EJNI
Environmental Justice Network Ireland

Access to Justice Observatory
Final Report

# Final Report:

# Analysis of the revised proposal to amend the Aarhus Regulation agreed 12.07.21

Final Report

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**Abbreviations**: ACCC/M/2017/3 referred to as "**M3**". ACCC/C/2008/32 Parts 1 & 2 is "**C32**". ACCC/C/2015/128 is "**C128**". Aarhus Convention Compliance Committee is"**ACCC**". Council Legal Services is "**CLS**" and European Parliament Legal Services is "**EPLS**". The Court of Justice of the European Union is "**the CJEU**". Member States are "**MS**".

# Introduction

The EU Commission has made a proposal for amendments to the Aarhus Regulation, a law that sought to implement the Aarhus Convention at EU level, vis-à-vis EU institutions and bodies, giving access to information rights regarding EU documents and providing for access to justice in relation to EU decision making. The Regulation sought to allow access to justice by providing NGOs meeting certain criteria the right to request an internal review of acts/decisions of EU institutions and bodies, and then to challenge the outcome of the review process before the CJEU. NGOs could request review of EU institutional decision making internally and on appeal before the CJEU. The regulation was challenged before the ACCC and found wanting in findings in 2011 and 2017 (Case C32). The EU Commission's proposal was aimed at improving implementation of the Aarhus Convention, and partly sought to address the ACCC findings. The Commission proposal was reviewed by the ACCC in "M3" in February 2021. The ACCC advised that the new proposal was still flawed and would not comply with the Convention, because while it removed certain restrictions, it introduced others (such as the implementing measures exclusion discussed below), and completely ignored other issues such as rights of standing for individuals to review EU decisions. The EU Parliament attempted to address the issue of compliance of the regulation with the Convention by introducing a number of amendments aimed at ensuring full compliance not just with the findings of the ACCC, but with the core requirements of the Convention itself. These amendments went through trilogue negotiations, with agreement reached on the 12th July 2021, and this analysis explains the final proposal to revise the Aarhus Regulation.

The key points of the final Political agreement on the 12th July 2021 are:

a. **The new definition of administrative act includes any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law. The exclusion from internal review of administrative acts that require national or EU implementing measures was deleted. (New Article 2(1)(g) and (f))**

b. **Providing rights for individuals to request review of such administrative decisions (new Art 11(1)(a)), in addition to the already existing standing rights of NGOs. This is subject to a range of requirements including mandatory representation, and two alternative grounds, impairment of a right and public interest. The first ground requires demonstrating both impairment of a right and being directly affected in comparison to the public at large (with a recital emphasising this is not to be interpreted restrictively in the same way as "direct and individual concern" in Art 263(4) of the TFEU). Alternatively, individuals can take a public interest action where at least 4,000 people from five Member States (with a minimum of 250 from each MS) support the measure, demonstrated by physical or digital signatures. These provisions will only become effective 18 months after entry into force of the main amendments.**

c. **Recitals on costs (Recital 3(a)) (implementing the "not prohibitively expensive" requirement of Art 9(4) of the Convention) and stating that judicial review should be both procedural and substantive (Recital 12a), which is an important clarification of the scope of review.**

European Parliament proposals on the inclusion of State Aid decisions in the scope of administrative review, and access to environmental information were lost in trilogue. The EU Commission committed to impact assessment of the issue of State Aid by the end of 2022, and to produce proposals to address same in 2023. Provisions improving access to information and granting access to the Member States negotiation positions introduced by the EU Parliament's proposal were also cut from the final version in trilogue.

Also lost during trilogue was a significant recital making it clear that the revised regulation is intended to implement Art 9(3) and 9(4) of the Convention (AM1). This may prove important later in terms of how the CJEU interprets the Aarhus Regulation, and this was an explicit request of the ACCC, because the CJEU had previously relied on the lack of such express implementation of Art 9(3) as justification for finding it did not have to interpret Union law in light Art 9(3) of the Aarhus Convention. However, there is a recital acknowledging the importance of compliance with the Convention and Art 9(3) and Art 9(4) (Recital 4).

These key amendments are discussed in detail below.

# 1. The Definition of "Administrative Act" & "Omission"

**The key change** introduced by the EU Parliament amendments related to the definition of an administrative act – which are 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 original 2006 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.

COM proposal sought to replace the original Article 2(1)(g) by the following:

> *"'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;'"* *(provisions underlined are new)

EU Parliament proposal was for Article 2(1)(g) to be replaced by the following (AM 23):

> *"'administrative act' means any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1); administrative acts shall not include acts adopted by public authorities of Member States;*

The final version in the informal consolidated version of the Regulations under the Political Agreement of the 12th July 2021 is extremely similar to this:

> *"'administrative act' means any non-legislative act adopted by a Union institution or body, which has legal 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*)"

Also included is a definition of administrative omission in Art 2(1)(h), defining it as a failure to adopt a non-legislative act, where that failure is a contravention of EU environmental law.

The removal of the "individual scope" restriction from the original 2006 Regulation is hugely important in terms of turning the Aarhus Regulation into a usable mechanism of review. Also important is the move from applicability of the review mechanism from acts "adopted under environmental law", to acts which "contravene" environmental law, with the recitals making it clear that the mechanism is applicable not only to measures adopted under environmental law, but also the law in other policy areas (Recital 9 & 10). This also expands hugely the categories of reviewable acts.

Finally, the removal from the original COM Proposal of the exclusion of acts requiring implementing measures (almost all EU level acts/decisions) avoided what would have been an extremely narrow definition of administrative acts. It should be noted that Recital 10a defines "legal and external effects" as equivalent to the phrase "legally binding vis-à-vis third parties", as interpreted by the CJEU and therefore the definition of administrative acts does not include preparatory acts, recommendations, opinions, and similar non-binding acts that do not produce legal effects vis-à-vis third parties.

Overall, it appears that the final version of the definition of reviewable acts arrived in trilogue ensures Article 2(1)(g) & (f) is fully compliant with the ACCC's findings and the Convention and represents a significant widening of the categories of decisions that are subject to the review mechanism under the Aarhus Regulation.

# 2. Individuals Rights of Access to Administrative & Judicial Review

The EU Parliament's proposal also contained amendments providing standing rights for individuals (AMs 25 – 30, 33, 39). The EU Commission never considered introducing individual rights despite this being a core requirement of the ACCC's findings in C32. As a result, no scoping or impact assessments were carried out on the issue, unlike the other parts of EU Commissions proposal. Therefore, the individual rights amendments eventually adopted are something of a "Frankenstein's Monster", cobbled together from parts of different ideas circulated by various actors including NGOs, academics, and various political actors.

The resultant proposal is somewhat restrictive.

The main operative provisions are contained in a new Art 11(1)(a) of the informal consolidated version of the Political Agreement, which will not take effect until 18 months after the entry into force of the amendments. This will presumably allow for some kind of post-hoc impact assessment. The operative provisions are supplemented by a number of highly significant recitals that are clearly aimed at guiding how the CJEU will interpret the provisions.

The main operative provisions consist of two options, both of which require representation by a lawyer or, unusually, an eNGO:

1. **An individual who complains of "impairment of a right" who is "directly affected in comparison to the public at large**".
   Recital 14(b) suggest impairment involves demonstration of "a violation of their rights. This may include an unjustified restriction or obstacle". Recital 14(c) makes it clear "directly affected" is not to be construed as "Plaumann" standing in the sense of "directly and individually concerned" and instead signposts that it means an "imminent threat to their own health and safety or of a prejudice to a right to which they are entitled pursuant to Union legislation", significantly referencing Janecek (C-237/07) (which based the standing rights for individuals on the general EU principle of an effective judicial protection).

2. **A group of individuals demonstrating "Sufficient Public Interest".**
   This ground is particularly complex and interesting. It requires a request for review be supported by signatures of a numerical threshold of 4000 members of the public from at least five Member States, with a minimum of 250 signatures from each of the five Member States. They must also demonstrate "sufficient public interest" in the form of "preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, or combatting climate change". This ground also requires representation by a lawyer qualified to practice in a Member State, or an environmental NGO.

Whether these definitions of standing rights for individuals will meet the requirements of the Aarhus Convention will depend in large part on how they are interpreted, in particular by the CJEU but also by the administrative decision makers who receive requests for internal review. The Aarhus Convention does not require "actio popularis" (access to justice by all) and permits Parties to lay down the conditions for restricting access to justice. However, they must do so in a manner consistent with the principle of broad access to justice (Art 9(3)). It is clear from the decision making of the ACCC that restricting the right in a manner that renders it unusable by the majority of the public concerned will put the Party in breach of the Convention.

The two options provided by Art 9(2) for access to justice criteria 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.

The ACCC have been clear in their advices and findings that barring individuals is not consistent with "wide access to justice", e.g. at para 92 – 93 of the M3 advices of the 12th February 2021, and the 2017 findings in C32, at para 36-42. This is consistent with previous ACCC findings such as ACCC/C/2006/18 (Denmark) (see paras 30-31). The CJEU, when discussing Member State level access to justice, 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 they said that Member State's procedural rules 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.

It seems clear that the public interest ground will be very difficult to co-ordinate, particularly in the context of the time limit of 8 weeks from the date of the decision or notification or the challenged decision, in addition to the obligation to have a law firm or eNGO confirm compliance with the complex requirements of Art 11(1)(a) within that timeframe. It remains to be seen whether the ACCC will consider such a complex mechanism represents genuine access to justice within the spirit of the Convention. The impairment of a right ground with its requirement of "particularly affected" has potential to be interpreted very restrictively, but it is to be hoped that Recital 14b will obviate restrictive interpretations along Plaumann lines. The requirement of representation seems to be an unnecessary restriction on the right of access to justice, and it seems difficult to justify. ENGO representation is not practical, and lawyer representation will represent an additional costs barrier, particularly in the absence of any kind of legal aid scheme at EU level. The Recital 3 "not-prohibitively-expensive" requirement appears weak and confined to suggesting that EU institutions should not seek exorbitant costs from litigants, which does nothing to help address covering the cost of mandatory representation.

Regarding the concept that individuals should be represented by environmental NGOs, the notion that environmental NGOs on tight budgets with scarce resources have the capacity to maintain their own advocacy operations while offering some kind of "public defender" system, does a disservice to complainants, and to NGOs. It seems like an attempt to foist onto the charitable sector the obligations of the State/Supra-State entity, and is highly impractical. It is a very different matter to engage in legal representation than to initiate a case on one's own behalf as an eNGO, which is self-representation. Practically, there would be great difficulty for an environmental NGO in obtaining the equivalent of professional indemnity insurance required to represent clients, and most lawyers who work in-house in NGOs would be committing misconduct by representing clients without such insurance. Again, the existence of standing rights depends on the knowledge and connection of the member of the public to a third party over whom they have no control, in this case an NGO who is willing to offer legal representation. For individuals who don't happen to already have a close working relationship with an NGO the way remains closed.

The right of access to the court is of fundamental importance and it is hard to see what justification could be offered that would counterbalance it. It also remains that this is a blanket requirement of representation for all individuals and therefore is not being subjected on a case-by-case basis to a proportionality assessment. It is possible therefore that it violates both Art 6 of the ECHR and Art 47 of the Charter, as well as the principle of effectiveness. The absolute requirement of representation arguably violates the EU law principles of equivalence and effectiveness, as set out by the CJEU in cases such as "Krizan" Case C-416/10 which highlighted that Member States had discretion as to the detailed procedural rules that individuals acquired under EU law, but these could not be less favourable than those available in the domestic legal order, and do not render the EU law rights impossible or impractical to exercise. Most Member States recognise the right to self-represent before a Court or tribunal, and it violates a basic tenet of access to justice to deny an individual access to the Court because they do not have access to legal representation[1],[2].

Therefore, it is likely that the requirement of representation may prove problematic, if not before the ACCC, then before the CJEU or the ECtHR (European Court of Human Rights). However, it is still too early to say how these provisions will work out in practice. This is reflected in the ACCC's preliminary response of the 26th July 2021 (at para 116) to the informal consolidated text, where they do not pronounce compliance but rather signpost that compliance is possible with these provisions depending on interpretation by the courts and administrative decision making bodies of the EU.

[1] France recently abandoned compulsory representation as it was found to be a breach of access to justice principles.
https://www.internationallawoffice.com/Newsletters/Litigation/France/Kalliop/Civil-procedure-reform-and-compulsory-representation-principle

[2] The right to self representation is well-established in the UK. See Rabeea Assy (2011)"Revisiting the right to self representation" https://law.haifa.ac.il/images/Publications/SSRN-id2010509.pdf

# 3. Costs

The applicant in C32 was not successful on their argument that the CJEU is prohibitively expensive, as not enough evidence was offered. The issue was not raised in M3.

There is however a clear requirement in Article 9(4) of Aarhus that access to justice procedures should not be prohibitively expensive. This requirement is not implemented by the Aarhus Regulation, but it should be.

Whilst the Commission is generally represented by its own lawyers, keeping costs low, other EU bodies (like the ECHA, EFSA or the EIB) hire private law firms to present their case and seek to pass on costs to unsuccessful NGOs in CJEU public interest cases[3], and there are no measures in place to limit or manage costs in these cases.

Therefore, the Recital 3a of the informal consolidated version of the Political Agreement is a welcome development, as it is clearly aimed at discouraging institutions from "lawyering up" to intimidate litigants with the threat of having to cover exorbitant costs should they lose (as has happened previously). The recital suggests that they should seek to recover reasonable costs only.

It is arguable that it does not go far enough to implement the Art 9(4) requirement that review procedures not be prohibitively expensive, representing as it does only a general exhortation to EU institutions to "endeavour only to incur and thus to request reimbursement for reasonable costs", but importantly it explicitly recognises Art 9(4) and the not prohibitively expensive requirement. However, it remains to be seen how this will influence the CJEU in apportioning costs in proceedings. It does not deal with the barrier of "own costs", which will be particularly important in the context of the new requirement of mandatory representation for individuals by a lawyer or an eNGO in article 11(1)(a). It is unlikely that eNGOs will take up representation of individuals on a large scale (and indeed it is likely there will be considerable legal barriers to them doing so), and therefore the majority of individuals will have to avail of lawyer representation, which they will have to fund themselves. Therefore, it is possible in the future that an individual may challenge the compliance of this provision, or the mandatory representation provision, on grounds of non-compliance with Art 9(4).

# 4. Procedural and Substantive Review

Recital 12a of the informal consolidated version of the revised Regulation states that the "scope of review proceedings under Regulation (EC) No 1367/2006 should cover both the substantive and procedural legality of the act challenged.". This is an important enshrining of a precedent set out by the General Court in the TestBiotech case[4], but which was not clear or guaranteed to remain secure. This will likely prove important as eNGOs utilise the expanded definition of administrative acts to challenge a greater range of EU institutional acts/decisions. If the CJEU were inclined to frustrate the intention of expanding the range of reviewable decisions it could have done so by confining eNGOs to procedural review only, whereby they could only challenge the processing of their request for review on procedural grounds and not the underlying administrative decision itself. This recital is therefore highly significant in terms of safeguarding the potential of the revised regulation to open up opportunities for strategic litigation against acts/decisions of EU institutions that contravene environmental law.

# 5. State Aid

State Aid decisions were excluded from review by explicit provision in the original 2006 Aarhus Regulation. The exclusion of State Aid decisions from the scope of the Aarhus Regulation (in Article 1 of the Aarhus Regulation) forms part of the ACCC advices in M3, which incorporates by reference the draft findings in C128. The findings

[3] Statewatch | Frontex: Billion-euro border agency sues individual transparency activists
[4] T-177/13, TestBioTech eV and Others v European Commission, ECLI:EU:T:2016:736, para. 56.

have been adopted by the ACCC and await approval at the MoP Oct 2021. In C128 the Committee finds that State Aid decisions are required by the Aarhus Convention to be amenable to review under the Aarhus Regulation.

In C128 the ACCC considered a UK State Aid application 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. Oekobeuro made a communication to the ACCC about the exclusion of State Aid from the Aarhus Regulation. 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 did not remove this exclusion, and the EU Parliament's proposals (AM24) sought to address this issue by providing for a phased introduction of the lifting of the exclusion within 18 months of the passing of the amendments to the Aarhus Regulation . The 2021 M3 advices (para 70) from the ACCC on the EU's amendment of the Aarhus Regulation mention the findings in C128 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.

It is also stated clearly in the decision in C32 that there is no basis in the Convention for excluding whole categories of decisions from the purview of administrative/judicial review.

It is disappointing that the EU Parliament's attempt to include State Aid decisions within the scope of review under the Aarhus Regulation was frustrated in trilogue. The ACCC have made it clear that it is required for compliance with the Aarhus Convention. This seems to have arisen as a result of Member State concerns about their freedom in relation to energy projects in particular. The Commission Political Declaration that they would impact assess the future inclusion of State Aid decisions, and possibly introduce proposals for same in 2023 is encouraging. These decisions are often extremely significant environmentally, and it has already been well established that there is in principle no difficulty under EU law with them being subject to judicial review. Therefore, the main obstacles appear to be political.

# 6. Access to Information

This did not form part of the findings in C32 or the advices in M3. The EU Parliament introduced provisions (AM25 & AM31) requiring immediate publication of environmental information as soon as it is available and access to an additional category of documents, the positions taken by Member States in decision-making procedures leading to the adoption of Union legislation or administrative acts on or relating to the environment. The first part is uncontroversial, as a basic requirement of effective access to justice under the Convention. The second category, the positions of Member States, is predictably controversial for the Member States. There is no justification for this category of information not to be considered accessible under the Convention. There may be circumstances in which one or other of the exceptions provided for under the Convention may be applied to individual examples of such documents (e.g. international relations), but exceptions cannot be applied in a blanket manner, and decisions to withhold such information must be subjected to a balancing test against the public interest served by disclosure (which could be quite high with this category of documents) on a case by case basis. Art 5(3)(c) of the Convention requires publication of plans and policies in relation to the environment, and arguably such positions form part of this.

The inclusion of such categories of information is therefore clearly required for compliance with the Aarhus Convention and it is to be hoped that the issue will be addressed in future revisions of the Aarhus Regulation.

The informal consolidated version of the Political Agreement does retain the provision in recitals for a published register for all requests for internal review, which is a positive development.

# 7. Conclusion

The original Commission proposal would not have represented compliance with the requirements of C32 or the

Convention. This was made clear by the ACCC in its advices on the proposal in February 2021. Nevertheless, the Commission fought strongly for the original proposal and were it not for the intervention of the European Parliament in introducing amendments with a keen focus on procuring compliance with international law, assisted by the constant efforts of eNGOs such as ClientEarth, EEB, Justice & Environment, CAN-E, YEE and EJNI, a crisis of international rule of law would have arisen at the Meeting of the Parties to the Aarhus Convention in October 2021.

The Final Political Agreement broadens access to justice by removing restrictions on categories of reviewable acts, and introduces rights for individuals, representing an important step towards compliance with the findings and advices of the ACCC. While not representing comprehensive compliance with the requirement of the Aarhus Convention at EU level, this does represent an important acceptance by the EU institutions of the applicability of the Convention and authority of the ACCC. This acceptance was previously absent in the mandate carried into the last Meeting of the Parties in 2017[5], and was not evident in the Commission proposals in 2020. It has also been notably absent in the case law of the CJEU (e.g. Mellifera Ev[6], and Carvalho[7]). This sign of acceptance is to be welcomed and hopefully represents the crossing of an important threshold of growth of the EU's consciousnesses as an actor on the international environmental governance stage, and an important safeguarding of the integrity of the Aarhus Convention and its Compliance Mechanism.

[5] Council Decision 2017/1346 of the 17 July 2017

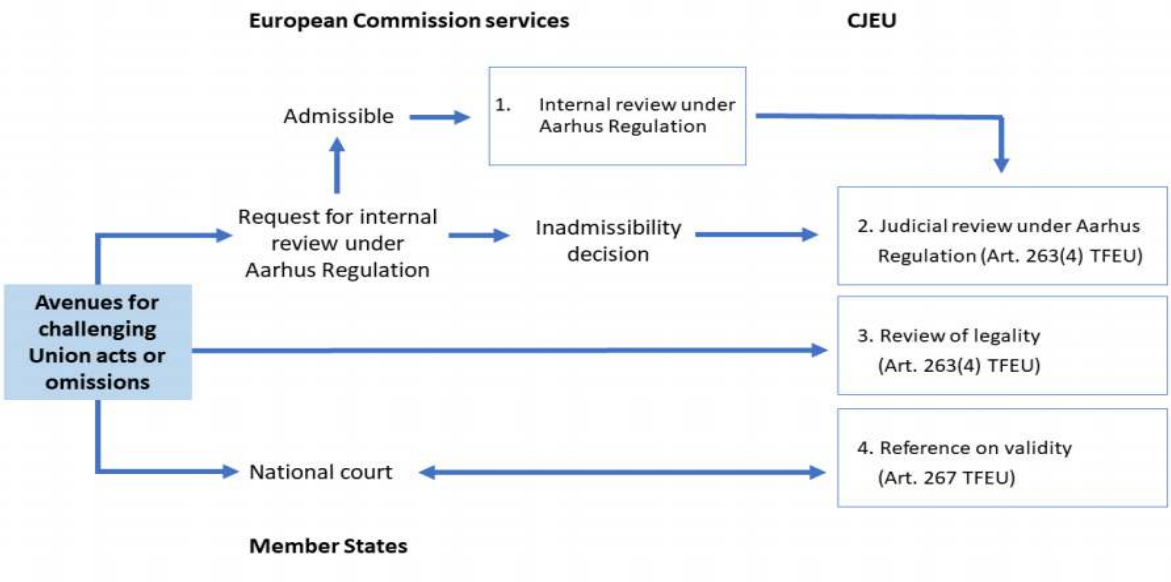
[6] Mellifera Ev & Ors v EU Commission, Case T-12/17 https://curia.europa.eu/juris/document/document.jsf?text=&docid=206172&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=7086325. Appeal C-784/18 Mellifera Ev v The Commission 20 September 2020.

[7] Case C-565/19 P Carvalho & Ors. v The EU Parliament, The Council and the EU Commission, 25th March 2021 https://curia.europa.eu/juris/document/document.jsf?text=&docid=239294&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5821389

# Appendix 1: The Judicial Review System at EU level

From pg. 3 of the Access to justice in environmental matters: Amending the Aarhus Regulation, Vivene Halleux, May 2021, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/679078/EPRS_BRI(2021)679078_EN.pdf

Figure 1 – The Union system of administrative and judicial review




Source: European Commission, 2019.

# 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 and beyond.

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