

COMMENTS ON THE DRAFT REPORT TO THE TASK FORCE ON ACCESS TO JUSTICE UNDER THE AARHUS CONVENTION - VERSION 14 MARCH 2019

Annex: European Union pages 23 to 25

' ClientEarth, statement on 12th meeting of the Task Force on Access to Justice

Legal framework: The Commissions response only concerns the Commission, omitting other EU institutions and bodies.

3) Independence and impartiality of appeal body:

Secretary-General of the Commission cannot be regarded as independent and impartial.

5) Average time for appeal, including reconsideration:

The relevant provision here is article 8 of Regulation 1049/2006, thus is the time frame for administrative reconsideration 15 + 15 days. In our experience, however, the default position from the Secretary-General for the Commission is to extend the deadline to 30 days, even if the case cannot be regarded as exceptional. It is also a common practise of that body to exceed the time limits with months and thereby forcing the applicant to appeal to court without full knowledge of the Commission's final position. Delays both in this phase and in the courts is central challenge to access to justice in information cases. In our experience, it may take 4.5 years for these cases to be finally decided, thus making the requested information of little use.

9) Misuse or abuse of environmental information:

The simplified procedure for handling of repetitive requests or wide-scope applications is unknown to ClientEarth.

10) Main barriers to access to justice in environmental information cases:

The extended deadlines and the length of the procedure (see Q5)'.

During the 12th meeting of the Task force on Access to justice, the representative of the EU already delivered his comments about the statements of ClientEarth. He reserved the possibility to confirm in writing those comments and to use the right of reply vis-à-vis any possible further position from ClientEarth or any other Party or NGO. In this context, the following comments are presented.

- About the scope of the reply :

In its reply of 15 October 2018, the EU presented its answer to the questionnaire focussing on the European Commission. In fact, a very significant number of requests for access to documents is addressed to this institution. I would like also to point out that, despite the large scope of the notion of public authorities, even other respondents seem not to have dealt with all possible public authorities envisaged in Article 2, paragraph 2 of the Aarhus Convention. Indeed, addressing only

the coverage of the public authorities mentioned in sub-paragraph (a) - i.e. governments, regional and local authorities and related advisory bodies - would imply such a big workload that other required administrative activities would risk being stopped or substantially delayed. Moreover, this seems disproportionate, having regard to the objectives of the questionnaire. If the Parties consisting in sovereign States have acted in this way, a similar approach is justified in relation to the European Union as a regional economic integration organisation party to the Aarhus Convention.

- About the independence and impartiality of the administrative review :

The EU answer highlighted the fact that : *'In the framework of its review, the Secretariat-General of the Commission conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage'* (emphasis added).

Every year the European Commission draws up a report giving an overview on how it applied the access to documents rules in the previous year. In the Report relating to the year 2017 (COM(2018)663 final of 3 October 2018) it can be read: *'In the European Commission, the treatment of initial access to documents requests is handled on a decentralised basis by the various Commission Directorates-General and services. Each Directorate-General and service has designated at least one legal expert, acting as 'access to documents coordinator', for this task. Depending on the size of the service and the number of requests received, these members of staff are usually assisted by a few administrative and support staff. The coordinator coordinates the draft replies with the units responsible for the underlying policy areas.*

Confirmatory requests are dealt with by the Secretariat-General, so as to ensure an independent administrative review of the reply given at the initial stage. Ten full-time equivalent posts are set aside in the Secretariat-General for this task, made up of case handlers and administrative staff. In addition to their responsibility for reviewing initial replies, they provide horizontal guidance, training and advice to all Directorates-General and services of the European Commission on the application of Regulation (EC) No 1049/2001¹. ... (emphasis added).

Apart from this position, statistics provided for in the Annex confirm the independence and impartiality. Table 6 *'The replies given at the confirmatory stage'* show that in 2017:

- In 14 out of 258 replies full access of the requested documents was granted;
- In 107 out of 258 replies partial access of the requested documents was granted;
- In 137 out of 258 replies access of the requested documents was refused.

In other words, in 46.90% of the decisions adopted (121 out 258) total or partial revision of the initial position by the competent service was carried out.

This situation does not concern only the year 2017, but also the previous years as table 6 and the previous Reports indicate.

- About the average time for appeal, including reconsideration :

¹ See page 4, under 'Resources'.

The European Commission makes every effort to try to comply with the deadline for reconsideration, called decision on the confirmatory application. This deadline is up to 15 working days from the registration of a confirmatory application. The deadline could be extended by 15 working days *'in exceptional circumstances, for instance in the event of an application relating a very long document or to a very large number of documents'* or due to the consultation of third parties holding a copyright in case the documents not emanating from the Commission or where extensive searches have to be carried out to identify the requested documents.

Most of the confirmatory applications are handled within deadlines. However, it can occur that in complex cases the relevant confirmatory decision is not adopted by the Secretary-General of the Commission within the envisaged deadlines. Failure by the institution to reply within the prescribed time limit is considered as a negative reply and entitles the applicant to institute court proceedings or make a complaint to the European Ombudsman.

As pointed out in the reply of the European Commission (under question 5): *'The average length of an access to documents case is 20 months (see the 'Statistiques judiciaires', published on the Court's website:*

https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/ra_2017_fr.pdf, at page 221, as regards 'autres recours directs')'.

This indication taken from official statistics is an average. It does not appear that this time is different than that required for the judicial actions carried out at national level.

If an appeal on a point of law (the only one possible) is submitted to the EU Court of Justice, an additional time is required. Again, the situation does not seem to be different than that prevailing at national level, when an appeal against a lower-court judgment is presented to a higher national instance.

- About 'the simplified procedure' for handling of repetitive requests or wide-scope applications :

ClientEarth defines as *'simplified procedure'* what the reply to question 9 indicates as the procedures followed in case of repetitive request and wide-scope initial requests.

The European Commission explained the way of dealing with these specific situations, which is in full conformity with the relevant legislation. As for other requests, careful analysis of the application is carried out. The situations reported does not cover the large majority of requests. The handling of these specific applications takes into account their specific nature.

It may be recalled that the abovementioned Report relating to the year 2017 (COM(2018)663 final of 3 October 2018) observes as follows: *'At a general level, as regards **wide-scope requests**, the General Court confirmed that the institution can refuse access if carrying out an individual assessment would represent a disproportionate administrative burden and if the applicant refuses to cooperate in finding a fair solution. The institution does not have to justify why it did not consider options other*

than the refusal, nor does the institution, in such cases, have to release the documents that it had already examined individually as part of the administrative burden assessment'².

About the barriers claimed by ClientEarth :

The European Commission notes that Article 4, paragraph 2 of the Aarhus Convention reads: *'The environmental information referred to in paragraph 1 shall be made available as soon as possible and at the latest within one month after the request has been submitted, unless the volume and the complexity of the information justify an extension up to two months after the request. ...'* (emphasis added).

Regulation (EC) n. 1049/2001 complies fully with this paragraph and goes further because the deadlines envisaged are shorter. Practice is also fully compatible, even if in certain specific situations due to the complexity of the request or the search needed, the deadline, even when extended, is not met.

² See, page 13, under 'Judicial Review', section 6.2.