PRELIMINARY POSITION PAPER

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Cefic' s views on the potential Aarhus Regulation revision foreseen to broaden rules on Access to Justice[1]

Following the legislative initiative announced in the Commission Roadmap on 'better access to justice in environmental matters', Cefic shares its views on the upcoming proposal to revise the Aarhus regulation which may lead to a privileged access to justice by environmental NGOs.

Impacts of the potential extension of the scope of review under the Aarhus Regulation

Although Cefic understands the criticism and circumstances that have led to the current debate on a possible extension of the scope of review (i.e. from acts of individual to acts of general scope) under the Aarhus Regulation (the Regulation), we believe this may lead to:

- **Inconsistency with the EU Treaties and specifically with Art. 263 TFEU**. According to sources of EU Law, an international convention or a proposal to amend EU Secondary Legislation cannot alter the provisions laid down under EU Primary Law, i.e. under the EU Treaties.

- **Increased legal actions from environmental NGOs against products and/or substances authorisations from EU institutions** will give rise to legal uncertainty and negative effects to business and industry, including indirect economic costs[2]. This is according to recent EU Court Rulings[3] on the Aarhus internal review mechanism, as well as to the Commission Staff Working Document on the 'EU Implementation of the Aarhus Convention in the area of access to justice in environmental matters'[4].

[1] As per the legislative initiative announced in the Commission Roadmap of March-April 2020, and following from the Commission Communications on the EU Green Deal , of 11 December 2019, and the Biodiversity Strategy for 2030, of 20 May 2020.

[2] See the **Economic impacts for Businesses, according to Measure B1 on the Change reference to individual scope,** Milieu Study on the 'EU Implementation of the Aarhus Convention in the area of access to justice in environmental matters', of 10 October 2019 (p. 239): *"The impact on the indirect costs to businesses is expected to be more significant, as the overall number of requests for internal review and judicial challenges under the Aarhus Regulation would grow. Businesses might face indirect costs linked to legal procedures and court cases that are lengthy or result in legal uncertainty (…),the broader scope of acts that might be challenged may raise not only the number of requests but also the instances of subsequent judicial challenges under the Aarhus Regulation. In both cases, businesses might face uncertainty, linked to the higher risk of challenges resulting in reversals or modifications of acts".*

[3] EU Courts have reprimanded environmental NGOs for not exhausting all available administrative means under EU Law. See for reference **Case 'ClientEarth v Commission' (T-108/17)** [Appeal Case, **C-458/19 P**] and **Appeal Case 'TestBio Tech eV v Commission' (C-82/17 P)** [Judgment under Appeal, **T-177/13**], where the Courts established clear limits on the use of the judicial review system, while assessing on the inadmissibility of the arguments raised by the NGOs in their actions for annulment of the Commission's acts subject to requests for internal review.

[4] COM SWD on the EU Implementation of the Aarhus Convention in the area of access to justice in environmental matters, of 10 October 2019 (p. 11): "*while most of the environmental NGOs who have tried to use the administrative review mechanism have been treated as eligible, over two-thirds of their requests have been treated as inadmissible at the administrative review stage itself*

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- **Inconsistency with the system of remedies established in EU primary law** and disruption of the existing level-playing between non-governmental organizations (NGOs) i.e. environmental NGOs and industry associations which are not for profit, if such a proposal were tabled.

- **A continued restrictive environment for businesses and industry associations to challenge EU acts of general application directly before the EU courts.** They often have no other option but to initiate proceedings before national courts against the national measure implementing the EU act and plead the invalidity of the latter[5]. Thus, businesses and industry associations also experience today difficulties to get standing before EU Courts if the EU act is not directly addressed to them.

- **A change to the EU's system of legal standing may require prior preliminary ruling from the European Court.** The constitutional settlement enshrined in the EU Treaties for the standing of natural and legal persons cannot be changed through the back door.

Aarhus Convention Compliance Committee's assessment of EU compliance on access to justice by members of the public

We consider that the Aarhus Convention Compliance Committee (the ACCC) may not have taken into account the specificity of the legal order and institutional framework of the Union[6]. If so, the EU compliance with the provisions of the Convention on access to justice by members of the public was not fully assessed for the following reasons:

- The EU is the only 'regional economic integration organization' having acceded to the Aarhus Convention. Access to justice in the EU cannot be assessed the same way as in a State.

- Parties to the Convention have been made aware by the Declaration that the EU made upon signature and reiterated upon approval of the Convention that "*[w]ithin the institutional and legal context of the Community […] the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention*."

- In the EU, the competences of the institutions including those of EU Courts, are those that the Member States accorded to grant via the Treaties of the Union. Hence, the role of the EU Courts and the rules on *locus standi* are limited to what is laid down in the EU Treaties.

– mostly because the acts were not deemed to be of individual scope. Almost half of the decisions on administrative review subsequently became subject to applications for judicial review under the first limb of Article 263(4) – although not all were ultimately pursued. This shows a high use of this judicial redress mechanism".

[5] See **Joined Cases C-191/14 and C-192/14** *Borealis Polyolefine GmbH and OMV Refining & Marketing GmbH v Bundesminister für Land-, und Forstwirtschaft, Umwelt und Wasserwirtschaft*, **Case C-295/14** *DOW Benelux BV and Others v Staatssecretaris van Infrastructur en Milieu and Others*, and **Joined Cases C-389/14, C-391/14 to C-393/14** *Esso Italiana Srl and Others, Api Raffineria di Ancona SpA, Lucchini in Amministrazione Straordinaria SpA and Dalmine SpA v Comitato nazionale per la gestione della direttiva 2003/87/CE e per il supporto nella gestione delle attività di progetto del protocollo di Kyoto and Others*.

[6] Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part II) concerning compliance by the European Union, adopted by the Compliance Committee on 17 March 2017. Available at: https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html.

- The case law of the European Court cannot be altered by the ACCC's findings[7]. It is for the European Court itself to decide on the development of its case law, within the limits of the Treaties.

- The findings of a Committee cannot take priority over the decisions of the European Court or the Treaty. The EU is an independent legal order.

Standing criteria upon discretion of all Parties to the Aarhus Convention

According to Art. 9(3) of the Convention[8] each Party, including the EU, must ensure that members of the public have access to administrative or judicial review procedures to challenge acts and omissions by private persons and public authorities contravening environmental law. In this way, the Convention sets out the aim but does not prescribe the means. Meaning:

- Parties have discretion as to **(i) the admissibility conditions** ("*where they meet the criteria … laid down in national law*"); **(ii) the nature of the review procedure (*"administrative or judicial"*)** plus, in the case of the European Union, the level at which that review takes place (i.e. before a national court/administrative authority or at EU level); **and (iii) the range of acts or omissions subject to review** (in contrast with other provisions on access to justice, in particular Art. 9(2) of the Convention)[9].

Existing EU means of administrative and judicial redress

The EU Aarhus Regulation allows for access to two dedicated review procedures that are reserved exclusively to environmental NGOs, in compliance with Art. 9(3) of the Aarhus Convention:

- ***Administrative Review*** – Art. 10 establishes the right of environmental NGOs to request the internal administrative review of EU acts of individual scope adopted under environmental law and omissions to adopt such acts.

- ***Judicial Review*** – Art. 12 already provides for judicial proceedings to be instituted by environmental NGOs. In essence, it lays-down the possibility for environmental NGOs who made a request for internal review to institute proceedings before the EU Court of Justice in accordance with the Treaty, thereby challenging the legality of the EU reply or failure to reply in time and/or due form. This shows that the EU has even provided more review possibilities for environmental NGOs than what would have been required according to the Aarhus Convention.

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[7] Following from the ACCC's findings, various recommendations were outlined relating to the EU Compliance Case ACCC/C/2008/32: achieve compliance with the Convention via EU secondary legislation, by amending the Aarhus Regulation, or via a change in the CJEU jurisprudence, so that EU Courts assess the legality of EU implementing measures and interpret EU law consistently with Art. 9 of the Convention.

[8] Art. 9(3) of the Aarhus Convention: *"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".*

[9] See for reference **paragraphs 47 and 51** of **Joined Cases C-404/12 P and C-405/12 P**, *Stichting Natuur en Milieu and Pesticides Action Network*, , regarding the broad margin of discretion of the Parties when defining the rules for the implementation of the administrative or judicial procedures.

Industry Views on the national measures expected within the proposal

Along with the anticipated legislative changes to the Regulation announced in the Commission Roadmap, a new Commission Communication on access to justice in environmental matters – including initiatives to improve the current situation – is also foreseen. Hence, it is possible that the final Commission Proposal might suggest adopting the Measure B4 suggested within the Milieu Study, i.e. an EU Access to Justice Directive. Provided this, we would like to underline the need to reconsider the following:

- Whereas the suggested Directive would not guarantee access to justice in cases where there are no implementing measures, it is likely to increase delays and contribute to business uncertainty[10] due to the expected increase in the use of the preliminary ruling from Art. 267 TFEU.

- Besides the obvious differences, in terms of implementation and enforcement, amongst EU Member States; those arising from the numerous national legal systems also suggest for a cautious approach in the event of adopting an Access to Justice Directive[11].

- Based on prior experience, chances for a Directive on Access to Justice are rather limited. Next to possible subsidiarity concerns, the support of Member States is not clear. The latter was evidenced when the Directive was first tabled in 2003 and eventually withdrawn in 2014 due, namely, to the lack of support from Member States[12].

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[10] See the **social impacts – for industry/economic actors – of measure B4** from the Milieu Study, page 250.

[11] During the negotiations on the Directive for Access to Justice in 2013, the proposal did not receive the necessary support by the Council. Whereas some Member States expressed doubts on the added value of the initiative, others feared the Directive could have a far-reaching impact on their national legal systems, or even took the view that the provisions of the Aarhus Convention are sufficient and so that there is no need for an EU initiative in this field (See the COM SWD – Impact Assessment on a Commission Initiative on Access to Justice in Environmental Matters, of 28 June 2017).

[12] See also page 46 of the above 2017 COM SWD: *"It is therefore reasonable to assume that the lack of Member State support that led the Commission to withdraw the proposal in 2014 has not changed, hence the prospects of having a new proposal adopted and take effect on the ground are thus very limited".*