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Access to justice on EU level: the long road to implement the Aarhus Convention

Dostępność systemu sprawiedliwości na szczeblu Unii Europejskiej: długa droga do wdrożenia Konwencji z Aarhus

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Abstract: More than 15 years after the EU's accession to the Aarhus Convention, EU legislation does not yet ensure that members of the public have access to justice as envisaged by the Convention. Specifically, the possibilities to judicially challenge contraventions of EU environmental law by EU institutions and bodies remain very limited. The result is a lack of accountability to EU law, which undermines the rule of law and the protection of the environment and human health. This article describes the EU's long road to implement the Convention. It analyses the EU's current legislative proposal to amend the Aarhus Regulation and explains why it would not, in this form, suffice to ensure compliance with the Convention, leaving the Council and European Parliament to ensure that international law is respected. More broadly, the lengthy process reflects wider issues of the EU legal framework, related to the institutional balance and the overconstitutionalisation of the EU's standing regime.

Keywords: access to justice, Aarhus Convention, rule of law, environment, EU Aarhus Regulation

Abstrakt: Po ponad 15 latach przystąpienia UE do Konwencji z Aarhus, prawodawstwo Unii wciąż jeszcze nie zapewnia swoim obywatelom dostępu do sprawiedliwości jak określone

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jest to w w/w Konwencji. Szczególnie ograniczone pozostają możliwości sądowego sprzeciwu wobec naruszeń prawa ochrony środowiska Unii Europejskiej przez unijne instytucje czy organy. W efekcie występuje brak odpowiedzialności wobec prawa Unii, co z kolei podważa idee praworządności oraz ochrony środowiska i zdrowia ludzi. Niniejszy artykuł opisuje długą drogę jaką UE przechodzi w procesie wdrażania Konwencji z Aarhus. Autor analizuje bieżącą propozycję wysuniętą przez EU w sprawie wniesienia poprawek do tej Regulacji oraz wyjaśnia dlaczego w takiej formie nie byłyby one wystarczające do zapewnienia zgodności z Konwencją, pozostawiając w gestii Rady oraz Parlamentu Europejskiego konieczność dopilnowania aby prawo międzynarodowe było respektowane. Z szerszej perspektywy, wydłużający się proces odzwierciedla istotne kwestie unijnej ramy prawnej, jakie związane są z instytucjonalną równowagą i 'przekonstytucjonalizowaniem' systemu obowiązującego w Unii Europejskiej.

Słowa kluczowe: dostęp do sprawiedliwości, Konwencja z Aarhus, rządy prawa, środowisko, Rozporządzenie EU w sprawie Konwencji z Aarhus

Introduction

Article 2 of the Treaty on the European Union ('TEU') lists the rule of law as one of the values of the European Union (the 'EU'). The World Justice Project considers the rule of law to consist of four universal principles: Accountability, Just Laws, Open Government and Accessible Justice.[2] Accountability requires that government (and private actors) are accountable under the law. Related to this principle, persons must be able to access the courts to ensure this accountability in practice.

Ostensibly in line with these principles, the Court of Justice of the European Union (CJEU) has consistently held that the EU Treaties provide a "complete system of remedies" (see for example, Judgement of the CJEU in Case C-72/2, paragraphs 66-68 and case law cited; Judgement of the CJEU in Case C-384/16, paragraphs 112-114 and case law cited). However, on closer inspection, access to the CJEU is rather limited, in particular for applicants seeking to enforce EU laws meant to protect public interests. Due to this lack of accessible justice, accountability to these EU laws is also weakened. The result is an enforcement deficit of laws meant to protect public goods, such as environment and health protection, and an imbalance with the protection of private interests.

This phenomenon is in no way unique to the EU. In fact, the international community already recognized the lack of enforcement of environmental law as one of the core issues preventing sustainable development more than 50 years ago. Principle 1 of the 1972 Stockholm Declaration and Principle 10 of the

[2] The World Justice Project is an independent non-profit organisation originally founded by the American Bar Association. For more information, see: <https://worldjusticeproject.org/about-us/overview/what-rule-law>.

1992 Rio Declaration therefore recognize that effective environmental protection requires active participation of citizens.

Based on these principles, States of Europe and Central Asia have adopted the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, commonly referred to as the Aarhus Convention (the 'AC')[3] (see principles 1 and 2 in relation to the Stockholm and Rio Declarations; see also Jendroska 2020: 5-8) The AC entered into force on 30 October 2001. It establishes three pillars of procedural rights, as set out in its title, in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being (Art. 1 AC).

The right of the public to access to justice constitutes the third pillar of the Convention. Specifically, Art. 9 AC requires access review procedures to challenge refusals of access to environmental information requests (Art. 9(1)), to challenge decisions, acts and omissions on specific activities preceded by public participation (Art. 9(2) as well as a to challenge acts and omissions of private persons and public authorities that contravene national law related to the environment (Art. 9(3)) (for a detailed analysis of the different elements of Art. 9 AC, see Jendroska (2020: 16 onwards).

This article describes and discusses the EU's long road to implement the latter provision, Art. 9(3) AC, in relation to acts of EU bodies and institutions.[4] The body charged with overseeing compliance with the AC, the Aarhus Convention Compliance Committee (the 'ACCC'), has found that the EU's current legal system does not ensure compliance with this provision (Findings and recommendations of the ACCC with regard to communication ACCC/C/2008/32 (parts I and II), as further discussed below). This eventually resulted in a request from the Council to the Commission to prepare a Study, and if necessary, a legislative proposal to amend Regulation (EC) 1367/2006 (the 'Aarhus Regulation').[5] The Commission published this proposal in October last year.

Section I describes the long process and international negotiations that led to this amendment. The second section analyses the EU's legislative proposal

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[3] 2161 UNTS 447, 38 ILM 517 (1999). See recitals 1 and 2 in relation to the Stockholm and Rio Declarations.

[4] In relation to access to justice to challenge acts of the EU Member States, see ClientEarth Legal Guide on Access to Justice in European Union Law: A Legal Guide on Access to Justice in environmental matters, 2021 edition, available at: <https://www.clientearth.org/latest/documents/access-to-justice-in-european-union-law-a-legal-guide-on-access-to-justice-in-environmental-matters-edition-2021/>.

[5] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, 2006 OJ L 264/13. See COM(2020) 642 final for the proposal to amend this Regulation.

in light of the Aarhus Convention. As will be shown, the proposal would, if adopted in this form, not yet ensure compliance with Art. 9(3) AC. Section III includes some observations on some wider issues in the EU legal framework that are exemplified by this case study, before concluding.

1. The long and winding road to implement the Aarhus Convention

1.1. The European Union's accession to the Aarhus Convention

The EU[6] approved the AC on 17 February 2005. It is thereby a Party to the Convention in its own right, separately from its Member States which are all also individually Parties to the Convention.[7] Prior to approval, the European Commission made a number of legislative proposals to implement the provisions of the Convention (see Jendroska 2012). Most importantly for the present article, the Commission proposed a Regulation to apply the provisions of the Convention to the European Union institutions and bodies.[8]

The Aarhus Regulation includes obligations of the EU institutions and bodies related to all three pillars of the AC supplementing the obligations that already existed prior to accession (Aarhus Regulation, recital 5). As regards access to justice, Article 10 Aarhus Regulation permits non-governmental organizations ('NGOs'), which meet certain criteria as per Article 11 Aarhus Regulation, to request an internal review of administrative acts and omissions of EU institutions and bodies.

The internal review mechanism was meant to supplement the existing access to justice avenues under Article 263 and 267 TFEU. Article 267 TFEU provides for the obligation for national courts to make a preliminary reference to the Court of Justice if, during a national dispute, a question as to the validity of an EU act arises. As further discussed below, this avenue is fraught with challenges because it presupposes national implementation of the act in question as well as a genuine national dispute. In order to prevent that an applicant needs to violate the law in order to obtain access to the Court, the Treaties therefore provide for Art. 263 TFEU as a direct means to challenge EU acts (Judgement of the CJEU in Case C-622/16 P, paragraph 58 and case law cited).

Based on Article 263(4) TFEU, an applicant can challenge an EU act directly before the EU General Court if they can show to be individually and

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[6] The term European Union is used throughout the text to refer to both the current European Union, in the proper sense of the term, as well as its predecessor organisations, such as the European Community.

[7] Some Member States acceeded to the Convention only after the European Union. The last EU Member State to ratify the Convention was Ireland, on 20 June 2012.

[8] COM/2003/0622 final.

directly concerned or, in the case of a regulatory act not requiring implementing measures, to be directly concerned by the measure.[9] To this date, no member of the public has been able to fulfil this criteria in a case intended to enforce EU environmental law in the public interest. By way of illustration, the CJEU recently ruled inadmissible applications alleging contraventions of environmental law of a legislative act in Case C-565/19 P (the "People's Climate Case") and of a regulatory act in Case T-600/15 *PAN Europe*.

The internal review mechanism leaves this restrictive standing criteria under Art. 263 TFEU intact but gives the applicant a possibility to challenge the reply received on the internal review request.[10] The reply of the EU institution or body is addressed to the applicant and constitutes, in line with Art. 12(1) Aarhus Regulation, an act that can be challenged under Art. 263(4) TFEU with an application to the EU General Court.[11]

However, the internal review mechanism is limited by stringent rules related to its scope of application and its own standing criteria. The internal review mechanism is, on the one hand, limited to NGOs that fulfil the requirements of Art. 11 Aarhus Regulation, thus excluding individuals. Moreover, the definition of a challengeable, "administrative" act or omission is so narrow that the mechanism becomes only available for a very limited number of acts. While the exact criteria are further discussed below, suffice to say here that to date only internal review requests that have been found admissible by the European Commission related to authorisations for a specific company to use a chemical substance of very high concern;[12] authorisations for a specific company to place on the market products containing genetically modified organisms (GMOs) and one decision recognising an entity as a monitoring organisation, pursuant to Regulation 995/2010, which lays down the obligations of operators who place timber and timber products on the market.[13] Requests to other EU institutions or bodies, if any have been made, are not made publicly available. The only case known to the author led to a judgment of the EU General Court that the European Investment Bank (EIB) was wrong to refuse an internal review

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9 Art. 265 TFEU provides for the possibility to challenge omissions under the same conditions.

10 An internal review request must be submitted within 6 weeks from the adoption of the act or, in the case of an omission, after the date when the administrative act was required (Art. 10(1)). The EU body or institution must then reply within 12 weeks to the internal review request (Art. 10(2)) or, in exceptional circumstances, within 18 weeks (Art. 10(3)).

11 The same applies to a failure by the EU institution or body to reply, which is of direct concern to the applicant, in accordance with Art. 12(2) Aarhus Regulation.

12 For example, the requests addressed to the Commission to review its decisions granting authorisations for some uses of substances under the REACH Regulation were deemed admissible. See reply from the Commission to ClientEarth request, 2 May 2017, C(2017)2914.

13 See reply of the Commission of 12 October 2015 to the request for internal review from Greenpeace, Ref Ares (2015)4274787.

request related to a financing decision (Judgement of the EU General Court in Case T-9/19; currently under appeal in Case C-212/21 P and Case C-223/21 P).

1.2. Communication to the AC Compliance Committee (ACCC)

Due to these limited access to justice avenues, on 1 December 2008 the NGO ClientEarth submitted a communication to the ACCC alleging that the EU failed to comply with its obligations under Art. 3(1) and 9(3)-(5) AC. The ACCC consists of 9 independent experts with recognized expertise in the Convention, which are elected by the Meeting of the Parties.[14] The possibility to submit a communication alleging non-compliance with the Convention is open to all natural and legal persons (for a more detailed analysis of the ACCC and its procedures, see Koester: 2005; Kravchenko 2007 and Jendroska 2011(1))

The core allegation of ClientEarth's communication, ACCC/C/2008/32 (European Union, referred to hereafter as'C32'), was that the EU did not provide for sufficient access to justice to challenge the acts and omissions of its institutions and bodies. Following written exchanges and a hearing before the Committee, the Committee adopted the first part of its findings on 14 April 2011 (Findings and recommendations of the ACCC with regard to communication ACCC/C/2008/32, part I (hereafter 'C32 findings, part I')). The Committee concluded that the preliminary reference procedure under Article 267 TFEU was in itself insufficient to provide for sufficient access to justice (C32 findings, part I, paragraph 90). However, it did not conclude that the EU failed to comply with the Convention because, at this point in time, the case *Stichting Milieu* was pending before the CJEU, which alleged that the Aarhus Regulation failed to comply with the AC (Case T-338/08). The Committee therefore concluded that, "if the jurisprudence of the EU Courts, as evidenced by the cases examined, were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraphs 3 and 4, of the Convention" (C32 findings, part I, paragraph 94; for a more detailed analysis, see Jendroska: 2011(2))

On 14 June 2012, the EU General Court rendered its judgement on *Stichting Milieu*. It held that the Aarhus Regulation failed to comply with Art. 9(3) AC, in so far as it permits internal review only in respect of "measures of individual scope" (Judgement of the EU General Court in Case T-338/08, paragraphs 83-84). However, on 13 January 2015, the Court of Justice overturned this judgement on appeal (Judgement of the CJEU in Joined Cases C-404/12 P and C-405/12 P). Importantly, the Court of Justice did not decide that the Aarhus Regulation complied with the Convention. However, it considered that it was

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[14] See the website of the UNECE Aarhus Convention secretariat for more information: < https://unece.org/env/pp/cc/committee-members>.

not competent to rule on the compliance with the provision because Art. 9(3) AC did not contain an unconditional and sufficiently precise obligation to be directly effective in the EU legal order (ibid, paragraph 47). More recently, the Court of Justice has also rejected the contention that the Aarhus Regulation could, on this point, be interpreted consistently with the Convention (indirect effect), as this would lead to a *contra legem* interpretation (Judgement of the EU General Court in Case T-12/17, paragraph 87; cited without opposition on appeal in Judgement of the CJEU in Case C-784/18 P, paragraph 78).

Following the Court of Justice judgement in *Stichting Milieu*, ClientEarth applied to continue the C32 proceedings before the ACCC. Following additional written exchanges and a second hearing with the participation of the European Commission representing the EU, the ACCC adopted the second part of its findings on 17 March 2017 (Findings and recommendations of the ACCC with regard to communication ACCC/C/2008/32, part II, (hereafter 'C32 findings, part II'). The ACCC considered the jurisprudence of the CJEU and concluded that there had been no new direction in the jurisprudence that would ensure compliance with Art. 9(3) AC. Specifically, the Committee referred to its findings on part I to the effect that Art. 267 TFEU is in itself insufficient to ensure adequate access to justice (C32 findings, part II, paras 56-57) and added that the case law did not indicate that members of the public would have direct access to the Courts under Art. 263 TFEU (ibid, paragraphs 58-78).

This only left the internal review mechanism under the Aarhus Regulation to the EU to demonstrate compliance with Art. 9(3) AC. The Committee firstly considered that the Regulation's limitation to only NGOs did not comply with the Art. 9(3) AC, which gives access to justice rights to "members of the public" more broadly (ibid, pargaraph 93). After considering the applicable criteria in depth, the Committee concluded that the requirements that an act be of individual scope, adopted under environmental law and having legally binding and external effect narrowed the definition of a challengeable act beyond the extent permitted by the AC (ibid, paragraphs 94, 100 and 104, respectively). The Committee therefore concluded that the EU failed to comply with Art. 9(3) and (4) AC (ibid, paragraph 122).[15]

1.3. 2017 Meeting of the Parties to the AC

All ACCC findings are submitted to the Meeting of the Parties ('MOP') to the AC for endorsement. To this date, all findings of the ACCC have been endorsed by the Meeting of the Parties by consensus, i.e. including by the Party concerned by the findings. Breaking with this established practice, the

[15] The breach of Art. 9(4) AC is based on the failure to provide effective remedies. It follows from the fact that not standing is provided under Art. 9(3) AC.

EU travelled to the 2017 MOP with the position that the MOP should only "take note" of the Committee's findings. This would have resulted in the findings neither being accepted by the Party concerned, meaning the Party would not be bound to implement them due to their own agreement, nor would the findings become a subsequent agreement or practice between the Parties, and hence not a means of interpretation of the Convention (Art. 31(3)(a) and (b) Vienna Convention on the Law of Treaties; for a discussion about the legal status of ACCC finding, see Fasoli and McGlone: 2018).

As also reflected in the report to the Meeting of the Parties, the EU's proposal met with resistance from non-EU Parties to the Convention, in particular Georgia, Norway, Switzerland and Ukraine, as well as from NGOs present as observers (Report of the sixth session of the Meeting of the Parties, ECE/MP.PP/2017/2, paragraphs 56-61 and 64). Finally, a compromise was reached. The matter was not put to a vote, which would have in itself broken with the established practice of consensus-based decision-making. Instead, the decision was postponed based on "exceptional circumstances" to the next Meeting of the Parties, which will take place in October 2021 (ibid, paragraphs 62 and 65).

The EU moreover committed to "continue to exploring ways and means to comply with the Convention in a way that was compatible with the fundamental principles of the European Union legal order and with its system of judicial review" (ibid, paragraph 62). Based on this statement and the explicit request of the Meeting of the Parties (ibid, paragraph 63), the ACCC also conducts a follow-up procedure to assess the extent the EU implements the C32 findings.[16]

1.4. The EU's follow-up

In June 2018, the Council resorted, for the first time in environmental matters, to a request to the European Commission under Art. 241 TFEU. The Council requested the Commission to prepare a study on the EU's compliance with Art. 9(3) AC and, "if appropriate in view of the outcomes of the study", a legislative amendment.[17] On 10 October 2019, the Commission reported back to the Council[18] and submitted the study, which had been prepared by

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[16] All related information can be found under: <https://unece.org/env/pp/cc/accc.m.2017.3_european-union>.

[17] Art. 2 of Council Decision (EU) 2018/881 of 18 June 2018 requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006, 2018 OJ L 155/6.

[18] Commission Staff Working Document, Report on European Union implementation of the Aarhus Convention in the area of access to justice in environmental matters, SWD(2019) 378 final.

an external consultancy (hereafter, the 'Milieu Study').[19] On 6 March 2020, the Commission then presented a roadmap in which it announced its intention to publish a legislative proposal to amend the Aarhus Regulation.[20]

The proposal to amend the Aarhus Regulation was finally published on 14 October 2020 (hereafter, 'the Commission proposal'),[21] jointly with a non-binding communication on access to justice to the Member State courts.[22] The Commission proposed to widen the definition of what constitutes a challenge-able act or omission by removing the requirement that an act be of individual scope and adopted under environmental law. It also proposed to extend the timeline for an applicant to bring a challenge and for the EU institution or body to respond, each time by 2 weeks. A more detailed analysis of the proposal follows in section II.

1.5. The ACCC's advice on the Commission's legislative proposal

Once the Commission had published its legislative proposal, it decided to request advice from the ACCC as to whether its proposal was adequate to achieve compliance with the Convention. The ACCC held a hearing with the communicant (ClientEarth) and the Commission representing the EU on 25 November 2020. Following a round of comments on a draft, the ACCC adopted its final advice on 12 February 2021 (Advice by the ACCC on the implementation of request ACCC/M/2017/3, available at: < https://unece.org/sites/default/files/2021-02/M3_EU_advice_12.02.2021.pdf> (It should be: "(hereafter, the 'ACCC Advice'). The ACCC Advice commended the Commission's proposal for permitting internal review for acts of general scope and acts not adopted under environmental law. However, it concluded that three aspects of the legislative proposal prevent the proposal from ensuring compliance with Art. 9(3) AC: (1) exclusion of acts that entail national implementing measures, (2) limitation to acts with legally and binding effects and (3) the continued exclusion of individuals from using the internal review mechanism. Additionally, the ACCC advice refers the EU to the parallel findings on communication ACCC/C/2015/128 (EU) ('C128')

[19] Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters, September 2019, 07.0203/2018/786407/SER/ENV.E.4, available at: <https://ec.europa.eu/environment/aarhus/pdf/Final_study_EU_implemention_environmental_matters_2019.pdf>.

[20] Ref. Ares(2020)1406501 - 06/03/2020.

[21] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, COM(2020) 642 final.

[22] Communication from the Commission on Improving access to justice in environmental matters in the EU and its Member States, COM(2020) 643 final.

discussed next, which were at that stage still in draft form, and recommends that the EU take them into account in the legislative procedure.

1.6. Additional ACCC findings on communication ACCC/C/2015/128 (EU): State Aid decisions

In parallel to the preparing its advice, the ACCC also finalized a new set of findings concerning access to justice on EU level. Communication C128 had been filed by the Austrian NGOs Ökobüro and Global 2000 in 2015.[23] The communicants wanted to challenge a Commission decision to approve State aid from the United Kingdom, at that time still a member of the EU, to the Hinkley Point C nuclear power plant. However, Art. 2(2) Aarhus Regulation explicitly excludes acts adopted in an administrative review capacity, including under Arts 86 and 87 EC (now Arts 106 and 107 TFEU), from the internal review mechanism.

In its findings on C32, part II, mentioned above, the ACCC held that the AC does not allow a general exclusion for acts adopted by EU institutions acting as administrative review bodies (C32 findings, part II, paragraphs 108-110). However, at the same time the Committee decided that it had not been informed of a specific act that would fall under Art. 2(2) Aarhus Regulation, which had the potential of contravening environmental law and thus fall under Art. 9(3) Aarhus Convention (C32 findings, part II, paragraph 111). Therefore, the ACCC concluded it had insufficient evidence to find non-compliance.

On 17 March 2021, the ACCC adopted its findings on communication C128 (Findings and recommendations of the ACCC with regard to communication ACCC/C/2015/128, advance unedited version available at: <https://unece.org/sites/default/files/2021-03/C128_EU_findings_advance%20unedited.pdf> (hereafter 'C128 findings'). The ACCC had awaited the judgement of the CJEU in Case C-594/18 P *Austria v Commission* of 22 September 2020, which incidentally concerned the same decision the Austrian NGOs had sought to challenge. In this judgement, the CJEU confirmed that when the Commission checks compliance of State aid within the nuclear sector with the requirements of Art. 107(3)(c) TFEU, it must "check that the activity does not infringe rules of EU law on the environment" (Judgement of the CJEU in Case C-594/18 P, paragraph 100). While the specific case concerned the nuclear sector, the Court's conclusion is based on the general applicability of Treaty rules, secondary EU law on the environment and general principles of EU law (ibid, paragraphs 42-45). The conclusion of the Court is therefore applicable also to State aid rendered in other sectors.

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[23] All information about the communication can be found under: < https://unece.org/env/pp/cc/accc.c.2015.128_european-union>.

Based on the CJEU's clear statements, the ACCC concluded that Commission State aid decisions have the potential to contravene environmental law and, therefore, it must be possible for members of the public to challenge them based on Art. 9(3) AC. Given that there is no other route to challenge State aid decisions violating environmental that would be available to members of the public in comparison to other EU acts,[24] the ACCC reached a very similar finding and recommendation as under case C32. The findings therefore added to the EU's non-compliance with Art. 9(3) AC (C128 findings, paragraphs 131-132).

2. Analysis: The legislative proposal's compliance with the Aarhus Convention

The Commission's legislative proposal defines an administrative act as "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" (Art. 2(1)(g) Aarhus Regulation, emphasis added). The elements of this definition, as well as some further crucial aspects, are considered one-by-one below.

"... any non-legislative act adopted by a Union institution or body ..."

Based on the Commission proposal, internal review would become available for all non-legislative acts. In accordance with the case law, non-legislative acts are those "adopted by a procedure other than a legislative procedure"; the legislative procedures being defined exhaustively in Art. 289(3) TFEU (Judgement of the CJEU in Joined Cases C-643/15 and C-647/15, paragraph 58). Accordingly, both acts of individual and general scope are captured by this definition. The Commission's proposal thereby removes the limitation to acts of individual scope, which has in the past proven to be the ground based on which most internal review requests have been rejected. This is positive as at the time of writing 27 out of the 47 internal review request processed by the Commission were rejected only, or *inter alia*, based on this criterion. This change was therefore also recommended by the Milieu Study (p. 198). As confirmed by the ACCC Advice (paragraph 43), this change addresses also one of the main grounds of non-compliance observed in the C32 findings.

Given that Art. 2(2), last sentence, AC excludes bodies or institutions acting in a legislative capacity from the definition of public authorities, this arguably

[24] There is the possibility to submit complaints to the Commission but, besides the fact that NGOs and individuals will not usually be considered interested parties, it is not a mechanism to challenge a decision by way of an administrative or judicial review. It is rather a mechanism to inform the Commission of a possible breach. Compare C128 findings, paras 116-119.

concords with Art. 9(3) AC, which only demands that acts and omissions of public authorities be subject to challenge. It is also consistent with the separation of powers, given that the internal review mechanism is inherently a form of administrative review, which is not easily transposed to the legislative context. This is, however, not to say that access to justice for legislative acts is not desirable, nor that it may be required on different legal grounds than the Aarhus Convention (see further below).

"... which has legally binding and external effects ..."

The Commission proposal would retain the current limitation to acts with legally binding and external effects. This is surprising, considering that it was one of the grounds for which the current wording of the Aarhus Regulation was found to be non-compliant in the C32 findings (C32 findings, part II, paragraphs 101 and 104). The finding was based on a number of examples of internal review requests that had been declared inadmissible on this basis, including regard the Operational Programme Transport of the Czech Republic.[25]

The Commission proposal justifies the continued inclusion of these terms on the basis that "only acts that are intended to produce legal effects are capable of 'contravening' environmental law, as indicated in Article 9(3) of the Convention" (page 8). In its advice, the ACCC agreed that an act needs to have some "effect" to contravene environmental law and considered therefore that the term "external effect" may be unproblematic if it was interpreted to not entail any further consequences than that. However, the ACCC considered that a contravention of law presupposed legally "binding" effects. It therefore recommended to amend the wording to "legal and external effects" (ACCC advice, paragraphs 51-55).

This is certainly correct in the view of compliance with the Aarhus Convention. However, there is also a consideration concerning the structure of the EU legal system. As AG Szpunar observed, the internal review mechanism is "meant to facilitate" access to justice that entities would not have when relying on Art. 263(4) TFEU directly (Opinion of AG Szupnar on Case C-82/17, pargagraph 36). While the internal review is directed at the reply to the internal review request, rather than the underlying act, the applicant will advance arguments in order to challenge the act that allegedly contravenes environmental law. In order to make the review based on these arguments meaningful, it must be conducted under the same standards as direct challenges under Art. 263 TFEU.

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[25] C32 findings, part II, para. 103 citing to the examples in the communicant's comments of 23 February 2015, paras 62-68, as possible examples that should be reviewable under the Convention. See the comments here: < https://unece.org/DAM/env/pp/compliance/C2008-32/communication/frCommC32_23.02.2015/frCommC32_comments_on_CJEUs_ruling_of_15.01.15.pdf>.

Thi is in particular because Art. 263 TFEU arguably establishes the standard of whether an act is to be considered compliant with EU law or not.

It would therefore be only logical to align the wording of the Aarhus Regulation with the wording of the Art. 263(1) TFEU, which uses "legal effects vis-à-vis third parties". The Commission proposal appears to acknowledge this idea in principle but claims, "although the terminology is not identical, the scope of this exclusion in the Regulation is consistent with the scope of Article 263(1) TFEU, as interpreted by CJEU case law" (page 8). This statement is given without any supporting case law from the CJEU and therefore constitutes a mere assertion, considering that the CJEU is the final arbiter of the meaning to be given to terms of EU law.

Only after the legislative proposal was published, the EU General Court ruled for the first time on this question in Case T-9/19 *ClientEarth v EIB*. The Court held that, indeed, "[i]n view of the link that thus exists between the concept of an act having 'legally binding and external effects', within the meaning of Article 2(1)(g) of the Aarhus Regulation, and that of an act producing legal effects vis-à-vis third parties, within the meaning of Article 263 TFEU, it is reasonable, in the interests of general consistency, to interpret the former in accordance with the latter" (Judgement of the EU General Court in Case T-9/19, paragraph 149).

While this conclusion supports the Commission's position to some extent, for the sake of legal certainty and considering that the judgement on Case T-9/19 is currently under appeal, using the same legal terms as Art. 263(1) TFEU would better ensure compliance with the Convention. This is not least to comply with Art. 3(1) Aarhus Convention, which requires that Parties to the Convention "establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention."

"... and contains provisions that may, because of their effects, contravene environmental law within the meaning of point (f) of Article 2(1) ..."

The Commission proposal would remove the requirement that an act be "adopted under environmental law"; which was the third point that the ACCC considered to stand in the way of the Aarhus Regulation ensuring the EU's compliance with the AC (C32 findings, part II, para. 100. See also the Milieu Study, p. 198). In the past the requirement had led to some confusion, for instance resulting in a Commission decision that the list of Projects of Common Interests was adopted under energy, as opposed to environmental law, and could therefore not be reviewed.

The wording "contravene environmental law" is very close to the Convention's wording, given that the Art. 2(1)(f) Aarhus Regulation adopts a wide definition of what constitutes environmental law and this is also reflected in the Court's case law (Judgement of the EU General Court on Case T-9/19,

paragraphs 117-126 and case law cited). As confirmed by the ACCC Advice, it appears that this wording would on this point ensure compliance with Art. 9(3) AC (ACCC advice, paragraph 44).

"… excepting those provisions of this act for which Union law explicitly requires implementing measures at Union or national level"

The most problematic aspect of the Commission proposed definition of a challengeable act is its final part. The Commission Proposal would introduce a new exception for provisions for which Union law explicitly requires implementing measures. The Proposal's explanation of this exemption is far from clear. The Commission suggests that this exception is modelled on Art. 263(4) TFEU and that for the provision that entail implementing measures, it is possible to seek remedy before the national jurisdiction, with further access to the CJEU under Article 267 TFEU (Commission proposal, pages 16-17).

The Proposal does not address the fact that environmental NGOs will often not have standing to challenge national measures implementing provisions of EU law. Generally, the Milieu Study confirmed that "broad legal standing is granted by law and in practice in less than half of the Member States (13 out of then 28)" (Milieu Study, pp. 106-107). More specifically, national measures implementing EU acts, such as an authorization of a plant protection product based on an EU level REACH authorization, are acts for which the legal system of many Member States does not accord standing rights to environmental NGOs. On this point, the proposal simply states that "the NGOs (much like any other individual or organisation) would need to wait for the adoption of the EU-level implementing measure and challenge the implementing measure before the General Court, if they succeed in demonstrating that they have standing" (Commission proposal, footnote 56). Considering that the proposal thereby accepts that national standing may not be granted in practice, this aspect of the proposal disregards the whole purpose of amending the Aarhus Regulation in a way that ensures compliance with Art. 9(3) Aarhus Convention.

Not surprisingly then, the ACCC concluded in its advice that this exclusion would prevent compliance with Art. 9(3) AC. The ACCC emphasized that it had already established that the preliminary review mechanism was in itself insufficient to ensure access to justice. It therefore considered that EU provisions should be immediately open to review at EU level, regardless of whether they entailed implementing measures (ACCC Advice, paragraphs 67-68).

Additionally, to this clear failure to comply with the Convention, the Commission's proposal does also not concord with the underlying logic of Art. 263 TFEU. In accordance with established case law, whether an act entails implementing measures is supposed to be assessed with regard to an individual applicant (Judgement of the CJEU in Case C-622/16 P, paragraph 61). This ensures that there is indeed a possibility for the applicant to rely on Art. 267 TFEU. As

an example, in *Montessori* it was considered that there were no implementing measures in relation to the applicant because the applicant did not satisfy the conditions to apply for the contested aid (ibid, paragraphs 65-66).

In the context of the Aarhus Regulation, it is very difficult to imagine a situation where an EU measure that could contravene environmental law is implemented in relation to an environmental NGO. These national measures would be intended to regulate the behaviour of companies or public authorities, they would not regulate NGOs. Thus, to introduce this exemption into the Regulation would either be without any effect, if it was applied the same way as under Article 263(4) TFEU or, and this appears more likely, it would be applied in a way that would exclude NGO applicants altogether from access to justice. Ironically, ENGOs would usually not even be able to break the law in order to obtain access to courts, the very thing Art. 263 TFEU seeks to prevent according to the CJEU (ibid, paragraph 58 and case law cited).

Even assuming that none of the above issues would exist and an applicant would have standing to challenge national implementing measures in national court, practical issues prevent this from being an adequate remedy. First, it is fundamentally unclear which acts entail national implementing measures. In the preparation of its Study, Milieu Ltd. consulted the relevant DGs of the Commission as to whether EU acts adopted based on 481 legal bases would result in implementing measures. The Commission services only replied for 107 of the legal bases, i.e. less than 22%. For the remaining 78%, the Commission services left the question unanswered or replied with "don't know" (Milieu Study, footnote 275 on page 120). Moreover, the adoption of implementing measures will often be a possibility but not required by EU law (ibid, page 122). This would make the identification of the correct legal avenue for NGOs extremely challenging. As also confirmed by the Milieu Study, this is in addition to the fact that national legal proceedings will often be prohibitively expensive (ibid, pages 170-171 and 175), take many years to complete (ibid, pages 131 and 171) and are often prevented by the failures of national judges to refer questions (ibid, pages 132-133).[26]

Additionally, the proposal would apply the same rules for implementing measures at EU level. On this point the proposal provides for a possibility to request an internal review of this EU implementing act in order to challenge the overarching act, which makes this aspect less problematic. Nonetheless, it still leads to a situation where the applicant needs to wait that an act that contravenes EU law needs to be implemented first before it can be challenged.

[26] According to the Study, nearly 80% of preliminary references originate from only 7 of the 28 Member States, one of which has since then left the EU.

For this reason, the ACCC advice did not conclude that this aspect prevents compliance with Art. 9(3) AC (ACCC advice, para. 58). Nonetheless, this contradicts the prevention principle, which entails that environmental damage should be prevented before it occurs, and stands in the way of the efficient use of EU resources. It would therefore appear recommendable to remove this limitation altogether.

Exclusion of State aid decisions: Arts 106 and 107 TFEU under Art. 2(2) Aarhus Regulation

The Commission's proposal would maintain the current exclusion of Commission State Aid decisions under Art. 2(2) Aarhus Regulation. It may be argued that the findings of the ACCC in C128 were only published after the publication of the legislative proposal, which gives the Commission a form of excuse as to why it did not cover this in their original proposal. However, the obligation that State aid decisions need to comply with environmental law is not new and had, as discussed above, only been confirmed one month prior to the publication of the proposal in the judgement in *Austria v Commission* based on the Treaty (Judgement of the CJEU in Case C-594/18 P, paragraphs 42-45 and 100). Moreover, the Commission has not since made a supplementary proposal, as it has for instance recently done in the context of the EU Climate Law.[27]

The findings on C128 unequivocally establish the reason for which this continued exclusion fails to comply with the Aarhus Convention. Given that the Aarhus Regulation is amended right now, now would be the moment to remedy this non-compliance. Otherwise, the ACCC will have to continue its follow-up procedure after the MOP and the EU would need to amend the Aarhus Regulation another time. It is for this reason that the ACCC Advice calls on the EU to bear these findings in mind in the context of the current legislative procedure (ACCC advice, paragraph 70).

Admissible claimants: Other members of the public but NGOs

Finally, the Commission's proposal opts to not change the currently admissible applicants, maintaining the admissibility criteria as they are currently reflected in Art. 11 Aarhus Regulation. The proposal seeks to justify this based on the available remedies, the privileged role for NGO access to justice envisaged by the AC, the fact that NGOs are best placed to challenge acts of general scope and because access to individuals would result in a situation "similar to" *actio popularis* (Commission proposal, pp. 7-8.).

None of these arguments are particularly convincing. It is not clear why the existing avenues for an individual to challenge a contravention of environmental

[27] Amendment Proposal, COM(2020) 563 final of 17 September 2020.

law in the public interst are broader than those available to NGOs. Moreover, the fact that the AC recognizes the special role of NGOs (Art. 3(5) AC; for the recognized special role of NGOs, see also Jendroska: 2020, pages 14-15) is not to be understood as meaning that individuals should not have access to justice, whether or not NGOs may be better qualified. Finally, without having discussed the criteria that individuals would have to fulfil, it cannot be said that giving individuals access to justice would amount to a situation similar to *actio popularis*.

Clearly, the formulation of satisfactory criteria is not an easy task. However, by simply refusing to engage in the discussion, the Commission stands on very weak ground, not only legally but also politically. The ACCC advice is unequivocal that there needs to be a possibility for members of the public other than NGOs to have access to justice. It is therefore difficult to imagine a scenario where the EU makes no proposal to that end, whatever its form, and the ACCC nonetheless considers the requirements of the Convention fulfilled. If the Aarhus Regulation does not address this issue, it will likely lead to similar problems as at the previous 2017 MOP.

Prohibitive costs

A final point may appear out of place in this section because it is not featured in the C32 findings nor in the ACCC advice, nor in the Commission's Proposal: prohibitive costs. It is nonetheless of crucial importance for compliance with the Convention. Art. 9(4) AC states that proceedings under Art. 9 AC may not be prohibitively expensive. In the first part of its C32 findings, the ACCC concluded that it not been provided with case law proving that this provision is not respected at EU level (C32 findings, part I, paragraph 93). However, recent developments suggest quite the contrary. There are essentially two issues in CJEU proceedings that may lead to a violation of this principle.

Proceedings before the CJEU are principally governed by the loser pays principle (Article 134(1) of the Rules of Procedure of the General Court, 2015 OJ L 105/1). Therefore, if an applicant appeals an internal review decision to the CJEU and loses, either before the General Court or on appeal, the Court will usually order the applicant to pay the costs of the defendant EU institution or body and of any intervening parties.

First, certain EU institutions, such as the European Commission, usually rely on internal counsel, which means that the costs will in practice be low (accommodation and travel to Luxembourg etc). However, other EU bodies have a tendency to rely on external counsel to represent them in the courts.[28]

[28] See for instance, Case T-9/19 *ClientEarth v EIB*, where the EIB is represented by external counsel.

The potential effect of this can be demonstrated at hand of the recent access to information cases, where the defendant (EU agency Frontex) requested the applicants to pay close to € 24,000 for instance. The Court finally fixed these costs at € 10,520.76 (Order of the EU General Court on Case T-31/18 DEP). While significantly lower, as a cost for one instance litigation, this costs would be prohibitive for smaller NGOs (as well as, potentially, individuals). Moreover, the Court did not consider relevant that the applicants had made use of their fundamental right to access to documents (Art. 42 Charter of Fundamental Rights). There was accordingly also no consideration of whether apportioning these costs would serve as an effective deterrence (or chilling effect) for applicants seeking to defend this fundamental right in Court and obtaining an effective remedy, in line with Art. 47 Charter of Fundamental Rights, in case it is violated. After all, an applicant applying to the Court needs to base this decision on possible cost exposure, as opposed to the assumption that he/she will win the case. Rather, the Court exclusively ruled based on whether the costs were proportional to the work incurred, which is not foreseeable for the applicant. The Court's approach makes advance cost calculation very difficult and is in itself a deterrent factor.

Secondly, the fact that the Court orders the applicant to pay the costs of intervening parties can lead to a potentially catastrophic explosion in costs. In a recent case concerning environmental information, the EU General Court ordered the applicants to pay the costs of 7(!) intervening industry associations (Judgement of the EU General Court in Case T-545/11 RENV, paragraph 118). This clearly opens the door to abuse, given that companies could intervene to discourage litigation altogether.

A real remedy for this issue would require an amendment of rules of procedure of the Court. However, as part of the Aarhus Regulation, a clarification could at least be made that the EU institutions or bodies shall not requests costs related to their legal representation and, in any event, none that are unreasonable.

Summary

To summarise, there are a number of strong points in the Commission proposal, specifically the deletion of the "individual scope" and "adopted under "environmental law" criteria. However, the proposal would not ensure compliance with Art. 9(3) AC, thus not fulfilling the objective of the amendment. Specifically, the exclusion of acts that entail implementing measures, the exclusion of State aid decisions, the lack of clarity concerning "legally binding and external effects" and the complete exclusion of individuals prevent the Aarhus Regulation's compliance with the Convention. Moreover, if not addressed, the issue of prohibitive costs may well lead to non-compliance with Art. 9(4) AC in the future.

3. Some further observations in relation to the EU legal order

While this article is mostly a descriptive account of the EU's difficult process towards implementing the Aarhus Convention's access to justice obligations, based on the example of this process a few observations can be made in relation to the EU legal order.

3.1. The EU's struggle with international law

First, the difficult process described above reflects the EU's continued struggle with international law, both legally and politically. Legally, the CJEU judgement in *Stichting Milieu* demonstrated once more the highly restrictive standard that the Court applies when assessing the compliance of EU acts with international law (Judgement of the CJEU in Joined Cases C-405/12 P and C-405/12 P). The Court's insistence that it could not review the Aarhus Regulation, as it had done in some cases related to the GATT and WTO, because it was not clear that the Regulation was meant to implement Art. 9(3) AC is a difficult position to defend. In any event, it is an expression of the Court's reluctance to accept the supremacy of international law except in very limited instances.

Politically, the position that the EU defended at the 2017 Meeting of the Parties, in particular as represented by the Commission, demonstrates a disregard for the bloc's international obligations vis-à-vis the other Parties to the Convention. The ACCC mechanism had been successful so far because of the consensus-based decision-making process. The EU's stance called this practice into question and opened the door to other Parties to equally refuse to endorse findings directed at them, thus undermining the mechanism as a whole. This stance of purported exceptionalism is very dangerous in the international arena, which is based on the idea that all contracting Parties assume equal obligations.

Due to both this legal and political approach, the Court and the European Commission has manoeuvred the EU in a corner. The Aarhus Regulation amendment is now the only means to rectify the issue before the MOP in October and it will be difficult to finalize the legislative procedure by then. It certainly does not represent the leading role that would be expected from the EU in international processes.

3.2. The consequences of overconstitutionalisation

One issue at the heart of the problem is that the standing rules are regulated in the TFEU, i.e. in primary as opposed to secondary law. Arguably, this is an example of what Grimm terms overconstitutionalisation of the EU (Grimm: 2015), which results in de-politicization of fundamentally political questions.

Since it has to operate within the constraints of Art. 263 TFEU, the Aarhus Regulation is an imperfect replacement mechanism. In the EU Member States, the rules regulating standing in administrative disputes are usually defined in legislation, as opposed to the Constitution. They can therefore be comparatively easily amended. In the EU, such a change requires the amendment of the Treaties.

The internal review mechanism is a clever way to circumvent the issue but it is by design limited. As the CJEU confirmed, an applicant is not able to contest the validity of the underlying act that contravenes environmental law. First, this has an impact on remedies because the CJEU cannot annul the actually contested act, only the internal review decision. The EU institution or body will, in accordance with Article 266 TFEU, be required to take the necessary measures to implement the Court's judgement. This should factually result in the withdrawal of an act, where necessary. Nonetheless, it is a significant legal difference.

Perhaps even more importantly, the distinction has an impact on the scope of review applied by the Court. Based on the Court's case law, an applicant is limited in his/her arguments to those raised in the internal review request (Judgement of the CJEU in Case C-82/17 P, paragraph 39) and may in Court only challenge the response to the internal review request for failing to recognize the alleged contravention of EU environmental law (Judgement of the EU General Court in Case T-33/16, paragraph 49. This is considerably different from a direct action, in which an applicant can challenge the actual decision based on any grounds available at the time when the court application is lodged.

Finally, this overconstitutionalisation limits the political options as regards the scope of access to justice. As discussed above, being an administrative review, it is very difficult to expand internal review to legislative acts. Nonetheless, judicial review of legislative acts is an established feature of EU law. Recently inadmissible cases moreover demonstrate that there are certainly grounds to challenge existing EU legislation on environmental grounds (see for instance, the arguments raised in the inadmissible CJEU Cases C-565/19 P and C-297/20 P). While this is not required by the Aarhus Convention, it would certainly contribute to bringing the Union closer to its citizens and improve enforcement of EU environmental legislation, if such a possibility to challenge EU legislative acts was provided.

The internal review mechanism is certainly a good solution within the remits of Art. 263 TFEU and, if amended along the lines envisaged by the ACCC advice, it will bring a significant improvement for access to justice and, by extension, for environmental protection and human health in Europe. Nonetheless, with a view to the future, sight should not be lost of the overarching issue of limited standing under the Treaties. The question must be asked

how standing should be regulated under the Treaties and whether the Treaties should regulate standing at all.

3.3. An unusual dynamic: Council vs Commission

As mentioned above, the Council's request to the Commission to prepare a study, and where necessary, a legislative amendment, was the first time Art. 241 TFEU was used in environmental matters. The reason it was used at all is likely connected to the realization by the Member States that the position prepared and defended by the Commission for the 2017 MOP was not in fact tenable.

One reason for this special dynamic lies perhaps in the fact that the Commission's own decisions are concerned. Internal review concerns non-legislative acts, such as those adopted by the Commission, and the majority of requests are submitted to the Commission. To leave the question whether Commission decisions shall be challengeable to the Commission entails a certain conflict of interest.

The special dynamic did not end when the Art. 241 TFEU decision was rendered. As discussed above, the Commission's proposal fails to ensure compliance with the AC. To ensure compliance with the AC was the explicit goal of the Art. 241 Council Decision. It is therefore again on the Member States, together with the Parliament, to decide whether they wish to ensure compliance with the AC or not. This puts the Member States in an unusual position, given that there usually tends to be a large amount of congruence between the positions of the Commission and the Council.

4. Conclusion

More than 15 years after the EU's accession to the Aarhus Convention, the implementation of Art. 9(3) AC in relation to acts and omissions of the EU bodies and institutions remains unresolved. The recent legislative proposal to amend the internal review mechanism under the Aarhus Regulation is a big step in the right direction. However, important amendments from the Council and European Parliament are needed to ensure compliance with the AC.

More broadly the process is interesting because it exemplifies the EUs continuous struggle to implement international law, the effects of the overconstitutionalisation of certain aspects of the EU legal framework and unusual dynamics in the institutional framework. These points could perhaps be the basis for further research.

When one takes a step back, it may appear surprising that the implementation of access to justice rights to challenge contraventions of environmental law is such a contested issue. One would assume that the legislative institutions

are interested that the laws that they adopt are respected by the EU institutions and bodies in practice. While the substance of laws meant to protect the environment is notoriously contested, one may assume that their enforcement, once agreed, should be much less controversial.

Whatever the reason, the real loss accrues to the environment and human health because laws meant to protect them can be bent or disregarded. In light of the European Green Deal, it is high time that accountability and accessible justice are guaranteed. This will be not only a win for the environment and human health, but also for the rule of law.

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