

**Communication to the
Aarhus Convention's Compliance Committee**

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II. Party concerned

The European Community

III. Use of domestic remedies or other international procedures

This case highlights the lack of effective remedies at European level for NGOs and individuals in environmental matters. There were not any domestic remedies or other international procedures we could have resorted to.

Moreover, ClientEarth submits this communication to the Compliance Committee of the Aarhus Convention in accordance with article 15 of the Convention and section VI of Decision I/7 on Review of Compliance of the First Meeting of the Parties. This communication complies with all the requirements provided in Decision I/7 and shall therefore be considered as admissible.

IV. Summary of the Communication

1. The jurisprudence of the European Courts has blocked all access to justice for individuals and NGOs in environmental matters. This is an erroneous reading of the EC Treaty. Article 230 paragraph 4 of the EC Treaty allows natural and legal persons to challenge decisions of EC institutions addressed to them and decisions which take the form of regulations provided they are of direct and individual concern to them (the “individual concern” criteria). The European Courts (the Court of First Instance and the European Court of Justice) have interpreted the individual concern criteria so narrowly that individuals and NGOs have *in every case* been refused standing to challenge EC institutions’ decisions, exempting these decisions from public scrutiny before the Courts. We argue in this communication that another interpretation of the criteria laid down in article 230 paragraph 4 of EC Treaty is not only possible but is required by article 9 of the Aarhus Convention.

The adoption of the Aarhus Convention by the European Community, on February 17th 2005 by Decision 2005/370/EC, requires the European Courts to interpret the provisions of the EC Treaty in a broader way.

To apply the provisions of the Aarhus Convention to EC institutions and bodies, the European Community adopted Regulation n°1367/2006 on September 6th 2006 (the “Aarhus Regulation”). This regulation allows NGOs to institute proceedings before the European Courts against EC institutions and bodies’ decisions. It expressly states that NGOs may do so only “in accordance with the relevant provisions of the EC Treaty”. One of these relevant provisions is article 230 paragraph 4 setting out the “individual concern” criteria. We therefore are concerned that the Courts will interpret the individual concern criteria in the same way as before the entry in force of the Aarhus Convention within the European Community legal order, and reassert the jurisprudence on standing they have been confirming since 1963.

This concern has been increased by the decision of the Court of First Instance in the *EEB* case. In this case the Court first held that the Aarhus Regulation, as secondary legislation, could not override the EC Treaty provisions. The Court then refused to grant standing to the EEB, an environmental NGO. At the time the Court rendered its judgment, the

Aarhus Convention was in force, and the Regulation had been proposed but not yet adopted. A subsequent decision is of even greater concern. In the *WWF-UK* case, the Court of First Instance again refused to grant standing to an environmental NGO. At the time the judgment was rendered, not only was the Convention in force, but the Aarhus Regulation had been adopted though it was not yet in force.

The Aarhus Convention and the Regulation are now EC law, and they have changed the landscape. There is thus a need for the European Courts to acknowledge that they cannot simply reassert their old jurisprudence on standing in environmental matters. They must instead grant access to justice to NGOs and individuals. If they refuse to do so they will be in breach of article 9 paragraphs 2 to 5 of the Aarhus Convention.

2. The refusal of the European Courts to grant individuals and NGOs access to justice results in a real disequilibrium between the different actors who may challenge EC institutions and bodies' decisions. Corporations and trade associations have a much wider access to the European Courts than individuals and NGOs. The Courts' jurisprudence clearly advantages the protection of private economic interests over public interests including the protection of the environment.

3. Other concerns addressed by this communication relate to the Aarhus Regulation itself. The Regulation only grants a right of judicial review to NGOs and not to individuals or other entities such as regions and municipalities. The scope of the acts which can be contested under the Aarhus Regulation is also too narrow, because only administrative acts of individual scope are challengeable. The Regulation therefore does not comply with article 9 paragraphs 2 to 5 of the Aarhus Convention.

4. In addition, uncertainty about the amount of costs the applicant will have to pay in case it/she/he loses as well as their possibly prohibitive amount act as a deterrent for NGOs and individuals to institute proceedings before the European Courts and are contrary to article 9(3) of the Aarhus Convention.

5. In the light of the foregoing, we invite the Compliance Committee to acknowledge that if the jurisprudence of the European Courts is not altered, the European Community will fail to comply with article 9 paragraphs 2 to 5 of the Aarhus Convention by preventing NGOs and individuals from having access to justice with respect to EC institutions and bodies' decisions in environmental matters. We further invite the Compliance Committee to recommend:

- The EC to undertake practical measures to overcome the shortcomings of the European Courts' jurisprudence in providing members of the public with access to justice in cases concerning environmental matters. Specifically, the European Commission should adopt guidelines on the way the Aarhus Regulation ought to be applied to grant NGOs standing before the European Courts;

- The Courts to interpret article 12 of Regulation n°1367/2006 in a way that grants environmental NGOs access to justice and allows them to challenge decisions of EC institutions and bodies;
- The Courts to interpret article 10 to 12 of Regulation n°1367/2006 as allowing environmental NGOs to challenge before the Courts the omission/refusal of EC institutions and bodies to allow the public to participate during the preparation, review and modification of plans and programmes relating to the environment;
- The EC institutions and bodies to stop opposing the right of standing of environmental NGOs before the European Courts when the NGOs institute proceedings against one of the institutions/bodies' decisions and to support this right;
- The EC institutions and bodies to never require environmental NGOs to pay the costs of lawyers and experts that the EC institutions and bodies may use in a case;
- The EC to promote awareness of the Convention, in particular the provisions concerning access to justice, among the European Courts;
- Any other measures the Committee considers appropriate to bring the EC to comply with the access to justice provisions of the Aarhus Convention.

V. Facts and legal arguments

This communication asks the Committee to rule that the European Community (“EC”) will violate article 9 paragraphs 2 to 5 of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (“the Aarhus Convention”) if the jurisprudence of the European Court of First Instance (“CFI”) and the European Court of Justice (“ECJ”), together “the European Courts”, is not altered. It fails to implement, give effect to and comply with the provisions of the Aarhus Convention with respect to access to justice. We refer to the findings and recommendations the Compliance Committee has adopted regarding the jurisprudence of the Belgian Conseil d’Etat¹.

This violation consists of the courts of the European Community giving interpretations of article 230 paragraph 4 of the EC Treaty that are too restrictive to comply with article 9 and the other EC institutions doing nothing to rectify this failure.

¹ Findings and recommendations of the Compliance Committee with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice, ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006. According to the complainant, Bond Beter Leefmilieu, the recommendations of the Committee had a tremendous impact since the Conseil d’Etat modified its jurisprudence and granted access to NGOs.

The EC Treaty² provides in article 230, paragraph 4 that:

“Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.”

Therefore, in order to be entitled to bring an action before the European Courts, a natural or a legal person has to be either the addressee of the EC institution’s decision he/she wants to challenge or to be directly and individually concerned by the decision in question.

On the basis of article 230(4), NGOs and individuals should have access to judicial review before the Courts in environmental matters.

However, the Courts have so far interpreted the criteria laid down by article 230(4) of EC Treaty so narrowly that NGOs or individuals have not been granted access to the Courts in any environmental matter. Indeed, associations, NGOs and individuals have never been considered as “*individually concerned*” by the acts they wanted to challenge and have therefore been denied access to justice. This interpretation precludes members of the public (including NGOs) from challenging EC institutions’ decisions and does not comply with article 9 paragraphs 2 to 4 and paragraph 5 as it constitutes a systematic barrier to access to justice.

Most of the cases cited in this Communication were initiated and decided before the entry into force of the Aarhus Convention in the European Community on 17 February 2005 with Decision 2005/370/EC. However, the cases remain highly relevant because, since then, the European Courts have not changed their interpretation of paragraph 4 of article 230 EC Treaty and of the “individual concern” criterion because the EC relies on article 230 of the EC Treaty to comply with article 9 of the Convention and because the other EC institutions have taken no steps to inform the Courts that their interpretations are too narrow.

We (in Section 1) comment on the jurisprudence of the European Courts and demonstrate that their interpretation of article 230(4) EC Treaty blocks all access to justice for NGOs and individuals in environmental matters and that consequently the European Community does not comply with article 9 paragraphs 2 to 5 of the Aarhus Convention.

We (in Section 2) demonstrate that the Courts’ interpretation of the standing rules is different, depending on whether economic or public interests are at stake, providing

² The EC Treaty results from the amendments made to the Treaty establishing the European Economic Community (“the EEC Treaty”) which was signed in Rome in 1957 and came into force on 1 January 1958. The articles of the EC Treaty were renumbered by the Treaty of Amsterdam (which came into force in 1999); thus article 230 of the EC Treaty was previously article 173 of the EEC Treaty.

corporations with more opportunity to be granted locus standi to protect their business interests than to NGOs when protecting the environment.

We (in Section 3) argue that the Courts have adopted a more flexible interpretation of article 230 in other matters to adapt the rules regarding litigation before the Courts and that they could therefore have such a liberal interpretation of article 230 paragraph 4 of the EC Treaty in environmental matters.

We (in Section 4) argue that the European Courts should interpret article 10 to 12 of Regulation 1367/2006 of 6 September 2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention to EC institutions and bodies in a way to allow NGOs to challenge EC institutions and bodies' decisions.

A full list of the legislation, jurisprudence of the European Courts and Compliance Committee Decisions referred to in this Communication is provided in the Annex attached.

1. The interpretation of “individual concern”

We refer in this part to the relevant cases of the Courts to show that the CFI and the ECJ have interpreted the criteria set out by article 230(4) of EC Treaty, to be individually concerned by the contested decisions, so narrowly that it blocked all access to justice for individual and NGO applicants in environmental matters. We also refer to cases that do not bear on environmental issues but which demonstrate the position of the Courts on the question of standing at European level. A thorough analysis of these decisions and of ClientEarth arguments is provided in Appendix 1.

The cases cited in this communication demonstrate that according to the Courts:

- The fact that the applicant NGOs' purpose and statutory aim is to protect the environment
- Special status of NGOs allowing them to participate in the decision-making process of the contested regulations/decisions
- The lack of effective remedies and judicial protection at national level against EC institutions' decisions
- The lack of effective remedies and judicial protection at European level against EC institutions' decisions
- The fact that individual applicants live in the area where environmental damages are caused by the EC institutions' decisions

Do not make the applicants individually concerned by the contested acts under article 230(4) of EC Treaty and therefore do not allow them to contest the EC institutions' decisions and regulations before European Courts. This jurisprudence clearly results in the blocking of access to justice for individuals and NGOs in environmental matters in violation of article 9 paragraphs 2 to 5 of the Aarhus Convention.

1.1. In the *Plaumann* case,³ the ECJ interpreted for the first time the criterion of “individual concern” provided by the paragraph 2 of article 173 EEC Treaty (now paragraph 4 of article 230 EC Treaty). This interpretation has, since then, been referred to by the Courts in order to examine whether natural and legal persons are individually concerned by acts of EC institutions. This interpretation is now known as the “*Plaumann* test”. *Plaumann* and Co, a German corporation, sought the annulment of a decision of the European Commission refusing to authorise the Federal Republic of Germany to suspend, in part, customs duties applicable to fresh mandarins and clementines imported from third countries. The Court held that:

“Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed. In the present case the applicant is affected by the disputed decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practiced by any person and is not therefore such as to distinguish the applicant in relation to the contested decision as in the case of the addressee.”

The ECJ considered that the corporation was not individually concerned even though its commercial activity as an importer of clementines was affected by the decision of the European Commission. This interpretation of the criterion of the “individual concern” is, therefore, excessively restrictive and provides a very narrow standing to the persons who are not the addressees of the contested decision. It, however, has invariably been relied on by the CFI and the ECJ to determine whether natural or legal persons, other than those to whom community acts are addressed, have locus standi.

1.2. The *Plaumann* jurisprudence was reasserted for the first time in a case on environmental matters in the *Stichting Greenpeace Council* case⁴. In that case, Greenpeace International together with local associations and residents in Gran Canaria, were seeking the annulment of a decision adopted by the European Commission to disburse to the Kingdom of Spain a certain sum by way of financial assistance provided by the European Regional Development Fund for the construction of two power stations in the Canary Islands without first requiring or carrying out an environmental impact assessment.

However, the CFI asserted that the *Plaumann* test “remains applicable whatever the nature, economic or otherwise, of those of the applicants’ interests which are affected” and did not set up an exception for environmental matters. The CFI consequently refused to grant standing to the environmental associations and to the residents potentially affected by the degradation of the environment due to the construction of the power stations.

¹ *Plaumann & Co v Commission*, Case 25/62, 15 July 1963.

⁴ *Stichting Greenpeace Council and Others v Commission*, T-585/93, 9 August 1995.

The Court has reasserted this interpretation in all the subsequent cases in which individuals or environmental NGOs were the applicants, even after the Aarhus Convention entered into force in the European Community.

1.3 On appeal,⁵ the ECJ confirmed the judgment of the CFI in applying the *Plaumann* test. It also asserted that remedies were available in the national courts notably by referring a question to the European Court of Justice for a preliminary ruling under article 177 of the EC Treaty (today article 234 EC Treaty).

1.4. The CFI reasserted its position in the *Danielsson case*.⁶ In this case, three inhabitants of Tahiti sought the annulment of a decision of the European Commission according to which Member States did not have to take additional health and safety measures when the French nuclear weapon tests were carried out in the region.

The Court reasserted the *Plaumann* test and the reasoning it held in the *Greenpeace* cases, again making clear that even where the applicants would suffer harm they still have no right to judicial review since they do not distinguish themselves from other people who might suffer equal harm.

This case shows that under the Court's logic, the larger the number of people affected by the act of a Community institution the less grounds there are to confer standing to challenge that act.

1.5. The UPA case⁷ and the *Jégo-Quéré* case cited below, do not implicate NGOs or bear on environmental matters. However, they are central to our analysis in that they illustrate the reasoning of the CFI and the ECJ as regards standing at the European level. Moreover, the Court applied the decisions it adopted in these cases in two subsequent judgments which bear on environmental matters, the *European Environmental Bureau (EEB)* and *WWF-UK* cases discussed below.

The Union de Pequenos Agricultores (UPA), a trade association which represents and acts in the interests of small Spanish agricultural businesses, brought an action before the CFI for annulment of a Council Regulation which reformed the common organisation of the olive oil market. According to UPA, the regulation abolished the previous intervention scheme, consumption aid and aid to small producers.

In this case, the Court reasserted the *Plaumann* jurisprudence and refused granting standing to UPA even though the contested regulation resulted in some members of the association applicant ceasing their economic activity.

⁵ *Stichting Greenpeace Council and Others v the Commission*, C-321/95 P, 2 April 1998.

⁶ *Marie-Thérèse Danielsson, Pierre Largenteau, Edwin Haa v Commission of the European Communities*, T-219/95 R, 22 December 1995.

⁷ *Union de Pequenos Agricultores v Commission*, Case T-173/98, 23 November 1999.

1.6. On appeal,⁸ UPA claimed essentially that the dismissal of its application as inadmissible infringed its right to effective judicial protection for the defence of its own interests and those of its members.

In addition to reasserting the *Plaumann* jurisprudence to deny standing to UPA, the Court rejected UPA's argument on the lack of effective remedies against EC institutions' decisions. It held that it was for the Member States to establish a system of legal remedies and procedures which ensured respect for the right to effective judicial protection and that the only way to relax the standing rules at European level would be to reform the current system that is to amend the EC Treaty.

1.7. In the *Jégo-Quéré et Cie SA case* (“*Jégo-Quéré*”),⁹ the CFI showed that another interpretation of article 230(4) of EC Treaty and particularly of the “individual concern” criteria was possible. The CFI reversed the *Plaumann* test and the whole of the Court's case-law on standing with it, while stressing that there was no need to modify the system set up by the EC Treaty. However, this judgment was handed down before the UPA appeal.

In this case, *Jégo-Quéré*, a fishing company which used nets having a mesh of 80 mm, sought the annulment of certain provisions of an EC Regulation¹⁰ which required fishing vessels operating in certain defined areas to use nets of a minimum mesh size of 100 or 120 mm for the different techniques employed when fishing with nets, therefore affecting *Jégo-Quéré*'s activities.

Reversing the previous jurisprudence of the European Courts, the CFI upheld the applicant's argument that to dismiss its action at European level as inadmissible would be to deny it any opportunity to challenge the legality of the contested provisions.¹¹

The CFI then reversed the *Plaumann* test and considered that “there is no compelling reason to read into the notion of individual concern a requirement that an individual applicant seeking to challenge a general measure must be differentiated from all others affected by it in the same way as an addressee”. As a result, the Court decided that “a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard”.

The CFI concluded that the contested provisions were of individual concern to the applicant, as the contested regulation subjected it to detailed obligations¹². It therefore ordered for the action to proceed on the substance.

⁸ *Union de Pequenos Agricultores v Council*, C-50/00P, 25 July 2002.

⁹ *Jégo-Quéré et Cie SA v Commission*, T-177/01, 3 May 2002.

¹⁰ Commission Regulation (EC) No 1162/2001 of 14 June 2001 establishing measures for the recovery of the stock of hake in ICES sub-areas III, IV, V, VI and VII and ICES divisions VIII a, b, d, e and associated conditions for the control of activities of fishing vessels.

¹¹ *Jégo-Quéré et Cie SA v Commission*, *Ibid*, paragraph 39.

1.8. On appeal, however, the CFI's judgment was quashed by the ECJ¹³ which reasserted the Plaumann test and the UPA jurisprudence.

1.9. The Court confirmed its position in the *EEB and Stichting Natuur en Milieu case*.¹⁴ This case is crucial for two reasons. The first one is that when the Court adopted its judgment, the Aarhus Convention was already in force in the European Community. The second reason is that the CFI stressed its refusal to grant NGOs access to justice since it considered that the proposal for the Regulation that applies the provisions of the Aarhus Convention to the EC institutions and bodies (the Aarhus Regulation)¹⁵ did not grant standing to environmental NGOs unless the latter meet the "individual concern" criterion as set out in article 230 paragraph 4 of EC Treaty. Consequently, the applicants were not considered as individually concerned by the contested decisions and their action was dismissed.

In this case, the EEB, a federation of over 145 environmental citizens' organisations based in the 27 EU Member States, and Stichting Natuur en Milieu ("SNM"), a member of the EEB, sought the annulment of some provisions of two decisions of the European Commission decisions which allowed the Member States to maintain in force authorisations to use dangerous plant protection products named atrazine and simazine (referred to as "the atrazine and the simazine decisions").

The CFI reasserted the *Plaumann* jurisprudence and considered that the European Commission's decisions affected the applicant in the same manner as any other person in the same situation and that the fact that their purpose was the protection of the environment and the conservation of nature did not establish that they were individually concerned by the decisions.

It also considered that the special consultative status of the EEB and of SNM with European institutions did not support the finding that they are individually concerned by the contested decisions as the Community legislation applicable to the adoption of the said decisions did not provide for any procedural guarantee for the applicants.

The Greenpeace (CFI and ECJ), the Danielsson and the EEB judgments would have breached article 9 paragraphs 3 to 5 of the Aarhus Convention if they had been rendered after the entry in force of the Aarhus Convention in the European Community. However, since that date the Court of First Instance has not changed its jurisprudence and one of its judgments has thus contravened article 9 paragraphs 2 to 5 of the Aarhus Convention.

¹² *Jégo-Quéré et Cie SA v Commission, Ibid*, paragraphs 52 and 53.

¹³ *Commission v Jégo-Quéré & Cie SA*, C-263/02P, 1 April 2004.

¹⁴ *EEB and Stichting Natuur en Milieu v Commission*, T-236/04, 28 November 2005.

¹⁵ Regulation 1367/2006 of the European Parliament and of the Council of 6 September 2006 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 Community institutions and bodies was adopted on 6 September 2006, entered into force on 28 September 2006 and took effect as from 17 July 2007.

1.10. Indeed, the CFI reasserted its jurisprudence in the *WWF-UK case*¹⁶ despite the fact that the action was brought by the applicant after the entry in force of the Aarhus Convention in the European Community.

In this case, WWF-UK, an environmental NGO, sought the annulment in part of Council Regulation of 21 December 2006 fixing for 2007 the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks applicable in community waters.

The CFI once again concluded that the WWF-UK was not individually concerned by the contested regulation in reasserting the *Plaumann* jurisprudence and dismissed the action. But most importantly, it further stated that:

“..Any entitlements which the applicant may derive from the Aarhus Convention and from Regulation No 1367/2006 [the Aarhus Regulation] are granted to it in its capacity as a member of the public. **Such entitlements cannot therefore be such as to differentiate the applicant from all other persons within the meaning of [the *Plaumann* jurisprudence]**”.

The Court thus continues to apply the *Plaumann* test notwithstanding the approval of the Aarhus Convention by the European Community and the adoption of the Aarhus Regulation.

Moreover, in this case again, neither the statutory aim of the applicant NGO to protect the environment, nor its special status allowing it to participate in the decision-making process of the contested regulation, as the one WWF-UK benefited from as a member of the Executive Committee of the North Sea Regional Advisory Council (the North Sea RAC)¹⁷, are criteria considered by the Court as giving the right to challenge the contested regulation.

This decision is therefore not in compliance with article 9 paragraph 2 of the Aarhus Convention as WWF-UK had a sufficient interest and that, as such, it should have been granted standing to benefit from a wide access to justice in the meaning of article 9 paragraph 2. This judgment also contravened article 9, paragraphs 3, 4 and 5 of the Aarhus Convention.

1.11. However, the CFI confirmed its position in the *Autonomous Region of the Azores case*,¹⁸ in which the Autonomous Region sought the annulment in part of a

¹⁶ WWF-UK Ltd v Council of the European Union (T-91/07), 2 June 2008.

¹⁷ The Executive Committee of the North Sea at Regional Advisory Council (the North Sea RAC) advises the Commission on matters of fisheries management in respect of certain sea areas or fishing zones. The North Sea RAC sent to the Council and the Commission a report on the latter's proposal which resulted in the adoption of the contested regulation. The report referred to a minority viewpoint of the environmental NGOs which included WWF-UK.

¹⁸ *Regiao autonoma dos Açores v Council*, T-37/04, 1 July 2008.

regulation on the management of the fishing effort relating to Community fishing areas and resources.

The environmental associations: Seas at risk, WWF and Stichting Greenpeace Council (collectively “SWG”), sought leave to intervene in the case in support of the form of order sought by the applicant.

In reply to the arguments of the applicant that article 230(4) EC should be interpreted by the Courts in such a way as to render it compatible with article 9(3) of the Aarhus Convention, the Court held that the Convention had not been approved by the Community when the present action was brought. In addition, it recalled that Article 9(3) of the Aarhus Convention refers expressly to “the criteria, if any, laid down in [the] national law” of the contracting parties, and that those criteria were laid down, with regard to actions brought before the Community judicature, in Article 230 EC. The Court once again dismissed the action as it considered the applicant not to be individually concerned by the contested act under article 230 paragraph 4 of EC Treaty.

The Court acknowledged that the Aarhus Regulation allows certain NGOs to bring an action for annulment before the Community judicature. However, the court considered that the conditions laid down in that regulation were not satisfied in the present case without giving any motivation, and further deemed that “it is not for the Court to substitute itself for the legislature and to accept, on the basis of the Aarhus Convention, the admissibility of an action which does not meet the conditions laid down in Article 230 EC”.

It is possible that the Court did not consider the applicant as individually concerned by the contested regulation because it was not an NGO as required by article 12 of the Aarhus Regulation. This interpretation does not, nevertheless, comply with article 9(3) of the Aarhus Convention since this provision requires access to justice to be granted to “members of the public” as defined by article 2 paragraph 4 of the Convention, and not only to NGOs. The autonomous region de Azores should therefore have been granted standing.

This judgement would have contravened article 9 paragraphs 3, 4 and 5 of the Aarhus Convention had the case been brought before the entry in force of the Convention in the European Community.

CONCLUSION: In reasserting the *Plaumann* jurisprudence in all the cases concerning environmental matters, the European Courts firmly refuse to allow individuals and NGOs to challenge decisions of EC institutions. However, public interests are by definition diffuse and collective and cannot therefore fulfil the conditions set out by the Court in the *Plaumann* case.

Yet, that is not the test article 173(4) of the Treaty set out at the time or the one that article 230(4) lays down nowadays, and even less what article 9(2)(3)(4) and (5) of the Aarhus Convention provides for.

The interpretation of the criterion of the “individual concern” is doubtful: to be individually concerned does not mean to be exclusively concerned as the Court has held. An environmental NGO should be considered individually concerned by an act impacting on the environment and be allowed to challenge such an act before the Courts. Moreover, numerous NGOs may each be individually concerned by the same act. Consequently, the interpretation by the Court of First instance of the Aarhus Convention and of the Aarhus Regulation in the WWF-UK case (the only case initiated after the entry in force of the Aarhus Convention in the European Community) does not comply with the requirements of article 9 paragraphs 2 to 5 of the Aarhus Convention. The Courts indeed interpreted the criteria laid down in article 230 EC so strictly that they bar all environmental organisations and individuals from challenging acts relating to the environment which are not in compliance with European law.

Please refer to Appendix 1 for a thorough analysis of the Courts’ jurisprudence.

2. The dichotomy between economic and public (environmental) interests

Although it is not a systematic approach (see the *UPA* and *Jego-Quéré* cases), the Court has shown in several cases that it interprets article 230(4) of EC Treaty and particularly the notion of “*individual concern*” differently depending on whether the interests at stake are of an economic or public (environmental) nature. Indeed, it has a much more flexible interpretation of the standing rules when the applicant is a business interest group than when it is a public interest group, notably an environmental NGO.

This is so when economic benefits and the use of a trademark are in question but also because of the procedural guarantees provided in commercial matters.

2.1 Procedural rights provided in commercial matters

The Court in commercial matters such as matters in the field of competition, State aids, anti-dumping and concentrations has progressively established a jurisprudence that automatically grants standing to applicants who challenge decisions taken pursuant to EC Regulations which entitle them to some specific procedural guarantees.

In *Comité Central d’Entreprise de la Société Générale des Grandes Sources and others*,¹⁹ the President of the Court of First Instance summarised the position of the Court

¹⁹ Order of the President of the Court of First Instance of 15 December 1992, *CCE Grandes Sources*, T-96/92.

on the granting of locus standi to applicants who are entitled to specific procedural guarantees in commercial matters:

“In its case-law on the locus standi of third parties in relation both to competition and State aid and to dumping and grants, the Court of Justice has held that where a regulation confers on undertakings procedural rights entitling them to request the Commission to find an infringement of the Community rules or to submit observations in an administrative procedure, **those undertakings may be able to institute proceedings in order to protect their legitimate interests** (see the judgments of the Court of Justice in Case 26/76 *Metro v Commission I* [1977] ECR 1875, Case 191/82 *FEDIOL v Commission* [1983] ECR 2913, and Case 169/84 *COFAZ v Commission* [1986] ECR 391). **The need to protect legitimate interests may also be a decisive criterion in deciding whether a natural or legal person may be regarded as directly or individually concerned by a decision in the same way as an addressee.**”²⁰

This jurisprudence was upheld in *Vittel and CE Pierval*.²¹ In this case, the CFI was even more flexible in its interpretation of the notion of individual concern since it did not require the applicant to effectively trigger the specific consulting procedure. The fact that the applicant had procedural guarantees under the contested regulation was sufficient to consider that it was individually concerned by it.

This position was confirmed in another competition law case²² where the CFI provided that, “If the capacity to bring proceedings of specified third parties who enjoy procedural rights in the administrative procedure were made subject to their actually taking part in that procedure, this would be tantamount to introducing an additional condition of admissibility in the form of a compulsory pre-litigation procedure, which is not provided for in Article 173 of the Treaty.”²³

It follows that this jurisprudence provides to economic operators a direct right to challenge an EC decision. Indeed, an applicant is automatically individually concerned by a decision taken pursuant to an EC Regulation that grants him some procedural rights enabling him either to submit observations in the decision-making process or to request the Commission to find an infringement to EC law. However, since NGOs and members of the public are not granted specific procedural rights under most EC environmental legislation, the result is that they are denied the right to have standing in the same way as economic operators (see the *Greenpeace*, *EEB* and *WWF-UK* cases).

2.2 Economic loss: a criterion to distinguish traders

²⁰ Ibid, paragraph 33.

²¹ *CFI, Comité Central d'Entreprise de la Société Anonyme Vittel and Comité d'Etablissement de Pierval and federation Générale Agroalimentaire v Commission*, T-12/93, 27 April 1995, paragraph 47.

²² *Metropole Télévision SA and Reti Televisive Italiane SpA and Gestevisión Telecinco SA and Antena 3 de Televisión v Commission*, 11 July 1996, joined cases T-528/93, T-542/93, T-543/93 and T-546/93.

²³ Ibid, paragraphs 35 and 36.

In the *Extramet* case,²⁴ the ECJ considered the particular commercial impact of a decision on the applicant as one of the criteria granting him locus standi under the fourth paragraph of article 230 EC. The Court considered that the gravity of the commercial impact of the anti-dumping Regulation on the applicant could distinguish him from all other traders.

The Court stated that,

“The applicant has established the existence of a set of factors constituting such a situation which is peculiar to the applicant and which differentiates it, as regards the measure in question, from all other traders. The applicant is the largest importer of the product forming the subject-matter of the anti-dumping measure and, at the same time, the end-user of the product. In addition, **its business activities depend to a very large extent on those imports and are seriously affected by the contested regulation** in view of the limited number of manufacturers of the product concerned and of the difficulties which it encounters in obtaining supplies from the sole Community producer, which, moreover, is its main competitor for the processed product”.²⁵

Hence, Extramet was not the only entity concerned by the EC Regulation; other traders could also allege that they were potentially affected by it. However, the Court took into account new criteria, the particular economic situation of the applicant and the important impact of the decision on its commercial activity, to conclude that the company was individually concerned by the anti-dumping measure.

Applying this line of reasoning in the *Greenpeace* and the *Danielsson* cases, the Court could have considered that the applicants were affected by the construction of the power stations and by the carrying out of the nuclear tests in a way that distinguished them from the other residents of Gran Canaria and French Polynesia, respectively, because of the fact that they were living near the sites.

2.3 The use of a trade mark: a criterion of distinction

The *Codorniu* case²⁶ shows the evolution of the Court’s interpretation of article 230(4) of EC treaty and of the *Plaumann* jurisprudence in commercial matters.

In that case the Court considered that Codorniu, a Spanish producer of sparkling wine, distinguished itself from the other producers, in accordance with the *Plaumann* test, because the contested Regulation, which reserved the right to use the appellation “Crémant” to French and Luxembourg producers, prevented it from using the graphic trade mark “Crémant.”

²⁴ *Extramet Industry SA v Council*, 11 June 1992, C-358/89.

²⁵ *Extramet*, *ibid*, paragraph 11.

²⁶ *Codorniu SA v Council*, C-309/89, 18 May 1994.

Here again, the criterion of distinction was the commercial interest of the applicant since the Regulation challenged by Codorniu was directly affecting its business activity by preventing it from using a valuable trade mark. The Court also took into consideration that Codorniu had registered the graphic trade mark in Spain in 1924 and traditionally used that mark before and after the registration. Moreover, Codorniu was the main Community producer of sparkling wines.

The Court therefore departed from the *Plaumann* jurisprudence since *Plaumann's* business activity was also affected by the contested regulation. However, the Court had refused to take into account the economical damage suffered by *Plaumann* and resulting from the regulation in considering that *Plaumann* was “affected by the disputed decision as an importer of clementines, that is to say, by reason of a commercial activity which may at any time be practiced by any person and is not therefore such as to distinguish the applicant in relation to the contested decision as in the case of the addressee”.

This case also demonstrates how the *Plaumann* test serves economic interests better than the public interest. Indeed, the effect of a decision on the commercial interest of an applicant can easily individualise him; while the impact of an EC decision on the health invoked by individuals or the environmental impact of a decision invoked by environmental NGO applicants are not, according to the Court, criteria distinguishing them from others.

It appears from the *Codorniu* and the *Extramet* cases that it is much easier for companies to fulfil the conditions set out in the *Plaumann* jurisprudence than for individuals or for NGOs. Environmental NGOs by definition defend collective interests and cannot therefore distinguish themselves from other affected persons by the contested decision or from other NGOs protecting the environment. As regards individual applicants, most of the time EC regulations (construction of power stations, nuclear tests, authorisation of chemicals) affect numerous individuals who are in the same situation and thus do not distinguish themselves from one another.

Environmental NGOs and other members of the public are therefore not granted the same opportunity to challenge EC decisions as commercial entities.

Moreover, it is relevant to note that the Court has already, in several cases fundamentally departed from a literal interpretation of the first paragraph of article 173 EEC Treaty, (now article 230 EC Treaty) that it continues to apply in the environmental cases discussed above. It could therefore also adopt a purposive interpretation of the fourth paragraph of article 230 EC Treaty.

3. The purposive interpretation of first paragraph of article 173 EEC by the ECJ

In a different set of cases, the ECJ has explicitly taken a different approach to interpretation of article 173 of the EEC Treaty. In *ERTA*²⁷, *Les Verts*²⁸, *Chernobyl*²⁹ and *Greece*,³⁰ the ECJ declined to adopt a narrow interpretation of the first paragraph of article 173 EEC Treaty³¹ (now first and second paragraphs of article 230 EC Treaty) so as to avoid an unjust result. It hence had a purposive interpretation of this provision.

The Court in *ERTA*³² took a generous view of the types of acts which are susceptible to review under its jurisdiction.

Under the first paragraph of Article 173 of the EEC Treaty, the Court was originally competent to review acts of the Council and the Commission except recommendations and opinions. However, the Court accepted to review the legality of Council proceedings regarding the negotiation and conclusion by the Member States of a particular agreement on the ground, essentially, that the purpose of the procedure for judicial review laid down in Article 173 of the EEC Treaty would not be fulfilled unless it was possible to challenge all measures, whatever their nature or form, which are intended to have legal effect.

In *Les Verts*, a French political party brought an action against the Parliament, objecting to its decision concerning reimbursement of expenditure incurred by political groups during parliamentary elections. However, under article 173 EEC Treaty, the Court was not allowed to review acts issued by the Parliament. Despite the wording of article 173, the Court considered that the action was admissible and held that, while Article 173 referred only to acts of the Council and the Commission, an interpretation of that provision which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary to both the spirit of the Treaty as expressed in Article 164 (now Article 220 EC) and to its system.

In *Chernobyl*³³, the Court similarly chose not to adopt a strict reading of the Treaty text. The first paragraph of article 173 of the EEC Treaty provided that the Court had jurisdiction in actions brought by a Member State, the Council or the Commission. The absence of any reference to the European Parliament in that provision did not, however, prevent the Court from holding that an action for annulment brought by the Parliament against an act of the Council or the Commission was admissible provided that the action sought only to safeguard its prerogatives.

²⁷ *Commission v Council*, C-22/70, 31 March 1971.

²⁸ *Parti écologiste "les Verts" v European Parliament*, C-294/83, 23 April 1986.

²⁹ *European Parliament v Council*, C-70/88, 22 May 1990.

³⁰ *Hellenic Republic v Council*, C-62/88, 29 March 1990.

³¹ Article 173: "The Court of Justice shall review the lawfulness of acts other than recommendations or opinions of the Council and the Commission. For this purpose, it shall be competent to give judgment on appeals by a Member State, the Council or the Commission on grounds of incompetence, of errors of substantial form, of infringement of this Treaty or of any legal provision relating to its application, or of abuse of power".

³² Opinion of Advocate General Jacobs delivered on 21 March 2002, *UPA v Council*, C-50/00.

³³ *European Parliament v Council*, C-70/88, 22 May 1990.

Finally, in *Greece v Council*³⁴, when considering on what grounds the validity of Community measures could be challenged, the Court held that, although article 173 of the EEC Treaty provided that the Court had jurisdiction in actions brought on grounds of infringement of EEC Treaty or of any rule of law relating to its application, the need for a complete and consistent review of legality required a more liberal interpretation. It therefore declined to construe article 173 as depriving the Court of jurisdiction to consider, in proceedings for the annulment of a measure based on a provision of the Treaty, a submission concerning the infringement of a provision of the EURATOM Treaty or the Treaty establishing the European Coal and Steel Community (“ECSC Treaty”).

Conclusion

The Court adopted in the aforementioned cases, a liberal and purposive interpretation of the Treaty in order to ensure that the evolution in the powers of the Community institutions does not undermine the rule of law and the institutional balance.³⁵ It would be open to the Court to apply a similar purposive interpretation as regards the fourth paragraph of article 230 EC Treaty in order to comply with the provisions of the Aarhus Convention on access to justice in environmental matters.

This jurisprudence also evidences that the Court interprets article 230(4) EC differently when economic and public interests are at issue. In cases where economic interests are at stake, the Court has a more liberal approach and chooses to consider the spirit and the aim of article 230(4) which enables it to consider that the applicants should have standing. By contrast, in cases where public interests are invoked, the Court interprets the “individual concern” criterion in an excessively restrictive manner, blocking all access to judicial review for NGOs and individuals.

We consider that the Court could and should interpret article 230(4) in a way to comply with article 9(2)(3)(4) and (5) of the Aarhus Convention.

4. The Aarhus Regulation (Regulation 1367/2006): A risk of status quo as regards access to justice

4.1 The implementation of article 9(3) of the Convention

- **The application of article 230 of the EC Treaty and the right to review the substance of the contested EC decision, act or omission**

³⁴ *Hellenic Republic v Council*, C-62/88, 29 March 1990.

³⁵ See Opinion of Advocate General Jacobs, loc.cit.

The Aarhus Regulation applies the provisions of the Aarhus Convention to Community institutions and bodies.

Article 10 of the Regulation establishes a review mechanism according to which an NGO is entitled to make a request for internal review to the Community institution or body that has adopted or omitted to adopt an administrative act under environmental law.

To be entitled to make the request the NGO must (article 11):

- be an independent non-profit-making legal person in accordance with a Member State's national law or practice;
- have the primary stated objective of promoting environmental protection in the context of environmental law;
- have existed for more than two years and is actively pursuing the objective referred to above;
- The subject matter in respect of which the request for internal review is made is covered by its objective and activities.

In case the NGO is not satisfied with the reply of the institution or body, article 12 of the Regulation enables it to institute proceedings before the Court.

However, this possibility is granted "in accordance with the relevant provisions of the Treaty" (article 12), and since one of the relevant provisions mentioned is article 230(4) of the EC Treaty, our concern is that the Courts might continue to interpret the "individual concern" criterion in an excessively restrictive fashion and deny NGOs access to justice.

We are aware that the Courts have not yet ruled on the application of article 12 of the Aarhus Regulation since it came into effect. However, the Court of First Instance has already held, in the *EEB* case, that the Aarhus Regulation as secondary legislation could not confer standing on individuals who did not meet the requirements of the fourth paragraph of article 230. Moreover, in the *WWF-UK* case, the CFI also denied WWF standing in reasserting the *Plaumann* test and its restrictive interpretation of article 230(4) of EC Treaty. However, WWF-UK had initiated the proceeding after the approval of the Aarhus Convention by the EC but before the entry in force of the Aarhus Regulation.

Furthermore, in the *Autonomous Region of Azores* case, the Court confirmed that it would interpret article 12 of the Aarhus Regulation in compliance with article 230(4) of the EC Treaty in line with its previous narrow interpretation of this article. Contrary to the *WWF-UK* case, this case was brought before the entry in force of both the Aarhus Convention in the EC and the Aarhus Regulation. Nevertheless, it gives a sense of the interpretation that the CFI might give of article 12 of the Aarhus Regulation.

We note that testing the Regulation before making this communication could have provided us with a more evidenced case. However, waiting for a decision of the European Court of Justice on a test case under the Aarhus Regulation would imply waiting for at least two or three years, given the difficulty that NGOs are having finding a test case, the time for internal review, and the time for the Court to decide.

Having a recommendation from the Compliance Committee advising the European Courts to grant NGOs standing would be a prudent and preventive way to act. In addition, waiting for a decision from the Courts refusing standing for an NGO under the Regulation would also risk having an unlawful decision in force, potentially causing damage to the environment. It is neither prudent nor desirable to wait in these circumstances.

We also note that the Compliance Committee in its Communication involving Belgium accepted to consider the cases cited by the applicant even though they all had been initiated before the entry in force of the Aarhus Convention in Belgium. This enabled it to decide that if the jurisprudence of the Belgian court was not altered, Belgium would fail to comply with article 9 paragraphs 2 to 4 of the Aarhus Convention following the Convention's entry into force. We accordingly invite the Committee to adopt a similar approach and assess whether, if the European Courts continue, under the Aarhus Regulation, to interpret the individual concern criterion as it has done in its previous case law, the European Community will fail to comply with article 9 (paragraphs 2 to 5) of the Aarhus Convention.

The Courts should, in our opinion, consider the environmental NGOs which fulfil criteria for entitlement provided by article 11 of the Aarhus Regulation as individually concerned by the reply of the EC institution or body to the internal review request and by the contested decision, act or omission of the EC institution or body in a way to give NGOs procedural rights.

We therefore request that the Committee makes a recommendation clearly setting out the Courts' obligation to interpret articles 10, 11 and 12 of the Aarhus Regulation in compliance with the requirements of article 9(3)(4) and (5) of the Aarhus Convention.

4.2 The type of decisions subject to review: administrative acts of individual scope or omissions to adopt an administrative act

The scope of the Aarhus Regulation is far more restrictive than that of the Aarhus Convention, and so the Regulation fails to fully implement the Convention. This causes three specific problems. First, it appears to make it impossible to challenge a whole range of EC institutions and bodies' decisions. Second, it fails to transpose of article 9(2) of the Convention. Third, it incorrectly transposes article 9(3) of the Convention.

a. Restricting the type of claim. The Aarhus Regulation only allows NGOs to use the internal review mechanism (article 10) and to institute proceedings before the European Courts (article 12) against “administrative acts” and “administrative omissions” of EC institutions and bodies.

Under article 2(1)(g) of the Aarhus Regulation, an administrative act is defined as “any measure of individual scope under environmental law taken by a Community institution or body, and having legally binding and external effects”. An omission is defined as “any failure of a Community institution or body to adopt an administrative act as defined in (g)” (article 2(1)(h)). The Aarhus Convention does not limit the types of acts and omissions that can be reviewed to only administrative acts. Article 9(3) of the Convention only provides that members of the public should be allowed to challenge acts and omissions which contravene provisions of national law relating to the environment. It hence refers to any acts or omissions giving members of the public a very wide access to justice.

Under the Aarhus Regulation, acts and omissions of another nature than an administrative one, i.e. legislative, directives and regulations, cannot therefore be challenged before the European courts. Aside from the narrow category of acts and omissions the regulation allows NGOs to challenge, this will mean that other groups than NGOs, such as corporations when they enjoy procedural rights under the regulations, will continue to have standing to challenge EC Regulations whereas NGOs will only be allowed, in environmental matters, to contest administrative acts and administrative omissions.

Moreover, the fact that the administrative acts must be of individual scope makes the type of challengeable acts and omissions even narrower.

It is interesting to note that the way the Aarhus Regulation Proposal was written enabled NGOs to challenge a much wider range of acts and omissions than the final regulation does because of the way challengeable acts and omissions were defined. Indeed, an administrative act was defined as “**any administrative measure** taken under environmental law by a Community institution or body having legally binding and external effect”. An omission was defined as “any failure of a Community institution or body to **take administrative action** under environmental law, where it is legally required to do so”.

While under the Aarhus Regulation Proposal an omission was established when an institution or a body failed to take administrative **action** under environmental law in general, under the present Regulation, an omission is characterised by the failure to adopt an administrative **act**. Moreover, an administrative act is defined as a measure of “individual scope” which restricts the type of acts and omissions which may be contested yet further.

Hence, under these definitions set out in the Regulation, as said before, “legislative” acts, directives and regulations, but also certain of the Commission’s and other EC

institutions' and bodies' decisions will not be subject to the review provisions of the Aarhus Regulation contrary to what article 9(3) provides.

For instance, the decision of the European Chemicals Agency (ECHA), established under the Regulation on Registration, Evaluation, Authorisation and Restrictions of Chemicals (REACH), not to subject a hazardous chemical to the authorisation procedure provided by the Regulation may not be considered as having an individual scope.

Likewise, the decision of the Commission to amend a Directive's annex in order to exempt some substances from the constraints or prohibition provided by the Directive, i.e. the Directive on the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment (ROHS) will not be considered as an administrative act.

Moreover, it would appear that the improper conduct of a public consultation by an EC institution would not fall either within the definition of an "administrative act" in article 2(1)(g) of the Regulation, as such an act would not be of "individual scope". Similarly, it would appear that an omission to organise a public consultation could not be interpreted as an "omission to adopt an administrative act" further to the definition in article 2(1)(h) of the Regulation, unless the organisation of a public consultation could be construed as a "measure of individual scope under environmental law". Narrowing the types of challengeable acts and omissions this way prevents the review of acts and omissions in relation to the conduct of public consultation on plans and programmes relating to the environment and in the lack of transposition of article 9(2) of the Aarhus Convention into the community legal order and in the incorrect transposition of article 9(3).

b. Failing to transpose article 9(2) of the Convention. The European Commission proposal for the Aarhus Regulation ("the Aarhus Regulation Proposal")³⁶ provided that "article 9(2) of the Convention is not of direct relevance, given that decision-making covered by article 6 of the Convention usually takes place at Member States', and not at Community level. However, legal provisions on participation in environmental decision-making can be part of "environmental law", in which case access to justice would be possible under the general procedure established to implement article 9(3) of the Convention".³⁷ An action to challenge improper consultation or the refusal to organise one could therefore be brought under article 12 of the Aarhus Regulation which transposes article 9(3) of the Convention. However, it is not clear whether the rights granted by article 9(3) of the Convention are provided for by article 12 of the Aarhus Regulation since only administrative acts and administrative omissions can be contested under that provision. As explained the proposal was modified through the legislative procedure and resulted in narrowing the types of acts and omissions challengeable.

However, notwithstanding that the Aarhus Regulation Proposal stated that the decision-making covered by article 6 of the Convention generally takes place at Member States', and not at Community level, it did transpose article 7 of the Convention, providing for

³⁶ Full reference as set out in footnote 19, *supra*.

³⁷ Title IV of the Aarhus Regulation Proposal.

the obligation to organise public consultations on plans and programmes relating to the environment, which gives effect to some of the requirements of article 6 of the Convention. Likewise the final Aarhus Regulation contains such a provision (in article 9).

c. Improper transposition of article 9(3) of the Convention. The EC seems therefore to have transposed only half of the Convention's provisions on public participation, since it establishes an obligation for the Community institutions and bodies to provide opportunities for the public to participate during the preparation, modification or review of plans and programmes relating to the environment (article 9 of the Regulation) but does not provide for any remedies in cases where they omit or refuse to do so, since the opportunities for internal review (article 10) and for proceedings before the courts (article 12) apply only to adoption or omission to adopt an "administrative act" as defined.

Yet, when an EC institution or body refuses to organise a public consultation about a plan or a programme relating to the environment it has prepared, modified or reviewed, (or fails to conduct such a consultation in a proper manner further to the criteria set out in article 6 of the Aarhus Convention), the members of the public concerned should have the right to institute proceedings before the Courts to challenge this refusal, further to requirements laid down by article 9(2) and 9(3) of the Convention.

We therefore invite the Committee to recommend the European Community to undertake the necessary practical and legislative measures to overcome these shortcomings.

Moreover, we suggest that the Committee makes a recommendation that the Courts should ensure that they give effect to the Convention by granting a right of review to members of the public to challenge the substantive and procedural legality of any decision, act or omission in relation to the conduct of public consultations about plans or programmes relating to the environment.

4.3 No access to justice for individual applicants and other entities

The Regulation fails to provide any means for individuals and other entities such as local authorities, i.e. local regions, to challenge Community acts or omissions. Articles 10 to 12 of the Regulation only provide access to the internal review procedure and to court proceedings to NGOs. Individual and other applicants may not therefore refer to the provisions of the Aarhus Convention to challenge EC institutions' decisions before the Courts. They are only subject to the Treaty conditions laid down in article 230 (4).

Yet, according to articles 230 and 232 of the EC Treaty, only the acts of the Commission, the European Parliament, the Council, the Council and the Parliament together and the European Central Bank, may be challenged before the Courts whereas according to the Aarhus Regulation the acts of all European institutions and bodies may be challenged.

The range of acts that may be challenged is therefore narrower according to the Treaty than to the Aarhus Regulation. Since the latter does not provide any remedies to individuals and local authorities, they will not have the possibility to challenge the same acts as the NGOs. It is thus clear that none of the texts provide a satisfactory solution.

This does not comply with article 9 paragraphs 2 to 5 of the Aarhus Convention. Article 9 paragraph 2 requires the parties to the convention to provide “members of the public concerned” “having a sufficient interest” or “maintaining an impairment of a right, where the administrative procedural law of a party requires this as a precondition” access to a review procedure. Article 9 paragraph 3 provides that “members of the public” “where they meet the criteria, if any, laid down in [the parties’] national law” shall have access to courts. The “public concerned” is defined by article 2 paragraph 5 of the Aarhus Convention as “the public affected or likely to be affected by, or having an interest in, environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest”. The “public” in general is defined by article 2 paragraph 4 as “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups.” These definitions encompass different types of persons and do not limit access to justice to NGOs.

5. The role of the EC institutions

The Commission and the Council are presently failing in their legal duties under the Aarhus Convention. Their systematic opposition to the right of NGOs to challenge their decisions, in cases in which they are parties, demonstrates the reluctance of these institutions to grant access to NGOs to justice.

All the cases cited in the present communication were brought against the Commission or the Council. In each case both contended that the request of the NGO should be dismissed. They argued that the NGO was not individually concerned by the contested decision and therefore had no standing. Their argument made it easier for the Court to deny standing to NGOs.

The EC institutions, namely, the Commission and the Council presently have a duplicitous position. On the one hand, they ratified the Aarhus Convention, adopted the Aarhus Regulation and provided a theoretical access for NGOs to the courts. But on the other hand, every time NGOs institute proceedings challenging one of their decisions, they argue that NGOs should not have standing. Instead they are required by the Aarhus Convention to allow citizens to use the legal process to test their rights.

We therefore invite the Committee to recommend that 1) the EC institutions and bodies not use the argument before the European Courts that NGOs are not individually concerned by the challenged acts and omissions; 2) that they refrain from contesting the right of NGOs to challenge their decisions in environmental

matters before the Courts; and 3) that they positively support the standing of NGOs in the European Courts to challenge their acts and omissions

Were the Commission and the Council to give up opposing the standing of EU NGOs and citizens, or better, were they to support the standing of the NGOs - because of their Aarhus legal obligations - the Court would be assisted in making the change its jurisprudence that the Aarhus Convention requires.

6. The Costs

Instituting proceedings before the European Courts may be prohibitively expensive for an NGO or an individual. According to article 87(2)(4) paragraph 2 of the Rules of Procedure of the Court of First Instance, “the unsuccessful party shall be ordered to pay the costs if they have been applied for in the successful party’s pleadings³⁸”.

Article 91 of the same rules, states that recoverable costs are “sums payable to witnesses and experts ... and expenses necessarily incurred by the parties for the purpose of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers³⁹”.

Not only may these costs be prohibitive, but it is not possible to foresee whether the EC institution will apply for the costs to be paid by the losing party. It is thus impossible to foresee the amount of the costs that could be required.

We have spoken to some NGOs who had to pay only minor costs, which is the way it should be. However, the clerk of the European Court of Justice informed us that the EC institutions could require the applicant to pay the expenses of their lawyers provided they hire an external one.

The uncertainty on the amount of the costs the applicant will have to pay in case it/she/he loses as well as their possibly prohibitive amount act as a deterrent for NGOs and individuals to institute proceedings before the European Courts and are contrary to article 9(3) of the Aarhus convention.

We therefore invite the Committee to address a recommendation to the EC institutions and bodies to never require environmental NGOs to pay the costs of lawyers and experts that the EC institutions and bodies may use in a case and adopt a statement in which they state the precise costs the NGO and individual applicants would have to pay in case they lose before the European Courts. These costs should of course not be prohibitive.

³⁸ Article 69 paragraph 2 of the Rule of Procedure of the Court of Justice provides the same rule.

³⁹ The costs are defined the same way in article 73 of the Rules of Procedure of the Court of Justice.

7. Conclusion: No access for NGOs and individuals before the Courts in environmental matters

As Advocate General Jacobs states: “The restrictive attitude towards individual applicants [we could add towards environmental NGOs] which the Court has adopted in the context of the fourth paragraph of article 230 EC – and which it has, despite the extension of the powers of the Community by successive Treaty amendments, declined to reconsider – appears difficult to justify in the light of cases decided under the other paragraphs of article 173 of the EEC Treaty (now article 230 EC), where the Court has adopted a generous and dynamic interpretation of the Treaty, or even a position contrary to the text, to ensure that the evolution in the powers of the Community institutions does not undermine the rule of law and the institutional balance.”⁴⁰”

To conclude, we gather the principal arguments of the Court and refute them.

- **As to the Plaumann test: the applicant must differentiate himself from other persons who are in the same situation in the same way as the addressee**

There are no compelling reasons to read the notion of the individual concern as requiring that an individual applicant or an NGO seeking to challenge a measure of general application must be differentiated from all others affected by it in the same way as an addressee. According to that reading, the greater the number of persons affected by a measure, the less likely it is that judicial review under the fourth paragraph of article 230 EC will be made available.

This interpretation contravenes article 9 (paragraphs 2 to 5) of the Aarhus Convention as follows:

- a) It does not fulfil the objective of the Convention to give the public concerned wide access to justice under article 9 paragraph 2.
- b) It does not provide members of the public access to judicial procedures to challenge acts or omissions in environmental matters under article 9 paragraph 3. As demonstrated, environmental NGOs and individuals are systematically denied access to the Courts.
- c) It thus prevents the Courts from providing adequate and effective remedies as required by article 9 paragraph 4 and constitutes a barrier to access to justice in the meaning of paragraph 5 of article 9.

- **As to the right to effective judicial protection: it is exercised before national courts through a request for a preliminary ruling from the European Court**

⁴⁰ Opinion of Advocate General Jacobs, loc.cit., paragraph 71.

To begin with, national courts are not competent to declare measures of Community law invalid or to order their suspension.⁴¹ In cases concerning the validity of a Community measure, the competence of the national courts is limited to assessing whether the applicant's arguments raise sufficient doubts about the validity of the impugned measure(s) to justify a request for a preliminary ruling from the Court of Justice.

In addition, when a reference is made, it is the national court which formulates the questions to the Court and not the applicant. Moreover, national courts may refuse to refer questions, and although courts of last instance are obliged to refer under the third paragraph of article 234 EC, appeals within national judicial systems are liable to entail long delays and to constitute a barrier to access to justice which may themselves be incompatible with article 9 (paragraphs 4 and 5) of the Aarhus Convention.

A decision of the national court adopted following a preliminary ruling from the European Court is applicable only within the legal order of the State in question and not throughout the whole European Community, whereas a European Court's judgment applies throughout the whole Community.

Furthermore, there are some situations, as in the *UPA* case, in which the Community legislation does not require any implementing acts by national authorities, for example European Regulations. In those cases, there are no measures which would form the basis of an action before national courts. It is therefore impossible for individuals or associations to challenge their legality, unless they deliberately breach the Regulation in question in order to gain access to the Court.

In any event, the possibility of making a request before national courts for a preliminary ruling from the European Court does not enable members of the public to challenge an act of an EC institution infringing EC law and cannot therefore be considered an effective remedy as required by paragraphs 3 and 4 of article 9 of the Aarhus Convention.

- As to the Amendment of the EC Treaty as the sole solution to grant standing to individuals and NGOs

As mentioned above, article 230(4) EC Treaty may be interpreted differently by the Courts. Indeed, there is nothing to prevent the Courts from reconsidering their case law on the notion of individual concern in relation to environmental matters. The CFI has already done this in the *Jégo-Quéré* case; it is therefore possible.

The jurisprudence of courts (national and European) is bound to evolve. The Court's case-law in other areas (see *supra*) recognises that an evolutionary interpretation of article 230 EC is needed in order to fill procedural gaps in the system of remedies laid down by the Treaty and to ensure effective judicial protection and the rule of law in the European Community.

⁴¹ *Foto-Frost*, Case 314/82, 1987.

While the Court acknowledges that it may be necessary to amend the EC Treaty to provide effective judicial protection to individuals, NGOs and other members of the public, we are of the opinion that it is not necessary to do so since there are interpretations that are wholly compatible with the wording of the Treaty.⁴²

Advocate General Jacobs proposes that a person could be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interest. Other proposals are possible as long as they provide access to the European Courts to members of the public and particularly to NGOs in environmental matters.

Moreover, the Aarhus Compliance Committee has stressed the fact that Parties to the Aarhus Convention should not use the clause **“where they meet the criteria, if any, laid down in its national law”** mentioned in article 9(3) of the Convention, **“as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment”**.

Accordingly, the phrase “the criteria, if any, laid down in national law” indicates a self-restraint on the parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception. One way for the Parties to avoid a popular action (“action popularis”) in these cases, is to employ some sort of criteria (e.g. of being affected or of having an interest) to be met by members of the public in order to be able to challenge a decision. However, this presupposes that such criteria do not bar effective remedies for members of the public. This interpretation of article 9, paragraph 3, is clearly supported by the Meeting of the Parties, which in paragraph 16 of Decision II/2 (promoting effective access to justice) invites those parties which choose to apply criteria in the exercise of their discretion under article 9, paragraph 3, “to take fully into account the objective of the Convention to guarantee access to justice⁴³.”

In conclusion, the interpretation by the courts of the notion of individual concern provided by article 230(4) EC Treaty is so excessively narrow that it effectively bars environmental organisations and individual applicants from challenging acts or omissions that contravene European law relating to the environment.

As the Aarhus Compliance Committee decided in the communication involving Belgium and Denmark, the **jurisprudence of national courts** must comply with the provisions of the Convention.

⁴² See Opinion of Advocate General Jacobs, loc.cit., paragraph 75.

⁴³ Paragraph 36 of the findings and recommendations of the Compliance Committee (full reference as set out in footnote 1, supra).

According to the Committee, the evaluation of the state of compliance of a Party with the Convention “is not limited to the wordings in legislation, but also includes jurisprudence of the Council of State itself.”⁴⁴

The Committee considers that “an independent judiciary must operate within the boundaries of law, but in international law the judiciary 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. Should legislation be the primary means for bringing about compliance, the legislature would have to consider amending or adopting new laws to that extent. **In parallel, however, the judiciary might have to carefully analyse its standards in the context of a Party’s international obligation, and apply them accordingly**”⁴⁵.

The European Courts should take notice of this interpretation of the Compliance Committee.

The Committee concluded:

“The Convention does not prevent a party from applying general criteria of the sort found in Belgian legislation. However, even though the wordings of the relevant Belgian laws do not as such imply a lack of compliance, the jurisprudence of the Belgian courts, as reflected in the cases submitted by the communicant, implies a too restrictive access to justice for environmental organisations. ... In the view of the Committee, ... the cases referred to show that the criteria applied by the Council of State so far seem to effectively bar most, if not all, environmental organisations from challenging town planning permits and area plans that they consider to contravene national law relating to the environment, as under article 9, paragraph 3. **Accordingly, in these cases, too, the jurisprudence of the Council of State appears too strict. Thus, if maintained by the Council of State, Belgium would fail to provide for access to justice as set out in article 9, paragraph 3, of the Convention. By failing to provide for effective remedies with respect to town planning permits and decisions on area plans, Belgium would then also fail to comply with article 9, paragraph 4**⁴⁶.”

Accordingly, the jurisprudence of the European Courts is too strict since the limitations on standing before the Courts lead to a complete denial of access to justice for NGOs and individuals in environmental matters. However, if the Courts do not change their jurisprudence it is the whole EC that will not comply with the Aarhus Convention, the other institutions should therefore also seek the appropriate options there are to ensure compliance to guarantee effective access to justice to NGOs.

It is the accountability of the EC Institutions and the democratic functioning of the EC that is at stake. Until now it has not been possible for environmental NGOs and

⁴⁴ Ibid, paragraph 37.

⁴⁵ Ibid., paragraph 42

⁴⁶ Ibid., paragraph 40.

individuals to challenge European Institutions' decisions in environmental matters before the European Courts.

VI. List of recommendations the applicants invite the Committee to adopt

We invite the Compliance Committee to acknowledge that if the jurisprudence of the European Courts is not altered under Regulation n°1367/2006, the European Community will fail to comply with article 9 paragraphs 2 to 5 of the Aarhus Convention by preventing NGOs from having access to justice with respect to EC institutions and bodies' decisions in environmental matters. We stress that the WWF-UK case is of high relevance. We further invite the Committee to recommend:

- The EC to undertake practical measures to overcome the shortcomings of the European Courts' jurisprudence in providing members of the public with access to justice in cases concerning environmental matters in accordance with article 9 paragraphs 2 to 5 of the Aarhus Convention specifically the European Commission should adopt guidelines on the way article 10 to 12 of the Aarhus Regulation ought to be applied to grant NGOs standing before the European Courts ;
- The Courts to interpret article 12 of Regulation 1367/2006 in a way to grant environmental NGOs, which comply with criteria set out in article 11 of the regulation, access to justice and allow them to challenge decisions of EC institutions and bodies ;
- The Courts to interpret article 10 to 12 of Regulation 1367/2006 as allowing environmental NGOs to challenge before the European Courts the omission/refusal of EC institutions and bodies to allow the public to participate during the preparation, review and modification of plans and programmes relating to the environment ;
- The EC institutions and bodies to stop opposing the right of standing of environmental NGOs and individuals before the European Courts when the organisations institute proceedings to challenge one of the institutions/bodies' decisions;
- The EC institutions and bodies to support the right of standing of NGOs and individuals;
- The EC institutions and bodies to never require environmental NGOs to pay the costs of lawyers and experts that the EC institutions and bodies may use in a case;

- The EC to promote awareness of the Convention, and in particular the provisions concerning access to justice, among the European Courts;
- Any other measures the Committee considers appropriate to bring the EC to comply with the access to justice provisions of the Aarhus Convention.

A handwritten signature in black ink, appearing to read "James Thornton", is centered on a light green rectangular background.

James Thornton
CEO and General Counsel

Brussels, 1 December 2008.