

Analysis of the Revised Proposal to amend the Aarhus Regulation agreed 12th July 2021.

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This is a summary of EJNI's Access to Justice Observatory Final Report, available [here](#).

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**". The Court of Justice of the European Union is "**the CJEU**". Member States are "**MS**". European Parliament is "**EP**".

- 1. In 2017, the EU were found in breach of the Aarhus Convention in a decision known as "**C32**", at the Meeting of the Parties to the Convention in 2017, by the ACCC, a body charged with ensuring compliance with the Convention.¹** The issues related to the [Aarhus Regulation](#); a law intended to implement the Convention at EU level. This law was supposed to allow access to review of EU institutional acts/decisions internally and before the CJEU where the acts/decisions did not comply with environmental law. The ACCC found that it did not do so.² The [Regulation](#) defined the categories of reviewable decisions narrowly and almost no decisions were reviewable³ (a big part of this was the requirement that reviewable decisions be of "individual scope" i.e. addressed to or affecting an individual, thereby excluding most environmental decisions which are of general scope). This was not compatible with the Convention. The ACCC also criticised the lack of standing for individuals, with standing only afforded to NGOs to challenge EU institutional decision making.
- 2. In 2020, the EU Commission made a [proposal to amend the Aarhus Regulation](#) in response to **C32**. The ACCC advised in [February 2021](#) that the proposal was inadequate in several respects (the **M3 advices**) – e.g. lack of individual rights of review and State Aid exclusions.** Some problematic restrictions had been removed⁴ (like the restriction of reviewable decisions to those of "individual scope") in the [Commission proposal](#), but new restrictions were added, e.g. the exclusion from the review process of any act that would require an implementing measure⁵ (which would have excluded most EU institutional decision making from the scope of review).
- 3. The [EU Parliament proposed](#) changes to the [Commission proposal](#) to bring about compliance with the findings/advices of the ACCC and the Convention.** The Parliament prioritised compliance with international law, recognising that the ongoing default of the EU on its obligations under the Convention contributed to a potential crisis in the international rule of law, and risked damaging the EU's reputation.

¹ Members of the Compliance Committee are selected by the Meeting of the Parties from candidates proposed by the Parties who have "[high moral character and recognized competence in the fields to which the Convention relates, including persons having legal experience](#)". The Compliance Committee is known for its rigour and expertise in national and international law.

² Further evidence of the ineffectiveness of the current Aarhus Regulation mechanism can be found in the [Milieu Study from 2019](#), bottom of pg. 156 – top of p. 157.

³ Allowing review only of administrative acts adopted 'under environmental law' of 'individual scope' and which had 'legally binding and external effects'. All these limitations were found by the ACCC to be incompatible with the Aarhus Convention.

⁴ The new proposal removed the requirements that in order to be reviewed the acts/decisions must be of 'individual scope' and have 'legally binding and external effects'. It changed the phrase acts adopted 'under environmental law' by broadening it to acts "that may, because of their effects, contravene environmental law", a much broader category of acts.

⁵ According to the [Milieu Study 2019](#), pg. 120, most EU acts require some implementing measure at EU or National level.

4. The [EU Parliament's proposals](#) removed problematic restrictions such as the exclusion of all acts requiring implementing measures and the blanket ban on review of State Aid decisions for compliance with environmental law. Individual Rights were provided for, albeit in very restricted form, with provision for further restrictions to be added later by the EU Commission by way of a delegated act. **Improvements in access to environmental information** were added, as well as **costs measures and a commitment to substantive and procedural review of impugned acts/decisions before the CJEU**.
5. **Trilogue negotiations between the Commission, the Council and the Parliament resulted in the removal of many of the progressive amendments** introduced by the Parliament proposal, including the removal of the ban on review of State Aid decisions and the improvements in Access to Environmental Information. However other important elements of the Parliament's amendments, including access to review for individuals, were retained. **The provisions for individual rights are complex and limited**, and the extent to which they comply with the Aarhus Convention remains questionable.
6. **Under the [political agreement](#) reached on the 12th July 2021 in trilogue negotiations, the key points of agreement are the following amendments:**
 - 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 as was a recital making it clear that the revised regulation is intended to implement Art 9(3) of the Convention. 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.

⁶ Based on the informal consolidated text submitted by the EU Commission to the ACCC on the 23rd July 2021 https://unece.org/sites/default/files/2021-07/frPartyM3_23.07.2021_annex1.pdf. The final version of the Regulation is not yet available. The draft legislation is expected to be published in late September 2021, and to come into force 20 days after publication in the Official Journal in the usual manner, in advance of the Aarhus Convention Meeting of the Parties on the 18th October 2021.

7. **The amendment of the definition of administrative acts, and the inclusion of individual rights in particular, represent an important threshold moment in which the Commission and other EU Institutions have accepted the rule of international law, and that the Aarhus Convention applies as much to EU institutional decision making as it does at Member State level.**
- a. This resolves a conflict in the application of the Convention between the levels of EU governance which had been pointed out by many commentators as representing a problematic non-compliance with international law.
 - b. This helps repair the damage to the international rule of law caused by the EU's previous non-compliance and non-co-operation with the ACCC (through the EU's unprecedented refusal to endorse the findings of the ACCC in [C32](#) at the last MoP in 2017) and the Convention.
 - c. This situation had threatened to undermine the effectiveness of the Convention and the EU as a global leader of good environmental governance and upholder of the international rule of law.

Therefore, while the EU still has some distance to go before they can claim full compliance with the Convention, the revision of the Aarhus Regulation is a welcome move towards compliance which represents an extremely important moment in EU and global environmental governance.

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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