

## EURACOAL Position Paper

### on the proposed amendment to the regulation on access to justice in environmental matters (COM(2020) 642)

EURACOAL rejects proposals to amend the Aarhus Regulation. The proposal to extend the rights of review and legal action is not in line with EU law which requires equal access to justice. The proposal would weaken the legal and planning framework in EU Member States by making decisions subject to countless challenges linked, however remotely, to environmental law. The investment decisions needed for economic development would be delayed, less certain and with higher risk premia, all because democratic policy making had been overruled by international law.

In its proposal, the Commission states that “there is no real alternative to amending the Regulation and no further realistic choice over the policy content of the initiative.” With this statement, the Commission places an ill-drafted international convention above EU Treaty law. The correct course of action would be to seek amendments to the Aarhus Convention, rather than undermine the legitimacy of the EU Treaty by introducing regulations that contradict the foundations of EU law.

#### **Background I: legal framework**

The *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* ([The Aarhus Convention](#)), adopted on 25 June 1998, entered into force on 30 October 2001. The convention establishes a number of public rights for individuals and their associations with regard to the environment. Parties to the convention are required to make the necessary provisions so that public authorities at national, regional or local levels contribute to the effectiveness of these rights which cover three “pillars”:

- access to environmental information,
- public participation in environmental decision-making, and
- access to justice (*i.e.* the right to challenge public decisions that have been made without respecting the two aforementioned rights or environmental law in general).

A Council Decision on the conclusion of the Aarhus Convention was adopted on 17 February 2005 (2005/370/EC) and the European Commission has been a party to the convention since May 2005. Earlier, in 2003, two directives concerning the first and second pillars of the convention were adopted and later transposed into national law:

- a directive on public access to environmental information (2003/4/EC of 28 January 2003, repealing 90/313/EEC), and
- a directive on providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment (2003/35/EC of 26 May 2003, amending 85/337/EEC and 96/61/EC with regard to public participation and access to justice).

Provisions for public participation in environmental decision-making can also be found in a number of other directives, such as the directive on the assessment of certain plans and programmes on the environment (2001/42/EC of 27 June 2001) and the Water Framework Directive (2000/60/EC of 23 October 2000). A regulation on the application of the provisions of the Aarhus Convention to Community institutions and bodies has applied since 17 July 2007 ([Regulation \(EC\) 1367/2006](#)).

## **Background II: relationship with current policy**

In its European Green Deal communication (COM(2019) 640 final), the European Commission committed to “consider revising the Aarhus Regulation to improve access to administrative and judicial review at EU level for citizens and NGOs [non-governmental organisations] who have concerns about the legality of decisions with effects on the environment”, and to “take action to improve their access to justice before national courts in all Member States.”

In 2008, the official committee which examines compliance with the Aarhus Convention found that the EU does not fully comply with its requirements on access to justice ([case ACCC/C/2008/32](#)). The parties to the convention will discuss this finding in 2021 and decide whether to endorse it. In summary, with regard to the EU’s non-compliance:

- The committee recalls part I of its findings on the communication, namely that if the jurisprudence of EU courts, including the Court of Justice of the EU (CJEU), on access to justice by members of the public were to continue, unless fully compensated for by adequate administrative review procedures, the EU would fail to comply with article 9, paragraphs 3 and 4, of the convention. Moreover, the committee finds there has been no new direction in the jurisprudence of EU courts to ensure compliance with the convention and that the Aarhus Regulation does not correct or compensate for the failings identified.

### **Aarhus Convention, Article 9, paragraphs 3 and 4**

*3. 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.*

*4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.*

## **Commission proposal**

Following the Commission [report](#) on EU implementation of the Aarhus Convention of October 2019 and after assessing how to ensure compliance in a way that is compatible with EU law, in particular with the Lisbon Treaty (TFEU Article 263(4)), two modifications of the Aarhus Regulation were identified to address the non-compliance issues:

- The Aarhus Regulation currently covers only administrative acts of individual scope (as opposed to acts of general scope).

Based on its experience with administrative and judicial reviews at the EU level, the Commission sees this as the main limitation for those environmental NGOs seeking review of administrative acts at the EU level.

- The Regulation covers acts “under” environmental law.

The formulation, “which contravene provisions of (...) law relating to the environment”, provided under Article 9(3) of the Aarhus Convention, needs to be considered carefully as a reviewable act may not itself have to have an environmental purpose. Also based on its experience, the Commission considers that existing deadlines are too short for review procedures under the Aarhus Regulation.

Finally, access to environmental justice is reported to be an issue of concern at the national level in many Member States. In particular, the Commission reports problems with the standing required under national laws when seeking the required reference from a national court to appeal to the Court of Justice of the EU under TFEU Article 267.

## **EURACOAL response**

### EU law

The Treaty on the Functioning of the European Union sets out certain principles in relation to access to justice. The most important is Article 263 which requires equal access, “Any natural or legal person may, ..., institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.”

Equal access is not served by granting NGOs any special rights over and above other groups such as industry associations. Moreover, an extension of the current rights to legal action beyond administrative acts must be rejected, as it would be contrary to EU law and the universal principles of just law and open government which require stability and fairness. Such an extension would undermine democratic processes.

### Boundaries of legal and political decision-making

EURACOAL fully supports actions brought by groups of citizens where there is a clearly defined failure to implement environmental law which has led to an identifiable and specific harm. We do not support the notation that NGOs can bring actions against the failure of national governments or the European Commission to tackle less clearly defined environmental issues, such as climate change, where the harm is of a general nature that affects regions or the whole world. In these cases, the decision-making process is of a political nature and should take place in chambers of elected representatives and not in court rooms. This is especially important in the case of climate change which is considered to have such an overriding importance that it affects every area of policy making, not only environmental legislation but the whole panoply of socio-economic policy. As such, it is unacceptable to allow courts to determine, in response to actions brought by NGOs, the totality of public policy. *In extremis*, this leads down a dangerous path as *everything* has a climate impact and *anyone* could claim to be affected, thus disrupting democratic processes and representing an unprecedented expansion of the possibilities for review and legal action compared to other areas of law.

It is precisely the limitation in Article 10(1) of the Aarhus Regulation to acts of individual scope rather than of general scope that serves to strike an appropriate balance between legal protection in environmental matters and economic development under a functional legal system. In fact, the Aarhus Regulation already complies with the Aarhus Convention in so far as the wording of Article 10(1) of the regulation refers broadly to “environmental law”. Furthermore and irrespective of the Aarhus Regulation, TFEU Articles 263, 267 and 277 allow for legal review of all EU acts.

The democratic process of policy making, built as it is on manifestos, elections, policy proposals and legislation, cannot be short-circuited such that policy is determined by the courts. It is for this reason that policy makers need to be very careful about what laws they enact. It is troubling to see legislation enacted that has no place in law. Law is a social construct that aims to manage social relationships. As such, law is for the people. To argue “Neither water nor the fish swimming in it can go to court.” misses the point of law making which is to enact decisions made by the common consent of the people.

EURACOAL therefore rejects amending the Aarhus Regulation as any extension of the rights of review and legal action would delay or kill infrastructure projects of all types and damage the legal and planning certainty needed by enterprises when making investment decisions. Our assessment therefore contradicts the Commission’s conclusion that there would be no significant economic impacts from the proposed regulatory amendments, **“apart from an increase in administrative burden on the EU institutions and the CJEU due to expected additional case-load”** (COM(2020) 642 p.13).

Any general rights of review and action derived from the Aarhus Convention would not be in line with the EU Treaties and, if enacted in the EU, would potential overwhelm European courts; no other comparable area of law assigns such extensive rights of review and action. Given the purpose and objectives of the Aarhus Convention, the rights of review and action should not be interpreted as conferring any general rights. Otherwise, the desired protection would extend too far and contradict the Aarhus Convention’s objective of ensuring access to judicial review in environmental matters, as described in the convention’s preamble and Article 9(4), and not general matters. Furthermore, acts of general scope can be subject to judicial review under TFEU Article 263(1). **For these reasons, the European Commission should instead aim to renegotiate the Aarhus Convention at the international level.**

### NGO representativeness

The Aarhus Regulation grants special rights to NGOs who, according to Article 11, must fulfil just four provisions (Regulation (EC) No 1367/2006):

- (a) it is an independent non-profit-making legal person in accordance with a Member State's national law or practice;
- (b) it has the primary stated objective of promoting environmental protection in the context of environmental law;
- (c) it has existed for more than two years and is actively pursuing the objective referred to under (b);
- (d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.

Special rights are justified by the Commission because, “NGOs are often best positioned to effectively represent public interest and civil society concerns in this area with professional, well-founded and substantiated argumentation.”

In practice, a tiny group of just two or three individuals could meet the stated criteria and create enormous legal uncertainty at the EU level: an *actio popularis* that the Aarhus Compliance Committee has expressly stated is *not* required.<sup>1</sup> The intent of the Aarhus Convention is to promote

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<sup>1</sup> See findings of the Committee in case ACCC/C/2005/11 (Belgium), as cited on page 191 of the Aarhus Convention Implementation Guide.

“public participation” in decision making related to environmental law. “The public” is legally defined in Article 2(4) of the convention and is broadly understood. However, Article 9(3) does not refer to “the public”, but rather to “members of the public” that meet criteria laid down in national law. Hence, national law (understood here to include EU law) determines which persons have the right of judicial review, and under what circumstances. This is not well served by allowing a tiny minority of individuals to represent “the public concerned” without any requirement concerning an NGO’s representativeness.

As a claimant in a significant case brought to the CJEU concerning environmental regulation, EURACOAL has close experience with the issues addressed in this proposal (Case T-739/17). The court dismissed our application on the grounds that the association and its members were *not directly affected*, despite the fact that EURACOAL members are operators of power plants that must comply with the regulation under question. We therefore have trouble accepting that NGOs are afforded any special rights. Moreover, we question if NGOs actually represent European citizens in the way anticipated by the Aarhus Convention. In our experience, NGOs actually reflect the interests of their funders (*NGOs for sale – ONGs à vendre*, EURACOAL, October 2015). We find little evidence that NGOs, especially at the European level, are representative of European citizens as there are no processes in place whereby the views of citizens are reflected in the activities of NGOs. In fact, NGOs appear to operate with little citizen contact, but rather support each other in their advocacy work and legal actions.

### Amendments to Aarhus Regulation are not necessary

EURACOAL supports equal access to justice for all. If NGOs are granted greater rights to legal redress in the field of environmental protection, then enterprises, industry associations and trade unions should have the same rights to defend themselves from any far-reaching environmental legislation where *a priori* impact assessments fail to reveal the true socio-economic impacts at the micro and macro levels. Given the importance of social dialogue on the European Union’s political agenda, we believe it is wrong to favour the access of NGOs to justice. Given the complexity of EU environmental protection legislation, the decisions of responsible authorities require much deliberation, and so approval procedures take a very long time before legally secure decisions can be taken. Any extension to the period of deliberation would seriously disadvantage the competitive position of EU industry and commerce in what is a globalised market place.

**EURACOAL is therefore in favour of maintaining the current rights of review and legal action**, because these already offer extensive opportunities to bring actions in the field of environmental protection. Instead of a review of the Aarhus Regulation, the consultation processes *prior* to decisions related to environmental matters should be streamlined and optimised so that concerns can be fully explored *prior* to reaching transparent decisions – even if these final decisions are not acceptable to a minority of stakeholders. Granting special rights to one small segment of society is undemocratic.

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