POSITION PAPER

November 2020

Cefic views on the Commission's legislative proposal to amend the Aarhus Regulation

The legislative proposal creates an unparalleled administrative review mechanism accessible only to a specific stakeholder category, with the risk that acts of quasi-legislative nature be challenged based on political considerations. To ensure consistency with the EU Treaty system of legal remedies, it is of crucial importance that applicants under the Aarhus Regulation should only be admitted to request reviews of acts not entailing implementing measures.

Cefic acknowledges the efforts made by the Commission to address concerns raised by the Aarhus Convention Compliance Committee[1] while preserving consistency with the EU Treaty system of legal remedies to ensure judicial review of EU acts – but remains concerned as to the consequences of the proposed legislative changes[2].

A far-reaching legislative proposal, creating privileged rights for environmental NGOs

With this Proposal, the Commission considerably extends the range of acts and omissions potentially challengeable under the Aarhus administrative review mechanism – reserving this remedy only to environmental NGOs. The latter may then challenge the EU institution or body's response directly before the EU Courts in line with Article 263 TFEU.

a) a much broader range of 'challengeable acts', including acts of quasi-legislative nature

The Proposal would enable environmental NGOs to challenge a much broader range of EU acts than under the current Aarhus Regulation, including measures adopted under EU chemical policy, such as REACH restrictions, CLP harmonized classification decisions, biocidal active substance approvals – but also a series of acts adopted under other EU policies (e.g. energy, transport, research and innovation), whether they are of purely administrative or quasi-legislative nature (cf. delegated acts).

[1] 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. In essence, the Committee considered that: (i) the Regulation should also encompass general acts and not only acts of individual scope; (ii) that every administrative act that is simply 'relating' to the environment should be challengeable, not only acts that fall 'under' environmental law; (iii) that the administrative review mechanism should be opened up beyond NGOs to other members of the public; and (iv) that acts that do not have legally binding and external effects should also be open to review.

[2] Proposal for a Regulation amending Regulation (EC) No 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, of 14 October 2020 [2020/0289 (COD).
See https://ec.europa.eu/environment/aarhus/pdf/legislative_proposal_amending_aarhus_regulation.pdf

European Chemical Industry Council - Cefic aisbl
Rue Belliard 40 b.15 B-1040 Brussels Belgium
Tel. +32.2.436.93.00 mail@cefic.be www.cefic.org
EU Transparency Register n° 64879142323-90

b) a lower threshold of admissibility

Environmental NGOs would be admitted to request a review as soon as the act contains provisions that "*may have an adverse effect on the attainment of the objectives of Union policy on the environment set out in Article 191 TFEU*". The threshold to trigger a review of the act would be much lower than under the current regulation, opening the possibility to challenge EU measures – including quasi-legislative measures – based on political considerations.

c) creating an unparalleled review procedure accessible exclusively to environmental NGOs

The Proposal would thus create a transversal administrative review mechanism accessible only to a specific stakeholder category. Environmental NGOs would be given privileged access to a two-tier review system – first before the EU institution/body adopting the contested act (or omitting to act) and second before the EU courts, for reviewing acts of individual and general scope.

Conversely, businesses, trade federations and other non-privileged applicants can rely on administrative review procedures only on a case-by-case basis, where this is provided for under sector-specific legislation and only for a limited number of decisions of individual scope (e.g. ECHA Board of Appeal; confirmatory applications under EU access to documents regulation).

A Proposal that risks leading to significant increase in litigation before the EU courts, challenging EU acts based on political considerations

Since the administrative review mechanism was created in 2006, environmental NGOs have repeatedly challenged before the EU courts the administrative response to the formal request for internal review. Out of the 47 requests for internal review on the public record, 18 led to actions for annulment[3].

Several appeals have been lodged in order to seek annulment of the measure subject to administrative review. In the chemical sector, court cases are ongoing to challenge product/substance authorizations granted under EU secondary legislation[4], creating legal uncertainty for the applicants.

This trend will likely increase with the broadening of the scope of 'administrative acts', and evolve towards challenges of a more political nature, arguing that EU measures should be annulled for lack of consistency with environmental principles and policy objectives.

There is hence an urgent need to safeguard consistency with the EU Treaty system of remedies

While we acknowledge the difficulties that environmental NGOs experience to get standing before EU courts, this is largely due to the design and nature of the system of legal remedies in the EU Treaty. Much of those difficulties are common to other 'non-privileged' applicants.

Despite changes brought by the Lisbon Treaty intended to 'relax' the admissibility conditions of the annulment action for natural and legal persons by removing the requirement for individual concern for certain non-legislative acts of general scope, businesses seeking judicial review of EU acts of general

[3] See public record at https://ec.europa.eu/environment/aarhus/requests.htm, consulted on 30 October 2020.

[4] See for example **Case T-436/17** *ClientEarth and Others v Commission*, and **Case T-108/17** *ClientEarth v Commission* [Appeal Case, **C-458/19 P**]

application often have to initiate proceedings before national courts against the national measure implementing the EU act and plead the invalidity of the latter[5].

The Proposal designs an administrative review mechanism which **cannot be considered consistent with the system of remedies established in the EU Treaty**.

First, in terms of scope of 'challengeable acts'.

The category of acts of general scope becoming challengeable under the Aarhus Regulation should match the concept of 'regulatory act' under Article 263 paragraph 4 TFEU, i.e. acts that:

- are non-legislative;
- have legally binding and external effects (i.e. intended to produce legal effects);
- do not entail implementing measures at EU or national level – **whether this explicitly or implicitly required**.

With regard to the last condition, the Proposal only excludes from the scope of the review mechanism "*those provisions [of the act] for which Union law **explicitly requires** implementing measures at Union or national level*".

As non-legislative acts of general scope do not usually include explicit formulations as regards the required implementation at EU/national level, the word '*explicitly*' should be removed.

To match the concept of 'regulatory act', the Aarhus Regulation should only allow reviews of measures where the implementation is 'purely' automatic and results directly from EU rules – not other transitional rules can apply. This is all the more important since the requirement for the absence of implementing measures under Article 263 TFEU has been interpreted restrictively by EU courts.

Second, in terms of 'right to act'.

To challenge a regulatory act under Article 263 paragraph 4 TFEU, the applicant has to prove that the act is of direct concern. This essentially means that the measure must directly affect the legal situation of the applicant. This is a difficult test to satisfy, often preventing groups and associations to institute proceedings in their own name[6].

Although environmental NGOs cannot be required to prove 'direct concern', criteria for entitlement at EU level under Article 11 of the Aarhus Regulation may have to be tightened up. Trade federations cannot challenge an act that only affects the interests of their members in a general manner. Hence it would be logical that environmental NGOs cannot challenge acts that are only remotely connected to their statutory purpose and record of activity.

[5] See for instance 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] See Case C-486/01 *Front National v European Parliament*, Case C-15/06 *Siciliana v Commission*.

For more information please contact:
Beatriz Lores Tercero, Legal Manager, Cefic,
+ 32.2.436.93.23 or slt@cefic.be.

About Cefic
Cefic, the European Chemical Industry Council, founded in 1972, is the voice of large, medium and small chemical companies across Europe, which provide 1.2 million jobs and account for 16% of world chemicals production.