ClientEarth

30 November 2020

ACCC/M/2017/3 (EU): Comments on illustrative examples provided by the Party concerned

1. On 26 November 2020, the Party concerned submitted a document entitled "Illustrative examples of acts entailing implementing measures under the legislative proposal to amend the Aarhus Regulation", which was sent in reply to a request to that end by the Chair during the open session of 25 November 2020 (hereafter "the Party's examples").
2. As the communicant of communication ACCC/C/2008/32 (EU), we would like to make the following observations on the Party's examples.

Comments on Section 1: "How will the proposal improve the current system of review?"

3. As regards section 1 of the Party's submission, we do not dispute that the legislative proposal published by the EU Commission on 14 October 2020 would remove two restrictions from the definition of an administrative act under Art. 2(1)(g) Aarhus Regulation (namely those relating to "individual scope" and "under environmental law"). In its findings, the Committee found that both of these restrictions prevent the Party concerned from complying with the Convention. We therefore welcome these specific amendments.
4. However, whether or not these amendments will, as the Party concerned states, "significantly broaden" the opportunities of NGOs to challenge decisions of the European Union institutions is not yet established. The new exclusion relating to provisions of acts for which Union law explicitly requires implementing measures is potentially far reaching in its scope. It is therefore far from clear whether or not the legislative proposal, as currently formulated, would broaden the opportunities for NGOs to request internal review decisions to a significant extent or not.
5. Moreover, whether or not the Aarhus Regulation amendment is sufficient will ultimately not turn on the number of decisions that are subject to challenge. The question is whether the text complies with the Convention or not.

Comments on Section 2: "Examples of provisions of acts which require implementing measures at national or EU level"

6. The Party concerned claims at the outset of this section that the proposal "*allows for the administrative review of all provisions of an administrative act, except for those provisions requiring implementing measures*." It further specifies that Union law must be "*explicit on the fact that a particular provision requires implementing measures.*" ClientEarth does not dispute these two points.
7. The Party concerned then alleges that "*this leaves no room for unjustified broadening of the exception*." The Party concerned thereby acknowledges that it introduces a new exception. As mentioned during the open session on 25 November, the Committee has been clear in its findings that, *"while article 9, paragraph 3, 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 <u>does not allow</u>*

Parties any discretion as to the acts or omissions that may be excluded from implementing law. (emphasis added).[1] The fact that the Party concerned introduces a new exception should therefore in itself suffice to demonstrate that it fails to comply with Art. 9(3) of the Convention.

8. With the same sentence, the Commission argues that there is no room to interpret this new exception in a manner that is unjustifiably broad. This is, however, a mere value judgement. Without an explanation as to what the Party concerned considers a “justified” exception, this statement is practically void of content. As stated in the previous paragraph, the Committee has been clear that no exception is “justified”.

9. The Party‘s examples resume with two bullet points, which are discussed in turn below.

- **Fishing activities**

Implementing measures at national level

10. As regards the exclusion pertaining to national implementing measures, the Party concerned raises Art. 6(1) of Council Regulation (EU) 2019/124 as an example. This provision reads:

“*The TACs [Total Allowable Catches] for certain fish stocks shall be determined by the Member State concerned. Those stocks are identified in Annex I.*”

11. This provision concerns only a small number of fish stocks. The vast majority of TACs for 2019 were set by the Council under Article 5 of Regulation 2019/124 and Annex I thereto. The Party concerned argues that the TACs adopted by the Council could be subject to internal review, while the determination of TACs directly by a Member State would have to be challenged at national level.

12. ClientEarth does not dispute that the “determination of TACs” by Member States would not fall under internal review. This is ensured by the wording in Art. 2(1)(g) of the proposal, which defines an administrative act, as a “non-legislative act adopted by a Union institution or body” (emphasis added). Accordingly, the exclusion for provisions that require national implementing measures is unnecessary to achieve this result. This argument is therefore ineffective.

13. The Party concerned further submits that the TACs set by the Council under Article 5 and listed in Annex I could be the subject of an internal review request. Of course, ClientEarth would indeed welcome this interpretation if it were to be followed. However, as also reflected in the first paragraph of the Party’s submission, it does not bind the EU Commission going forward in treating individual internal review requests, nor does it bind other EU institutions and bodies. Most importantly, it does not bind the CJEU which serves as the final arbiter on the interpretation of EU law. Therefore, the only decisive question is whether this interpretation follows clearly and unequivocally from the wording proposed by the Commission. This is the point that ClientEarth disputes.

14. To recall, based on the Commission’s proposal, provisions for which Union law explicitly requires implementing measures are excluded from internal review. Article 16(6) of the Common Fisheries Policy Regulation (Regulation 1380/2013) explicitly requires that a Member State must allocate the TACs attributed to it among the vessels flying its flag, i.e. by way of a national implementing measure. It is therefore hard to argue that TACs do not require implementing measures, in the

[1] Committee’s findings on communication ACCC/C/2008/32 (Part II), para. 52.

ordinary meaning of the term, to implement the protection scheme for the specific fish stocks set out in Article 5 and Annex I of Council Regulation (EU) 2019/124.

15. Another indication of the interpretation of this provision that would be followed in practice is the CJEU's longstanding case law interpreting the terms "entail implementing measures" under Art. 263(4) TFEU, which clearly inspired the wording that the Commission included in the Regulation (see to that effect the explanation provided in pages 16 and 17 of the proposal). As the CJEU has consistently held, the objective of this provision is to ensure that an applicant does not need to "*break the law in order to have access to the court*" be permitting an applicant to challenge an EU act that "*directly affects the legal situation of a natural or legal person*".[2] On the other hand, "*where implementation is a matter for the Member States*" applicants are expected to plead the invalidity of the implementing act before the national court and ask for a preliminary ruling under Art. 267 TFEU to challenge the validity of the EU act it purports to implement.[3]

16. It becomes very clear from this case law that the decisive criterion is whether the provision of the EU regulatory act in question can have an effect without an intervening national act. Applying this test to Art. 5 and Annex I of Council Regulation 2019/124, it is rather clear that the TACs set by the Council only take effect when the Member States allocate individual fishing opportunities among their vessels.

17. Of course, Article 263(4) TFEU is a different provision and the exact question it entails is whether the EU regulatory act directly affects the position of a specific applicant or whether there are intervening national implementing measures that affect the applicant. However, this mostly demonstrates why simply implanting this requirement into the Aarhus Regulation is in itself contradictory. As explained at lengths during the open session, acts that violate environmental law will never directly affect the legal situation of NGOs. Nonetheless, it is likely that the EU Courts will follow a similar interpretation as in their longstanding case law. This is because, as the CJEU has consistently held:

    "*Given the requirements of unity and consistency in the EU legal order, the terms used by the measures adopted in the same sector must be given the same meaning, unless the EU legislature has expressed a different intention.*"[4]

18. It should also be noted that the explanation provided on pages 16 and 17 of the Commission's proposal explicitly refers to the need to align the concept with the CJEU's case law under Article 263 TFEU.

19. There is therefore a considerable risk that the Council and the CJEU would find that the TACs set in accordance with Article 5 and listed in Annex I are not susceptible to internal review.

Implementing measures at EU level

20. As regards the exclusion pertaining to EU level implementing measures, the Party concerned cites points 7.5 and 11.4, among others, of Annex II.B of Council Regulation (EU) 2019/124.

[2] Judgement on Joined Cases C-622/16 P to C-624/16 P, *Scuola Elementare Maria Montessori v Commission*, ECLI:EU:C:2018:873, para. 58 See also the case law cited.
[3] Ibid, para. 60. See also the case law cited.
[4] See judgement on Case C-775/19, *5th AVENUE Products Trading*, ECLI:EU:C:2020:948, para. 42 and the case law cited.

21. Point 7.5 of Annex II.B reads:

    “On the basis of such a request by a Member State the Commission may, by means of implementing acts, allocate that Member State a number of days additional to that referred to in point 5 for that Member State. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 49(2).”

22. Point 11.4. reads:

    “On request from the Commission, Member States shall provide information on the transfers that have taken place. Formats of spreadsheet for the collection and transmission of information referred to in this point may be established by the Commission, by means of implementing acts. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 49(2).”

23. Both of these provisions delegate power to the Commission to adopt implementing acts to regulate specific matters that are not regulated in the Council Regulation itself. As acknowledged by the Party concerned, the resulting Commission implementing measures are therefore acts that by themselves should be possible to challenge by way of an internal review act as soon as they are adopted. This does not, however, explain why an applicant should not be able to challenge these provisions of the Council Regulation until the Commission adopts these implementing measures.

24. In most cases, it will not be possible to bring an internal review challenging a provision such as point 7.5 or 11.5 of Council Regulation (EU) 2019/124 (or Article 6 for that matter) which “merely” delegates powers to the Commission (or Member States) because such provisions would generally not “contravene environmental law” (as required by Art. 2(1)(g) of the Proposal). However, it is possible to imagine a scenario where the Council adopts a provision which delegates power to the Commission in breach of EU environmental law. It such a situation, it should be possible to request internal review of such unlawful delegation of power immediately. There is no reason why an NGO should need to wait until the Commission implements an illegal provision to challenge it.

- **Climate**

25. As a second example, the Party concerned provides Art. 4(1) Commission Decision 2011/278/EU, which reads:

    Member States shall make the appropriate administrative arrangements, including designation of the competent authority or authorities in accordance with Article 18 of Directive 2003/87/EC, for the implementation of the rules of this Decision.

26. ClientEarth does not dispute that the administrative measures adopted by the Member States could not be subject of an internal review request. However, as is the case for the example provided by the Party concerned pertaining to fishing activities, this is ensured by the wording “*adopted by a Union body or institution*”, rather than by the wording related to national implementing measures (see para. 12 above). This example does not therefore explain why the Commission proposes to include this additional exclusion.

27. In ClientEarth’s view, the only potential violation of EU law by an EU institution would be if the Commission had exceeded its powers when adopting Art. 4(1) Commission Decision

2011/278/EU. The Commission's powers in this context are defined by Art. 10(a)(1), in conjunction with Art. 23, Directive 2003/87/EC by which the European Parliament and the Council empower the Commission to adopt delegated acts to supplement the Directive with specific rules for the allocation of allowances. In this case, there is no indication that the Commission would have exceeded its powers. However, if Art. 4(1) would, for instance, permit the Member States to not only adopt supplementary measures but allow the Member States to derogate from the overarching Directive, for instance, by permitting them to give out additional free allocations, then this could indeed be a violation by an EU institution (the Commission) of EU law related to the environment (Art. 10(a)(1) and 23 of Directive 2003/87/EC). To ClientEarth there is no question that NGOs should in such a situation be able to request an internal review of Art. 4(1) Commission Decision 2011/278/EU.

Comments on Section 3: "Other types of administrative (non-legislative) acts that can be challenged under the new rules"

28. As to this final section, ClientEarth recalls its Statement at the open session, particularly concerning our position that the requirement that non-legislative acts must have "legally binding and external effects" does not comply with the Convention.[5]

ClientEarth would like to thank the Committee once again for its detailed consideration of this request from the Meeting of the Parties.

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

[5] See, for instance, Statement from the communicant of communication ACCC/C/2008/32 (EU), 25 November 2020, paras 17 and 18.