

**EEB comments on the draft advice of the Aarhus Convention Compliance Committee
regarding compliance by the European Union (MoP request ACCC/M/2017/3)**

1 February 2021

1. The European Environmental Bureau is grateful for the opportunity to comment on the draft advice prepared by the Committee in connection with the above case.
2. We fully support the response provided earlier today by the communicant in the ACCC/C/2008/32 case, ClientEarth.
3. In addition, we would like to make the following observation concerning the stipulation in the Commission proposal for revision of the Aarhus Regulation that to be challengeable, an act should have 'legally binding and external effects' (proposed amendment to Art. 2(1)(g) of the Regulation).
4. We agree with the Committee's draft advice that 'binding' should be removed and do not agree with the draft advice that the reference to 'external effects' is not problematic, for reasons that are well set out in the communicant's response. Thus, a slimmed-down reference to 'legal effects' would be an improvement. However, even this could potentially be problematic. According to article 9(3) of the Convention, whether acts or omissions produce legal effects should not be the test for inclusion, but rather whether they are capable of contravening provisions of environmental law.
5. The Committee's draft advice implies that any act or omission contravening environmental law would necessarily have legal effects (para. 47, second sentence). Such an interpretation would indeed remove any potential discrepancy between the requirements of the Convention and the revised Regulation but it cannot be ruled out that the courts might apply a different interpretation of 'legal effects' that ends up excluding some acts or omissions that are capable of contravening environmental law.
6. One way to ensure that all administrative acts capable of contravening environmental law are covered would be to remove the reference in the proposed amendment to Article 2(1)(g) of the Aarhus Regulation to "legally binding and external effects" (and the qualifier "because of their effects") entirely, so that the text would simply read: "'administrative act' means any non-legislative act adopted by a Union institution or body which contains provisions that may contravene environmental law [...]".
7. We would be grateful if you could take this point into consideration when finalizing the Committee's advice.

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