully supporting the objectives pursued by the Convention and considering that the European Community itself is being actively involved in the protection of the environment through a comprehensive and evolving set of legislation, it was felt important not only to sign up to the Convention at Community level but also to cover its own institutions, alongside national public authorities.

Within the institutional and legal context of the Community and given also the provisions of the Treaty of Amsterdam with respect to future legislation on transparency, the Community also declares that the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention."

In its reply, the EU goes on to explain that it cannot "*depart in secondary legislation from the express provisions of the Treaties...Any modification of the Aarhus Regulation or adoption of new implementing legislation can thus only take place within the boundaries and in full compliance with the institutional balance and the specific role conferred by the TFEU and TEU on each EU institutions, including the CJEU in its jurisdictional role, and both the Parliament and the Council in their legislative functions.*" However, the EU does not explain how complying with the Committee's draft findings would require the EU to amend its treaties and/or stray beyond the boundaries of its institutional balance.

At paragraphs 23 to 27 the EU essentially states that it considers there to be no breach of Article 9(3) and (4) and repeats the arguments put forward in previous submissions to the Committee. It raises no new points of fact or law. The Committee has already dealt with these considerations in parts I and II of its draft findings.

2. CJEU case law

The EU's comments on CJEU case law demonstrate a fundamental lack of understanding of the Committee's draft findings in relation to both part I and part II of the Communication.

The EU states, again, that the ACCC's position "*ignores the vital role that the courts of the Member States play as 'ordinary courts' within the EU legal order*" and the "*specific legal nature of the EU legal order and the evolving nature of CJEU jurisprudence relating to the Aarhus Convention...*"

On the contrary, these questions have been specifically addressed by the Committee. The Committee recognised, in both part I and II of its decisions, the importance of the mechanism of a referral for preliminary rulings and welcomed the evolution of the case-law of the CJEU requiring national courts to interpret their procedural rules in light and in compliance with Article 9(2) and (3) of the Aarhus Convention. However, the Committee also made clear in the draft findings and during the hearing in 2015 that the implementation of the access to justice provisions of the Convention at national level was not the subject matter of the case. Therefore, in part I of its findings, it stated that "*the system of preliminary ruling neither in itself meets the requirements of access to justice in article 9 of the Convention, nor compensates for the strict jurisprudence of the EU Courts [in relation to direct access to the CJEU]*". In addition, in Part II of its findings the Committee discussed the developments in CJEU jurisprudence on standing in direct actions and found that it continues to deny NGOs and members of the public access to justice in breach of Article 9(3). In these circumstances, the long list of preliminary reference procedures referred to by the EU is irrelevant to part II of the Committee's findings because they do not compensate for the lack of standing before EU courts.

Finally, the Committee regrets that the CJEU does not apply its own case-law, namely the Slovak bear case, to its own jurisdiction.

3. The Aarhus Regulation

i) Entities other than NGOs

Article 9(3) affords the parties a margin of discretion to define the criteria that members of the public must meet in order to avail themselves of the review mechanism. The EU argues that this

margin of discretion entitles the parties to exclude members of the public from the review mechanisms entirely. Such an interpretation frustrates the very intention of Article 9(3) and is inconsistent with any legal interpretation of the rights it affords.

Second, the EU argues that individuals do not need to access the internal review procedure because access to justice for individuals is already afforded through Member State courts. However, the Committee has already stated that access to Member State courts cannot compensate for the CJEU's strict rules on standing that effectively prevent individuals from bringing cases in environmental matters before the EU courts. In these circumstances, the internal review procedure remains the only alternative means by which individuals can have access to justice in environmental matters as regards the decisions of EU institutions.

ii) Acts of individual scope

At paragraphs 72 to 74 the EU seems to argue that the Committee is not entitled to adopt a position that goes against a CJEU judgment. This is obviously erroneous, given that the Committee is charged with deciding if the EU, and thus the CJEU, is in compliance with the Aarhus Convention.

The EU's argument **is** that all "normative acts of general scope" are legislative in nature, including implementing acts adopted by the Commission. This bestows undue democratic legitimacy on the acts of the Commission.

The statement of the EU that "the criterion "of individual scope" in Article 10(1) of the Aarhus Regulation thus reflects the specific decision-making procedure within the Union and within its "institutional and legal context"" (para. 80) is quite puzzling. In particular since most of the internal review requests made under the Aarhus Regulation to the Commission have been deemed inadmissible because the decisions challenged were not of individual scope. Also, it is noteworthy that the individual scope criterion was not included in the Commission's proposal for the Aarhus Regulation but was only inserted by the Council at a later stage in the decision-making process. At the time, the Commission therefore did not consider that such a limitation of the scope of review was required and desirable.

iii) The exemption of administrative review

At paragraph 106 of its reply the EU states that *"as a general rule, norms applying to undertakings and state aid are outside the scope of the Aarhus Convention. Their subject-matter is to avoid any distortion of competition within the internal market that is harmful to citizens and companies in the EU. The Commission's decision-making role here generally relates to competition matters rather than environmental issues."*

This statement fails to take into account that many of the Commission's state aid and competition decisions have a direct impact on the environment. See, for example, the Commission's decision to declare aid which the UK intended to grant to a nuclear power station at Hinkley to be compatible with the internal market¹. Such a decision certainly has an impact on the environment. Yet, it cannot be challenged through the internal review procedure in the Aarhus Regulation. It is rather frustrating to note that a competitor of the Hinkley Power Plant,

¹ Commission Decision (EU) 2015/658 of 8 October 2014

Green Peace Energy, brought a direct action before the General Court that was held to be inadmissible for the reason that it was not individually and directly concerned by the decision.

4. Request for another hearing

The Commission is asking for the organisation of another hearing so that they can further present their comments in particular on the standing criteria laid down in the Aarhus Regulation. ClientEarth is opposed to such a request.

The Commission had all the necessary opportunities to address the arguments made by ClientEarth on these points. The written update containing these was sent on 23 February 2015. They were also addressed during the hearing in Geneva on the 1 July 2015. The Commission's representatives therefore were aware that the Committee was taking into consideration these arguments. The Commission should have raised their concerns about their admissibility then. The fact that they replied to the questions of the Committee specifically on these points shows that they implicitly accepted their admissibility.

The rules of procedure of the Committee do not foresee the possibility to organise a second hearing nor do they provide an obligation for the Committee to accept all or any of the comments made by the Party complained of. The only obligation mentioned is to take them into account which does not mean to adhere to the position taken and include it in the findings and recommendations. This is confirmed by the fact that the rule applies equally to the comments made by the communicant.

The Guidance Document on the Compliance Mechanism also provides that "Any comments to the draft findings and recommendations should not include information that could have been provided at an earlier stage of the process."² The Comments provided by the EU on the points relating to the non-compliance of the Aarhus Regulation could and should have been provided right after the communicant sent the update containing the allegation of non-compliance, that is in 2015.

It follows from the arguments set out above that we respectfully ask the Committee to reject the request for another hearing and proceed to the adoption of the final findings.

² Guidance Document on the Aarhus Convention Compliance Mechanism, Modus Operandi, p. 21.