Access to justice in environmental matters

Amending the Aarhus Regulation

OVERVIEW

The European Union is party to the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters. The Aarhus Regulation applies the Convention’s provisions to EU institutions and bodies. In 2017, the Aarhus Convention Compliance Committee, reviewing implementation by the parties, found that the EU fails to comply with its obligations under Article 9, paragraphs 3 and 4 of the convention concerning access to justice by members of the public. To address this non-compliance issue, on 14 October 2020 the European Commission put forward a legislative proposal to amend the Aarhus Regulation. The Council and Parliament adopted their positions on 17 December 2020 and 20 May 2021, respectively. Interinstitutional negotiations, launched on 4 June 2021, concluded on 12 July with a provisional agreement. Parliament approved the agreed text on 5 October 2021. The regulation was published in the Official Journal on 8 October 2021, and entered into force on 28 October 2021.


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<th>Committee responsible:</th>
<th>Environment, Public Health and Food Safety (ENVI)</th>
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<td>Procedure completed:</td>
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Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly ‘co-decision’).
Introduction

The European Union (EU) is party to the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters, as are its Member States. Adopted in 1998 under the auspices of the United Nations Economic Commission for Europe (UNECE), the convention aims ‘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’. It establishes a set of rights for citizens and their associations, broken down into three broad categories, corresponding to the convention’s pillars:

> The right to know, i.e. receive environmental information held by public authorities (‘access to information’);
> The right to participate in decisions to permit certain types of activity that may have a significant effect on the environment and during the preparation of plans, programmes, policies and legislation relating to the environment (‘public participation in decision-making’); and
> The right to recourse to a court of law to enforce their rights of information and participation, or to challenge public decisions that contravene environmental law (‘access to justice’).

Contracting parties are required to make the necessary provisions to ensure that public authorities help these rights to become effective. In 2017, following a complaint by a non-governmental organisation (NGO), the Aarhus Convention Compliance Committee (ACCC), in charge of reviewing implementation by the parties to the convention, found that the EU fails to comply with its obligations under Article 9, paragraphs 3 and 4 with regard to access to justice by members of the public (see box). At its sixth session held in September 2017 in Montenegro, the Meeting of the Parties (MOP), the main governing body of the convention, decided to postpone its decision on the endorsement of those findings of non-compliance until its next ordinary session, planned for October 2021. The EU committed for its part to explore ways and means to comply with the convention in a way that is compatible with the fundamental principles of the Union legal order and with its system of judicial review.

Existing situation

EU framework

The Aarhus Regulation No 1367/2006 applies the provisions of the convention to EU institutions and bodies. Access to justice is governed by Articles 10 to 12. Under Article 10, environmental NGOs that meet certain requirements can submit a request for ‘internal review’, i.e. ask an EU institution or body to consider whether an administrative act it has adopted is contrary to EU environmental law; or whether it should have adopted an act, the lack of action being an administrative omission. An administrative act is understood as ‘any measure of individual scope adopted under environmental law and having legally binding and external effects’. Whereas access to environmental information and public participation concern both individuals and associations, reviews can only be requested by eligible NGOs, and not by individuals. Article 12 of the Aarhus Regulation grants NGOs the right to go to the Court of Justice of the European Union (CJEU) to appeal a negative decision adopted in reply to their administrative review request (i.e. should it be considered inadmissible or dismissed).
The redress mechanisms provided through Articles 263(4) and 267 of the Treaty on the Functioning of the European Union (TFEU) are further building blocks of the EU system of judicial review (see Figure 1 below). Article 263(4) TFEU enables legal and natural persons to institute proceedings directly before the CJEU against acts of direct and individual concern to them, and against regulatory acts of direct concern to them that do not entail implementing measures. Article 267 TFEU provides the possibility for natural and legal persons to bring a case before national courts and seek to have the latter make a referral to the CJEU to decide on the validity of an EU act.

Figure 1 – The Union system of administrative and judicial review

Several environment-related directives, such as the Industrial Emissions Directive; the Environmental Impact Assessment Directive; and the Seveso III Directive, contain explicit access to justice requirements, referring to the Aarhus Convention. The Environmental Liability Directive contains such provisions independently from the convention.

Issues

The Aarhus Convention Compliance Committee found that neither the Aarhus Regulation, nor the jurisprudence of the CJEU implements or complies with the obligations arising under Article 9, paragraphs 3 and 4 of the convention. In its opinion, the CJEU jurisprudence is too strict to meet the convention criteria. As regards legal standing in particular (i.e. the entitlement to bring a legal challenge), the interpretation of the direct and individual concern requirement as set out in Article 263(4) TFEU, which has not changed significantly since the Court first clarified the criterion in the 1963 Plaumann judgment (see box below), means, in practice, that no member of the public is ever able to challenge EU acts on environmental matters before the CJEU. Regarding the third limb of Article 263(4), allowing those having 'direct concern' to challenge regulatory acts not entailing implementing measures, the Compliance Committee (ACCC) noted that the direct concern criterion as interpreted in the current CJEU case law would always exclude NGOs acting solely for the purposes of promoting environmental protection from instituting proceedings. On another note, it stressed that there is no basis in the convention for excluding acts that include implementing measures. For the ACCC, the system of judicial review in the national courts of the EU Member States,
including the possibility to refer to the CJEU for a preliminary ruling under Article 267 TFEU, cannot offset the limitations of Article 263(4).

The Compliance Committee found that the Aarhus Regulation does not correct or compensate for the failings in the European Union jurisprudence against Article 9(3) and (4) of the convention. It identified in particular the following discrepancies between the regulation and the convention:

- Under the Aarhus Regulation only NGOs that meet particular criteria are entitled to make a request for an internal review, whereas the convention requires that ‘members of the public’ (a term including, but not limited to, NGOs) be given access to administrative or judicial procedures.
- The regulation covers only acts of individual scope.
- The regulation provides for the internal review of acts adopted ‘under’ environmental law, whereas the convention makes it possible to challenge acts that contravene laws relating to the environment.
- The regulation covers only administrative acts that have legally binding and external effects.

Against this backdrop, in June 2018 the EU Council adopted a decision asking the Commission to submit, by 30 September 2019, a study on the Union’s options for addressing the ACCC findings; and to present, by 30 September 2020, if appropriate in view of the study outcomes, a proposal to amend the Aarhus Regulation, or otherwise to inform the Council of other measures.

The study was published on 10 October 2019, along with a Commission report on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters (see next section ‘Preparation of the proposal’ for more details).

In the European Green Deal communication, the Commission committed to consider revising the Aarhus Regulation to improve access to administrative and judicial review at EU level for citizens and NGOs who have concerns about the legality of decisions with effects on the environment and to take action to improve their access to justice before national courts in all Member States. A legislative proposal for amending the Aarhus Regulation was put forward on 14 October 2020, together with a communication on ‘Improving access to justice in environmental matters in the EU and its Member States’. On behalf of the EU, the Commission sought advice from the ACCC on whether the new proposal would address the issue of non-compliance with the Aarhus Convention.

**Parliament's starting position**

In its January 2020 resolution on the European Green Deal, recalling how essential it is to guarantee EU citizens the genuine access to justice and documents enshrined in the Aarhus Convention, the European Parliament called on the Commission to ensure EU compliance with the convention, and welcomed its consideration of the revision of the Aarhus Regulation.

In its previous term, Parliament called repeatedly for action on this issue. In its resolution of 14 June 2018 on monitoring the application of EU law 2016, the Parliament expressed serious concern that EU environmental rules may not be in compliance with the convention because they do not grant sufficient access to justice to environmental organisations and members of the public.

*Determining 'individual concern'*

In the **Plaumann case**, the Court ruled that:

‘... persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.’

Evidence shows that this interpretation, known as the ‘Plaumann test’, has led to the inadmissibility of all of the direct actions challenging EU acts on environmental grounds brought by environmental NGOs (defending general, not individual, interests).
explore ways and means to comply in a way compatible with the fundamental principles of the Union’s legal order and with its system of judicial review.

In its November 2017 resolution on an action plan for nature, people and the economy, Parliament asked the Commission to make a new legislative proposal on minimum standards for access to judicial review, and to revise the Aarhus Regulation to take account of the ACCC recommendation.

Preparation of the proposal

The external study on EU implementation of the convention in the area of access to justice in environmental matters, which started in mid-August 2018, was supported by a 12-week public consultation, which closed on 14 March 2019. The consultation revealed a clear dichotomy of views, with environmental organisations, EU citizens and other organisations and NGOs expressing dissatisfaction with the existing means of redress against EU acts, while business associations, business organisations and public authorities expressed a mainly positive perception of the situation. Several other stakeholder consultation activities took place in the context of the study.

The study found that while the Aarhus Regulation is meant to provide a mechanism enabling eligible entities to challenge measures that they could not have challenged under the Treaty rules, the additional requirements imposed by the definition of an administrative act limit the regulation’s added value by restricting the range of acts that can be addressed through the review procedure. In particular, the requirement that acts subject to administrative review be of ‘individual scope’ represents the most significant obstacle for the admissibility of review requests, as decisions on environmental matters are typically of public interest and of general scope. The requirements for the reviewable act to ‘have legally binding and external effects’ and to be adopted ‘under environmental law’ provide additional limitations. These requirements also apply during any subsequent judicial review ruling on the decision on the admissibility of the request for internal review (it does not address the merits of the administrative act contested). Environmental NGOs are thus left without the possibility to challenge certain EU regulatory acts through either the administrative and judicial review procedures.

The study therefore pointed to the need to improve the regulation mechanism, in light of its objective of facilitating access to justice for those entities experiencing difficulties under the Treaty requirements. Legislative measures proposed include extending the scope of acts that can be challenged to cover regulatory acts not entailing implementing measures (so as to overcome the issue with reference to individual scope, and ensure consistency with Article 263(4) TFEU); and removing the requirement that acts be adopted ‘under environmental law’ so as to cover all acts relating to the environment. The study also suggests extending the time-frames for review applications and handling. Measures such as eliminating the requirement that reviewable acts be legally binding, and opening up the review mechanism to any natural or legal person, were set aside as they were considered not sufficiently justified or feasible. On the latter point (extension of the mechanism beyond entitled environmental NGOs), the reasoning is that individuals and entities have access to other redress mechanisms (under Article 263 and 267 TFEU). At the same time, Article 9(3) of the convention gives the parties a certain margin of discretion in defining those members of the public who have a right of recourse to administrative or judicial procedures.

The legislative proposal was not accompanied by an impact assessment. The Commission deemed it unnecessary because the study examined all options to remedy the shortcomings identified by the ACCC, measured their impact and made clear that the only option to effectively address them was to amend the Aarhus Regulation. It did not find any significant social or economic impacts.

The changes the proposal would bring

The Commission proposal to amend the Aarhus Regulation would broaden the scope of the internal review procedure to include acts of general scope. In the proposed text, the reference to ‘individual scope’ is removed from the definition of ‘administrative act’, which clarifies that ‘any non-legislative
act adopted by a Union institution or body, which has legally binding and external effects and contains provisions that may, because of their effects, contravene environmental law within the meaning of point (f) of Article 2(1)’ may be subject to review. The new definition specifies that those provisions of an administrative act for which EU law explicitly requires implementing measures at EU or national level would however be excluded from the scope of the internal review. The reasoning behind this is that where the contested provisions entail implementing measures at national level, remedy can be sought before the national jurisdiction, with further access to the CJEU under Article 267 TFEU. Where the contested provisions entail implementing measures at EU level, the Commission proposes that review of those provisions be sought when a review of the EU-level implementing measure is requested.

Furthermore, the proposal would remove the requirement that reviewable acts be adopted ‘under environmental law’. In the proposed text, the definition of ‘administrative act’ is amended accordingly (see above), specifying that any administrative act that ‘contravene EU environmental law’ may be reviewed (irrespective of its policy objectives). The Commission also proposes to clarify in Article 10(1) that the internal review should be carried out to verify whether an act or omission contravenes environmental law.

Finally, it was proposed to extend the time-frame for the administrative review process (a two-week extension for NGOs to submit a request for internal review, from the current six to eight weeks; a four-week extension for EU institutions to reply to the request, from the current 12 to 16 weeks).

Advisory committees

Consultation of the European Economic and Social Committee (EESC) and the European Committee of the Regions (CoR) is mandatory on this proposal. The EESC appointed Arnaud Schwartz (Diversity Europe – Group III/France) as rapporteur, and Isabel Caño Aguilar (Workers – Group II/Spain) as co-rapporteur. The opinion was adopted at the Committee’s plenary session on 27 January 2021. The Committee, while welcoming the Commission’s text, did not endorse the proposal to exclude EU acts entailing national implementing measures. It also expressed concern that allowing civil society organisations to conduct a review only when implementing measures have been adopted would shield many, if not most, EU acts and omissions from internal review. The EESC took the view that Commission State aid decisions should also be open to review. It also called for explicit recognition of social partners as regards access to justice; and stressed the need to protect civil society organisations from extra burdens (such as additional costs and bureaucratic measures) in order to make judicial review accessible in practice.

The Committee of the Regions decided not to draw up an opinion on the proposal.

National parliaments

The deadline for the submission of reasoned opinions on grounds of subsidiarity was 10 December 2020. No such opinion was delivered within the time limit.

Stakeholder views

The date set by the Commission for feedback on the proposal following its adoption was 10 December 2020. 33 replies were posted.

NGOs, while welcoming the removal of the ‘individual scope’ requirement, pointed to loopholes in the Commission proposal. In their joint position paper, the European Environmental Bureau (EEB), Client Earth, and Justice and Environment, supported by other NGOs, warned that the text contains restrictions that would continue to exclude a significant proportion of EU acts from internal review. In particular, they stressed that most EU acts require national implementing measures at some stage, and could thus not be reviewed at source, but would need to first be challenged in national courts, which NGOs cannot always access. Were they able to use this avenue, the process would be lengthy,
creating a risk that the environmental damage they were seeking to prevent would already have occurred. They further asked for all acts producing binding legal effects to be covered by internal review. The fact that the proposal still excludes Commission state aid decisions from internal review, and does not address the issue of cost protection, so as to make judicial review accessible in practice, was also stressed. Some NGOs also highlighted the importance of taking account, in the legislative process, of the ACCC’s expected advice on whether the proposal addressed non-compliance with the Aarhus Convention.

On the industry side, the European Chemical Industry Council (CEFIC) expressed concern as to the consequences of the proposed legislative changes. It pointed that the Commission proposal would create an unparalleled review procedure accessible exclusively to environmental NGOs, with a much broader range of challengeable acts, including acts of a quasi-legislative nature (e.g. delegated acts) and a lower threshold for triggering a review (i.e. on the basis that the act would only need to contain provisions that ‘may have an adverse effect on the attainment of the objectives of Union policy on the environment set out in Article 191 TFEU’). Businesses, trade federations and other non-privileged applicants, by contrast, can rely on administrative review procedures only on a case-by-case basis. CEFIC warned that the proposal risks leading to a significant increase in litigation before the EU courts, challenging EU acts based on political considerations. It took the view that applicants under the Aarhus Regulation should only be allowed to request reviews of acts not entailing implementing measures – whether explicitly or implicitly required, so as to ensure consistency with the EU Treaty system of legal remedies.

The European Association for Coal and Lignite EURACOAL argued that the proposal to extend the rights of review and legal action is not in line with EU law as regards equal access to justice, insofar as it would grant NGOs special rights compared to other groups such as industry associations. The Commission proposal would also weaken the legal and planning framework in EU Member States by subjecting decisions to countless challenges linked, however remotely, to environmental law.

On 12 February 2021, the Aarhus Convention Compliance Committee issued advice in relation to the Commission’s proposal. Welcoming it as a significant positive development, the Compliance Committee found, nonetheless, that further steps need to be taken to comply with the convention. It considered, for instance, that the EU should:

- allow access to review procedures to members of the public other than NGOs. Granting such access to persons fulfilling certain criteria, for instance, demonstrating a ‘sufficient interest’ in the contested act, could be one way to avoid an actio popularis (where any natural or legal person would be able to request review).
- amend the proposed exception from the scope of review of those provisions of an act for which EU law explicitly requires implementing measures at national level, so that such provisions are immediately open to review at EU level. The Committee clarifies that it does not expect the review to cover the implementing measures themselves, which, under EU law, must be challenged at national level; and
- modify the requirement that reviewable acts should have ‘legally binding effects’. The Committee considers that there is no legal basis in the convention to limit the scope to acts with ‘binding’ legal effects. It therefore recommends to remove the word ‘binding’ from the definition of an administrative act. The relevant wording would then read ‘has legal and external effects’ only.

**Legislative process**

On 17 December 2020, the Council agreed on a general approach, its mandate for negotiations with Parliament. The text proposes only a few changes to the Commission proposal. It introduces a new recital clarifying the concept of a legally binding act, in line with the case law of the CJEU. It also clarifies, in Article 10, that provisions of an administrative act for which EU law explicitly requires implementing measures at Union or national level cannot be subject to a request for internal review.
In Parliament, the file was referred to the Committee on the Environment, Public Health and Food Safety (ENVI), which appointed Christian Doleschal (EPP, Germany) as rapporteur. The ENVI committee adopted its report on 23 April 2021. Taking into account the advice of the Aarhus Convention Compliance Committee on the Commission proposal, the report would open up the review mechanism to members of the public other than NGOs demonstrating ‘sufficient interest or impairment of a right’ in accordance with the regulation. The Commission would specify by delegated act the criteria these members of the public need to fulfil; review their application at least every three years; and, where appropriate, amend the delegated act, to guarantee the effective exercise of the right conferred.

The report modifies the definition of an administrative act as an act having ‘legal and external effects’. It removes the proposed exception excluding from review the provisions of an act that entail implementing measures at EU or national level, but clarifies that acts adopted by public authorities of Member States (including implementing measures at national level required by a non-legislative act under EU law) do not fall within the scope of the regulation. NGOs and members of the public would be able to seek review of the provisions entailing EU-level implementing measures when requesting the review of the EU-level implementing measure. Furthermore, the report requires the Commission to adopt guidelines to facilitate the assessment of the compatibility of State aid with relevant provisions of EU law relating to the environment.

In the event that an EU institution or body receives multiple requests for review of the same act or omission citing the same grounds, it would be able to decide to combine the requests and treat them as one, notifying its decision to all those who made the request. Within four weeks of submission of a review request, third parties directly affected by that request, such as companies or public authorities, would be able to submit comments to the EU institution or body concerned. A public register of requests for internal review would be set up.

The report further specifies that NGOs or members of the public considering that the decision in reply to their internal review request is insufficient to ensure compliance with environmental law may institute proceedings before the Court of Justice in accordance with Article 263 TFEU to review the substantive and procedural legality of that decision. To ensure that court proceedings are not prohibitively expensive, the report insists that EU institutions and bodies, when they are successful in litigation, make reasonable cost reimbursement requests.


A provisional agreement was reached on 12 July 2021. It includes the following main elements:

- The co-legislators agreed on a new definition of administrative acts, which now refers to acts having ‘legal and external effects’, and no longer contains any exception for those provisions that require implementing measures at EU or national level.

- Under the deal, members of the public other than NGOs will be entitled to ask for internal review, provided that they demonstrate an impairment of their rights caused by the alleged contravention of environmental law and that they are directly affected by such impairment in comparison with the public at large; or demonstrate a sufficient public interest and that the request is supported by at least 4 000 members of the public residing or established in at least five Member States, with at least 250 members of the public residing or established in each of those Member States. In both cases, the members of the public should be represented by an NGO meeting the regulation criteria or by a lawyer authorised to practise before a court of a Member State. Those new provisions extending access to review to members of the public beyond NGOs will apply 18 months after the entry into force of the regulation.

- EU institutions and bodies will have to publish all internal review requests as soon as possible after their receipt, as well as all final decisions on those requests as soon as possible after their adoption. They may set up on-line systems for receipt of review requests.
As regards costs, a new recital specifies that court proceedings under the regulation are not to be prohibitively expensive, and accordingly, EU institutions and bodies should endeavour only to incur and thus to request reimbursement for reasonable costs in such proceedings.

On State aid, the Commission has issued a statement in which it commits to carry out an analysis on how to address the findings of the Aarhus Convention Compliance Committee in a separate case; to complete and publish this assessment by the end of 2022; and, if appropriate, bring forward, by the end of 2023, measures to address the issue.

The provisional agreement was endorsed by Member States’ ambassadors on 23 July, and approved by the ENVI committee on 1 September 2021. Parliament formally adopted the agreed text at first reading on 5 October 2021. The Council did so on 6 October 2021.

The final act was signed on 6 October 2021, and published in the EU Official Journal on 8 October 2021. The regulation entered into force on 28 October 2021. The provisions opening the review mechanism to members of the public beyond NGOs will apply from 29 April 2023.

At its seventh session, held from 18 to 21 October 2021 in Geneva, the Meeting of the Parties to the Aarhus Convention endorsed the findings of the Convention Compliance Committee in case ACCC/C/2008/32 concerning access to justice, and decided that with the adoption of the revised Aarhus Regulation, the EU had taken the necessary steps to ensure compliance. The compliance case was therefore closed.

EP SUPPORTING ANALYSIS


OTHER SOURCES

Environment: access to information and justice, public participation, application of the Arhus Convention, European Parliament, Legislative Observatory (OEL).
ENDNOTES

1 The Committee findings were issued in two batches, the first on 24 August 2011 and the second in March 2017 (see Case ACCC/C/2008/32 for more details).

2 To be considered of direct concern, the contested act must directly affect the legal situation of the individual and leave no discretion to its addressees. On this, see for instance Case T-262/10, Microban International Ltd v Commission, which offers a practical example of an organisation considered by the Court to be directly concerned.

3 The Aarhus Regulation does not define 'acts of individual scope', but the CJEU clarified the meaning of their opposite, holding that an act is regarded as being of general application if it 'applies to objectively determined situations and entails legal effects for categories of persons envisaged generally and in the abstract'. In its legislative proposal for amending the Aarhus Regulation, the Commission refers to 'acts of individual scope' as 'acts which are directly addressed to a person or where the person affected can be distinguished individually'.

4 One such example is the recent case Mellifera v Commission, concerning Commission Implementing Regulation (EU) 2016/1056 regarding the extension of the approval period of the active substance glyphosate.

5 Opinion of Advocate-General Szpunar, Case C-82/17 P, TestBioTech. As explained earlier, Article 12 of the Aarhus Regulation enables the NGO that made the request for review to challenge before the CJEU the decision received on that request in accordance with the relevant provisions of the Treaty, namely Article 263(4) TFEU. As the decision is addressed to the NGO concerned, the criterion of direct concern under Article 263(4) TFEU is fulfilled.

6 This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. More stakeholders’ contributions can be found on the Commission webpage on feedback.

7 For instance, the existence of an imminent threat to their own health and safety or of a prejudice to a right to which they are entitled pursuant to EU legislation resulting from the alleged contravention of environmental law, in line with the CJEU case law (Case C-197/18; Case-529/15 (Folk) and Case-237/07 (Janecek)).

8 Case ACCC/C/2015/128. In its findings, delivered on 17 March 2021, the ACCC recommends that the EU ‘take the necessary measures to ensure that the Aarhus Regulation is amended, or new EU legislation is adopted, to clearly provide members of the public with access to administrative or judicial procedures to challenge decisions on state aid measures taken by the European Commission under article 108(2) TFEU which contravene EU law relating to the environment, in accordance with article 9(3) and (4) of the Convention’. At its seventh session, the Meeting of the Parties agreed to postpone the decision on whether to endorse the ACCC’s findings to its next ordinary session in 2025.

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