

Suggested amendments to Articles 2(1)(g) and 10(1) of the Aarhus Regulation following the Aarhus Convention Compliance Committee findings and recommendations with regard to Communication ACCC/C/2008/32

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Introduction

According to Article 10(1) of the Aarhus Regulation, « *Any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act* ».

Article 2(1)(g) of the Aarhus Regulation defines the notion of administrative act as « *any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects* ».

In its findings and recommendations with regard to Communication ACCC/C/2008/32, the Aarhus Convention Compliance Committee (ACCC) has found this internal review mechanism too narrow in scope and has therefore concluded that it fell short of the requirements laid down in Article 9(3) of the Aarhus Convention.

The two main shortcomings identified by the ACCC relate to :

- The legal entities entitled to make requests for internal review, i.e. only environmental NGOs ;
- The types of acts amenable for such requests, i.e. only individual acts under environmental law having legally binding and external effects.

This paper will address in turn each of these flaws and suggest alternative wordings to the current legislation in order to bring the Aarhus Regulation into line with the findings of the ACC.

1. Who ?

According to Article 9(3) of the Aarhus Convention, « *In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment* ».

The notion of « *public* » – as opposed to that of « *public concerned* » used in Article 9(1) and (2) – is not defined in the Aarhus Convention, which leaves the States Parties (including the EU) a great measure of discretion in implementing Article 9(3). This discretion – which

controversially led the Court of Justice to conclude to the lack of direct effect of that provision – is, however, not unfettered.

In its abovementioned findings and recommendations regarding the EU (part II), the ACCC considered in this respect that « *the term “members of the public” in the Convention includes NGOs, but is not limited to NGOs. It follows that, 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* » (para. 94).

It seems therefore, that the implementation of Article 9(3) requires an extension of the personal scope of Article 10 of the Aarhus Regulation to legal subjects other than NGOs without however going so far as to extend it to all the members of the « *public concerned* » within the meaning of the Convention, namely anyone « *affected or likely to be affected by, or having an interest in, the environmental decision-making* ».

Importantly, the conditions for filing an internal review application must not be aligned with the admissibility requirements for the lodging of an action for annulment of the reply to such application under Article 263(4) TFEU and Article 12 of the Aarhus Regulation. As the General Court observed, these are two separate proceedings governed by different procedural regimes. Therefore, an entity’s right to make an internal review application with respect to a given act does not automatically secure that same entity’s *locus standi* in subsequent annulment proceedings¹.

In view of the foregoing and considering also the more general right of EU citizens to write to and receive an answer from the EU institutions and bodies enshrined in Article 24 of the TFEU, it would be perfectly sensible to provide for more relaxed admissibility requirements with respect to internal review applications than those currently applicable to actions for annulment under the general Treaty rules.

With that in mind, I suggest to seek inspiration from the proposal made by Advocate General Jacobs in his opinion in *Union de Pequenos Agricultores*². AG Jacobs suggested in this case to relax the « *individual concern* » requirement applicable to actions for annulment. According to him, « *it should (...) be accepted that a person is to be regarded as individually concerned by a Community measure where, by reason of his particular circumstances, the measure has, or is liable to have, a substantial adverse effect on his interests* » (para. 60).

This test, which the Court of Justice refused to take on board with respect to actions for annulment, could provide a middle ground between the strict *Plaumann* case-law under Article 263(4) TFEU and the very wide notion of « *public concerned* » as per the Aarhus Convention. Because of the quantitative assessment that it implies, the requirement that the effect be « *substantial* » is, however, vague and its application would be fraught with difficulty. It is therefore suggested to replace it with the term « *specific* ». Requiring that the interests of the applicant are *specifically* affected would prevent any kind of *actio popularis*

¹ T-338/08 *Stichting Natuur & Milieu*, EU:T:2012:300, paras 80-81 ; T-396/09 *Vereniging Milieudefensie*, EU:T:2012:301, paras 71-73.

² Opinion delivered on 21 March 2002 in Case C-500/00 *Union de Pequenos Agricultores v. Council*, EU:C:2002:197.

based on a diffuse and widespread concern for or interest in the matter. Without going back to the extreme conditions of the individual concern test, it would nonetheless require the applicant to demonstrate that he/she is affected in a special way that differentiates him/her not from *anybody else* (as in the *Plaumann* test) but from *everybody* (because of the place where (s)he lives, because of his/her work occupation, etc.).

2. What?

The category of acts amenable for internal review pursuant to Article 10 of the Aarhus Regulation is restricted in terms of (i) scope, (ii) effect, and (iii) subject-matter. The ACC took issue with each of these restrictions, which must therefore be revised accordingly.

(i) The scope – individual acts

The ACCC and the General Court both considered that the concept of « acts » referred to in Article 9(3) of the Convention is not limited to individual acts. They took the view that the exclusion of acts adopted by public authorities in their legislative capacity as per Article 2(2) of the Aarhus Convention does not mean that this Convention only covers acts of individual scope. They therefore concluded that Article 10(1) and 2(1)(g) of the Aarhus Regulation fall foul of Article 9(3) of the Convention.

In order to find a middle way between a catch-all wording that would cover all pieces of EU legislation and the current and overly narrow restriction to individual acts, it is suggested to seek inspiration from the category of « regulatory acts » introduced by the Lisbon Treaty at Article 263(4) TFEU. The EU Courts have defined such category as covering « acts of general application other than legislative acts »³.

In practice, it would mean that any act other than an act adopted following a (special or ordinary) legislative procedure could be subject to an internal review procedure. It would include, most notably, all implementing and delegated acts adopted by the Commission. The other condition introduced by the Lisbon Treaty (« *regulatory act which (...) does not entail implementing measures* ») would, on the other hand, not apply because its rationale (sharing the burden between Member States and EU Courts and applying some form of judicial subsidiarity) is not relevant to internal review procedures.

For logistic reasons, I would however recommend keeping the current concept of « *administrative act* » and to simply change its definition. The reason is that, as will be seen below, the acts subject to the internal review mechanism should also include acts that do not necessarily have legally binding effects. And as the case-law currently stands, there is no indication that the concept of regulatory act would adequately capture such acts.

(ii) The effect

According to Article 2(1)(g) of the Aarhus Regulation, the internal review procedure is limited to acts which have legally binding and external effects. The ACCC declared that it is « *not*

³ C-438/11 *Inuit Tapiriit Kanatami*, EU:C:2013:625, para. 51.

convinced that generally excluding all acts that do not have legally binding and external effects is compatible with article 9, paragraph 3 of the Convention » (para. 104).

Once again, we suggest finding a middle way between the current wording, which almost perfectly matches the category of acts subject to actions for annulment, and a much looser formulation which, as for the preliminary reference proceedings, would cover all the acts of EU institutions and bodies.

Accordingly, we submit that the internal review procedure could cover all acts that « *produce legal effects* ».

This formulation would bring within the purview of Article 10 of the Aarhus Regulations all sorts of acts which, without being legally binding, have consequences from a legal perspective. This is, e.g., the case for legislative proposals tabled by the Commission (which legally trigger the start of the legislative procedure), recommendations (which must be taken into account by national courts in the interpretation of EU law), or even reports and plans designed to fulfil an obligation imposed by EU law. On the other hand, acts such as green or white papers, or voluntary opinions and reports, would remain outside the remit of the internal review mechanism.

(iii) The subject-matter

The ACCC took great exception to the fact that Article 2(1)(g) of the Aarhus Regulation restricts the internal review procedure to the acts adopted « *under environmental law* ». As the ACCC rightly pointed out, Article 9(3) of the Aarhus Convention refers to *any* act, regardless of its content or legal basis, which *contravenes* environmental law. In view of this plain contradiction with the wording and spirit of Article 9(3), we recommend to simply drop the requirement that the act concerned be adopted « *under environmental law* ».

Conclusion

In view of the foregoing, I suggest replacing the current Articles 2(1)(g) and 10(1) of the Aarhus Regulation with the following wording:

Article 10(1) « *Any non-governmental organisation which meets the criteria set out in Article 11, and any person who has, or is liable to have, a specific adverse effect on his interests, is entitled to make a request for internal review to the Community EU institution or body that has adopted an administrative act **allegedly incompatible with environmental law**—~~under environmental law~~ or, in case of an alleged administrative omission, should have adopted such an act **under environmental law**.* »

Article 2(1)(g) of the Aarhus Regulation defines the notion of administrative act as « *any **non-legislative and non-judicial measure act of individual scope**—~~under environmental law~~, taken by an EU Community institution or body, and ~~having legally binding and external~~ **producing legal effects** ».*