

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

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This Q&A examines the implications of the Aarhus Convention Compliance Committee's (ACCC) advices to the EU regarding the draft Aarhus Regulation amendment contained in EU Commission proposal [COM\(2020\) 642 final](#), as well as the impact of the changes [proposed](#) by major EU NGOs, ClientEarth, EEB and Justice & Environment ('the NGO proposals'). 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. Further detail on each of the questions and answers below can be found in our detailed technical paper, available [here](#).

- 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.
- 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 (as they should be).
- 3. Do the [NGO proposals](#) go too far by including State Aid decisions within the remit of the Aarhus Regulation considering that the 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 make it clear that State Aid decisions should come within the Aarhus Regulation where they contravene environmental law.
- 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. As the ACCC have [stated](#), this is inconsistent with the Aarhus Convention which provides that Parties have no discretion regarding the categories of acts which are reviewable.
- 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 inclusion of this measure is to ensure that decisions of EU institutions/bodies can effectively only be challenged through their implementing measures, at national level, through Art [267](#) references. Subsidiarity does not require this, since the objectives of such review cannot be achieved by Member State courts.
- 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 represents a limitation on the categories of acts

which are reviewable, which is not permitted by the Aarhus Convention, as highlighted by the ACCC in their decision in [2017](#).

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 as a contravention of the Aarhus Convention in their decision in [2017](#) and their advices in [2021](#) and is not consistent with the CJEU case law. This is not required by Art [263](#) TFEU.

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). If all restrictions were removed from the Aarhus Regulation then the Regulation would still be interpreted in light of the relevant CJEU interpretation of the Treaties, which would still govern its application and no conflict would arise.

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. The ACCC has been clear in its [2017](#) findings that the Aarhus Regulation as currently drafted does not comply with the Convention. This is consistent with previous findings of the ACCC. The ACCC has also advised in [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 it despite being on notice that it is a wrongful act. This places the EU as a whole in violation of international law.

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 EU [impact assessment](#) of removal of restrictions demonstrates that review requests to the cannot rise by more than a factor of three (going from average of 3 to 9 requests per year). Statistics from [Germany](#) and the [UK](#) show that broad standing rights do not significantly increase the number of environmental cases. Filters remain in place – institutions can refuse unsubstantiated requests under the Aarhus Regulation, and NGOs must establish a legal basis. Decisions must contravene environmental law before they are reviewable. Running court cases takes financial resources and manpower, scarce for NGOs on tight budgets. The likelihood of vexatious requests is therefore low.

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

No. This argument by the EU is addressed and rebutted by the ACCC (for example, by paragraph 41 of the [2021](#) advice), which makes express reference to the EU’s special status. The special character of the EU legal order is best respected by the EU Courts reviewing the flawed acts of EU institutions and bodies.

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