

Response to Roadmap Consultation: Access to Justice in Environmental Matters

April 3, 2020

Nuclear Transparency Watch (NTW) is a European network of experts and NGOs whose goal is to increase nuclear safety by supporting citizen participatory mechanisms, access to justice and access to information.

NTW welcomes the Commission's efforts to address the findings of EU non-compliance with the Aarhus Convention¹ by amending the Aarhus Regulation with suitable measures. We firmly believe that legislative initiatives will be necessary to ensure that Aarhus Convention rights are granted uniformly across the EU. We hope to also be able to contribute to a public consultation on the Commission's proposed amendments once they drafted.

1. Public disclosure of Commission documents

Under the Convention the substantive right to a safe environment and justice in environmental matters depends on the effective implementation of procedural rights enabling access to information. These rights are considered the 'pillars' of the Convention and are critical to effective environmental governance and environmental justice. Denial of access to documents that clearly fall under the Convention, including those of EU institutions, has frequently been flagged as a problematic issue by the Aarhus Convention Compliance Committee and the European Ombudsman.

Given the large number of complaints before the courts related to denial of access, we hope that amendments to strengthen the Regulation will clarify that grounds for refusals of requests for documents must be interpreted more strictly when the documents contain environmental information, and that the disclosure of documents may also occur over the course of the decision-making process².

¹ Case ACCC/C/2008/32; See also www.documents.clientearth.org/wp-content/uploads/library/2019-02-13-answer-to-the-public-consultation-on-access-to-justice-2019-ce-en.pdf and Milieu Consulting, "Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters: Final report" (September 2019, 07.0203/2018/786407/SER/ENV.E.4), www.ec.europa.eu/environment/aarhus/pdf/Final_study_EU_implementation_environmental_matters_2019.pdf

² As the Grand Chamber of the Court of Justice ruled on 4 September, 2018 the Commission had wrongly denied access guaranteed under the Aarhus Regulation and Convention to important documents used as a basis for its decision-making process (ClientEarth v Commission, C-57/16 P).

The high number of incidents of misapplication of the exceptions (particularly the presumption of confidentiality) and the failure to respect the deadline for requests constitute important barriers to access to justice in information cases. The frequent failure on the part of the Commission to recognize an overriding public interest in disclosure is also a point of concern which clearly requires guidance and/or legislative reforms.

Moreover, there remain serious discrepancies between the information provisions of the Regulation (read in conjunction with Regulation 1049/2001) and the Aarhus Convention. We hope that the Commission will take this opportunity to correct these issues during the revision process.

2. Scope of judicial review

Under Art.10(1) of the Regulation the scope of review only covers challenges of administrative acts ‘under environmental law’³; this should be broadened to ‘[law relating to the environment](#)’ in line with Art. 9(3) of the Aarhus Convention.

3. Domestic barriers

The right to environmental justice of EU citizens, where affected at the Member State level, must ensure access to national courts in line with the principle of effective judicial protection guaranteed under both the EU Treaties and the European Charter.

The CJEU considers that it is settled case law that where EU regulations are absent Member States may establish the procedural rules designed to ensure these rights *“provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness).”*⁴

Despite the settled case law, the procedural autonomy of the Member States has continued to result in unacceptable discrepancies in the level of access to justice;⁵ legislative changes that reflect this case law constitute a necessary remedy.

4. Amendment proposals

NTW fully supports ClientEarth’s proposed substantive amendments to the Regulation preamble and to Articles 2, 10 and 12, as indicated below.

Whereas:

(3) On 25 June 1998 the Community signed the United Economic Commission

³ Aarhus Regulation, Art.10(1)

⁴ 350 C-378/10, Vale Epitesi kft, ECLI:EU:C:2012:440, para 48.

⁵ See ClientEarth’s analysis: www.clientearth.org/states-fail-to-remedy-access-to-justice-failures, 29 April, 2019

for Europe (UNECE) Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters (hereinafter the Aarhus Convention). The Community approved the Aarhus Convention on 17 February 2005. Provisions of EU law should be consistent with that Convention and must be interpreted in such a way as to give full effect to its provisions.

- (4) The Union has already adopted a body of legislation, which is evolving and contributes to the achievement of the objectives of the Aarhus Convention. Provision should be made to apply the requirements of the Convention to Union institutions and bodies, including institutions and bodies under the Euratom Treaty.
- (11) Administrative acts of general and individual scope should be open to possible internal review where they have legally binding ~~and external~~ effects. Similarly, omissions should be covered where there is an obligation to adopt an administrative act under environmental law. Given that acts adopted by a Community institution or body acting in a judicial or legislative capacity can be excluded, the same should apply to Ombudsman, infringement and OLAF proceedings ~~other inquiry procedures where the Community institution or body acts as an administrative review body under provisions of the Treaty.~~
 [...]

Article 2: Definitions

- (g) 'administrative act' means any measure ~~of individual scope under environmental law,~~ taken by a Union Institution or body, and having legally binding ~~and external~~ effects;
2. Administrative acts and administrative omissions shall not include Measures taken or omissions ~~by a Community institution or body in its capacity as an administrative review body, such as~~ under:
- (a) ~~Articles 81, 82, 86 and 87 of the Treaty (competition rules);~~
 - (b) Article 258, 259 and 260 TFEU (infringement proceedings);
 - (c) Article 228 TFEU (Ombudsman proceedings);
 - (d) Article 325 TFEU (OLAF proceedings).

Article 10: Request for internal review of administrative acts

1. Any non-governmental organisation which meets the criteria set out in Article 11 and who considers that an administrative act or an omission contravenes environmental law is entitled to make a request for internal review to the Union institution or body that has adopted ~~the an act under environmental law~~ or, in case of an alleged omission, should have adopted ~~such~~ an act.
 [...]
2. The Union institution or body referred to in paragraph 1 shall consider any such request, unless it is clearly unsubstantiated. The Union institution or body shall issue ~~state its reasons in a written reply~~ as soon as possible, but no later than 12 weeks after receipt of the request, a decision in writing on the measure to be taken to ensure compliance with the environmental law or state its reasons to reject the request.

[...]

Article 12: Proceedings before the Court of Justice

1. The non-governmental organisation which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty to review the substantive and procedural legality of the decision.
[...]
3. The Court of Justice has jurisdiction to annul or to alter the contested decision.
4. If the Court proceedings under Article 12(1) are not successful, the Union institution or body referred to in Article 10(1) shall not request costs exceeding a reasonable amount and shall, in any event, not request costs other than travel and subsistence expenses. In particular, the Union institution or body shall not request the applicant to pay the remuneration of agents, advisers or lawyers. Applicants shall moreover not be required to pay the costs of any intervening parties.

5. Amendment process

In addition, NTW believes that the process of amending the Regulation should be used to revise any other provisions of the Regulation, including those relating to access to information that do not meet the requirements of the Aarhus Convention, in order to ensure full compliance with all aspects of the Convention.