ClientEarth

1 February 2021

Comments on Aarhus Convention Compliance Committee draft advice regarding request ACCC/M/2017/3 (European Union)

1. As the Communicant of communication ACCC/C/2008/32 (EU), ClientEarth thanks the Compliance Committee for this opportunity to comment on its draft advice, issued on 18 January 2021, in relation to the Commission's proposal to amend the internal review procedure provided for in EU Regulation 1367/2006.

2. ClientEarth welcomes the draft advice and shares the Committee's view that the EU co-legislators should take the necessary steps to address the findings on communication ACCC/C/2008/32 (EU) within the ongoing legislative procedure leading to the amendment of EU Regulation 1367/2006. In this respect, we note that the Committee's draft advice applies equally to the Council's general approach adopted on 17 December 2020.[1]

Entities other than NGOs

3. The draft advice recalls that the Plaumann test prevents all members of the public, be they individuals or NGOs, from bringing direct actions before the CJEU under Article 263 TFEU in environmental and health matters. Since the Commission's proposal does not extend access to the internal review procedure to any individuals, it is clear that the EU has not yet addressed the Committee's findings on part II, specifically paragraph 93.

4. The Communicant agrees that excluding all individuals from the internal review procedure and providing for *actio popularis* are not the only options available to the EU. It would be perfectly feasible for the EU to elaborate criteria to ensure that only individuals with a certain interest in the act or omission in question would be entitled to submit a request for internal review.

5. It should be noted that the CJEU itself has demanded precisely this course of action from its Member States to ensure that individuals have access to national courts to challenge acts and omissions that contravene EU environmental law. For example, in case C-535/18 IL and others v Land Nordrhein-Westfalen, the Court of Justice stated that individuals who are "directly concerned " by a public authority's decision that breaches Article 4 of the Water Framework Directive by virtue of the fact they "legitimately use" the body of water in question, must have standing to challenge that decision. [2] It is still unclear to the Communicant why these obligations should not be applied to the EU itself.

6. The Committee refers to the possibility of allowing persons who are individually and directly concerned by the administrative act or omission in question to request internal review. The Communicant notes that the Committee makes this reference by way of example and insists that the

[1] ACCC Draft Advice of 18 January 2021, paragraph 8.
[2] Case C-535/18 IL and others v Land Nordrhein-Westfalen, ECLI:EU:C:2020:391, paragraphs 130 – 132.

interpretation of such criteria in relation to internal review would have to be broader than the Plaumann test.

7. The Communicant would like to emphasise, firstly, that the regulatory acts which are subject to internal review can be reviewed under Art. 263 TFEU if they are of "direct concern" to an individual. The criterion of "individual concern" does not apply to such acts and the criteria under the Aarhus Regulation should not be more restrictive than this.

8. Second, the Communicant observes that were such criteria to be included in the Commission's legislative proposal, they must be accompanied by a clear indication of the co-legislators' intention as to their interpretation by the CJEU. Otherwise, there is a considerable risk that the CJEU would seek to ensure unity and consistency by applying the Plaumann test, or at least its case law on "direct concern" in this context too. This would, of course, defeat the purpose of elaborating criteria for individuals' access to the internal review procedure in the first place.

Acts of individual scope and acts not adopted under environmental law

9. The Communicant agrees that the Commission's proposal deals adequately with paragraphs 51 and 100 of the findings on part II. The Communicant notes that any ambiguity or legal uncertainty resulting from the verb "adopted" would be resolved by referring to "any non-legislative act of a Union institution or body."

Acts not having legally binding and external effects

10. The Communicant agrees that as long as an administrative act or omission is capable of contravening national (in this case, EU) law relating to the environment, it must be susceptible to review. The EU cannot introduce additional criteria which place further limits on the acts that can be reviewed.

11. Therefore, we strongly support paragraph 45 of the draft advice. While we acknowledge that acts and omissions capable of contravening environmental law generally do produce "legal effects", the term "legally binding effects" is too restrictive. The complexity of the discussion at the hearing on 25 November points to the fact that the term also raises important question of legal certainty. For these reasons, we concur with the Committee's draft advice that the word "binding" should be removed.

12. By contrast, we are concerned that the draft advice does not consider the reference to "external effects" to be problematic as long as it is not "*interpreted to require anything beyond a requirement that the act or omission has effects which have the potential to contravene EU law relating to the environment*".

13. The term "external effects" clearly leaves a margin of interpretation to EU officials that, in the past, has led to confusion and erroneous rejections of internal review requests, as referenced in our previous submissions in relation to communication ACCC/C/2008/32 (EU) and as acknowledged in the Committee's findings on part II (paragraphs 102 and 103). As a minimum, the draft advice should recommend an amendment to ensure that the term is interpreted in accordance with the Convention.

14. We are also concerned about the cumulative effect of the term "external effects" with the Commission proposal's introduction of the words "because of their effects" in Article 2(1)(g) of the Aarhus Regulation. We consider that this qualifier introduces potential for confusion. Whether or not an EU measure or omission contravenes environmental law goes down to procedural and/or

substantive issues; it is not necessarily due to the effects of the act. Indeed, at the point when a request for internal review is introduced, the full effects of the act in question may yet be far from clear. Rather, non-compliance can arise from the wording of a specific provision alone. NGOs should not have to wait to quantify and assess the decision's negative effects on the environment. To make this clear, we suggest deletion of these words.

15. The best way to ensure that all administrative acts capable of contravening environmental law are covered is to remove, at the very least, the words "binding" and "external" and the qualifier "because of their effects", so that the text would read: "which has legal effects".

New exception – implementing measures at national level

16. The Communicant fully supports the Committee's draft advice at paragraphs 62 and 63. The findings in part I are very clear that the preliminary reference procedure does not meet the requirements of Article 9(3) of the Convention and, accordingly, cannot be the only means by which members of the public can challenge provisions of EU administrative acts and omissions that contravene EU law relating to the environment. Therefore, the exclusion of provisions of acts and omissions that require national implementing measures should be removed in its entirety.

New exception – implementing measures at EU level

17. The Committee does not find the exception relating to implementing measures at EU level problematic as long as its application in practice does not undermine the requirements of Article 9(4) of the Convention.

18. Given the length of internal review proceedings and in the absence of the possibility for NGOs to request injunctive relief in both the Commission's proposal and the existing EU legal framework,[3] it is vital that EU administrative acts that contravene environmental law can be reviewed as soon as possible, before their implementation causes environmental damage. Otherwise, future violations of Article 9(4) of the Convention are inevitable.

19. The Communicant is therefore concerned that the Party concerned, rather than take this opportunity to ensure full compliance with Articles 9(3) and (4) of the Convention, is eager to avoid review of unlawful administrative acts at a time when the resulting environmental damage can still be avoided.

20. It should also be noted that the implementation of unlawful EU acts by EU institutions wastes precious time and resources. The exclusion, therefore, also goes against the EU's own principle of procedural economy.[4]

21. For these reasons, the Communicant continues to be of the view that the exception relating to provisions that require EU implementing measures should be removed. We urge the Committee to consider the inevitability of future breaches of Article 9(4) of the Convention and reconsider its advice on this point.

The Committee's draft findings on communication ACCC/C/2015/128

[3] Case T-396/09 R Vereniging Mileudefensie and Stichting Stop Luchtverontreiniging Utrecht v European Commission, ECLI:EU:T:2009:526.
[4] See, by analogy, Advocate General Sharpston's Opinion in Case C-664/15 Protect Natur-, Arten- under Landschaftsshutz Umweltorganisation v Bezirkshauptmannschaft Gmünd, ECLI:EU:C:2017:760, paragraph 105 and case law cited therein.

22. In its draft findings on communication ACCC/C/2015/128, the Committee provisionally finds the EU to be in breach of Article 9(3) and 9(4) of the Convention for failing to provide access to administrative or judicial procedures for members of the public to challenge decisions on state aid measures taken by the European Commission under article 108(2) TFEU which contravene EU law relating to the environment. The draft findings include a recommendation for the EU to ensure that the Aarhus Regulation is amended to include the Commission's decisions on State aid measures among the acts that can be subject to requests for internal review. Alternatively, the EU must enact alternative legislation to ensure compliance with the findings.

23. The Communicant fully supports the Committee's draft advice to take account of the draft findings and recommendations referred to above in the current legislative process. This is an opportunity for the Party concerned to take a proactive approach to its obligations under the Aarhus Convention and avoid the necessity of starting a new legislative process within a matter of months when the Aarhus Committee adopts its findings.

24. As a presentational point, we would also find it more transparent to set out, in the present advice, what the core of the relevant finding is in the ACCC/C/2015/128 case, at least in summary form.

Adequacy and effectiveness of the internal review procedure

25. In its findings in ACCC/C/2008/32 (Part II), the Committee did not make a finding of non-compliance in relation to the adequacy and effectiveness of the internal review procedure, because it considered that it would be possible for the European courts to interpret Article 12 of the Aarhus Regulation in such a way that the substance of the underlying act (and not just whether a request for internal review has been processed in accordance with Article 10(2) and (3)) could be challenged. Since then, the CJEU has confirmed that its review of internal review decisions may take into account arguments regarding the substantive unlawfulness of the underlying act to the extent that they were raised and substantiated in the request for internal review.[5] However, it has also clarified beyond doubt that the Article 12 procedure can only result in the annulment of the internal review decision, and not in the annulment of the underlying act that was subject to internal review.[6] This raises questions as to the effectiveness of the remedy provided by the internal review mechanism.

Purpose of Aarhus Regulation

26. In part II of its findings the Committee recommended that the Aarhus Regulation should be amended to make it clear to the CJEU that the legislation is intended to implement Article 9(3) of the Convention. Since the proposal does not address this point, we urge the Committee to reiterate this recommendation in its advice.

Conclusion

27. The Communicant regrets that the Council adopted its general approach on the Commission's proposal before the Committee issued its draft advice. This goes against the reasons for which the Council triggered the procedure in Article 241 TFEU in the first place, which were to bring the EU into compliance with the Aarhus Convention. Furthermore, when the Commission sought the advice of the Committee through its letter of 5 November 2020, it did so on behalf of the EU, which makes it all the more inappropriate that another EU institution, the Council, made haste to adopt its general

[5] C-82/17 P - TestBioTech and Others v Commission, ECLI:EU:C:2019:719.
[6] T-108/17 - ClientEarth v Commission, ECLI:EU:T:2019:215.

approach without awaiting the advice of the Committee. For these reasons, we find it surprising that the draft advice of the Committee welcomes the adoption by the Council of its general approach on 17 December 2020 (para. 30). It would be more appropriate to regret the fact that the Council did not see fit to await the advice of the Committee which it, as part of the EU, had sought.

28. Nevertheless, the Presidency of the EU stated on several occasions that the Council would integrate the Committee's advice into its preparations for the trilogue with the European Parliament. It is crucial that the Council honours this statement and amends its general approach to comply with the Committee's advice.

29. It will also be important that the European Parliament adopts the amendments necessary to comply with the Committee's advice in its position to be voted on in May 2021.

ClientEarth is a charity registered in England and Wales, number 1053988, company number 02863827.