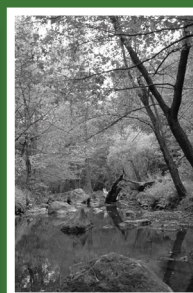


RIR IN PRACTICE

The Functioning of the Legal Instrument of Request for Internal Review under the Aarhus Regulation



Justice & Environment

Justice & Environment (J&E) is a European network of environmental law organisations. J&E is a non-profit association with a mission that *aims for better legislation and implementation of environmental law on the national and European Union (EU) level to protect the environment, people and nature*. J&E fulfils this mission by ensuring the enforcement of EU legislation through the use of European law and exchange of information.

J&E was created in January 2003 and founded as a non-profit association in September 2004. J&E currently comprises six full-member organisations: Environmental Law Service, Czech Republic (EPS); Estonian Environmental Law Centre, Estonia (EELC); Environmental Management and Law Association, Hungary (EMLA); ÖKOBÜRO – Coordination Office of Austrian Environmental Organisations, Austria; Legal-Informational Centre for NGOs, Slovenia (PIC); and the Centre for Public Advocacy, Slovakia (VIA IURIS). J&E also has six associate members: Environmental Justice Association, Spain (AJA); Centre for Legal Resources, Romania (CRJ); Front 21/42 Citizens' Association, Macedonia (Front 21/42); MilieuKontakt International, the Netherlands (MKI); Independent Institute of Environmental Concerns, Germany (UfU); and Green Action – Friends of the Earth Croatia, Croatia (ZA).

All J&E activities are based on the expertise, knowledge and experience of its member organisations. The members contribute their legal know-how and are instrumental in the initiation, design and implementation of the J&E work programme. The strong grassroots contacts of the members enable J&E to concentrate on Europe-wide legal issues and horizontal legislation, notably the: Aarhus Convention, environmental impact assessment, environmental liability, pollution, Natura 2000, transport and the building of legal capacity. Within these fields J&E: carries out analysis, compiles case studies and joint position papers; formulates strategic complaints, encourages discussion and legal education; and conducts outreach activities. Thus J&E provides added value from civil society to legislators and adds tangible benefits by broadening public knowledge of EU law and legislation.

To carry out its programme of work J&E relies on a number of donors and supporters. First and foremost the members themselves financially contribute to the network. However J&E has been supported by: the European Commission through the LIFE+ programme, the International Visegrad Fund (IVF), The Ministry of Housing, Spatial Planning and the Environment of The Netherlands (VROM), the Sigrid Rausing Trust and its own member organisations

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*The report was funded by
the European Commission LIFE+ programme
and the VROM.*

Acknowledgements

This project of the Justice and Environment Network was made possible by the expertise and dedication of the legal experts and staff of the following member organisations:



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This publication was made possible by the financial support of the European Commission LIFE+ Programme and the Netherlands Ministry of Housing, Spatial Planning and the Environment (VROM).

Opinions or points of view expressed are those of the author(s) and do not necessarily reflect the official position or policies of the European Commission, the VROM or other supporters.

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Written by Dr. Csaba Kiss for Justice & Environment 2009

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Contents

1. Introduction	7
2. The legal framework	7
2.1 The legal instrument	8
2.2 The case law to date	9
2.3 Notes to the comparative matrix	11
3. Conclusions	12
4. Recommendations	13

1. Introduction

It is undoubted that the Aarhus Convention¹ is such a piece of international legislation that has fundamentally altered the frameworks of interaction between the governments and civil society at large. Its real impacts are still to be precisely assessed but one of its characteristics is that it obligates its parties to create a favorable environment for the exercise of access rights, either by amending existing laws or by genuine legislation.

The EC being one of the parties to the Aarhus Convention has adopted a law in the form of a regulation in order to comply with the provisions of the Aarhus Convention. This regulation² as opposed to the laws of the individual country parties and also to the European laws made in the form of directives obliging Member States, applies to EC institutions and bodies.

This regulation (hereafter called Aarhus Regulation) is briefly introduced³ on the website⁴ of the European Commission and is also included in the Aarhus Clearinghouse⁵ of the UNECE. Its adoption was mostly welcome by one of the largest Green 10 members in a statement⁶ dated July 2006 while another Brussels-based NGO has dedicated a full-day forum⁷ to the Aarhus Regulation in October 2006.

Regulation – and that is important for us now – enables environmental NGOs meeting certain criteria to request an internal review under environmental law of acts adopted, or omissions, by Community institutions and bodies.

Thus many expectations were raised by the adoption and June 2007 entry into force of this law; this brief paper examines whether such expectations were substantiated with special regard to a new legal instrument in the law: the Request for Internal Review.

2. The legal framework

The Aarhus Regulation has created an entire regime of access rights implementation ranging from access to information through participation in decision-making to access to justice, all relating to Community institutions and bodies.

¹ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

² 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

³ „The “Aarhus Regulation” covers not only the institutions, but also bodies, offices or agencies established by, or on the basis of the EC Treaty. They now need to adapt their internal procedures and practice to the provisions of the Regulation. The Aarhus Regulation addresses the “three pillars” of the Aarhus Convention -access to information, public participation and access to justice in environmental matters -where those are of relevance to Community institutions and bodies and lays down related requirements.”

⁴ <http://ec.europa.eu/environment/aarhus>

⁵ <http://aarhusclearinghouse.unece.org/results.cfm?q=%22aarhus+regulation%22>

⁶ John Hontelez, EEB's Secretary General, said: “This is a step forward for the EU's transparency and accountability to its citizens. The EU takes important decisions that affect people's health and the natural environment. The Regulation improves access to environmental information and public participation, but we are disappointed at the refusal of the Council and Parliament to follow the Convention and provide more effective access to justice at EU level in cases when EU Institutions fail to apply or defend EU environmental law.”

⁷ <http://www.ecosphere.be/pdflyers/ReportForumOct2006.pdf>

Two other legal enactments are worth mentioning: a Commission Decision 2008/50/EC⁸ from 2007 establishing criteria for the submission of the aforementioned Request for Internal Review, and a Commission Decision 2008/401/EC, Euratom⁹ from 2008 amending the Rules of Procedure of the Commission.

2.1 The legal instrument

The legal tool in the focus of our assessment is the Request for Internal Review (hereafter called RIR) that is regulated in the Aarhus Regulation under its Title IV called “Internal Review and Access to Justice”. Article 10 of the Aarhus Regulation called “Request for internal review of administrative acts” states that

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

[...]

2. The Community institution or body referred to in paragraph 1 shall consider any such request, unless it is clearly unsubstantiated. The Community institution or body shall state its reasons in a written reply as soon as possible, but no later than 12 weeks after receipt of the request.

It is obvious that the RIR is a certain kind of appeal that is targeted to the very same body that has made the original decision. This solution is commonly adopted in the Member States, making it possible for the organ making a decision to reconsider its standpoint after having received contrary arguments. Its advantages and disadvantages are equally clear: while it is a system that operates at low cost (there is no superior authority overseeing the legality of the original decision and there are no collateral costs such as moving the files from one body to another), the organ having made the original decision is naturally inclined to uphold its previous decision, thus making it more difficult to give way to the appeal.

While Commission Decision 2008/50/EC has not added to the substantive implementation of the Aarhus Regulation, the Commission Decision 2008/401/EC, Euratom in its Annex (“Detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council 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”) states that

⁸ Commission Decision of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts (2008/50/EC)

⁹ Commission Decision of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council 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 institution and bodies (2008/401/EC, Euratom)

Article 4

Decisions concerning the admissibility of requests for internal review

3. In accordance with Article 14 of the Rules of Procedure, the power to take decisions on the admissibility of a request for internal review is delegated to the Director-General or the head of department concerned.

Article 5

Decisions concerning the substance of requests for internal review

1. Any decision whereby it is determined that the administrative act whose review is sought, or the alleged administrative omission, is in breach of environmental law shall be taken by the Commission.

[...]

2. In accordance with Article 13 of the Rules of Procedure, the Member of the Commission responsible for the application of the provisions on the basis of which the administrative act concerned was adopted or to which the alleged administrative omission relates shall be empowered to decide that the administrative act whose review is sought, or the alleged administrative omission, is not in breach of environmental law.

As it is seen from the above extracts, while the decision on the admissibility of a RIR is conferred upon the competent DGs, the substantive decision is shared between the Commission as a collective body and the competent DG.

2.2 The case law to date

Many environmental non-governmental organizations have noticed the entry into force of the Aarhus Regulation and have consequently tried to apply the legal instruments provided thereby.

To date, even a small case law have developed from the RIRs submitted by the NGOs and the replies made by the Commission or its bodies.¹⁰ We have examined these submissions and the replies, and have prepared a comparative matrix out of the existing materials.

The case law shows the following results:

¹⁰ http://ec.europa.eu/environment/aarhus/internal_review.htm

Case law of the RIR in the Aarhus Regulation 2007 - 2009

Serial number	Applicant	Date	Matter of submission	Respondent	Date	Reply	Reasoning
1	"European Environmental Bureau Friends of the Earth Europe Health and Environment Alliance Women in Europe for a Common Future"	2007 September	Commission Decision of 12 September 2007 adopting the list of candidates for the appointment of the Executive Director of the European Chemicals Agency by the Management Board thereof	"DG Environment DG Enterprise and Industry"	2007 December	inadmissible	"staff related decision are by their very nature to be regarded as internal to the institution or body concerned and thus incapable of having "external effects" within the meaning of the Regulation"
2	Justice and Environment	2007 December	Commission Decisions 2007/701/EC, 2007/702/EC and 2007/703/EC of 24 October 2007 authorizing the placing on the market of products containing, consisting of, or produced from genetically modified maize	DG Health and Consumers	2008 May	admissible	"Decisions 2007/701/EC, 2007/702/EC and 2007/703/EC are in line with provisions of law regarding the environment and do not need to be amended by the Commission"
3	Ekologicky Pravní Servis	2008 January	Commission Decision C(2007)6367 adopting the Operational Programme Transport for Community assistance from the European Regional Development Fund and the Cohesion Fund under the Convergence Objective in the Czech Republic	DG Regional Policy	2008 August	inadmissible	"this act, although having "legally binding ... effects", has no "external effects"
4	"Pesticides Action Network Stichting Natuur en Milieu"	2008 April	Commission Regulation (EC) No 149/2008 of 29 January 2008 amending Regulation (EC) No 396/2005 of the European Parliament and of the Council by establishing Annexes II, III and IV setting maximum residue levels for products covered by Annex I thereto	DG Health and Consumers	2008 July	inadmissible	"Regulation (EC) No 149/2008 cannot be considered an act of individual scope nor, as it is claimed in your letter, a bundle of decisions"
5	Liga para a Protecção da Natureza	2008 July	Commission Decision of 28 February 2008 whereby infringement procedure 2003/4523 concerning the Baixo Sabor dam project in Portugal	DG Environment	2008 October	inadmissible	"a request for internal review may only be lodged against administrative acts [...] which are not taken by the Commission in its capacity as an administrative review body"
6	Stichting Natuur en Milieu	2009 January	Commission Directive 2008/116/EC of 15 December 2008 amending Council Directive 91/414/EEC to include acodifen, imidacloprid and metazachlor as active substances insofar as the inclusion of imidacloprid is concerned	DG Health and Consumers	2009 April	inadmissible	"Directive 2008/116/EC must be regarded as an act of general scope. It cannot be considered an administrative act within the meaning of Art. 2(1)(g)"
7	Client Earth	2009 January	Statement on the use of revenues generated from the auctioning of allowances made by the Commission with respect to Article 10(3) of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003	European Commission	2009 April	inadmissible	"the Commission's statement was a statement of political character and is considered not to be legally binding and not to have external (legal) effects"
8	"Vereniging Milieudefensie Stichting Stop Luchtverontreiniging Utrecht"	2009 May	Commission Decision C(2009) 2560 of 7 April 2009 on the notification by the Netherlands of a postponement for attaining the deadline for the limit values for NO2 and an exemption from the obligation to apply the limit values for PM10	DG Environment	2009 July	inadmissible	"the Commission considers that its Decision of 7 April 2009 is not a measure of individual scope [...] decisions adopted pursuant to that provision constitute "derogations to a general regime" within the meaning of the abovementioned case-law and partake therefore the general nature of Directive 2008/50/EC"

2.3 Notes to the comparative matrix

It is worth making relevant comments to each of the columns of the above matrix, however, its most striking feature is the very high level of cases (almost 90%, marked with red) where the RIR was simply inadmissible.

Firstly, one significant data is the relatively low number of submissions made by the eligible NGOs. In our understanding, 8 such requests within 2 years of time cannot be considered a frequently and widely used legal instrument. It gives a round 1 submission per quarter year average.

Secondly, half of the applicants are rather national environmental NGOs (3, 5, 6 and 8) while the other half is international networks or federations (1, 2, 4 and 7). There are 3 Brussels-based applicant in the list (1, 3, and 7) and there is only one EU-10 based NGO (3) besides the rest that are all EU-15 based NGOs. There are no EU-2 NGOs in the list. This gives an impression that there is a need for a higher expertise and more connectedness in order first of all to be aware of this legal instrument and second to use it properly.

Thirdly, the dates of submissions show that some “early birds” have discovered this legal opportunity not much after the entry into force of the Aarhus Regulation, thus the alert system of some environmental NGOs is quite developed.

Fourthly, the topics of submissions vary greatly. There are matters affected such as staff and personnel (1), GMOs (1), funding and finances (2), chemicals and pollutants (3) and infringement procedure (1). There can be a linkage established between the nationality of the applicant and the matter of the case in 3 instances (3, 5 and 5) but otherwise the contested acts are of a general European nature.

Fifthly, DG Environment and DG Health and Consumers are overrepresented within the affected DGs with 3 replies each. The Commission itself has answered only in 1 instance whereas the replies came from individual DGs in all the rest of the cases.

Sixthly, the average answer time is 3 months which is in compliance with the 12-week deadline established by Art. 10.2 of the Aarhus Regulation. There is only 1 instance (2) where 5 months and 1 instance (3) where 7 months (!) were needed to reply to a RIR, however, in all the latter cases the delay was either due to an administrative mistake or to an extensive communication preceding the decision of the competent DG.

Seventhly, the most striking feature of the above matrix is the already mentioned very high level of refusals due to inadmissibility. The reasons for refusal we will examine later, however, the success ratio of this new legal instrument for the environmental NGO community seems to be very low. From the 8 submissions, only 1 (!) such RIR was admissible that is hardly more than 10% of all. This conveys a message from the Commission to the public that an utmost care ought to be applied when making a submission; otherwise the applicant would risk a swift and simple refusal for procedural reasons. It also means that only a fragment of the legal issues raised by the NGOs was in fact analyzed by the Commission in merit, whereas in most of the cases the easiest available refusal for procedural reasons was applied.

Eighthly and finally, the reasons for refusal due to inadmissibility vary but not considerably. There is lack of a reviewable decision (1 case), lack of external effect (3 cases) and non-individual decisions

(3 instances). This led us to ask what the criteria are according to which an administrative act can be challenged by a RIR. These are laid down by Art. 2.1.g of the Aarhus Regulation as follows:

(g) 'administrative act' means any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects;

It seems that such acts are quite rarely made by Community institutions or bodies. An act to be regarded as challengeable by a RIR must be

any measure = must take one of the legally accepted forms for a decision within the Community, most typically be a Commission Decision, however, as case No. 7 suggests, it cannot be a political statement

of individual scope = must relate to a specifically defined subject of law, however, it seems from case No. 4 and case No. 6 that the act cannot be of a legislative character or as case No. 8 suggests, if such an act affects an undefined number of subject through affecting a Member State, that act is not considered individual

under environmental law (this has not raised a question yet and hopefully this term is interpreted in an inclusive manner by the Commission)

taken by a Community institution or body (but the capacity of the Commission in which the act is taken cannot be of an administrative review body, see case No. 5)

having legally binding effects = rights and obligations must stem from the act, as case No. 7 demonstrates

having external effects = must relate to individual subjects of Community law, e.g. natural or legal persons, and cannot be Member States (as in case No. 1, No. 3 and No.7 happened)

Thus far, the only case where all such criteria were met was case No. 2 where the acts took the form of Commission Decisions published in the OJ, the decisions were addressed to Monsanto Europe SA, Pioneer Overseas Corporation and Dow AgroSciences Europe Ltd., they affected environmental law in the sphere of GMOs, they were made by the Commissioner for Health for the Commission, were legally binding as a Commission Decision is pursuant to the EC Treaty and had clear external effects by authorizing the placing on the market of GMO maize. That act, however, was not found substantively faulty, therefore the RIR was refused in the merits.

3. Conclusions

This is not complicated to conclude after such an overview that the legal instrument of RIR established by the Aarhus Regulation for providing access rights implementation opportunity to certain selected applicants has not fulfilled the expectations.

Administrative acts conforming to the criteria of the Aarhus Regulation are rare or are not easily accessible for the potential applicants, refusal of applications by the DGs is common practice, and notions like “individual”, “external” or “binding” are construed quite restrictively.

The Commission should change its attitude towards this legal instrument in case it is interested in making the RIR a meaningful tool of remedy as much as the environmental NGO community is.

4. Recommendations

Recommendations logically stem from the conclusions, so the Commission (and its institutions and bodies) should

- make a formal administrative act the form of its decision whenever circumstances so require, trying to avoid non-standard forms of decision-making to the most extent
- create a platform for accessing all such decisions i.e. making an internet website under the Commission's webpage for environmental administrative acts
- interpret the criteria of the Aarhus Regulation (Art. 2.1.g) in a non-restrictive, lenient manner so as to ensure wider access to the merits of the cases within the RIR regime

Last but not least, we urge the Commission to perform its duties under the Commission Decision 2008/401/EC, Euratom as laid down in its Annex Article 7 called "Information of the public", as follows:

A practical guide shall provide to the public appropriate information about their rights under Regulation (EC) No 1367/2006.

In case the above recommendations are not adopted by the Commission, thus the instrument of RIR is not opened up for the environmental NGO community, we suggest that the Commission describe in the aforementioned practical guide – based on the empirical experience gathered so far and presented in this study, and conveying truly appropriate information – the significantly limited practical use of RIR.

