



28.9.2012

NOTICE TO MEMBERS

Subject: Petition 0134/2012 by Anaïs Berthier and Natacha Cingotti (French), on behalf of ClientEarth and Friends of the Earth Europe with 14 signatures, on access to EU documents and environmental information

1. Summary of petition

The petitioners complain about the European Commission's application of the provisions of the Aarhus Convention regarding access to information, participation in decision making and access to the judge in environmental matters. This concerns Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, and Regulation 1049/2001 regarding public access to European Parliament, Council and Commission documents. The petitioners request that the European Parliament ensures that the Commission abides by the provisions in the documents mentioned above and adapts Regulation 1049/2001 to the provisions of the Aarhus Convention that governs the regulation.

2. Admissibility

Declared admissible on 5 June 2012. Information requested from Commission under Rule 202(6).

3. Commission reply, received on 28 September 2012

The petitioners claim that the European Commission does not comply with its obligations under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission

documents¹ and with Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (the "Aarhus Regulation").² The petitioners consider that the Commission's answers to requests for access to documents show a systemic trend towards secrecy.

As far as the Aarhus Regulation is concerned, the Commission has the following observations:-

- Dissemination of environmental information

The petitioners claim that the Commission fails to actively disseminate environmental information in accordance with the requirements of the Aarhus Regulation. In particular, the petitioners claim that the Commission failed to set up a public register for providing environmental information.

The Commission would like to point out that Article 4 of the Aarhus Regulation does not require that the environmental information is necessarily available through a public register. Indeed, Article 4(1) of the Aarhus Regulation specifically provides for "electronic databases". In accordance with that provision, Commission services publish environmental information on websites accessible via the Europa portal on the Internet and where appropriate provide links to other sites where the information is stored.

Furthermore, as stipulated equally in Article 4(1) of the Aarhus Regulation, the dissemination of environmental information is a progressive process. Commission services are continually and gradually updating and enlarging the environmental information provided on these databases.

Some Commission ideas on how to disseminate information in a more strategic way can be found in the Communication of 7 March 2012 on *Improving the delivery of the benefits from EU environment measures: building confidence through better knowledge and responsiveness*.³ In this Communication, the Commission identified access to information as a key priority for improving the level of implementation of environmental law.

With regard to scientific studies, mentioned as an example for active dissemination by the petitioners, the Commission would like to refer to the alphabetical list of studies and reports on the Europa website (<http://ec.europa.eu/environment/pubs/studies.htm>).

- Non-compliance with the Aarhus Convention

The petitioners claim that certain exceptions to disclosure of environmental information under the Aarhus Regulation are not provided for by the Aarhus Convention. The petitioners refer,

¹ OJ L 145 of 31 May 2001, p. 43.

² OJ L 264 of 25 September 2006, p. 13.

³ COM (2012)95 final.

in particular, to infringements of Community law. The petitioners indicate that, according to them, *"[t]he only exception that relates to investigations is the one provided under Article 4(4)(c) of the Convention, on enquiries of a criminal or disciplinary nature."* The Commission would use *"this exception to refuse access to environmental information such as letters of formal notice and reasoned opinions sent to Member States as part of infringement proceedings"*.

As a preliminary remark regarding this argument, the Commission would like to point out that documents related to ongoing infringement procedures indeed enjoy a high level of protection by EU law. According to Article 4(2) 3rd indent of Regulation 1049/2001, the institutions shall refuse access to a document where disclosure would undermine the protection of *"the purpose of inspections, investigations and audits"*, unless there is an overriding public interest in disclosure. As the General Court (then Court of First Instance) has already held in its judgment of 11 December 2001 in Case T-191/99, *Petrie v Commission*, *"the Member States are entitled to expect the Commission to guarantee confidentiality during investigations which might lead to an infringement procedure. This requirement of confidentiality remains even after the matter has been brought before the Court of Justice, on the grounds that it cannot be ruled out that the discussions between the Commission and the Member State in question regarding the latter's voluntary compliance with the Treaty requirements may continue during the court proceedings and up to the delivery of the judgment of the Court of Justice. The preservation of that objective, namely an amicable resolution of the dispute between the Commission and the Member State concerned before the Court of Justice has delivered judgment, justifies refusal of access to the letters of formal notice and reasoned opinions drawn up in connection with the Article 226 EC proceedings on the ground of protection of the public interest relating to inspections, investigations and court proceedings"* (paragraph 68).

The level of legal protection of documents in ongoing infringement procedures is not any different for environmental information. As results already from the wording of Article 6(1) of the Aarhus Regulation, ongoing infringement procedures are excluded from the presumption of an overriding public interest in disclosure where the information relates to emissions into the environment.

In its judgment of 9 September 2011 in Case T-29/08, *Liga para Proteccao da Natureza (LPN) v Commission*, the General Court has underlined that fact and pointed out that no greater transparency is foreseen in environmental matters as compared to the general rules of Regulation 1049/2001 on access to documents in ongoing infringement procedures (paragraph 135 of the judgment which is currently under appeal). The petitioners claim that the Aarhus Convention would not allow that form of "secrecy" in environmental matters. The Commission does not, however, share the petitioners' interpretation of the Aarhus Convention. Article 4(a) of the Aarhus Convention allows a request for environmental information to be refused under certain conditions if the disclosure would adversely affect *"[t]he confidentiality of the proceedings of public authorities"*. The Commission considers that infringement procedures can be regarded to fall under this provision of the Aarhus Convention.

Article 4(2)(a) of Directive 2003/4/EC on public access to environmental information¹ which implements the provisions on access to information of the Aarhus Convention at Member State level, contains the same exemption to disclosing environmental information, to safeguard "*the confidentiality of the proceedings of public authorities*".

Conclusion

The Commission, therefore, considers that it correctly implements the Aarhus Regulation. The Commission services' practice on active dissemination of environmental information and disclosure of environmental information on request is fully in line with the obligations stemming from the Aarhus Convention.

¹ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC; OJ L 41 of 14 February 2003, p. 26.