

**EU comments on practical examples provided by ClientEarth following the  
open session of 25/11/ 2020**

**of the Aarhus Convention Compliance Committee**

**regarding request ACCC/M/2017/3 (EU) in case ACCC/C/2008/32**

*30/11/2020*

## **1. Introduction**

This document is complementary to the EU statement and to the separate document providing illustrative examples (in the field of fisheries and climate action), submitted on 26/11/2020, at the request of the Committee.

We thank the Committee for the opportunity to comment on the three practical examples submitted by ClientEarth on 26/1/2020. The examples: relate to (1) approval of a herbicide, such as glyphosate, (2) type approval of motor vehicles, and (3) list of Projects of Common Interest. They illustrate the NGOs' questions and concerns regarding the precise scope of the exceptions for provisions of acts entailing national implementing measures under the [legislative proposal to amend the Aarhus Regulation](#).

These concerns are unfounded. We would therefore like to use this opportunity to reassure ClientEarth and the Committee, using ClientEarth's own examples, that indeed, in all three cases, NGOs will be able to challenge these administrative decisions, which do not require national implementing measures.

## **2. General remarks**

As a general remark, the scope of the exception is narrowly tailored, and the drafting itself ensures sufficient legal certainty.

The legislative proposal does not provide for a blanket exception of the entirety of an act entailing implementing measures. The definition is carefully crafted to ensure that all provisions of an administrative act can be reviewed, except those provisions requiring national implementing measures. Further, Union law must be explicit on the fact that a particular provision requires implementing measures. This leaves no room for unjustified broadening of the exception.

Legal certainty is further enhanced by the fact that the Explanatory Memorandum itself provides detailed explanations how these provisions should be interpreted.<sup>1</sup>

In the following, we explain how the text of the proposal applies to the three examples provided by ClientEarth. In particular, we will explain how each provision must be looked at separately when deciding whether Union law explicitly requires implementing measures for it.

### **3. Approval of an active ingredient (such as glyphosate) in a herbicide**

NGO concern: NGOs would like to know if they can challenge the approval of an active ingredient (such as glyphosate) in a herbicide, at EU level. They would like to know, in particular, whether Art. 1 of Regulation 540/2011 would be excluded from scope of the Aarhus Regulation on the grounds that it is a provision for which Art. 33(1) of Regulation 1107/2009 would explicitly require national implementing measures.

Short answer: NGOs can challenge the approval of an active ingredient (such as glyphosate) in a herbicide, at EU level, under the proposed amendment to the Aarhus Regulation. Art. 1 of Regulation 540/2011 is not a provision for which Art. 33(1) of Regulation 1107/2009 explicitly requires national implementing measures. Therefore, it is not excluded from the proposed scope of the Aarhus Regulation.

In more detail:

Article 33(1) of the legislative act ([Regulation 1107/2009](#)) provides:

*Application for authorisation or amendment of an authorisation*

*(1) An applicant who wishes to place a plant protection product on the market shall apply for an authorisation or amendment of an authorisation himself, or through a representative, to each Member State where the plant protection product is intended to be placed on the market.*

Article 1 of the non-legislative act ([Regulation 540/2011](#)) provides:

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<sup>1</sup> See, in particular, pages 17 and 18.

*The active substances as set out in the Annex to this Regulation shall be deemed to have been approved under Regulation (EC) No 1107/2009.*

Article 33(1) of Regulation 1107/2009 relates to the process of authorisations at national level for specific plant protection products using the active substance authorised at EU level.

Article 1 of Regulation 540/2011, in contrast, relates to the authorisation of the active ingredient at EU level, by the Commission.

Article 33(1) cannot be considered as a Union law provision that would require national implementing measures with respect to the specific provision, Article 1 of Regulation 540/2011. Indeed, this EU-level approval, the approval of the active substance, in itself, may contravene EU environmental law. Therefore, Article 1 of Regulation 540/2011 is included in scope and NGOs are able to challenge it under the Aarhus Regulation.

Subsequently, if a plant protection product containing a substance referenced under Annex I is authorised under national law, the respective national decisions will also be challengeable at national level, subject to the national rules.

#### **4. Type approval of motor vehicles**

NGO concern: NGOs would like to know if they can challenge under the proposed amendment to the Aarhus Regulation Article 1(6) of Regulation 2016/646, which, via its Annex II, sets out the conformity factors and emission limits of engines. They would like to know, in particular, whether Article 6(4) of Regulation 2018/858 can be considered as Union law which would explicitly require a national implementing measure for Article 1(6) of Regulation 2016/646 and its Annex II.

Short answer: Article 1(6) of Regulation 2016/646, which, via its Annex II, sets out the conformity factors and emission limits of engines can be challenged under the proposal to amend the Aarhus Regulation. Article 6(4) of Regulation 2018/858 cannot be considered as Union law which would explicitly require a national implementing measure for Article 1(6) of Regulation 2016/646 and its Annex II.

In more detail:

Article 6(4) of the legislative act ([Regulation 2018/858](#)) provides:

*Member States shall only permit the placing on the market, the registration or the entry into service of vehicles, systems, components and separate technical units that comply with this Regulation.*

Article 1(6) of the non-legislative act ([Regulation 2016/646](#)) provides:

*Annex IIIA is amended as set out in Annex II to this Regulation.*

Annex II, in turn, sets out the conformity factors and emission limits of engines, etc.

Article 1(6) of Regulation 2016/646, which, via its Annex II, sets out the conformity factors and emission limits of engines can be challenged under the Aarhus Regulation. Article 6(4) of Regulation 2018/858 cannot be considered as Union law which would explicitly require a national implementing measure for Article 1(6) of Regulation 2016/646 and its Annex II.

Subsequently, the respective national decisions will also be challengeable at national level, subject to the national rules.

## **5. List of Projects of Common Interest**

NGO concern: NGOs would like to know if they can challenge under the Aarhus Regulation which particular projects are included in the Union list of projects of common interest. They would like to know, in particular, whether Articles 5(1) or 7-10 of Regulation 347/2013 can be considered as Union law which would explicitly require a national implementing measure for Art. 1 of Regulation 2020/389.

Short answer: NGOs can challenge under the Aarhus Regulation which particular projects are included in the Union list of projects of common interest.

Neither the implementation plan required under Art. 5(1) of Regulation 347/2013 or a national permit regulated under Arts. 7-10 of the same would be considered as Union law explicitly requiring national implementing measures for Art. 1 of Regulation 2020/389. Therefore, Art. 1 of Regulation 2020/389 is not excluded from the proposed scope of the Aarhus Regulation.

In more detail:

Art. 3(4) of a legislative act ([Regulation 347/2013](#)) provides:

*The Commission shall be empowered to adopt delegated acts in accordance with Article 16 that establish the Union list of projects of common interest ('Union list'), subject to the second paragraph of Article 172 of the TFEU. The Union list shall take the form of an annex to this Regulation.*

An example of such a delegated act (a non-legislative act) is [Commission Delegated Regulation 2020/389](#).

An NGO may seek to challenge Art. 1 of the Delegated Regulation 2020/389 which amends the Annex to Regulation 347/2013 by inserting certain projects, alleging that this inclusion contravened environmental law.

Art. 5(1) Regulation 347/2013 requires project promoters to draw up an "Implementation plan" for PCIs including a timetable (such as certain studies, approval by national authorities, constructions and the permit granting schedule). Moreover, Arts 7-10 explicitly regulate the national permitting process for PCIs.

Neither the implementation plan required under Art. 5(1) of Regulation 347/2013 nor a national permit regulated under Arts. 7-10 of the same would be considered as Union law explicitly requiring national implementing measures for Art. 1 of Regulation 2020/389.

## **6. Conclusions**

In conclusion, none of the three examples has real ambiguity: the national approvals (in the first 2 cases) and the implementation plan (or the permit) in the third case are not national implementing measures that would be explicitly required under Union law for the specific provisions that the NGOs wish to challenge. They simply execute the decisions which are taken at EU level. Therefore, the administrative provisions referred to in the ClientEarth examples do come under scope of the proposed amendments to the Aarhus Regulation and the NGOs will be able to challenge the contravention to environmental law stemming from their adoption.

This is indeed in line with the requirements of the Aarhus Convention. The contravention to EU environmental legislation, if any, will take place at the moment of the approval of the active substance (in the first case), at the moment of the adoption of the Commission implementing Regulation (in the

second case) and, respectively, at the moment of the adoption of the Commission delegated Regulation establishing the PCI list (in the third case).