

The Aarhus Regulation and the future of standing of NGOs/public concerned before the ECJ in environmental cases



Introduction

In September 2006, the European Council and Parliament adopted the Regulation (EC) 1367/2006 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 (so-called “Aarhus Regulation”). The Regulation is applicable from 28 June 2007. By adopting this Regulation, the EC intended to fulfill part of its obligations – as a party to the Aarhus Convention¹ – to adapt its legislation in conformity with the Aarhus Convention requirements.

The title of the Regulation predicts that its purpose is to apply the provisions of the Convention with regard to the institutions of the EC². It is obvious that this must concern all bodies including the judicial ones of the EU, as one of the main “pillars” of the Aarhus Convention is access to justice (judicial protection) in environmental matters.

This paper discusses how adoption of the Aarhus Regulation has changed – or could change – the (so far very limited) possibilities of NGOs and other private (“non-privileged” – see below) applicants to challenge acts of EC institutions having impacts on the environment at the European Court of Justice (ECJ)³.

1. Current situation of access of “non-privileged applicants” (especially environmental NGOs) to the ECJ

Before the adoption of the Aarhus Regulation, there were no special provisions on access to judicial review of EC institutions’ acts related to the environment in EC law. The possibility of such legal steps was therefore regulated by general provisions of the EC Treaty, namely its Article 230. This provision gives the ECJ competence to review legally binding acts, adopted by other EC bodies. The review procedure can be started by actions brought by two groups of applicants.

- A) The Member States, the European Parliament, the Council and the Commission (so-called “privileged applicants”) can bring an action in front of the ECJ without any

¹ EC signed the Aarhus Convention in June 1998 and approved (ratified) it on 17 February 2005 by Council Decision 2005/370/EC.

² By adoption of directives 2003/4/EC and 2003/35/EC, the EU contributed to the application of the Convention provisions by the Member States; there is, however, no directive in force yet covering the area of access to justice although it is being in the pipeline for many years.

³ In this text, we do not distinguish between competences of the Court of First Instance and the European Court of Justice and use the abbreviation “ECJ” for both.

standing restrictions. The only condition is that the action must be raised within two months of the publication of the contested act.

- B) Other applicants - natural and legal persons, called also “non-privileged applicants” - have much more limited possibilities to start the review procedure of EC acts before the ECJ. According to Article 230(4) of the EC Treaty, they can do so only
- if the act is explicitly addressed to the applicant or
 - (is addressed to another person but) is of “direct and individual concern” to the applicant.⁴

According to ECJ case-law, an act is of *direct concern* if it does not require implementing measures to produce direct legal effects on the situation of the applicant.⁵

The prevailing ECJ interpretation of an *individual concern* dates back to the case known as *Plaumann*.⁶ In this decision, the ECJ stated that “Persons other than those to whom a decision is addressed may only claim to be individually concerned if that decision affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed.” In other words, the ECJ said that to satisfy the condition of *individual concern*, it is not sufficient that the act clearly applies to the applicant and influences his/her legal situation. The so-called “Plaumann test” requires the non-privileged applicant to prove that he/she is in a unique position towards the contested act and no one else could be affected by it in the same way.

This interpretation of *individual concern* has represented the main limitation of private applicants’ access to judicial review of EC acts before the ECJ. It was approved by the ECJ also in cases, in which environmental NGOs and other non-privileged applicants tried to challenge acts of the Commission which according to their opinion contravened EC environmental law.

The *Greenpeace v. Commission* case⁷ is probably the best known example. In this case, Greenpeace, local environmental organizations and local fishermen, farmers and citizens sought for annulment of a Commission Decision providing funds for the construction of coal-fired power plants at the Canary Islands. The NGO applicants have claimed that their special interests in the protection of environment should be deemed as sufficient to satisfy the standing requirements.

⁴ The wording of Article 230(4) limits the scope of the acts that can be challenged by private applicants to decisions and decisions in form of regulations. However, according to the Court of Justice jurisdiction, private applicants can challenge any act that is, in reality, a decision of direct and individual concern to the applicant, including directives and acts *sui generis* such as informal letters from the Commission.

⁵ The application of the measure must be automatic and leaves no discretion to the addressees of the measure who are entrusted with its implementation. Cases 41-44/70 *NV International Fruit Company v. Commission* [1971] ECR 411, Case 62/70 *Bock v. Commission* [1971] ECR 897, Case 69/69 *Alcan v. Commission* [1971] ECR 385.

⁶ *Plaumann v. Commission*, Case 25/62, [1963] ECR 95. Plaumann was a German company that imported clementines and sought to challenge the Commission's decision addressed to Germany, refusing a request by the latter to suspend the collection of customs duties on the import of fresh clementines into the EC.

⁷ Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) v. Commission* [1995] ECR II-2205. Appealed to and upheld by the European Court of Justice; see *Stichting Greenpeace Council (Greenpeace International) v. Commission*, Case C-321/95, [1998] ECR I-1651.

The ECJ categorically refused this argumentation. It did not acknowledge that the applicants' interests are of public character (in contrast to private economical interests for which the *Plaumann test* was designed). Instead, it has stated that the public interests, such as protection of the environment, are by definition diffuse and therefore the NGOs cannot fulfill the requirement of a unique position towards the contested act. Nor has the ECJ accepted the standing of local inhabitants, concluding that the possible harms concerning their health and environmental conditions, caused by the investment, "do not differentiate them from any person residing or staying temporarily in the areas concerned". Similarly has the ECJ refused standing of environmental NGOs in a number of other cases.⁸

2. The Aarhus Regulation and access of NGOs to ECJ – general remarks

Articles 10 to 12 of the Aarhus Regulation (Title IV – "Internal Review and Access to Justice") set out special rules for the review of legality of certain acts and omissions of EC institutions in the field of environmental law. As these provisions are intended to implement the requirements of Article 9 of the Aarhus Convention, it seems to be obvious that they should give the non-privileged applicants – environmental NGOs as well as other members of the public – a far broader access to ECJ in environmental matters, compared to Article 230(4) of the EC Treaty, as interpreted by the doctrine of "direct and individual concern".

It must be noted that the Aarhus Regulation is not explicit as concerns the question of broadening the access to ECJ in environmental matters. Thus, it leaves a considerable room for interpretation and also gives the chance to both the environmental NGOs and the ECJ to reconsider their standpoints in this crucial matter.

There's little guidance on whether the entry into force of the Aarhus Regulation means that NGOs' access to judicial review remains limited by the existing rules of Article 230 and the jurisdiction of the ECJ, or whether it requires the Court of Justice to relax its standing requirements. The European Commission did not attempt to answer this question. Instead it refrained to stating that "*there is no case-law on the application and interpretation of Title IV of Regulation No 1367/2006 as yet*".⁹ But as long as it is true, the lack of relevant case law opens a window of opportunity for environmental NGOs of Europe. If all prior ECJ rulings and judgments containing restrictive criteria and interpreting NGO standing in a prohibitive way are NOT the case law of the Aarhus Regulation, then it is literally a *tabula rasa* situation.

⁸ See e.g. Case T-236/04 *EEB and Stichting Natuur en Milieu v. Commission*, [2005]. It shall be added that the ECJ has not always applied the "individual concern" criteria so strictly in other branches of law, e.g. in trademark or competition and anti-dumping law. In these areas the ECJ seems to examine more flexibly if the particular situation of the plaintiff has some unique characteristics that justify the action to be accepted. For example, the situations in which "*the plaintiff holds a unique right that is affected by the contested measure*" (Case C-309/89, *Codorniu SA v. Council*, [1994] ECR I-1853), "*the Commission owns a legislative duty to take account of the specific circumstances of the plaintiff before adopting a measure*" Cases T-480 and 483/93, *Antillean Rice Mills NV v. Commission* [1995] ECR II-2305 or "*an investigation was initiated by the Commission on the basis of the plaintiff's complaint*" Case C-26/76, *Metro-SB-Großmärkte GmbH & Co KG v. Commission* [1977] ECR 1875, were accepted by ECJ as sufficient for granting to private persons standing to challenge the acts of the Commission.

⁹ Commission of the European Communities: Aarhus Convention Implementation Report – European Community, SEC(2008) 556, Brussels, 7 May 2008, p. 27

Then any ensuing ECJ decision can form this area even in a way different from the earlier ECJ standpoints and can open the gates of access to justice on a European level.

It is worth looking at those arguments that suggest that the Aarhus Regulation will change the prevailing situation of limited access.

3. The Request for Internal Review

The Aarhus Convention enables its parties to condition the access to court by exhaustion of preliminary review procedure before an administrative authority. The Aarhus Regulation primarily establishes terms for launching a “request for internal review” of administrative acts and omissions of EC institutions under environmental law and regulates a procedure of such a review by the same institutions, which had issued the contested acts (or should have done so). Exhaustion of the “internal review procedure” is, according to Article 12 of the Aarhus Regulation, a necessary pre-requisite for bringing the same problem to the ECJ.

According to Article 10(1) of the Aarhus Regulation, “*any non-governmental organization which meets the criteria set out in Article 11 of the Regulation 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*”. The terms for launching the request for internal review according to this provision can be divided into two groups: an objective and a subjective one.

A) Objective Criteria

The first determinates WHAT can be subject to an internal review procedure according to the Aarhus Regulation. This results from the definitions of the terms “Community institution or body”, “environmental law”, “administrative act” and “administrative omission”, set forth in Article 2 of the Aarhus Regulation:

‘Community institution or body’

means any public institution, body, office or agency established by, or on the basis of, the Treaty except when acting in a judicial or legislative capacity. In practice, the provisions on internal review procedure will be in most cases applicable on acts or omissions of the Commission, or individual Directorates-General.

‘Environmental law’

means Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilization of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems. The definition of environmental law is quite broad, however, borderline cases may cause problems in interpretation. One such example can be financial measures that otherwise contribute to the pursuit of the objectives of Community policy on the environment.

'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. These cumulative conditions - apart from the above that it should fall under environmental law - limit the scope of acts which can be subject to the internal review procedure:

- a) be legally binding (recommendations and opinions without binding force are therefore excluded from the review procedure),
- b) have external effect – it appears to mean that the act shall not only be binding for the EC institutions but (also) for external subjects – whether the Member States or private person(s),
- c) be of individual scope – according to the Commission this simply excludes thereby legislative (most of regulations and directives) and judicial measures from the scope of challengeable acts¹⁰.

However, the Aarhus Regulation does not apply to directives, or any other normative acts, not even to acts of the Commission when it updates annexes of environmental directives by decisions, given that these are done in a legislative capacity, clearly excluded from the scope of the Aarhus Regulation.

One example from the incipient case law of the Commission suggests the interpretation of these criteria. Based upon the request for internal review submitted by Justice and Environment Association (applicant of the case), the Commission has responded in the merit of the case. The request affected three Commission Decisions authorizing the placing on the market of products containing, consisting of, or produced from genetically modified maize.¹¹ The Commission (DG Health) has judged that such a decision fulfills all necessary (objective) criteria prescribed by the Aarhus Regulation.

On the contrary, the Commission (DG Regio) has refused to review according to the Aarhus Regulation the Decision approving the Operational Program Transport 2007-2013 for the Czech Republic, arguing that this act does not meet the condition of having an external effect. According to the answer of the Commission to the Justice and Environment Association member Environmental Law Service (applicant of the case), *"this act, although having "legally binding effects", has no "external effects", as "Decisions approving operational programmes are addressed to the Member State, but such decisions do not approve any project to be co-funded under that programme."* We can conclude that the Commission Decisions on Operational Programs Transport of Member States do not fall under the Aarhus Regulation.

'Administrative omission'

means any failure of a Community institution or body to adopt an administrative act as defined above.

B) Subjective Criteria

10 Commission of the European Communities: Aarhus Convention Implementation Report – European Community, SEC(2008) 556, Brussels, 7 May 2008, p. 26

¹¹ See <http://www.justiceandenvironment.org/wp-content/uploads/2008/01/aarhus-gmo-request.pdf>

The second group of terms for filing a request for internal review determines WHO can do that under which further procedural requirements.

According to Article 11 of the Aarhus Regulation, the request can be made by a non-governmental organization, provided that

- 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.

The request must be made in writing within a time limit not exceeding six weeks after the administrative act was adopted, notified or published, whichever is the latest, or, in the case of an alleged omission, six weeks after the date when the administrative act was required. It shall state grounds for the review.

Additionally to the criteria set by the Aarhus Regulation, the Commission has issued 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).¹²

As a proof that the Commission takes its role quite seriously in this matter, is also issued 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).

4. Access to the ECJ for NGOs according to Article 12 of the Aarhus Regulation

The Community institution or body which received a request for internal review shall provide the applicant with a written reply no later than 12 weeks after receipt of the request (in exceptional cases within 18 weeks).

Article 12(1) of the Aarhus Regulation states that the NGO "*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 question which has not been solved by ECJ so far is, if the NGOs access to ECJ according to Article 12(1) of the Aarhus Regulation is limited by the conditions of Article 230(4) of the Treaty and the relevant ECJ case-law (the doctrine of direct and individual concern – see Part

¹² A bit strange situation developed, due to the fact that the decision was done at Brussels at 13 December 2007, published in the Official Journal at 16 January 2007 but was declared to apply from 28 June 2007. This may contravene the principle of ban of retroactivity of Community acts.

1), OR the Aarhus Regulation gives the standing before ECJ to all NGOs meeting the criteria to file a request for internal review and having done so unsuccessfully.

It is impossible to predict if and under what criteria will the Court of Justice accept legal standing of NGOs on the basis of rules of the Aarhus Regulation. There are, however, a few legal reasons and indications that the Aarhus Regulation indeed opens a way for NGOs to challenge acts of EC Institutions:

First of all, it seems to be the only plausible interpretation that Article 12(1) of the Aarhus Regulation shall apply in the situation when the NGO's request for internal review has been unsuccessful (i.e. dismissed as inadmissible for not meeting the above mentioned terms, or on merit). This is supported also by the wording of Article 10(2) of the Aarhus Regulation, which applies to the situation when the respective EC institution fails to deal with the request for internal review in the appropriate time-limits and entitles the NGO to institute the proceedings before ECJ for the protection against such omission in this situation.

Secondly, Article 12(1) of the Aarhus Regulation gives standing before ECJ to NGOs which made (previously) the request for internal review; this means that the Regulation assumes that when an NGO is not satisfied with the results of the "internal review procedure", it can ask ECJ to review the legality of the administrative act in question. It would have no sense to have such provision in the Regulation unless the words "in accordance with relevant provisions of the Treaty" would give more rights to the NGOs, than the Treaty itself to date; these words shall be therefore interpreted in a way that all other issues (except standing, which is based on the Aarhus Regulation) are regulated by the Treaty. (See also point 21 of the Aarhus Regulation Preamble, which states that "Where previous requests for internal review have been unsuccessful, the non-governmental organization concerned should be able to institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty").

Thirdly, this latter construction is supported by Article 6 of the Annex of the aforementioned Commission Decision 2008/401/EC, Euratom called "Remedies", that states:

"All replies informing the non-governmental organisation that its request is either inadmissible, in full or part, or that the administrative act whose review is sought, or the alleged administrative omission, is not in breach of environmental law shall apprise the non-governmental organisation of the remedies open to it, namely instituting court proceedings against the Commission, or making a complaint to the Ombudsman, or both, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively."

This additional provision would again make no sense if the interpretation of Article 12(1) of the Aarhus Regulation continued as it prevails now in the current ECJ case law.

Fourthly, the NGO to which the written reply in the *internal review* procedure was or should have been addressed can argue that this reply as such shall be considered as "a decision addressed to that person" in the sense of Article 230(4) of the Treaty. It can be noted in this

respect that a *written reply* under the Transparency Regulation¹³ is deemed to be a decision that can be challenged by the NGO in the European Court of Justice.¹⁴

Fifthly, in the Acores case¹⁵ the ECJ has already expressed its position towards possible standing of environmental NGOs, based on Article 12 of the Aarhus Regulation (though indirectly and not sufficiently clearly), when saying that

*“Although it is true that the conditions for admissibility laid down in [Article 230 of the Treaty] are strict, the fact remains that the Community legislature adopted, in order to facilitate access to the Community judicature in environmental matters [the Aarhus Regulation]. **Title IV (Articles 10 to 12) of that regulation lays down a procedure on completion of which certain non-governmental organizations may bring an action for annulment before the Community judicature under Article 230 EC.** Since the conditions laid down in Title IV of that regulation are manifestly not satisfied in the present case, it is not for the Court to substitute itself for the legislature and to accept, on the basis of the Aarhus Convention, the admissibility of an action which does not meet the conditions laid down in Article 230 EC.*

This part of the decision can be interpreted in the way that the court explicitly recognized that the Aarhus Regulation laid down a procedure which makes it possible for “certain environmental NGOs” to bring an action for annulment of certain EC acts before the ECJ. The term “annulment” also indicates that it should be possible for the NGOs to challenge the act in question in merit (not only for a procedural failure in dealing with the request for the internal review). At the same time, we have to notice that the court found the Aarhus Regulation inapplicable in this case because the applicants did not follow the internal review procedure of the Regulation’s Title IV (it has not been in force yet at the relevant time), and because the contested measure was of legislative and not of administrative character. This again may give us the freedom of interpretation that had there been the rules of the Aarhus Regulation complied with, the decision of the Court would have been different.

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5. Conclusions

We can conclude that the Aarhus Regulation has established relatively clear rules of the “preliminary review procedure before an administrative authority” in the sense of Article 9(2) of the Aarhus Convention (the last paragraph) with regard to the decisions, acts and omissions of EC institutions under environmental law. On the contrary, the Regulation is not very clear as concerns the conditions for access to judicial review (i.e. ECJ) for environmental NGOs.

However, the arguments presented in Part 4 of this paper, together with the fact that the Aarhus Regulation was adopted by the EC with the aim to fulfill the obligations it has as a party to the Aarhus Convention, support the interpretation that the ECJ shall not apply its

13 Regulation (EC) No 1049/2001 of The European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L 145/43.

14 Case T-264/04 *WWF European Policy Programme v. Council of the European Union (supported by Commission of the European Communities, intervener)*, OJ C 96 of 28.04.2007, p. 32

15 Case T-37/04 *Regiao autonoma dos Açores v. Council*, of 1st July 2008.

previous restrictive standing conditions as concerns the acts and omissions “covered” by the Regulation (see Part 3), but rather accept the lawsuits of the NGOs which filed a request for internal review unsuccessfully. The fact that the ECJ took a different (more relaxed) approach to standing of unprivileged applicants at other branches of law (see Footnote 9 for more details) can support this hope.

It shall be added, that even if this hope will be met, there remain serious gaps concerning access of the public concerned to the ECJ.

Firstly, the Aarhus Regulation does not grant any rights (with regard to the internal review procedure, and therefore also concerning access to the ECJ) to private persons, affected by the acts or omissions of EC institutions. The regulation therefore fails to grant the rights resulting from Article 9 of the Aarhus Convention to all subjects falling into the scope of the “public concerned”, as defined by Article 2(5) of the Convention.

Secondly, the Aarhus Regulation is applicable only to “measures of individual scope” (see the definition of “administrative act” in Part 3 above). Article 230(4) of the Treaty does not limit the scope of acts which can be subject to review before ECJ in this way; instead, it states that the lawsuit can be filed also against “a decision” (obviously in a material sense) “*although in the form of a regulation*”.

6. Recommendations

Having discussed the above problems and possible interpretations, there can be at least two systemic recommendations drawn for environmental NGOs on the European level:

First of all, the existing legal instruments provided by the Aarhus Regulation should be used in an extensive way. The reason does not merely lie in the mission of the affected NGOs to promote public participation in environmental matters, or in the inherent desire of such NGOs to improve the state of environment in Europe. It has hard legal reasons which were worked out by the ECJ in the TWD case¹⁶ where it stated that the invalidity of a Commission Decision cannot be raised in proceedings against authorities implementing the decision before the national courts if the applicant has not applied for the annulment of the contested Commission Decision under Article 230 EC within the prescribed period and where the applicant could undoubtedly have done so. Consequently, all administrative acts or omissions of Community institutions that contravene EC environmental law must be attacked pursuant to the Aarhus Regulation, otherwise the applicants will lose their right for a preliminary ruling in national judicial procedures.

Secondly, the boundaries of access to the courts including the ECJ must constantly be tried in order to achieve what the Aarhus Convention envisages in its Article 9: wide access to justice. However, the first ever case brought before the ECJ in order to see how the Aarhus Regulation can be applied in practice must be cleverly selected and carefully prepared. The possible interpretations favorable for the environmental NGOs must be worked out in details, and the arguments in the merit of the case must also be based on firm foundations.

¹⁶ Case C-188/92 TWD Textilwerke Deggendorf v. Germany, 1994, also in Case C-178/95 Wiljo NV v. Belgium, 1997

Thus, the convincing reasoning regarding legal standing as well as the persuasive arguments in the substance of the case together will result in a broadened standing for NGOs in environmental matters before the ECJ.

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