

Amending the Aarhus Regulation: an internal review mechanism that delivers the EU Green Deal

Delivery of the Green Deal depends on the implementation and enforcement of EU environmental law by Member States and EU institutions alike. To ensure compliance in practice, the EU needs strong enforcement mechanisms that allow civil society to hold EU institutions to account when they fail to deliver for the environment and human health.

We welcome the [Commission's proposal](#) to improve the internal review mechanism contained in the [Aarhus Regulation](#) and recognise its potential. In theory, the removal of the “individual scope” criterion should ensure that the internal review mechanism is available for most non-legislative acts that breach EU environmental law – this would be a crucial improvement.

However, the proposal contains **significant loopholes** which the institutions can use to avoid being held accountable. It also fails to ensure compliance with the EU's international law commitments in the [Aarhus Convention](#), which the Regulation seeks to Implement.

This position paper identifies the main deficiencies in the Commission's proposal and suggests appropriate amendments that would ensure accountability and compliance with international law.

What is “internal review”?

In 2006 the EU adopted the Aarhus Regulation to implement the access to justice rights contained in the Aarhus Convention. It did so by creating an “internal review” mechanism, allowing certain environmental NGOs to ask EU institutions to review their own non-legislative decisions, with a right of appeal to the EU courts. It is widely accepted that the current internal review mechanism does not work, mainly because it is unavailable for the vast majority of EU non-legislative acts (so far, it has only been available for certain chemicals and GMO decisions). While the proposal removes some of the existing restrictions, it maintains others and even adds some new ones.

This failure to implement the Aarhus Convention not only breaks international law; it means that the public cannot hold EU institutions to account when their decisions break the EU's environmental laws, causing harm to the environment and human health. Examples of EU non-legislative acts that impact the environment but which are not subject to internal review include the following:

- Decisions to approve (at EU level) active substances that can be used in pesticides, such as glyphosate, which has been labelled as “[probably carcinogenic](#)” by the International Agency for Research on Cancer (IARC);
- the [decision](#) to approve the list of new fossil fuel energy infrastructure projects (the so-called PCI list);
- Decisions regulating [real time emissions tests](#) for motor vehicles;
- Decisions setting total allowable catches (TACs) of certain fish stocks in the [Northeast Atlantic](#) and [Baltic Sea](#).

Unfortunately, the proposal is phrased in such a way that it is unclear whether it would remedy or maintain this situation. It therefore falls on the co-legislators to ensure that the wording leaves no doubt as to which measures can in the future be subject to internal review.

The Aarhus Convention

The UNECE Aarhus Convention guarantees the right of environmental NGOs to challenge certain EU measures that breach EU environmental law. This right is vital to ensuring that EU institutions implement and respect environmental laws and can be held accountable when they fail to do so. In 2017 the UN body responsible for compliance with the Aarhus Convention [found the EU to be in violation of the access to justice provisions in the Convention](#) because environmental NGOs do not have access to an effective review mechanism to ensure that EU measures comply with environmental law. **The Commission's proposal – what needs to change?**

The Commission has adopted this legislative proposal with the objective of bringing the EU into compliance with the Aarhus Convention and to ensure delivery of the Green Deal. However, the current wording would achieve neither of these goals because it contains restrictions that would continue to exclude a significant proportion of EU acts from internal review.

EU acts that entail national implementing measures

The Commission's proposal excludes the provisions of EU acts that explicitly require "national implementing measures". It is far from clear what this provision will mean in practice. The Commission's proposal does not contain any clear explanation.

What is clear is that most EU acts do require national implementing measures at some stage. The proposed phrasing may therefore allow institutions to refuse internal review requests on the basis that the contested EU act will still require national implementation.

In practice, this means that many EU acts cannot be reviewed at source and must first be challenged in national courts, which are then supposed to send a preliminary reference to the Court of Justice of the EU to rule on the validity of the EU acts in question. However, the Commission's own [Report](#) acknowledges that NGOs cannot always access national courts to challenge such implementing measures and, even if they do, it is often impossible to secure the necessary preliminary reference. Unfortunately, the [Communication](#) on improving access to justice in the EU and its Member States, published the same day as the proposal, will not change this.

Even when NGOs are successful in using this route, it can take years, by which time the environmental damage has already occurred in most cases. It also means continuous uncertainty for businesses relying on the legality of EU measures.

The UN body responsible for compliance with the Aarhus Convention has therefore [already found that the preliminary reference procedure does not provide a suitable alternative to the internal review mechanism](#).

Decisions with legally binding effects

According to the proposal, the internal review mechanism is available for "acts with legally binding and external effects" (emphasis added). The Commission claims that this covers all acts that have binding effects. However, experience shows otherwise. For instance, the Commission has in the past refused to review an act that has a legally binding determination because it did not have "external effects" ([Commission decision](#) to approve the Czech Republic's Operational Programme Transport 2007 - 2013) – making the conditions cumulative. The easy solution for this problem is to make the wording consistent with the long-established case law of the CJEU, simply stating that all "acts which produce binding legal effects" acts are covered.

State aid decisions

The proposal still excludes Commission state aid decisions from internal review. State aid decisions are administrative acts adopted by the Commission that may breach EU environmental laws. The [CJEU has explicitly confirmed](#) that the Commission needs to ensure that its State aid decisions only authorise projects that comply with EU environmental law. NGOs must therefore be able to request an internal

review if there is evidence that the Commission may have approved state aid that does not meet this requirement.

State aid decisions are powerful instruments that affect the environment. For example, State aid decisions shape the EU's energy market (support to fossil fuels, to renewable energy sources, to nuclear energy, security of supply measures etc.), which has a direct impact on the balance between polluting and non-polluting industries on the market. They can determine when an industry can benefit from free emissions (ETS) allowances or be compensated for indirect emissions costs. Although this can preserve their competitiveness, it relieves them from internalising pollution costs and can be a disincentive for shifting to cleaner energy sources or increasing energy efficiency. State aid decisions also authorise public funding of infrastructure projects (roads, pipelines, airports etc.) that must comply with environmental laws.

The Commission has stated that the decision to grant aid is taken at national level and should be challenged in national courts. However, there are two main problems with this argument. First, only the Commission and the CJEU have the competence to decide that a national State aid measure is incompatible with EU law. Indeed, Article 2(2)(a) of the Aarhus Regulation excludes decisions made under competition rules, which includes state aid decisions, precisely because the EU has exclusive competence in this field. Second, all of the problems described above in relation to NGOs' access to national courts and their reluctance to refer preliminary questions on the validity of EU acts apply equally in this context. It should also be noted that the exclusion of State aid decisions has no basis in the Aarhus Convention, which excludes acts adopted by public authorities acting in their legislative or judicial capacities only.

Prohibitive costs

Another issue that remains unaddressed is cost protection. If NGOs that want to protect the environment are [forced to pay tens of thousands of Euros in legal fees and costs](#), this has a chilling effect: virtually no applicant will be able to risk litigation at all. While the European Commission is generally represented by its internal legal service in litigation, other EU bodies (such as the European Food Safety Authority (EFSA), the European Chemicals Agency (ECHA) or the European Investment Bank) often hire private law firms and seek to pass these costs on to applicant NGOs if they win. The proposal therefore needs to include a cost protection mechanism to make judicial review accessible in practice and not only on paper.

In case of any questions, please contact:

Anne Friel, lawyer, Environmental Democracy Lead: afriel@clientearth.org

Sebastian Bechtel, Environmental Democracy lawyer: sbechtel@clientearth.org

ANNEX: Proposal for amending the Commission’s proposal and detailed explanations

Amendments No. 1 & 2: “National Implementing measures” & “External effects”

Article 1(1)

Commission amendment proposal	Proposed amendment
Article 2(1)(g) is replaced by the following: ‘(g) ‘administrative act’ means 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; ’	Article 2(1)(g) is replaced by the following: ‘(g) ‘administrative act’ means any non-legislative act adopted by a Union institution or body, which has legally binding effects and contains provisions that may contravene environmental law within the meaning of point (f) of Article 2(1);’

This amendment will further require an amendment of recital 6 of the amending Regulation and, perhaps, to change the order of recitals 7 and 8.

Explanation

Implementing measures

By deleting the words “*excepting those provisions of this act for which Union law explicitly requires implementing measures at Union or national level*”, this amendment ensures that no new restrictions to NGO standing are included in the amendment. If not removed, the reference to “implementing measures” will frustrate the *effet utile* of the internal review mechanism. The [Milieu Study](#) taken into account by the Commission in this Proposal concluded that “*most types of acts will result in implementing measures*”.¹ This would mean that the internal review mechanism would remain unavailable in the majority of cases.

This limitation also introduces legal uncertainty as the question of which provisions of EU acts explicitly require implementing measures at national level or EU level is far from clear. In the preparation of its Study, Milieu consulted the relevant Commission DGs as to whether the EU acts adopted on 481 legal bases would result in implementing measures. The Commission services provided a response for only 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”.² The Commission’s proposal also fails to provide clarity on this matter.³

With regard to EU implementing measures, this lack of clarity could result in NGOs missing their only opportunity to request review of an act due to a mistaken presumption that implementing measures would follow. Additionally, it will certainly result in increased environmental damage, as NGOs have to wait for the adoption of an implementing measure before it can challenge the original act that breaches environmental law. It does not make sense to wait for the implementation of an illegal act before a possibility to challenge it arises.

For national implementing measures, what this will mean in practice is also unclear. For instance, will it be possible for an applicant to challenge the authorisation of a herbicide, [such as glyphosate](#), or would the NGO be expected to challenge national approvals of plant protection products that contain glyphosate in a national court? Questions like this are likely to be the subject of litigation for several years to come.

¹ Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters, September 2019, Milieu Law and Policy Consulting, p. 120. See also table 15 on pp. 120-122.

² See Milieu Study, footnote 275 on p. 120.

³ Proposal, pp. 14-15.

The proposal rests on the false assumption that NGOs can challenge EU acts that require national implementing measures by going through national courts and the preliminary reference procedure under Art. 267 TFEU.⁴ However, as the Commission itself admits⁵ and as also clearly demonstrated by the Study prepared to inform this very Proposal,⁶ legal and practical challenges abound for ENGOs to obtain standing at national level to challenge implementing measures.

The Milieu Study concludes that “*broad legal standing is granted by law and in practice in less than half of the Member States (13 out of then 28)*” and “*the issue of legal standing is an enduring one, as demonstrated both by the legal settings in the EU-28 and the experiences of potential claimants (NGOs) and national judges.*”⁷ More specifically, in many Member States certain acts are effectively barred from judicial review because they are considered “internal” to the administration or to only affect an economic operator. Additionally, many practical challenges arise, which are also discussed in the Study, such as prohibitive costs,⁸ delays (of around 16 months per case)⁹ and failures by national judges to refer questions.¹⁰

“External effects” & “because of their effects”

By deleting the words “and external”, this amendment ensures that all acts that have legally binding effects that can contravene environmental law are covered. In the proposal, the Commission states itself that it seeks to cover all legally binding acts. However, at the same time, it confirms that the CJEU under Article 263 TFEU uses a different legal test, namely “binding legal effects”, as opposed to the Regulation’s wording of “external and legally binding effects”.¹¹ If the meaning is supposed to be the same, why not align the wording?

As mentioned above, this inconsistency has led to unjustified refusals of internal review requests in the past.¹² This is also one of the points that the Aarhus Convention Compliance Committee (ACCC) found to be in non-compliance with the Aarhus Convention. As the Commission confirms, its proposal is intended to address these concerns.¹³

Equally, the term “because of their effects” introduces potential for confusion. Whether or not an EU measure or omission contravenes environmental law goes down to procedural and/or substantive issues. It is not necessarily due to the effects of the act that there is such non-compliance; the effects may be yet far from clear. Rather, non-compliance can arise from the wording of a specific provision alone. NGOs should not have to wait to quantify and assess the decision’s negative effects on the environment. To make this clear, we equally propose deletion of these words.

⁴ Proposal, p. 2.

⁵ Proposal, p. 12.

⁶ Milieu Study, p. 122.

⁷ Milieu Study, pp. 106-107.

⁸ Milieu Study, pp. 170-171 and 175.

⁹ Milieu Study, p. 131 and 171, referred to as hassle costs. As an example, in a recent case in Belgium the preliminary reference led to an 18 months delay of its national litigation on an urgent human health matter (review of an air quality plan), which also amounted to one third of the costs incurred in the case.

¹⁰ See Milieu study, inter alia pp. 132-3 stating for instance that nearly 80% of preliminary references originate from only 7 of the 28 Member States, one of which has since then left the European Union.

¹¹ Proposal, p. 8, which refers to C-583/11 *Inuit*, para. 56 where the CJEU uses the term “binding legal effects”.

¹² Further examples include: a Commission proposal to implement a directive and the omission to adopt such a proposal; guidelines on state aid for environmental protection and energy and a Commission statement concerning the implementation of a provision of the EU ETS Directive specifying the way Member States may use revenues generated from auctioning of allowances to support the construction of certain plants.

¹³ Proposal, p. 1.

Amendment No. 3: State Aid

Article 1(2a) (new)

Current Regulation text	Proposed amendment
Article 2(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) Articles 226 and 228 of the Treaty (infringement proceedings); (c) Article 195 of the Treaty (Ombudsman proceedings); (d) Article 280 of the Treaty (OLAF proceedings)	Article 2(2) is replaced with the following: Administrative acts and administrative omissions shall not include measures taken or omissions by a Community institution or body under: (a) Articles 258, 259 and 260 TFEU (infringement proceedings) (b) Article 228 TFEU (Ombudsman proceedings); (c) Article 325 TFEU (OLAF proceedings).

This amendment will additionally require an amendment of recital 11 of the current Aarhus Regulation.

Explanation

This amendment achieves two important objectives: a) it deletes the explicit exclusion of state aid decisions from internal review; and b) it ensures that the list of exclusions is exhaustive. This avoids new kinds of decisions being excluded in the future on the basis that they constitute “administrative review proceedings”. Indeed, the UN body responsible for compliance with the Aarhus Convention clearly noted that “there is, however, no express exemption from the Convention for measures taken in the capacity of an administrative review body”.¹⁴

When adopting a state aid decision, the Commission confirms that certain financial support granted by a Member State complies with EU law. The CJEU has explicitly confirmed that the Commission needs to ensure that its state aid decisions comply with EU environmental law.¹⁵ NGOs must therefore be able to request an internal review where there is evidence that the Commission may have failed to ensure compliance with EU environmental law.

¹⁴ ACCCC/C/2008/32, Part II (European Union), ECE/MP.PP/C.1/2017/7, para. 108.

¹⁵ An extensive review of Commission’s state aid decisions reveals that the Commission only checks compliance of an activity with environmental laws when that is required by its own guidelines (for examples, with the Water Framework Directive for support to hydropower projects, or with the Waste Framework Directive for support to waste management projects). When that is not the case, the Commission verifies compliance in a very selective manner. For example, state aid decisions sometimes check that a road infrastructure project conducted an environmental impact assessment whereas state aid decisions for gas infrastructure generally do not contain a reference to environmental law. In its observations in a pending case before the Aarhus Convention Compliance Committee on this specific issue (ACCC/C/2015/128), the Commission recognised that it does not consider itself obliged to verify the compliance of an activity receiving aid with environmental law. This contradicts the CJEU’s ruling on *Austria v. Commission* of 22 September 2020 (C-594/18P), para 45: “It follows that, since Article 107(3)(c) TFEU applies to State aid in the nuclear energy sector covered by the Euratom Treaty, State aid for an economic activity falling within that sector that is shown upon examination to contravene rules of EU law on the environment cannot be declared compatible with the internal market pursuant to that provision.” While this statement applies to nuclear energy, it is based on principles that equally apply outside of the nuclear sector (see paras 42-44).

Amendments No. 4 and 5: Costs & Effective Remedies

Article 1(3a) (new)

Current Regulation text	Proposed amendment
Article 12(1)	Article 12(1) is replaced with the following:
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.	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 or procedural legality of the internal review decision.
	A new Article 12(3) is inserted:
	Without prejudice to the Court's prerogative to apportion costs, it must be ensured that court proceedings initiated under this provision are not prohibitively expensive. Union institutions and bodies referred to in Article 10(1) shall not request that applicants pay costs exceeding a reasonable amount and shall, in any event, not request costs other than travel and subsistence expenses. In particular, Union institutions and bodies shall not request applicants to pay the remuneration of agents, advisers or lawyers.

Explanation

Effective Remedies

The amendment to Art. 12(1) would ensure that the Court of Justice can review all procedural and substantive aspects of the review decision. This goes some way to address the current issue that an applicant is not able to directly contest the substantive and procedural legality of the challenged administrative act before the CJEU,¹⁶ which, as confirmed in the Milieu Study, limits the effectiveness of the internal review mechanism.¹⁷ Moreover, it ensures compliance with the Aarhus Convention, as confirmed by the findings of the ACCC.¹⁸

Costs

The proposed new Art. 12(3) clarifies, firstly, that costs may generally not be prohibitively expensive. This is a direct implementation of Art. 9(4) Aarhus Convention, which has been implemented in similar terms in a number of EU Directives.¹⁹ A similar requirement is so far lacking for the EU level. The provision would guide the CJEU when making cost orders. For instance, in a recent case the General Court ordered two

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¹⁶ T-108/17 *ClientEarth v Commission*, paras 28 and 30. See also T-177/13 *Testbiotech and Others v Commission*, paras 56 and 60.

¹⁷ Milieu Study, p. 126.

¹⁸ ACCCC/C/2008/32, Part II (European Union), ECE/MP.PP/C.1/2017/7, para. 119. The Committee states that Art. 12 Aarhus Regulation would only comply with the Convention if the European Courts were to interpret it in a way that would allow for judicial review of the substance of the original act.

¹⁹ Article 11(4) of the EIA Directive, Article 25(4) of the IED and Article 23 of the Seveso III Directive. EU Member States have established various mechanisms to ensure that costs are not prohibitive in practice. For example, in Poland an unsuccessful applicant does not have to pay the costs of the administration. In Slovakia, the same applies, except in some limited circumstances. In other countries, such as Germany or Austria, lawyers' fees are calculated based on a table in accordance with the value of the claim.

environmental NGOs to pay the costs of all intervening parties: seven(!) international companies and industry associations.²⁰ This provision should be taken into account when the Court rules on the costs in such a case.

Secondly, the amendment ensures that NGOs do not have to pay the excessive costs incurred by EU bodies when they hire external law firms to defend internal review cases. In a recent case an EU agency has requested the unsuccessful applicants (both NGO employees) to pay an amount of € 23.700 for external lawyer fees. For an environmental NGO such cost awards potentially threaten their existence. It makes litigation even for the relatively well-funded NGOs too financially risky to pursue. It is in that regard immaterial whether the NGO would finally win the case, the mere possibility of losing would deter litigation from the outset.

²⁰ Case T-545/11 RENV *Stichting Greenpeace Nederland and PAN Europe v Commission*, ECLI:EU:T:2018:817, para. 118