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Environmental Justice Network Ireland

Access to Justice Observatory
Technical Report

The EU Aarhus Regulation, the Aarhus Convention and the rule of law: Q&A

Technical Report

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This technical report examines in detail the implications of the Aarhus Convention Compliance Committee's (ACCC) advices to the EU on the draft Aarhus Regulation amendment contained in EU Commission's proposal COM(2020) 642 final. It also examines the impact of the changes proposed by major EU NGOs, ClientEarth, EEB and Justice & Environment ('the NGO proposals'). The Commission amendments are aimed at bringing the Aarhus Regulation into compliance with the EU's international law obligations (specifically the Aarhus Convention) and the findings and advices of the ACCC, which is the body established to oversee compliance with the Convention's requirements. The findings of the ACCC from 2011 and 2017, and the recent advices from 12th February 2021, make it clear that neither the original Aarhus Regulation, nor the Commission's proposals, bring the EU into compliance with the requirements of the Convention. The document provides detailed responses to some of the key questions which have been raised in the context of the EU's review of its Aarhus Regulation and con in light of recent ACCC advices.

Background

**A summary of this paper is available here.*

The key changes being proposed by the Commission relate to the definition of an administrative act – which is the category of acts that can be reviewed under the Regulation. The nature of a reviewable act is defined in Article 2(1)(g) of the Aarhus Regulation.

The original text of the Article 2(1)(g) defines this concept in the following terms:

"'administrative act' means any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects."

The ACCC highlighted "**individual scope**", "**under environmental law**" and "**legally binding and external effects**" as being unduly restrictive and incompatible with the Convention.

The COM proposal replaces the original Article 2(1)(g) with the following (provisions underlined are new additions):

"'administrative act' means 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), excepting those provisions of this act for which Union law explicitly requires implementing measures at Union or national level;'"

The NGO proposal was for Article 2(1)(g) to be replaced by the following:

"*'administrative act' means any non-legislative act adopted by a Union institution or body, which has legal effects and contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1);"*

The NGO proposals would ensure Article 2(1)(g) is fully compliant with the ACCC's ruling and the Convention. The NGO proposal also contains amendments ensuring costs are not prohibitively expensive (this was not a specific finding of the ACCC but is in line with the Convention) and an amendment to include State Aid decisions in the scope of reviewable acts (currently excluded). State Aid decisions were not dealt with directly in the findings in 2017 on ACCC/C/2008/32 but arise from the ACCC findings in a different case (ACCC/C/2015/128); the revision of the Regulation should take account of the ACCC's rulings in both cases.

Contents

1. Is Member State level access to justice affected by the current proposals?

No. The Aarhus Regulation, the Commission amendment and the NGO proposals only apply to EU institutions and bodies. The Aarhus Regulation only facilitates review of EU bodies before the CJEU. It will not create any new Member State level access to justice rights, issues or administrative burdens. For the same reasons, the NGO proposals will not affect Member State level access to justice as these rules are only applicable to EU bodies/institutions and facilitate challenges before the CJEU only. Therefore, there will be no change to Member State level access to justice.

2. Will the ACCC recommendations or the NGO proposals create any extra administrative burdens for Member States?

No. In fact, it will reduce the burden on Member States. Facilitating proper access to justice at EU level (as required by the Aarhus Convention) will ensure that problematic acts of EU institutions and bodies are dealt with at EU level instead of having to be first implemented by Member States, then subjected to national level challenges through the Courts, and ultimately ending up before the CJEU anyway through national courts making Art 267 references on acts implementing the acts of EU institutions or bodies. The NGO proposals are more consistent with the Aarhus Convention which demands access to justice before the CJEU for individuals and NGOs. It is also more consistent with the requirements of the findings of the ACCC in 2011 (para 90) which indicated that Art 267 references are not a substitute for proper access to justice at EU level. This is reiterated in the consideration of Art 267 reference procedure in the advices issued in 2021 (para 32 - 35). Finally, it is more consistent with the principle of subsidiarity and the division of competencies of the EU that the public get to review directly before the EU Courts the decisions of EU bodies. (See Q.5 for more detailed consideration of these issues.)

3. Do the NGO proposals go too far by including State Aid decisions within the remit of the Aarhus Regulation given that exclusion of State Aid is not criticised in the findings of the ACCC in ACCC/C/2008/32?

No. The exclusion of State Aid decisions from the scope of the Aarhus Regulation (in Article 1) has been the subject of draft findings from the ACCC with respect to State Aid, ACCC/C/2015/128, which were sent out for comments on the 18th Jan 2021. This ACCC decision arose out of a complaint by Oekobeuro concerning UK State Aid for the nuclear power industry, specifically benefitting the Hinkley Point power station. Greenpeace Energy in C-640/16 P sought review by the CJEU of the decision of the EU Commission to approve the State Aid measures concerned and were refused. The ACCC found that the exclusion of State Aid decisions from the ambit of the Aarhus Regulation was not compliant with the Convention. The EU Commission proposals do not remove this exclusion. The 2021 advices (para 70) from the ACCC on the EU's amendment of the Aarhus Regulation mention the findings in ACCC/C/2015/128 in order to demonstrate that compliance with those findings (and removal of the State Aid exception from the Aarhus Regulation) is a necessary part of compliance with Article 9(3) of the Aarhus Convention.

4. What is the effect of the new exception in the Commission Proposal excluding from review acts for which Union law "explicitly requires implementing measures at Union or national level"?

The inclusion of this phrase in the Commission proposal drastically limits the categories of reviewable Acts under the Aarhus Regulation. This is clearly inconsistent with the Aarhus Convention which provides that Parties can limit the categories of eligible applicants for administrative/judicial review using standing criteria but have no discretion

regarding the categories of acts that are reviewable (see para 21 and para 47 of the 2021 advices quoting para 101 of the 2017 findings in this regard). That the introduction of this phrase represents a restriction on the categories of acts that are reviewable is confirmed by the ACCC advices of the 12th February 2021, paras 56-68 where the introduction of this phrase was criticised.

A similar requirement relating to regulatory acts which do not "entail implementing measures" can be found in Art 263(4)TFEU and has been interpreted by the case law to mean:

"an implementing measure is any measure adopted by an implementing authority on the basis of a regulatory act, irrespective of the exercise of discretion, provided that it 'constitutes a decision' in the sense that legal effects formally flow from it, rather than the related EU act." (Buchanan & Bolzonello, 2015)

The CJEU (in the 'Telefónica' Case 274/12P) interpreted this broadly. The court said whether an act entails an implementing measure should be assessed by reference to the position of the person pleading the right to bring proceedings. This renders its application variable from case to case, and difficult to predict. In the Telefónica case, a Commission Decision found a tax relief scheme run by Spain was illegal State Aid. The ECJ identified that the Commission State Aid decision would entail the following implementing measures: (**1**) refusal of existing applications for tax relief (para 36) (**2**) issuing of tax documents and other administrative acts (para 35) (**3**) issuing of tax documents and other administrative measures. In the case the Commission also argued that the act of bringing the scheme to an end and recovery of benefit granted were also implementing measures (para 26).

In another case (C456/13P) changes to the sugar quota and import tariffs system by four Regulations constituted measures for which implementing measures were required – these being decisions in response to application by sugar producers/importers for issue of certificates and licences under the scheme.

The inclusion of the word "explicitly" does not carry any particular legal significance and in the Explanatory Memorandum to the draft amendment the EU Commission have not argued that it has any particular meaning. Therefore, it can be considered that it simply means "on the face of it" - that it is clear from a reading of the act concerned, or another act that it interacts with, that implementing measures will be required.

An example of a decision which would explicitly require implementing measures includes a decision such as the Commission decision to approve the use of glyphosate within the EU. This decision will require implementing measures under a separate piece of Union law, the Pesticides Regulation (Article 29) which prevents products containing pesticides such as glyphosate from being placed on the market without a Member State level authorisation. Therefore the original Commission decision will not be amenable to review.

The Commission justifies the exclusion of acts requiring implementing measures is justified on the grounds that the implementing measures can be challenged rather than the original measure, and the EU expects this to be mainly by way of Art 267 reference procedure

This is flawed on a number of grounds - it requires the implementation of a measure which contravenes environmental law, before it can be challenged, giving rise to the possibility of environmental damage in the process. This is clearly inconsistent with precautionary principle. It assumes that an EU measure can contravene environmental law only once it is implemented. It also assumes that the decision to introduce an implementing measure will be taken, which might not happen, leaving the original decision unchallengeable. It assumes that the system of judicial protection is adequate at Member State level (which clearly it is not - as demonstrated by the Milieu Study 2019). The Milieu study also suggests (at pg. 120) that most EU institutional decisions require implementing measures. Most importantly, the exclusion of such acts would be in breach of the Aarhus Convention, which binds the EU. The Union cannot justify its failure to comply with its international obligations by reference to EU law.

5. Is the exclusion of acts for which Union law "explicitly requires implementing measures at Union or national level" required in order to respect the integrity of the EU legal order?

No. The effect of this measure is (as explained above) to ensure that decisions of EU institutions/bodies can effectively only be challenged through their implementing measures, generally at national level, through Art 267 references from the Member State court where the individual lives. The EU Commission has argued that this is necessary to respect the division of competencies of the EU in the area of environment, which is a shared competency, and the principle of subsidiarity.[1] Subsidiarity is described in Art 5(3)of the TEU as that "the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member States" It is clear from the wording of Art 5(3) TEU that the Union can act in this instance, particularly as the Member States cannot in any meaningful way review the decisions of EU institutions and bodies. The Member State courts can only hand over such questions on Art 267 reference, to the CJEU. Subsidiarity permits administrative review of EU institutional decision making directly before the EU Courts, since the objectives of such review cannot be achieved by Member State courts.

In the advices of the ACCC of the 12th February 2021, they state that the EU has not presented any evidence that allowing review at EU level would affect the special legal order of the EU. They also discuss at length the reasons why the arguments based on subsidiarity are flawed (paras 32 - 35), because the ACCC are requiring that decisions of EU bodies are reviewed at EU level, which does not conflict with any existing rules on subsidiarity or competence.

It is clear that under Art 4 of the Treaties the EU has shared competence in the area of Environment, as well as Freedom, Security and Justice. Art 2 TFEU provides that in areas of shared competence "*The Member States shall exercise their competence to the extent that the Union has not exercised its competence*.". The EU Commission has argued that it has not yet implemented the access to justice provision in Art 9(3) of the Aarhus Convention (despite the Aarhus Regulation constituting a partial and incorrect implementation of Art 9(3)) and therefore it has not exercised its competence in this area. However, its own inaction in not fully implementing the access to justice provisions of the Aarhus Convention is not a justification for continuing not to do so. It clearly has the capacity to if it chooses. This is further supported by Art 191 and 192 TFEU which create competence in the area of environmental matters.

In fact, it seems clear that the division of competencies of the EU is best respected by the EU Courts reviewing the flawed acts of EU institutions and bodies. There is no question but that the CJEU has competency in the area of the environment over the acts of EU institutions and bodies that represent a threat to the environment. The EU Commission itself argued that the EU had competence to act to provide Union wide rules on access to environmental justice and that subsidiarity did not pose a problem in this regard (pg. 27 & 28 of the 2017 Commission Impact Assessment for an Access to Justice Directive, SWD(2017) 255 final)

It has also been stated many times by leading academic commentators (e.g. Craig & DeBurca, (2020), pg. 567)) as well as the ACCC decision of 2011 (para 90) that the principle of subsidiarity does not support the theory that citizens should be confined mainly to Article 267 references as the main way to challenge EU institutional acts/decision. This is because in fact the decision is not taken by the body closest to the citizen (the national court). It must be referred to the CJEU by the body closest to the citizen, who can in the intervening period offer no more than temporary interim reliefs if anything. The CJEU is the only court with the capacity to annul an EU institutional measure.

This system also gives rise to several practical problems identified by commentators:

i. It depends on access to justice rights being fully vindicated at Member State level which the EU's own Study on the matter in 2019 shows is not the case.

[1] Article 5(3) TEU: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

ii. It requires the implementation of a measure which contravenes environmental law before it can be challenged, which is contrary to the precautionary principle. It should be possible to challenge the decision that contravenes environmental law directly.

iii. It depends on the citizen being able to put the case forward to the courts, convincing them to make the Art 267 reference (which some countries' courts show a marked reluctance to do), and this may require fighting through several levels of the Courts system just to get the reference. Then the citizen must wait for the reference to be heard and decided, returned to the originating court, and then implemented by the National Court (as highlighted by Craig & DeBurca (2020), pg 567). This may take many years during which the measure may be in place damaging the environment.

iv. Art 267 references go directly into the highest level of the CJEU, clogging it up with excess cases that could be dealt with by the General Court if they came in under Art 263(4). (Craig & DeBurca (2020) pg 567).

In any event, even if the EU legal order militated in favour of excluding acts which require implementing measures at Union or national level (which it clearly does not) the EU's legal obligation is to make such acts subject to challenge, and that obligation cannot be escaped simply because of the alleged nature of the EU legal system.

6. What is the meaning of "legally binding and external effects" in the Article 2(1)(g) definition of administrative act?

The phrase "legally binding and external effects" is treated as interchangeable with "legally binding effects vis-a-vis third parties", a phrase that originates in Art 263(1)). This is the interpretation suggested by the EU Commission in its Explanatory Memorandum (pg. 8) to its proposal. This can be seen in the case law (e.g. Case T9/19).

The Commission has already deemed that the following 'acts' do not to have "legally binding and external effects" under the current Aarhus Regulation:

1. A decision adopting the list of candidates to be proposed by the Commission to the Management Board of the European Chemicals Agency for the appointment by the latter of the Executive Director of the Agency.

2. The decisions approving Operational Programme Transport for certain Member States

3. An implementation measure for a provision of the Fuel Quality Directive

4. Decisions by the Commission on state aid for environmental protection and energy 2014-2020.

5. Decisions by the Commission to issue a statement concerning the implementation of a provision of the EU ETS Directive specifying the way Member States may use revenues generated from auctioning of allowances to support the construction of certain plants.

For full details of the above decisions please see the Comments of ClientEarth, 23 Feb 2015, paras 61 - 72 available here.

The problem with this term is that an administrative act which does not have legally binding effects on third parties may nevertheless have negative effects on the environment and breach environmental law. For example under the draft EU Climate Law, Article 6, the EU Commission will have the power to issue "recommendation" against Member States who are not complying with their climate law obligations. If the Commission fails to issue a recommendation, or issues a recommendation that is "weak", NGOs will not be able to challenge the Commission on such acts or omissions as a "recommendation" is a non-legally-binding measure (Art 288 TFEU, Craig & DeBurca, 2020, pg. 140).

While the Aarhus Convention gives parties the discretion to limit the categories of parties who may be eligible to seek review by using standing criteria, it absolutely does not permit parties to limit the categories of acts that may be reviewed. In addition, the Aarhus Convention very clearly requires that all acts and omissions that have the potential to

contravene (in this case - EU law) relating to the environment must be subject to review. This phrase is particularly designed to eliminate review of "framework" type decisions, not addressed to anybody in particular, and producing no immediate concrete changes in a named individuals' legal rights. There is nothing in the Convention permitting the exclusion of such decisions. If they contravene environmental law they should be reviewable.

It is very clear that the Commission's interpretation of the concept in its previous decision making (see above) of the 'external effects' would lead to a wide range of acts being excluded from review and would breach the Convention. This is why the advices of the ACCC from 12th February 2021, paras 47 - 55, and the findings in 2017 para 101- 104 highlight this phrase as problematic.

It is therefore essential that if the reference to 'external effects' is adopted in the Aarhus Regulation – it must be clearly defined so that it does not operate to permit the EU to exclude act/omissions from review for reasons other than those allowed by the Convention (but preferably it would be removed to avoid any issues of interpretation).

7. Are individual rights of review required to be inserted in the Aarhus Regulation?

Yes. Neither the original Aarhus Regulation nor the Commission Proposals included rights for individual members of the public to seek administrative review of EU institutional decision making. This has been extensively criticised by the ACCC in their decision in 2017 and their advices on the Commission's proposal in 2021 (paras 36 - 42). The Aarhus Convention does not (as asserted by the Commission) privilege NGOs over individuals, but rather NGOs are a subset of "members of the public" who are to be given access to justice rights. This view of the Convention is not supported by the CJEU's own decision making or any other interpretations of the Convention. There is no basis for the exclusion of individuals from rights of review in the Aarhus Regulation and this is not required in by Art 263 TFEU.

The Aarhus Convention is quite clear that access to justice rights must be provided to "the public". Article 2 of the Convention states:

"*4. The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations organizations or groups;*

5. "The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

It can be seen from this that NGOs are a subset of "the public", and not a substitute for the public as maintained by the EU in the Explanatory Memorandum to the legislation.

The Aarhus Convention does not require "*Actio Popularis*" (that legal action can be taken by any member of the public at large without any restriction). It permits Parties (including the EU) a limited discretion as to what section of the public is afforded standing. Parties to the Convention may lay down criteria (the two options provided by Art 9(2) are "sufficient interest" or "impairment of a right" for challenging any decision, plan or program subject to public participation or any contravention of any other provision of the Convention). Art 9(3) states that the discretion must be exercised in accordance with the principles of broad access to justice; "consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention" (Art 9(2)).

The ACCC have stated their advices and findings that barring individuals is not consistent with "wide access to justice" required by Art 9(3) of the Convention, e.g. at para 92 – 93 of the advices of the 12th February 2021:

"…by barring all members of the public except NGOs meeting the criteria of its article 11, the Aarhus Regulation fails to correctly implement article 9, paragraph 3"

Also, in the findings 2017 in ACCC/C/2008/32 EU, at para 36-42 the ACCC stated:

"It is for the Party concerned to determine which measures may be most feasible and appropriate, bearing in mind its special character as a regional economic integration organisation. The Committee, however, makes clear that access to review procedures under Article 9(3) of the Convention cannot be limited to NGOs only".

This is consistent with previous ACCC decision making such as ACCC/C/2006/18 (Denmark) (see paras 30-31).

Finally, the CJEU has been clear that categories of persons cannot be restricted in a manner not consistent with "broad access to justice" (e.g. LZ no 1 Case C240/09 paras 47 -49, where the CJEU said that Member State's procedural rules must not make it and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law). This is consistent with general CJEU environmental decisions such as C-237/07 Janecek (para 39) which bases standing rights for individuals on the general EU principle of an effective judicial protection. This is also consistent with the right to an effective remedy contained in Art 47 of the EU Charter of Fundamental Rights.

In conclusion, access to justice rights for individuals are required by the Aarhus Convention and the previous findings of the ACCC. As can be seen from the analysis in Q. 5 above, these rights are not adequately provided for through the Art 267 reference procedure.

8. Do the EU Treaties prevent the EU from complying with the Aarhus Convention?

No. If the amendments suggested by the NGO proposal were adopted there would be no conflict with the Treaty provisions governing access to the CJEU under Article 263(4). Indeed, if all restrictions were stripped from the Aarhus Regulation (e.g. administrative acts to be simply defined as acts of EU institutions/bodies that contravene environmental law) and the language in the Regulation simply reflected the Convention's language, then the Regulation would be interpreted in light of the relevant CJEU interpretation of the Treaties, which would still govern its application and no conflict would arise. The Treaties (specifically Art 263(4)) do not require the Aarhus Regulation to contain restrictions on standing or categories of acts which are reviewable. Art 263(4) can operate to govern/restrict the admissibility before the court of any and all actions for annulment including those coming in under the Aarhus Regulation, by itself without the need for restrictions in the Aarhus Regulation itself. There is no legal need to import the Treaty standing criteria into the Aarhus Regulation. The Regulation should be designed to ensure compliance with the Convention. This is why the ACCC itself recommended in its 2017 findings at para 123 that it would be better to stick more closely to the language of the Convention. The ACCC have stated clearly that there is no evidence having more extensive access to review at EU level is incompatible with the EU legal order (e.g. at para 68, and paras 32-35 of the 2021 advices). The fact remains also that nothing in the NGO proposals seek to affect the Courts' jurisdiction in relation to determining standing.

9. Will the EU be in breach of International Law if it amends the Aarhus Regulation in the manner currently proposed by the Commission, or does not amend the Aarhus Regulation?

Yes. A Party to a Convention violates international law when it commits a breach of an international obligation that the Party (which can be a state or an organisation) was bound by at the time when the act took place. A Party is bound to act according to international treaties it has signed as well as rules of customary international law. The EU has been party to the Aarhus Convention since May 2005, and the current Aarhus Regulation entered into force on 28 June 2007. The ACCC has been clear in its 2017 findings that the Aarhus Regulation as currently drafted does not comply with the Convention. The ACCC has also issued advices on the 12th February 2021 that the Commission proposal does not comply with the requirements of the Convention. The EU Commission has nonetheless stated they intend to proceed with the

current proposal despite being on notice that it is a wrongful act. This places the EU as a whole in violation of international law.

The EU Commission has argued on many occasions that the unique features of the EU's legal system prevent it from fully complying with its Treaty obligations under the Aarhus Convention. The ACCC has addressed this in its advices from the 12th February 2021, and made it clear that they have taken the features of the EU legal system and its unique status into account in its findings. It explains why these are not obstacles to implementation of the recommendations (para 68, paras 32, 35).The EU Commission's flawed argument that the EU's legal system prevents compliance with the Aarhus Convention is, in any event, contrary to customary international law principles and is contrary to Art 27, Vienna Convention on the Law of Treaties in particular. The position of the CJEU as regards giving effect to ACCC interpretations of the Aarhus Convention is the same as any State Parties sovereign national courts whose jurisprudence is found wanting (or indeed any Member State whose Courts interpretation of EU law has been found to be flawed in infringement proceedings).

The EU are currently in breach of international law and have stated an intention to remain so. This is undesirable from a rule of law perspective.

10. Will the removal of restrictions on review under the Aarhus Regulation result in NGOs being able to "paralyse" EU institutional decision making with challenges?

No. The time limits within which the NGO must make the request for review are very short, and the time limits for the body to respond is also limited. This will still be the case with the extensions proposed by the Commission. This limits the impact of the review request on institutional decision making. NGOs have been taking cases before the CJEU seeking review of environmental decisions for many years, since before the introduction of the Aarhus Regulation. They were usually ultimately determined inadmissible, after a hearing before the CJEU on the matter. There is no evidence that this has paralysed decision-making to date. In fact, the EU's own Study into Aarhus Implementation states that only 23 cases were taken before the CJEU by NGOs between 2006 and 2018 (pg. 223). The impact assessment of what would happen if the restrictions on categories of reviewable acts were removed demonstrates that this cannot rise by more than a factor of three, meaning the Commission would likely receive nine or ten requests for review per year rather than the currently average of three requests per year (pg. 224 of the Milieu Study, 2019). Environmental litigation, while increasing as all types of litigation increase, remains a tiny fraction of the case load in most countries. For example in Germany who had to bring in broader standing rule to comply with the Convention/EU law, Aarhus Cases represented 0.04% of the overall case load between 2013 – 2016. In the UK Aarhus Judicial Reviews represented 3% of all Judicial Review cases in 2018-2019, and this is generally consistent every year from 2015- 2019 (also after the broadening of access to justice brought about by EU implementation of the Aarhus Convention standing requirements at Member State level). A 2017 Impact Assessment by the EU Commission indicated (pg 8) that increasing access to justice for individuals and NGOs had not significantly increased the related case load at Member State level across the EU. There will be no floodgates effect, as the usual checks and balances apply to Aarhus Regulation cases as much as to any other type of case.

It is clear from the case law of the CJEU (e.g. Case 82/17P at para 69) and the Aarhus Regulation itself that the NGOs wishing to review decisions of EU institutions/bodies must put forward arguments that have some substance to them before the institution or body is obliged to consider the request for review – they cannot simply assert that the decision needs review, they must show strong grounds that it does. The Aarhus Regulation itself permits the body to refuse the request for review where it is clearly unsubstantiated (Art 10(2)). This is not sought to be changed by either the Commission proposals or the NGO proposals. This limits frivolous or vexatious reviews being initiated in a way that could interfere with decision making.

It should also be borne in mind that there are considerable costs implications to bringing challenges of administrative review decisions before the CJEU, a matter raised by ClientEarth in their complaint in ACCC/C/2008/32 but not addressed in the decision by the ACCC. This is also referenced in the 2019 Study on Aarhus Implementation in the EU where they show considerable NGO costs associated with such challenges (pg. 169) including manpower costs and legal fees, which is particularly disadvantageous to NGOs run on tight budgets. There is also a reputational risk if weak cases are fielded, and legal professionals acting no-foal, no-fee also filter cases based on merit/likelihood of success. These factors also mean that NGOs themselves and their legal representatives select carefully the cases that they bring on for challenge, prioritising those cases with merit and strategic value in terms of environmental protection. These factors are also deterrents to frivolous challenges.

NGOs may also be exposed to "other side costs" if they lose the challenge. For example in Case T-545/11, two NGOs (Greenpeace Netherlands and PAN Europe) initiated an action under the Aarhus Regulation access to information provisions were ordered by the General Court to pay the costs of seven intervening parties who were industry bodies and companies. This is why the NGO proposal has recommended a provision regarding prohibitive costs be introduced in line with the Aarhus Convention Art 9(4) requirement that access to justice be "fair, equitable, timely and not prohibitively expensive". The level of costs risk represents a chilling factor even for cases of merit.

It also remains that the decision challenged would still need to contravene environmental law under ACCC recommendations (and current NGO proposals) which in itself limits the categories of institutional decision making which can be challenged. An NGO could not, for example, challenge any random internal employment decision to an EU institution or body, unless the decision somehow contravened environmental law. Oversight and accountability for institutional decision making are a core part of any functioning democracy that upholds the rule of law. The narrative that more oversight is somehow undesirable is a troubling one.

All that would change should the NGO proposals be adopted is that the NGOs might succeed in blocking decisions which the CJEU finds contravene environmental law. This is as it should be and is merely the Courts exercising an appropriate supervisory jurisdiction over the EU institutions and bodies, as is their mandate in the Treaties. Decisions which contravene environmental law need to be challenged if the EU is to do more than pay lip service to commitments of a Greener Europe in the EU Green Deal and offer the kind of global leadership on Climate Action that it lays claim to.

11. Does the ACCC disregard the special character of the EU in its advices/findings?

No. The EU have argued (e.g. at pgs. 1&2 of its comments on the draft advices dated 1st February 2021: "the Committee disregards fundamental elements of the EU legal order flowing from the special character of the EU as a Party to the Convention, which leads the Committee to draw erroneous conclusions.") that the ACCC advices/findings disregard the special character of the EU and the existence of Art 267 reference procedure. This is rebutted by the ACCC, for example, by paragraph 41 of the 2021 advice, which has been amended to make express reference to the EU's special status; it says that the EU can bear in mind its special character as REIO (Regional Economic Integration Organisation) when deciding what measures are most feasible and appropriate to provide access to members of the public. Paras 32 – 35 of the 2021 advices explain why the preliminary reference procedure does not adequately provide for access to justice at EU level, as does para 90 of the 2011 decision.

As explained in detail under Q. 5 above, it seems clear that the special character of the EU is best respected by the EU Courts reviewing the flawed acts of EU institutions and bodies. There is no question but that the CJEU has competency in the area of the environment over the acts of EU institutions and bodies that represent a threat to the environment, and this is also in line with the fundamental principle of subsidiarity.

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Environmental Justice Network Ireland

The Environmental Justice Network Ireland was established in June 2019. EJNI is an all-island network which seeks to build collaboration between groups and individuals involved in the delivery or pursuit of env justice. Its goal is to connect academics, lawyers, NGOs, decisionmakers and community activists and in doing so help equip people with the knowledge and tools they need to enhance the quality of environmental justice on the island of Ireland.

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