



Communication ACCC/C/2008/32 - Update on EU General Court's decisions under Regulation 1367/2006

July 2012

1. We would like to inform the Compliance Committee of the EU General Court's decisions adopted on last June 14th in cases T-338/08¹ (Annex 1) and T-396/09² (Annex 2). The Parties in ClientEarth communication ACCC/C/2008/32 ('the communication') and the Committee had agreed to stay the discussions on the second part of the communication (on the incompatibility of Regulation 1367/2006 on the application of the Aarhus Convention to the EU institutions with the Aarhus Convention) until the Court would adopt its decisions in the two pending cases.
2. We propose to highlight the main findings of the Court and analyze whether the Court applied Regulation 1367/2006 in a way to provide access to justice to NGOs in accordance with Article 9(3) and (4) of the Convention.
3. In case T-338/08, the NGO Applicants made a request pursuant to Article 10 of Regulation 1367/2006 to the Commission to review Regulation 149/2008 setting maximum residue levels for certain products³.
4. In case T-396/09, the NGOs asked the Commission to review the decision granting the Kingdom of the Netherlands a temporary exemption from the obligations laid down by Directive 2008/50/EC on ambient air quality and cleaner air for Europe⁴.
5. In both cases, the Commission considered the requests inadmissible as the concerned acts were not "*administrative acts*" as defined in Article 2(1)(g) of Regulation 1367/2006 because they were not of individual scope.

¹ Case T-338/08, *Stichting Natuur en Milieu and PAN Europe v Commission*, judgment of 14 June 2012.

² Case T-396/09, *Vereniging Milieudefensie, Stichting Stop Luchtverontreiniging Utrecht v Commission*, judgment of 14 June 2012.

³ Regulation (EC) No 149/2008 of 29 January 2008 amending Regulation (EC) No 396/2005 of the European Parliament and of the Council by establishing Annexes UU, III and IV setting maximum residue levels for products covered by Annex I thereto (OJ 2008 L 58, p.1).

⁴ Decision C(2009) 2560 final of 9 April 2009 granting the Kingdom of the Netherlands a temporary exemption from the obligations laid down by Directive 2008/50/EC on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p.1).

Incompatibility of Article 10(1) of Regulation 1367/2006 with Article 9(3) of the Convention

6. In both cases, the Court expressly considered that because Article 10(1) of Regulation 1367/2006 limits the concept of "acts" that can be challenged by NGOs to "*administrative acts*" defined in Article 2(1)(g) of the Regulation as "*measures of individual scope*", it is not compatible with Article 9(3) of the Convention.
7. The Court referred to the objectives of the Convention and to the terms of Article 9(3) of the Convention to hold that "*.. Article 9(3) of the Aarhus Convention cannot be construed as referring only to measures of individual scope*"⁵.
8. The very narrow definition of the acts that could be challenged under the Regulation is one of the points raised in the Communication (section 4.2) as one of the most important violations by the Regulation of the Convention and is therefore upheld by the Court.
9. The Court also considered in case T-338/08 that acts adopted by the Commission in the exercise of its implementing powers (conferred on the Commission by Council Decision 1999/468/EC of June 1999) were not legislative acts and could thus be challenged under the Regulation⁶. That is an important clarification as the Commission was arguing that the act in question was a legislative act.

Status quo on the right of standing

10. In neither of the decisions, the Court examines the substance of the cases that is the lawfulness of the decisions the review of was requested. It only annuls the Commission's decisions about the inadmissibility of the requests made under Article 10 of Regulation 1367/2006.
11. The decisions do not therefore bring any changes in the case law of the Court or any clarifications on the NGOs' right of standing to challenge EU institutions' decisions before the Courts.
12. As evidenced by these two cases, in case the administrative review request is considered as inadmissible by the institution, the NGO can only challenge the decision on the admissibility. If the Court annuls the institution's decision on the inadmissibility and that the institution reviews the substantial legality of its decision

⁵ Case T-338/08, paras 71-79, case T-396/09, paras 58-59.

⁶ Case T-338/08, para 65.

but maintains it because it considers it lawful the NGO has to bring another action for annulment. It is only then that the Court will maybe decide whether the NGO has legal standing to challenge the lawfulness of the decision. This procedure is obviously way too long and burdensome as it requires two cases to be brought before the Court without any guarantee that it really allows NGOs to challenge the substantial legality of the decisions in the end. However, it might be submitted that now that the Court has ruled that acts such as the Decision and Regulation that were challenged should be considered as acts that could be contested under the Convention, the Commission will not reject similar review requests in the future as inadmissible. This should give the opportunity to the Court to rule directly on the right of standing of NGO applicants to challenge the decisions themselves in future cases.

13. Paradoxically, in both cases the Court refers to case C-240/09⁷ (Annex 3) with regard to EU institutions in stating that "*it is apparent from the case-law of the Court of Justice that obligations arise under Article 9(3) of the Aarhus Convention and that Regulation No 1367/2006 is intended to implement that provision with respect to the institutions of the European Union (see , to that effect, Case C-240/09 Lesoochranárske zoskupenie [2011] ECR I-0000, paragraphs 39 and 41).*"⁸

14. In case C-240/09, the Court considered that Article 9(3) of the Convention had to be interpreted by national courts and authorities in a way to provide legal standing to environmental NGOs:

"Article 9(3) of the Convention on access to information, public participation in decision-making and access to justice in environmental matters approved on behalf of the European Community by Council Decision 2005/370/EC of 17 February 2005 does not have direct effect in European Union law. It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by European Union law, in order to enable an environmental protection organisation, such as the Lesoochranárske zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to European Union environmental law."

15. The reference to this case by the Court could be interpreted as meaning that it considers that NGOs should also have legal standing before the EU courts to challenge decisions of the EU institutions.

⁷ Case C-240/09, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky*, judgment of 8 March 2011.

⁸ Case T-396/09, para 58 and Case T-338/08, para 58.

16. However, this is far from being clear, on the contrary, as the Court states in both cases that the provision of Article (ex) 230(4) (new 263(4) TFEU) still need to be complied with:

"Article 12(1) of Regulation No 1367/2006 provides that a non-governmental organisation which has made a request for internal review pursuant to Article 10 of that regulation may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty, hence in accordance with Article 230 EC. However, whatever the scope of the measure covered by an internal review as provided for in Article 10 of Regulation No 1367/2006, the conditions for admissibility laid down in Article 230EC must always be satisfied if an action is brought before the Court of the European Union.

Moreover, the conditions laid down in Article 230EC - and, in particular, the condition that the contested act must be of individual and direct concern to the applicant - apply also to measures of individual scope which are not addressed to the applicant. A measure of individual scope will not necessarily be of individual and direct concern to a non-governmental organisation which meets the conditions laid down in Article 11 of Regulation No 1367/2006. Contrary to the assertions made by the European Parliament and the Council, limiting the concept of 'acts' exclusively to measures of individual scope does not ensure that the condition laid down in Article 230 EC - that the contested act must be of direct and individual concern to the applicant - will be satisfied."⁹

17. It implies either that the NGO be individually and directly concerned or only directly concerned depending on whether the challenged act is a regulatory act or not in accordance with Article 263(4) TFEU.
18. As argued in section 4.1 of the communication, the risk is that the Courts reassert their case-law on the interpretation of the individual concern criteria adopted in the Plauman case and still bar all access to the Courts to NGOs.
19. Additionally, if the Courts stick to the recent case-law on the interpretation of the "direct concern" criteria, it is very doubtful that NGOs will have standing. In case T-18/10 (Annex 4) and T-262/10 (Annex 5), the General Court considered that "*for an individual to be directly concerned by a European Union measure, first, that measure must directly affect the legal situation of that individual [emphasis added] and, secondly, there must be no discretion left to the addressees of that measure who are responsible for its implementation, that implementation being purely automatic and*

⁹ Case T-396/09, paras 72-73 and Case T-338/08, paras 80-81.

*resulting from European Union rules alone without the application of other intermediate rules.."*¹⁰

20. In one of the two cases, the contested regulation provided that "*the placing on the market of seal products shall be allowed only where the seal products result from hunts traditionally conducted by Inuit and other indigenous communities and contribute to their subsistence*"¹¹. The Court decided that:
21. "*Consequently, the contested regulation directly affects only the legal situation of those of the applicants who are active in the placing on the market of the European Union of seal products. That regulation does not in any way prohibit seal hunting, which indeed takes place outside the European Union market, or the use or consumption of seal products which are not marketed. Consequently, it should be observed that, while it cannot be precluded that the general prohibition of placing on the market provided for by the contested regulation may have consequences for the business activities of persons intervening upstream or downstream of that placing on the market, the fact remains that such consequences cannot be regarded as resulting directly from that regulation (see, to that effect, order of the General Court in Case T-40/04 Bonino and Others v Parliament and Council [2005] ECR II-2685, paragraph 56).*"¹²
22. The Court specified that "*Furthermore, as regards the possible economic consequences of that prohibition, it must be borne in mind that, according to case-law, those consequences do not affect the applicants' legal situation, but only their factual situation*".¹³
23. It follows that if the Courts maintains their interpretation and apply it to NGOs, it is more than likely that because NGOs legal situation will never be affected by a measure adopted by an EU institutions under environmental law, they will not be considered as directly concerned by any EU institutions' decisions and will therefore not be provided with access to the courts.
24. It is uncertain whether the Commission will appeal the decisions of the Court in cases T-338/08 and T-396/09 or whether it will review its decisions. In case the Commission refuses to review its decisions, the NGO applicants will surely bring other proceedings. Only in these hypothetical future cases the Court will either allow NGOs to challenge

¹⁰ Case T-18/10, *Inuit Tapiriit Kanatami and others v Parliament and Council*, para 71, (pending appeal C-583/11) and Case T-262/10, *Microban International Ltd v Commission*, judgment of 25 October 2011, para 27.

¹¹ Case T-18/10, para 74.

¹² Case T-18/10, para 75.

¹³ Case T-18/10, para 75.

the substance of the institutions' decisions or consider the cases inadmissible because of lack of standing.

25. However, on the basis of what the Court ruled in these two cases, the conclusion to be drawn is that NGOs still do not have access to EU courts to challenge EU institutions' decisions.

26. In addition, as argued in ClientEarth's comments on the European Commission's submission (section 4.1) there is no satisfactory administrative procedure that would compensate for the lack of access to the Courts.

27. We therefore respectfully request the Committee to:

- Reassert its findings according to which the Courts have to alter their jurisprudence on the interpretation of ex Article 230(4) EC (now Article 263(4) TFEU) and provide NGOs with standing;
- Hold that the interpretation of the direct concern criteria as held in cases T-18/10 and T-262/10 if applied to NGOs would not be compatible with Article 9(3) and (4) of the Convention;
- Confirm that Article 10(1) of Regulation 1367/2006, in that it allows NGOs to only challenge administrative acts as defined by Article 2(1)(g) as being "*of individual scope*", is incompatible with Article 9(3) of the Convention;
- Hold that the internal review request procedure under Article 10 of Regulation 1367/2006 is incompatible with Article 9(3) and (4) of the Convention;
- Suggest a review of Regulation 1367/2006 to align it with the Convention on these specific points.

Annexes

Annexe 1. Case T-338/08

<http://curia.europa.eu/juris/liste.jsf?language=en&num=T-338/08>

Annex 2. Case T-396/09

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=123823&pageIndex=0&doclang=en&mode=doc&dir=&occ=first&part=1&cid=2564252>

Annex 3. Case C-240/09

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=80235&pageIndex=0&doclang=en&mode=doc&dir=&occ=first&part=1&cid=2564659>

Annex 4. Case T-18/10

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=109461&pageIndex=0&doclang=en&mode=doc&dir=&occ=first&part=1&cid=2564784>

Annex 5. Case T-262/10

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=111762&pageIndex=0&doclang=en&mode=doc&dir=&occ=first&part=1&cid=2564965>

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

As legal experts working in the public interest, we act to strengthen the work of our partner organisations. Our work covers climate change and energy system transformation, protection of oceans, biodiversity and forests, and environmental justice

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