Environment Links UK Accompanying text for response to "EU implementation of the Aarhus Convention in the area of access of justice in environmental matters"

Introduction

1. Environment Links UK, collectively representing voluntary organisations with more than 8 million members across the UK, comprises the combined memberships of Wildlife and Countryside Link (WCL), Scottish Environment Link (SEL), Wales Environment Link (WEL) and Northern Ireland Environment Link (NIEL). Each is a coalition of environmental voluntary organisations, united by common interest in the conservation and restoration of nature and the promotion of sustainable development across the terrestrial, freshwater and marine environments.

2. We welcome the opportunity to respond to this consultation on the effectiveness of EU access to justice in environmental matters. However, in light of the importance of the subject matter, we are concerned that the questionnaire was formatted in such as a way as to make it difficult to express our views comprehensively. We therefore ask the EU to read this text alongside our questionnaire response, which together represent an accurate reflection of our views on the issue.

Direct and individual concern

3. Individual and public interest groups who wish to challenge the validity of the decisions and acts of the EU institutions in the Court of Justice of the European Union (CJEU) must satisfy the requirements of Article 263(4) of the Treaty on the Functioning of the European Union (TFEU). Article 263(4) states:

"*Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.*"

4. Direct concern exists where a legislative act has a direct effect on the legal position of an applicant and Member States have no discretion in its implementation (see Case C-386/96 P *Dreyfus*). There are a minority of cases in which the CJEU has determined that direct concern is satisfied, usually because (with regard to EU Directives) the Directive, or some parts of it, require implementation only in a formal sense, and leave no discretion in practice for Member States as to the substantive effect of the

implementing law (see, for example, Cases T-420/05 and T-380/06 *Vischim Srl* and Case T-262/10 *Microban).*

5. The Court of Justice stated the test for individual concern in Case-25/62 *Plaumann* ("the *Plaumann* formula"). Applicants may challenge legislative acts that affect them: "*by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as the addressee of a decision*" (see p.107).

6. Since this case in 1962, a highly constrained version of the *Plaumann* formula has been used to interpret individual concern. Those cases admitted to the Courts concern very specific circumstances - see, for example Case C-309/89 *Codorníu*, in which the Applicant was able to establish individual concern because it had an individual right (a trademark) that was adversely affected by the legislative act. Most cases, including those brought by environmental NGOs have been consistently denied access. See, for example, Cases T-91/07 *WWF-UK Ltd v Council* and Case C-355/08 *WWF-UK Ltd v Council Commission* and Case C-640/16 P, *Greenpeace Energy v Commission*.

The need for reform

7. We believe there is a compelling case for the CJEU to reform the existing interpretation of direct and individual concern in the special context of environmental cases. It is widely recognised that adequate environmental protection, more than any other area of law, relies on the involvement of the public and interest groups. This is the basis of Article 1 of the Aarhus Convention[1] to which the EU is a party in its own right. Article 1 states: "*In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention."*

8. It is entirely inappropriate to apply a rigid *Plaumann* formula to the identification of individual concern in environmental cases. By its nature, the quality of the environment and the protection and regulation of it is something that affects everyone in both current and future generations. It cannot be a consequence of this that there can be no standing for individuals or environmental NGOs in any case relating to the environment. This is particularly so in light of the EU's commitments made under the UNECE Aarhus Convention.

Aarhus Convention: the EU is a Party in its own right

9. In 2005, the EU as a Party in its own right ratified the Aarhus Convention. The Convention establishes standards for the participatory rights of access to information, public participation in decision-making and access to justice in environmental matters. In so doing, the Member States and the EU itself have unambiguously indicated a commitment to enhanced access to justice in the environmental context. Part of that commitment includes Article 9(3):

"… each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

[1] UN Economic Commission for Europe Convention, *Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* ("Aarhus Convention")

10. The Aarhus Convention Compliance Committee has found that a rigid interpretation of direct and individual concern in Article 263 to be incompatible with the Aarhus Convention[2]:

a. In Part 1 of its report adopted on 14 April 2011, the Compliance Committee found that the *Plaumann* formula was "*too strict to meet the criteria of the Convention*" because "*persons cannot be individually concerned if the decision or regulation takes effect by virtue of an objective legal or factual situation*" (Part 1, paragraphs 86-89).

b. The Compliance Committee repeated this finding in Part 2 of its report adopted on 17 March 2017, stating that the *Plaumann* formula, "*does not implement article 9, paragraph 3, of the Convention because the restrictions to access to justice imposed by the 'direct and individual concern' test are too severe to comply with the Convention*" (Part 2, paragraphs 64, 79-81).

c. The Compliance Committee also found that that the requirement, in relation to regulatory acts, that there be no implementing measures was incompatible with the Article 9(3) of the Aarhus Convention. As the interpretation of "*direct concern*" has occasionally also required that there be no implementing measures, such an interpretation is also incompatible with the Aarhus Convention.

11. The Compliance Committee also found that EU legislation, Regulation (EC) No 1367/2006 (the "Aarhus Regulation"), is not compatible with the Aarhus Convention. The EU is, consequently, not meeting its Aarhus Convention commitments through both its legislation and its standing rules.

12. In relation to access to the CJEU, the Compliance Committee recognised that the issue is one of the interpretation of Article 263 by the Court, rather than the terms of the Treaty itself or the content of legislation: "*It is clear to the Committee that TEC article 230 [now Article 263], paragraph 4, on which the ECJ has based its strict position on standing, is drafted in a way that could be interpreted so as to provide standing for qualified individuals and civil society organizations in a way that would meet the standard of article 9, paragraph 3, of the Convention."* (Part 1, paragraph 86).

13. The political institutions of the EU appear to recognise that it is for this Court to evolve its interpretation of Article 263 to bring the EU in line with it commitments under the Aarhus Convention in relation to the standing rules.

14. In 2017, the European Parliament passed the *Resolution Of 15 November 2017 On An Action Plan For Nature, People And The Economy*, which clearly recognises the need for the EU fully to comply with the Aarhus Convention and seeks ways to address the findings of the Compliance Committee. In its Resolution, the Parliament: "*Emphasises the role of civil society in ensuring better implementation of Union nature legislation, and the importance of the provisions of the Aarhus Convention in this regard; Calls on the Commission to come forward with a new legislative proposal on minimum standards for access to judicial review, and a revision of the Aarhus Regulation implementing the Convention as regards Union action in order to take account of the recent recommendation from the Aarhus Convention Compliance Committee;"* (General Remarks 15-16).

15. Similarly, the Council Decision taken on 18 June 2018 committed the EU to addressing the shortcomings of the Aarhus Regulation[3], on the basis of which the Commission launched this public consultation.

16. Somewhat ironically, the CJEU has demonstrated a strong commitment to effective access to environmental justice when assessing the standing rules of Member States. For example, in Case C-

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2 See Part I and II of the findings of the Compliance Committee here and here

3 See here

240/09 *The Slovak Brown Bears Case*, the Court said: "*Therefore, if the effective protection of EU environmental law is not to be undermined, it is inconceivable that Article 9(3) of the Aarhus Convention be interpreted in such a way as to make it in practice impossible or excessively difficult to exercise rights conferred by EU law. It follows that ... it is for the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention."* (paragraphs 49-50).

17. In light of this position, we believe it is essential that the Court evolves its interpretation of direct and individual concern away from the excessive rigidity of the *Plaumann* formula.

18. The EU is globally the leading governmental body on environmental protection. This is something about which the EU, its Member States and citizens can be rightly proud. However, the application of a rigid interpretation of Article 263 under the *Plaumann* formula in the context of environmental cases is starkly at odds with this position.

Preliminary reference inadequate alternative

19. The European Commission has consistently maintained that there is no need to reinterpret direct and individual concern as the preliminary reference procedure adequately provides access to justice. This is manifestly not the case, as found by the Compliance Committee:

"*While the system of judicial review in the national courts of the EU member States, including the possibility to request a preliminary ruling, is a significant element for ensuring consistent application and proper implementation of EU law in its member States, it cannot be a basis for generally denying members of the public access to the EU Courts to challenge decisions, acts and omissions by EU institutions and bodies; nor does the system of preliminary review amount to an appellate system with regard to decisions, acts and omissions by the EU institutions and bodies. Thus, with respect to decisions, acts and omissions of EU institutions and bodies, the system of preliminary ruling neither in itself meets the requirements of access to justice in article 9 of the Convention, nor compensates for the strict jurisprudence of the EU Courts, examined*" (Part 1, paragraph 90; Part 2, paragraph 56).

20. This mechanism is inadequate for several reasons. First, preliminary references are at the discretion of Member State courts (rather than as of right when an applicant satisfies certain admissibility criteria). Consequently, an applicant raising an important issue of EU law may not be able to bring this issue before the CJEU. Second, even if a Member State court does agree to refer a matter, it may choose not to refer the issues the applicant seeks to raise, or it may choose to re-frame the issues contrary to the wishes of the applicant. Third, similarly, the CJEU may again reframe the issues. Applicants cannot rely on the preliminary reference procedure to bring an issue to the CJEU; they have to surrender their case to the Member State courts and then also to the CJEU. This indirect and uncertain mechanism is manifestly inadequate access to justice.

21. By way of illustration, in 2013, an Irish NGO (An Taisce) launched Judicial Review proceedings in the UK High Court alleging that the Secretary of State's decision to grant permission for a nuclear power station at Hinckley Point in England was in breach of an EU Directive on Environmental Impact Assessment (EIA) and UK regulations on transboundary impacts and consultation. The case centred on the meaning of 'likely' in this context, given that Ireland should have been consulted if environmental effects from the project were considered 'likely'. The Court of Appeal considered whether it was possible to give a definitive ruling as to the approach to likelihood in the EIA Directive, or – on the request of the claimants – there should be a reference of that question to the CJEU. The Court of Appeal rejected the request for a preliminary reference and subsequently found against the claimants

(see *The Queen on the Application of An Taisce v The Secretary of State for Energy and Climate Change*[4]).

22. Adequate judicial protection should be the cornerstone of the EU legal system. It is the basis for uniform enforcement of EU law across the diversity of 28 Member States. The CJEU has (consequently and correctly) held that adequate access to justice within Member States is integral to the EU legal order. See, for example, Case C-326/96 *Levez v Jennings*, which involved access to judicial enforcement of EU rights to non-discrimination in the employment context. The Employment Tribunal claim was time-barred, leaving the claimant to rely instead on a County Court procedure (which was slower and more expensive). The CJEU recognised that the "*additional costs and delay*" of the alternative procedure could be enough to make the legal mechanism ineffective.

Standing for Environmental Interest Groups

23. It is settled case law that representative groups can have standing where individual members of the group have standing: Case T-268/10 *Polyelectrolyte Producers Group GETE (PPG)*. However, the CJEU has previously held that interest groups cannot satisfy the need for direct and individual concern. The Compliance Committee found that this was incompatible with the Aarhus Convention:

"*It follows from the Microban case and the case law referred to therein that an NGO promoting environmental protection would not be directly concerned with a contested measure unless the measure in question directly affected the organization's legal position. Such an organization would always be excluded from instituting proceedings under the third limb of article 263, paragraph 4, when it acted purely for the purposes of promoting environmental protection. The Committee considers that while Parties have a margin of discretion when establishing criteria for the purposes of article 9, paragraph 3, of the Convention, that margin of discretion does not allow them to exclude all NGOs acting solely for the purposes of promoting environmental protection from redress*." (Part 2, paragraph 73).

24. There would be significant advantages to the Court's procedures if appropriate interest groups were granted standing. Cases brought by interest groups can streamline hearings, helping the court to identify the issues and ultimately decide cases more quickly than if the court only hears cases brought by individuals (who will inevitably bring factual complexity). *Bona fide* interest groups, with a proven track record of interest to the issue before the court should be given standing on the basis that this *bona fide* interest is analogous to the direct and individual concern required by Article 263.

Regulation (EC) No 1367/2006 (the "Aarhus Regulation")

25. In evaluating whether the EU complies with the requirements of Article 9(3) of the Aarhus Convention, the Aarhus Compliance Committee also examined the Aarhus Regulation.

26. Article 10(1) of the Aarhus Regulation provides that: "*Any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act*."

27. The Compliance Committee started by addressing the general allegation that the Aarhus Regulation fails to grant individuals or entities other than NGOs (such as regional and municipal authorities) access to internal review. The Committee held that Article 10(1) of the Aarhus Regulation only entitles NGOs that meet particular criteria to make a request for an internal review; yet Article 9(3) of the

4 [2014] EWCA Civ 1111

Convention requires "members of the public" that meet the criteria, if any, laid down in the law, to be given access to administrative or judicial procedures. The Committee noted that Article 9(3) may not be used to effectively bar almost all members of the public from challenging acts and omissions and that in doing so, the Aarhus Regulation fails to correctly implement Article 9(3) of the Convention.

28. The Compliance Committee then considered whether the Aarhus Regulation fails to implement Article 9(3) of the Convention in five areas: (i) acts of individual scope; (ii) acts not adopted under environmental law; (iii) acts not having legally binding and external effects; (iv) arbitrary exemptions to the administrative acts definition; and (v) the adequacy and effectiveness of the internal review procedure. The Committee found the EU to be in non-compliance with the Aarhus Regulation in the following areas:

- **Acts of individual scope** – Article 10(1) of the Aarhus Regulation fails to correctly implement Article 9(3) of the Convention because the former provision covers only acts of individual scope.

- **Acts not adopted under environmental law** – the Committee found that the combined effect of the definition of "*Administrative act*[5]" (Article 2(1)(g)) and "*Environmental law*[6]" (Article 2(1)(f)) is too narrow. Article 9(3) of the Convention requires Parties to ensure members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which "contravene" provisions of its national law relating to the environment. This is not implemented by the Aarhus Regulation, which simply provides for internal review where a Community institution or body has "*adopted an act under*" environmental law. The Committee held that under the Convention, an act may "contravene" laws relating to the environment without being "*adopted*" under environmental law within the meaning of Article 10(1) of the Regulation. So it is not consistent with Article 9(3) of the Convention to exclude from the scope of Article 10(1) any act or omission made under EU legislation which does not "*contribute to the pursuit of the objectives of Community policy on the environment as set out in the Treaty*". Depending on the circumstances, such an act or omission may contravene a law relating to the environment. The correct test is not whether an act is adopted under law of any description.

- **Acts not having legally binding and external effects** – the Committee held that while Article 9(3) of the Convention allows Parties a degree of discretion to provide criteria that must be met by members of the public before they have access to justice, it does not allow Parties any discretion as to the acts that may be excluded from implementing laws. Article 2(1) (g) of the Aarhus Regulation requires a measure to have "*legally binding and external effects*" before that measure falls within the definition of "*administrative act*", and thus within the scope of Article 10(1). The Committee was not convinced that generally excluding all acts that do not have legally binding and external effects is compatible with Article 9(3) of the Convention. It therefore followed that Article 10(1) of the Aarhus Regulation fails to implement Article 9(3) of the Convention insofar as it covers only administrative acts, or omissions to adopt such acts, that have legally binding and external effects.

29. In light of the above, the Compliance Committee concluded that the Aarhus Regulation fails to comply with Articles 9(3) and (4) of the Convention. Moreover, having considered the main jurisprudence of the EU courts since part I, the Committee noted there had been no new direction in the EU courts that would ensure compliance with the Convention and that the Aarhus Regulation does not correct or

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5 Defined as any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects

6 Defined as Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems

compensate for these failings in the jurisprudence. Accordingly, the Committee concluded that the EU fails to comply with Articles 9(3) and (4) of the Convention and recommended that relevant EU institutions take the steps necessary to provide the public concerned with access to justice in environmental matters in accordance with Articles 9 (3) and (4) of the Convention.

30. If, and to the extent, that the EU intends to rely on the Aarhus Regulation or other EU legislation to implement Articles 9(3) and (4) of the Convention, the Committee recommended that:

- The Aarhus Regulation be amended, or any new EU legislation be drafted, so that it is clear to the CJEU that that legislation is intended to implement Article 9(3) of the Convention;

- New or amended legislation implementing the Aarhus Convention use wording that clearly and fully transposes the relevant part of the Convention; in particular it is important to correct failures in implementation caused by the use of words or terms that do not fully correspond to the terms of the Convention;

- If and to the extent the EU intends to rely on the jurisprudence of the CJEU to ensure that the obligations arising under Articles 9(3) and (4) of the Convention are implemented, the CJEU:
  - Assesses the legality of the EU's implementing measures in the light of those obligations and act accordingly;
  - Interprets EU law in a way which, to the fullest extent possible, is consistent with the objectives of Articles 9(3) and (4) of the Convention.

31. Link supports the findings of the Compliance Committee in these respects and calls on the EU to address the recommendations of the Committee at its earliest opportunity to address the significant access to justice deficit existing at the highest level of the EU.

Environment Links UK

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