

A Chance for Enhanced Environmental Accountability? The Aarhus Regulation Review

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This is a summary of the EJNI Technical Report of the same name which can be accessed [here](#).

The Aarhus Regulation amendment is currently being negotiated in Brussels. It represents an unparalleled opportunity for the EU to demonstrate its commitment to the rule of international law and its global leadership in improving environmental democracy and climate governance worldwide, and forms part of its commitments under the EU Green Deal. However, in a draft decision issued in January [2021](#), the Aarhus Convention Compliance Committee has found that current proposals fall short of what is required for the EU to meet its compliance obligations under the Aarhus Convention. The current legislative proposals increase the complexity and uncertainty of the rules. A simpler approach, mirroring the wording of the Aarhus Convention, would resolve many of these difficulties.

- 1 In 2017, the EU was [found](#) by an international UN body, the [Aarhus Convention Compliance Committee \(ACCC\)](#), to be in breach of their obligations under an international convention, the [Aarhus Convention 1998 UNECE](#) (which provides the public/NGOs rights of public participation in environmental decision making and associated rights for access to environmental information and to the courts).**
- 2 EU legislation ([‘the Aarhus Regulation’ 1367/2006 EC](#)) designed to implement the Aarhus Convention at EU level and provide access to the EU courts for NGOs, in practice denies the public/NGOs the right to challenge the decisions of its institutions that have environmental protection implications.** The ACCC made findings in [2011](#) and [2017](#) on a case initiated by ClientEarth ([ACCC/C/2008/32](#)) that the Aarhus Regulation was not fit for purpose on two main grounds: (a) restrictions on the categories of reviewable decisions and (b) restrictions on the standing rights of NGOs and individuals.
- 3 The ACCC rulings in [2011](#) and [2017](#) were clear that the EU needed to act immediately to change their laws.** This is a position widely agreed by Europe’s leading environmental [lawyers](#), including [Kramer](#) and [others](#) and many leading environmental NGOs such as [ClientEarth](#) and the [EEB](#).
- 4 The European Commission produced [draft legislation](#) on the 20th October 2020 intended to address the findings of the ACCC by proposed amendment of the Aarhus Regulation.**
- 5 The ACCC indicated in their [draft findings](#) issued on the 17th January 2021 that the EU Commission’s current proposals fall short of what is required to meet the obligations of the Aarhus Convention and do not fully resolve the access to justice issues identified by the ACCC, namely:**
 - 5.1 The draft legislation does not address the problem of an overly restrictive approach to standing rights.** Under the [‘Plaumann’](#) case law on [Art 263\(4\)](#) and individuals/NGOs, the CJEU continues to interpret Art 263(4) in a manner incompatible with broad access to justice, reading the Art 263(4) standing criteria ‘individually concerned’ as meaning ‘uniquely’ affected by the measure, instead of the plain meaning, ‘having rights which are affected by the measure’. The ACCC criticised this interpretation for departing from the plain meaning of the text. However, this is not a matter that can be resolved through the Aarhus Regulation amendment.
 - 5.2 The proposals do not resolve the absence of standing rights for individuals in the Aarhus Regulation.** The ACCC has also criticised the fact that individuals are entirely absent from the Aarhus Regulation (para 32 – 38 of the [2021](#) advices). Individuals have never been granted any standing rights under the Aarhus Regulations, which only gave standing rights to NGOs to review administrative decisions before the EU Courts.
 - 5.3 The proposals still overly restrict the categories of decisions that are subject to administrative review:**
 - 5.3.1** They do not remove the impugned restriction that the measure must have **‘legally binding and external effects’**. The ACCC found that there was no basis in the Convention for including the phrase ‘legally binding’ effects. They felt that this potentially limited the categories of decisions which are reviewable. This phrase ‘legally binding and external effects’ was also singled out for criticism in the [2017](#) decision, for going beyond the terms of the Convention.

- 5.3.2 The Commission's legislative proposals for revising the Aarhus Regulation also introduce further restrictions, limiting the categories of reviewable acts to **'non-legislative act adopted by a Union institution or body'**. The ACCC raised issue with the term 'adopted' by a Union institution or body, because of the potential for it to be given a restrictive technical meaning.
- 5.3.3 **'Implementing Measures'**: The ACCC also highlighted that excluding provisions for which 'implementing measures' were required at Union or National level was unnecessarily restrictive. This will unjustifiably exclude broad categories of acts and may result in delays waiting for an 'implementing measure' to be adopted. It also means that the right to challenge a measure might vary from country to country due to uneven implementation of access to justice rights across the EU.

5.4 The ACCC report states that these added qualifications add layers of complexity to determining what decisions can be reviewed, generate uncertainty, and in some cases clearly exclude certain decisions which fall within the provisions of the Aarhus Convention.

- 6 The approach of the EU to access to justice rights at EU level stands in marked contrast to the EU's strict approach to implementing the Access to Justice provisions of the Aarhus Convention vis-à-vis Member States.** The failure of the CJEU to take account of the Aarhus Convention's provisions and in particular to read the Art 263(4) requirement of individual concern in light of the provisions of Art 9(3) and the Aarhus Regulation conflicts directly with the CJEU's own approach in LZ C-240/09 and other cases dealing with the national courts role in the implementation of the Convention. However, the current EU position is that this is outside the scope of this legislative amendment to resolve.
- 7 The EU is considering implementation of access to justice rights in two crucial legislative files, the EU Climate Law and the Aarhus Regulation.** Ensuring access to justice at EU level is an important oversight and accountability mechanism. The access to justice provisions in both pieces of legislation are parallel, complementary systems of oversight which would ensure accountability and strengthen decision making at EU and Member State level. It is important to note neither would replace the other as they work at different levels.
- 8 It is in Ireland's interests to promote a strengthened Aarhus Regulation, as well as the full implementation/respect for the Aarhus Convention (in particular the ACCC).** The Convention and the Compliance Committee will play a pivotal role in ensuring (synergistically with the [GF/BA1998](#)) the maintenance of cross-border environmental standards post-Brexit. Non-compliance with the ACCC's findings in the case of the proposed amendment to the Aarhus Regulation sets a dangerous precedent which could weaken the effectiveness of the Compliance mechanism. Additionally, the EU institutions/bodies will have oversight of certain matters in relation to the [Protocol on Ireland/Northern Ireland](#), and NGOs/Individuals may wish to review decisions made by EU bodies under the Aarhus Regulation if they contravene any environmental laws. Therefore, it is important for Ireland that the Aarhus Regulation complies with the principles of broad access to justice, to allow this to happen.
- 9 The importance of the opportunity before the EU Legislature cannot be overstated.** It has never been more urgent that EU institutions and bodies are transparent and accountable for the decisions that they make. The revision of the Aarhus Regulation clearly has strong implications for the quality of access to justice across all aspects of environmental policy including climate action and the related biodiversity crisis. Strong oversight and accountability make the EU stronger and enhances institutional legitimacy. It is also important that the EU is not seen to 'cherry pick' between international norms it is willing to adhere to, as this puts at risk its leverage in global climate diplomacy as the world prepares for the crucial Glasgow Climate COP in October 2021.

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