

Response of the Council of Bars and Law Societies of Europe (CCBE) to the Commission Consultation on the EU implementation of the Aarhus Convention in the area of access of justice in environmental matters

14/03/2019

1. Introduction

The Council of Bars and Law Societies of Europe (the **CCBE**) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

The CCBE considers the topic of access to justice and compliance with the Aarhus Convention of crucial importance, because access to justice constitutes one of the most important pillars of the Rule of Law. Lawyers, Bars and Bar Associations play a fundamental role in the safeguarding of the Rule of Law. For this reason, the CCBE requests the Commission to attribute weight to the view of the CCBE in this matter.

The CCBE wishes to stress that, particularly in light of the current criticism by the EU as regards the respect for the Rule of Law by some EU Member States, a criticism which the CCBE fully shares, the EU itself should also be beyond any possible criticism in this regard.

In this context, the Commission is of course fully aware of the findings of the Aarhus Convention Compliance Committee (the **ACCC**), on the basis of which the Council of the European Union has issued a formal decision to request the Commission to submit a study considering ways to address these findings and potentially a proposal for a revised Aarhus regulation.¹ The CCBE understands that important and comprehensive observations will be made to argue and substantiate that the EU Aarhus Regulation needs to be amended in order to achieve that it complies with the Aarhus Convention. The CCBE shares this view which has already been forcefully expressed by well-known NGOs and academics².

In the below, the CCBE will set out very succinctly why the EU Aarhus Regulation needs in its view to be amended and which considerations are crucial when considering the compliance with the Aarhus Convention. The setting out of these considerations will be followed by concrete suggestions for amendments to be made in the EU Aarhus Regulation.

¹ Council decision 9422/18 requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/2008/32 and, if appropriate in view of the outcome of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006.

² See, inter alia, Observations on the progress report on the implementation of request of the Meeting of the parties ACCC/M/2017/3 (European Union), <https://www.unece.org/?id=48110>

2. The inadequacy of direct access to the EU Courts (Article 263(4) TFEU)³

It has long been pointed out – *inter alia* by the CCBE - that Article 263(4) TFEU – as currently read and applied by the Court of Justice of the EU (the CJ) - provides insufficient access to justice for private parties. This is so both generally⁴, and also more specifically in environmental matters. It has also been emphasized that the restrictions developed by the CJ do not comply with the Aarhus Convention. The origin of the problem in this regard is indeed that EU law distinguishes between so-called «*privileged applicants*» (the Member States and EU Institutions) and «*non privileged applicants*» (the private applicants), a distinction which sits oddly with basic requirements of the Rule of Law and in particular the principle of «*isonomy*»⁵. Unless they are the formal addressee of the act concerned, private applicants are in the overwhelming majority of cases denied access to the CJ. Thus, when it comes to environmental matters, it is striking that no NGO or individual has ever been considered as fulfilling the conditions imposed by Article 263(4) TFEU to have legal standing before the General Court (the GC) or the CJ.

Under EU law currently, in the majority of cases, only Member States and Institutions can challenge EU acts before courts⁶. Indeed, when a private applicant is not the «*addressee*» of the act, he must be «*directly and individually concerned*» by it⁷. As individuals and NGOs in environmental matters are rarely (if ever) «*addressees*» of the act, they must in practice always demonstrate that they are «*directly and individually concerned*» by it in order to be able to bring an action in court.

Despite some occasional and very timid openings in the past, this has increasingly become today an extremely difficult hurdle to meet⁸.

Direct concern

Regarding first the criterion of «*direct concern*», it results from case law that a regulatory act directly concerns a person if (i) it affects sufficiently directly his/her legal situation (immediate causality link) and (ii) its implementation is automatic, i.e. does not require the application of other intermediary rules or if there is an intermediary rule, it must be shown that the authority adopting it had no discretion in doing so.⁹

It hardly needs be pointed out that the requirement that the act affects the applicant's own legal situation sufficiently directly is in practice well-nigh impossible to meet for an individual or a NGO acting in an environmental matter, as they act to defend the public interest, rather than their own individual rights.¹⁰

³ The present document does not discuss problems arising in the context of other procedures such as actions for damages. Nor is it worthwhile - in the absence of direct access to the CJ - discussing issues such as interim relief, marginal judicial review, etc.

⁴ See <https://bit.ly/2EVmrAP>

⁵ This isonomy principle implies equality before the Law of both rulers and ruled. Since Herodotus and Thucydides or Cicero, it has been considered to lie at the heart of the Western legal tradition.

⁶ As Member States and EU Institutions are themselves mostly involved in the adoption of the said acts, this remains only exceptional appeals addressing issues which may be of lesser relevance for EU criticism more generally.

⁷ Or since the Lisbon Treaty, in case of a regulatory act without implementing measure, a private applicant should be at least «*directly concerned*» by it, but there should be in principle no requirement of «*individual concern*».

⁸ For instance, although the CJ had accepted in cases such as *Codorniu* or *Antillean Rice* that a party was «*individually concerned*» as soon as one of its «*specific rights*» was affected by the contested act, the concept of «*specific rights*» was thereafter progressively limited very significantly. Thus, the CJ found for instance in *Danielson* (T-215/95R, 22 December 1995) that a breach of a provision of the Euratom Treaty protecting the rights of workers on a nuclear site was not to be regarded as infringing a sufficiently «*specific*» right whose violation gave the workers concerned «*individual concern*» and hence access to the Court. See also below the *Greenpeace* case (Case C-640/16P, ECLI:EU:C:2017:752) which rewrites restrictively the previous case-law on «*participation in the procedure*» as sufficient to establish individual concern etc.

⁹ T-262/10, *Microban International and Microban (Europe) v Commission*, ECLI:EU:T:2011:623 para. 27,

¹⁰ This was also confirmed by the ACCC in Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/200832 (Part II) concerning compliance by the European Union, para. 75.

The ACCC also found rightly that the requirement that the act is implemented automatically was incompatible with Article 9(3) of the Convention, as it introduces a condition related to the kind of acts which are challengeable, which is not included in the Aarhus Convention.

Individual concern

Regarding second the criterion of «*individual concern*» it also rules out NGOs and individual applicants in environmental matters, as it requires applicants to be concerned “*by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons*”¹¹ – putting them effectively in the same position as the «*addressee*» of the act¹². This again will hardly ever be the case for applicants acting in environmental matters, given that acts in this area will not concern solely an individual applicant, but rather the public at large¹³.

As a result, and as indicated, all cases brought so far by NGOs and individuals in environmental matters have - unsurprisingly in the light of the current case-law - been rejected by the EU courts.¹⁴ In CCBE's respectful submission, this indicates a serious deficiency in relation to the access to the courts in environmental matters, and therefore that EU law is here again breaching Article 9(3) of the Aarhus Convention.

3. The inadequacy of indirect access to the EU Courts (Article 267 TFEU)

As a preliminary point, it is noted that access to European courts in environmental matters should be ensured directly before EU courts under Article 263 TFEU, in order to be compliant with the Aarhus Convention. Indeed, first, the EU is itself a party to the Convention, and therefore cannot rely on Member States to provide access to justice to be compliant with Article 9(3) of the Convention. Therefore, indirect access through national courts referring the case to the CJ for a preliminary ruling cannot be seen as a suitable mechanism replacing direct access. This is all the more so as the preliminary ruling procedure is not an «*appeal procedure*» at the discretion of parties but a mere cooperation procedure between courts. Second, it can in no circumstance be regarded as an adequate remedy to force parties to start proceedings against *national authorities* before *national courts* where the alleged wrongdoing is done not by national authorities but by an EU institution. This amounts indeed to imposing on parties to *attack the wrong defendant* (a national authority who is not the author of the alleged illegality), and this before *the wrong court* (a court which has no power to rule on the validity of the act¹⁵), in the *hope* to obtain a *possible* reference to the CJ (whose wording and scope is at the discretion of the referring court and not the parties).

It is important to stress here once more (as done by the CCBE on many other occasions before) that the case-law of the CJ on access to justice puts hurdles which are *unknown in any judicial protection system of any Member State*. This has been shown *inter alia* by the Comparative *Locus Standi* Report prepared on this question in 2012 by eminent experts for the European Parliament¹⁶.

The CCBE also respectfully submits that it is unclear how the hurdles put by the CJ could be justified on account of a possible «*flooding*» of cases with which it could not cope. Beyond the fact that access

¹¹ Case 25/62 *Plaumann v Commission*, ECLI:EU:C:1963:17

¹² I.e. even if not «*formally*» the addressee of the act, it has to be shown that they are the «*effective*» addressee of it, at least in the mind of its author.

¹³ See eg Case T-385/15, *Greenpeace* ECLI: EU:T:2016:589, and Case C-640/16P, ECLI:EU:C:2017:752 where Greenpeace was plaintiff before the Commission against State aid granted by the government to construct a nuclear plant in the UK. Despite this complaint, the aid was nevertheless allowed by the Commission. Hence Greenpeace was both the plaintiff and a direct competitor to the beneficiary of the aid but that was not enough for the Court to accept the admissibility of its action (previous case law had been more open on issues of standing in similar circumstances).

¹⁴ For an example of this, see case T-236/04, *EEB and Stichting Natuur en Milieu v Commission*, ECLI:EU:T:2005:426

¹⁵ See CJ, Case 314/85, *Foto Frost*, ECLI:EU:C:1987:452.

¹⁶ See EP, Directorate General for internal policies - «*Standing up for your right(s) in Europe*», *Locus Standi* Study – PE 462-478.

to justice is a fundamental right and can therefore never be denied for reasons of alleged insufficient resources, the output of EU institutions is not larger than the equivalent output of national authorities, and national administrative courts are perfectly able to deal with the case-load involved when it comes to national acts, without having any of the restrictive conditions on standing developed at EU level.

For the avoidance of doubt, the fact that Article 19 TEU has consecrated the «*principle of effectiveness*» in the Treaty, by stating that «*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by EU law*» can obviously under no circumstances be read somehow *a contrario* as implying that the CJ would not be bound to give effective remedies itself – Article 47 of the Charter applies equally to the CJ.

Lack of a national implementation measure

The preliminary reference mechanism is only accessible when the applicant has first contested a national implementation measure before a national court. Therefore, it is not possible to challenge a European act which has not been subject to a national implementation measure, through a preliminary reference. Moreover in many cases, even if some act at national level can be identified, it can nevertheless not be challenged there either because the Member State is a mere «*mailbox*» (i.e. its act is simply «*confirmatory*»), or because the act concerned is addressed to a third party (and often unknown to the applicant), or because the national act was taken before the European act, etc.

More generally where the alleged illegality lies with the European act, it is obviously the act that deserves to be challenged and not some other act with which there is no issue, and this before the only Court that has the power to review in legality (i.e. the CJ).

An EU decision authorizing the use of a substance or a GMO¹⁷ or a Commission decision providing a derogation to a Member State from the obligations of a directive¹⁸ are examples that illustrate this shortcoming. The only way that these acts could be subject to a preliminary reference would be to first breach the law in order to have access to justice at the national level – which cannot be considered an adequate access to justice¹⁹.

The CCBE notes that this situation is even more unsatisfactory with regard to actions for failure to act. Indeed it is a mystery how Member States could supposedly be expected to be challenged before national courts for a failure to act by an EU institution.

Hurdles in accessing the courts at national level

Even where there is a national implementation measure which the applicant can theoretically challenge before a national court, there are a number of hurdles at the national level to obtain access to justice. This has been highlighted by a Study prepared for the Commission in 2013, on the implementation of Articles 9(3) and (4) of the Aarhus Convention.²⁰

This study shows that a number of obstacles remain at the national level, in cases of infringement of EU environmental law. Indeed, the study found barriers relating to standing in the environmental procedure in 19 out of 27 Member States.²¹

¹⁷ For example, Implementing Regulations under art. 13(2) and art. 78(2) of Regulation 1107/2009

¹⁸ For example derogation under Article 22 of Directive 2008/50/EC on ambient air quality and cleaner air for Europe – this was at stake in case T-396/09 Milieudefensie and the Court held that it had not been shown that “*the applicants could bring an action before a national court challenging the measure of general application in respect of which they have asked the Commission to conduct an internal review*”

¹⁹ Although this shortcoming was meant to have been corrected by the modification of Article 263(4) TFEU brought about by the Lisbon Treaty, the subsequent extremely narrow and strict reading by the CJ of this opening, both as regards the acts concerned and the concept of implementing measure, has in practice almost entirely written off the openings which the Lisbon Treaty was meant to introduce.

²⁰ See the “2012/13 Access to Justice Study” prepared by Professor Jan Darpö for the European Commission, accessible under <http://ec.europa.eu/environment/aarhus/access_studies.htm>

²¹ Since the amendment of the German UmwRG by the Act amending the Environmental Remedy Act and other environmental regulations of January 1st 2013 (BGBl. I p. 95), environmental organisations no longer have to assert the

For instance, the study found that there were additional obstacles to environmental justice in Member States linked to the type of review exercised by the courts, and to the effectiveness of the procedures.²² These hurdles *inter alia* related to the absence of a suspensive effect of the procedures, to strict conditions for obtaining injunction relief, to potential requirements for obtaining injunctive relief and to issues linked to enforcement of decisions.²³

Cost and length of a preliminary reference case

The cost of bringing an action in court in certain Member States is moreover prohibitive for NGOs and individual applicants. The abovementioned Access to Justice Study found the cost of judicial procedures to be an obstacle to access to environmental justice – or at least to have a dissuasive effect in 20 Member States out of 28.²⁴ These costs include administrative fees, court fees, mandatory lawyers' fees, expert fees and costs of the other party where the 'loser pays' principle applies. This is in particular the case in the UK²⁵, Ireland and Bulgaria. For example, the Access to Justice Study found that it was "*not unusual for legal proceedings in the United Kingdom and Ireland to exceed EUR 50,000*".²⁶

The preliminary reference procedure is moreover "*an additional procedure*" which necessarily involves more work and causes longer delays²⁷ than direct access to the European courts would entail.

It should also be noted that the CJ's current restrictive case-law on admissibility may oblige to challenge national implementing measures in the courts of all Member States (or even worse, where powers have been entrusted to local authorities, to multiple courts in each Member State) to finally maybe obtain a reference to the CJ and hence judicial review of the act by the only Court which has the power to do so²⁸.

Reluctance of national courts to refer a question for a preliminary ruling

Finally, there is clear reluctance of (certain) national courts in certain Member States to refer a question for a preliminary ruling to the CJ²⁹.

It must also be noted that the applicant in this type of cases can in any event normally not decide which questions will be referred to the EU courts which further restricts access to justice.

violation of a third-party-protecting provision. This amendment resulted from the "Trianel" judgment of the CJ from 12 May 2011 (Case C-115/09 [2011] ECR I-3701). Individual applicants still need to show that their subjective right has been infringed. See in this context also judgment CJ of 15 October 2015, Case C-137/14.

²² Articles 9.4 and 9.5 of the Aarhus Convention provide that the procedures in Article 9.3 must provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable and timely.

²³ "2012/13 Access to Justice Study" prepared by Professor Jan Darpö for the European Commission, page 21-23.

²⁴ "2012/13 Access to Justice Study" prepared by Professor Jan Darpö for the European Commission, page 21.

²⁵ This has been recognized by the Meeting of the Parties to the Aarhus Convention Decision VI/8k on compliance by the United Kingdom with the Convention, ECE/MP.PP/2017/2/Add.1, available online at: <https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/Compliance_by_United_Kingdom_VI-8k.pdf>.

²⁶ "2012/13 Access to Justice Study" prepared by Professor Jan Darpö for the European Commission, page 18.

²⁷ On average, the preliminary rulings take 16 months in environmental matters. See Judicial statistics of 2017, available at: <<https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180036en.pdf>>.

²⁸ See eg *Toulorge* application which was declared inadmissible before the European Courts - (Case T-167/02, 2003 ECR II-1111) forcing the applicants - in order to avoid irreparable damage in the implementation of the national measures (i.e. disclosure of their secret know-how) - to start thereupon multiple actions before the Courts of all Member States (and effectively because of decentralised powers before several courts in each Member State) to obtain the requested interim suspension of the national measures concerned and to finally succeed in obtaining a reference in one case to the CJ which declared ultimately the act invalid (*ABNA judgment, Case C-453/03 e.a. ECLI:EU:C:2005:741*). Thus there was no economy of work for the CJ (which had in the end to look at the issue), but national courts were overburdened unnecessarily and there is a multiplication of costs for the parties, in direct contradiction with the principle of economy of procedure.

²⁹ For example, France has recently been condemned for a breach of article 267(3) TFEU in the context of an infringement action, after the French administrative Supreme Court failed to make a preliminary reference. *C-416/17 Commission v France* ECLI:EU:C:2018:811. The Commission however started the infringement proceedings in relation to a tax law dispute. It is not necessarily indicative of the Commission systematically taking action against this type of practice.

4. The inadequacy of the internal review process as an alternative to access to the EU Courts

The internal review process of Articles 10 to 12 of the Aarhus Regulation is intended to allow NGOs to contest decisions of an EU institution or body that has adopted an administrative act under environmental law, in order to implement Article 9(3) of the Aarhus Convention.³⁰ However, this mechanism has been found by the ACCC to be insufficient.³¹

Limitations in relation to standing

Out of 40 requests under the internal review process, only 9 requests have been ruled as admissible, therefore demonstrating its inadequacy in implementing Article 9(3) of the Aarhus Convention. This is due to several restrictions in relation to the standing of the applicant.

To have sufficient standing, an applicant must first show that the act it is challenging has individual scope. The lack of individual scope has been the ground of rejection in more than half of the cases rejected as inadmissible by the Commission. This condition requires that the act is addressed specifically to one economic operator or association of operators. Therefore, a number of acts are effectively excluded from the review process, including decisions addressed to a Member State or acts that regulate a specific subject. This has been found by the ACCC to be in breach of Article 9(3) of the Aarhus Convention.³²

Additionally, the Aarhus Regulation provides that an act can only be subject to review if it is legally binding and has external effects. This has been interpreted in a manner that goes beyond the usual requirement of a legal effect, and as a result excludes from the internal review process important acts such as guidelines on state aid for environmental protection and energy³³, or a Commission proposal to implement a directive and the omission to adopt such a proposal³⁴. An interpretation of this condition coherent with the Aarhus Convention should instead focus on the potential of the act to contravene environmental law.

Finally, the review is limited to acts “*adopted under environmental law*”. This has been interpreted by the Commission to mean acts specifically intended to positively contribute to the environmental policy of the EU.³⁵ However, the Aarhus Convention does not include such wording, and envisages that the review should be open to acts which contravene environmental law. These two categories of acts only overlap to a certain extent, as acts not contributing to the EU environmental policy (for example acts relating to energy policy), can infringe EU environmental law. Therefore, the correct interpretation of Article 10 of the Aarhus Convention should be that access to justice must be available for all acts contravening EU environmental law.³⁶

Exclusion of decisions of administrative review bodies

Article 2(2) of the Aarhus Regulation includes an exemption from review for decisions of bodies acting as “*administrative review body*”. This would encompass for example the Commission’s state aid decisions, which have the clear potential to infringe EU environmental law. This exemption is in breach of the Aarhus Convention, as it is not provided for by the Convention³⁷.

³⁰ See 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, recitals 18-20.

³¹ Findings of the Aarhus Compliance Committee on communication ACCC/C/2008/32, Part II (European Union)

³² Findings of the Aarhus Compliance Committee on communication ACCC/C/2008/32, Part II (European Union), para. 51

³³ Commission’s reply of 13/10/2014 to Friends of the Earth England, Wales and Northern Ireland

³⁴ Commission’s reply of 7/04/2014 to Greenpeace, Transport & Environment, Friends of the Earth Europe.

³⁵ Reply of 7 February 2014 by the European Commission to request for internal review by Justice & Environment, available at: <<http://ec.europa.eu/environment/aarhus/pdf/requests/21/reply.pdf>>.

³⁶ This was also confirmed by the GC in case T-33/16 *Testbiotech v Commission* ECLI:EU:T:2018:135

³⁷ This has been recognized by the ACCC, even though at the time it did not find a concrete example of a decision which would have been exempted in breach of the Aarhus convention [insert ref]

No review of the underlying acts before European courts

Finally, it results from the current case law of the GC that, if an applicant brings proceedings against a decision rejecting the request for internal review, the Court can only rule on the rejection decision, but not on the lawfulness of the underlying act.³⁸ Therefore, an applicant cannot challenge the substance of an act before the EU courts. This effectively means that the Aarhus Regulation does not fulfill its purpose to provide access to justice in relation to breaches of environmental law.

5. Concrete suggestions for amendment

In conclusion, the CCBE emphasises the importance for the EU to respect its international obligations. It also re-emphasises that the role of *locus standi* rules should never be merely to «shield» authorities from appeals.

The CCBE would like also to stress that the shortcomings highlighted above are made even worse as the EU has so far resisted becoming a party to the ECHR.

Although the issue of standing is wider than discussed in the present paper in the context of environmental matters and arises in many other areas, the CCBE proposes hereafter – as a minimum - a number of changes so as to comply with the obligations arising out of the Aarhus Convention.

³⁸ T-33/16 *Testbiotech v Commission* ECLI:EU:T:2018:135

Proposed substantive amendments in green, amendments to reflect Lisbon Treaty changes in blue:

Article 2
Definitions

1. For the purpose of this Regulation:

[...]

(g) ‘administrative act’ means any measure ~~of individual scope under environmental law,~~ taken by a **Union** institution or body, and having legally binding ~~and external~~ effects ;

[...]

2. Administrative acts and administrative omissions shall not include measures taken or omissions ~~by a Community institution or body in its capacity as an administrative review body, such as~~ under:

~~(a) Articles 81, 82, 86 and 87 of the Treaty (competition rules);~~

(a) Article 258, 259 and 260 TFEU (infringement proceedings)

(b) Article 228 TFEU (Ombudsman proceedings);

(c) Article 325 TFEU (OLAF proceedings).

[...]

Article 10
Request for internal review of administrative acts

1. Any non-governmental organisation which meets the criteria set out in Article 11 ~~and who considers that an administrative act or an omission contravenes environmental law~~ is entitled to make a request for internal review to the **Union** institution or body that has adopted ~~the an~~ act ~~under environmental law~~ or, in case of an alleged omission, should have adopted ~~such~~ an act.

[...]

2. The **Union** institution or body referred to in paragraph 1 shall consider any such request, unless it is clearly unsubstantiated. The **Union** institution or body shall ~~issue state its reasons in a written reply~~ as soon as possible, but no later than 12 weeks after receipt of the request, a decision in writing on the measure to be taken to ensure compliance with the environmental law or state its reasons to reject the request.

[...]

Article 12
Proceedings before the Court of Justice

1. The non-governmental organisation which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice ~~in accordance with the relevant provisions of the Treaty~~ to review the substantive and procedural legality of the decision.