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## **Presentation at the Aarhus Convention Access to Justice Task Force, April 2023**

### **Update and state of play on Aarhus Regulation internal review requests and related court cases since the revision of the Aarhus Regulation in October 2021**

#### **Introduction**

In my capacity as the Aarhus Convention Focal Point for the EU, I would like to share with you our recent experience with reforming our access to justice system in the European Union. Nearly a year and a half passed since the adoption of the revised Aarhus Regulation. It is a good time (i) to take stock, (ii) to describe some of our challenges with regard to the implementation of this reform, and (iii) to signal a few upcoming changes.

#### **Background and problem definition**

Many of you in this room followed closely the recent revision of the Aarhus Regulation, and therefore, I will only briefly summarise what the Aarhus Regulation is and why it was reformed, by way of background.

For the past 16 or so years, since 2007, we have had in place a dedicated Regulation, the so-called Aarhus Regulation, to contribute to the implementation of the requirements of the Aarhus Convention towards EU institutions and bodies. The Aarhus Regulation regulates access to information, public participation and access to justice at the EU level.

With regard to access to justice, the Aarhus Regulation allows environmental NGOs access to an internal review mechanism. On the basis of this mechanism, NGOs are able to request the Commission, and other EU institutions and bodies, to reconsider their decisions where the NGOs demonstrated that these decisions contravened EU environmental law. The Commission reply can then be challenged before the General Court. The basic rationale is to ensure accountability and make sure that any administrative decisions comply with EU environmental law.

Prior to this recent reform, this internal review system was very much underused and therefore brought very limited practical benefits. To illustrate, during the 14-year period between 2007-2021, before the revision of the Aarhus Regulation, there were only a total of 49 internal review requests (IRRs). This comes down to an average of 3 or 4 cases per year.

Why was the system so underused? In short, mainly because the scope of the decisions that were subject to review were so narrowly defined that most cases that an NGO would have liked to bring would not have been considered admissible.

What did we do to reform the system? First and foremost, we broadened the possibility to review to include administrative acts that previously were not subject to review. As a result, most acts that were of interest and concern to the NGO community became eligible for review.

Let me now come to the details.

#### **How does the revised Regulation improve the current system of review?**

The revised Aarhus Regulation brings a very important step towards more effective scrutiny of EU decisions. Let me briefly explain.

### **Acts of individual scope versus acts of general scope**

Prior to the revision of the Aarhus Regulation, NGOs were only able to challenge individual decisions, for example an authorisation to use a specific chemical addressed to a single company, or a GMO authorization. However, general decisions applicable to all firms could not be challenged. Now, NGOs can challenge also general decisions.

### **Opening up acts for review in other policy areas**

In addition, decisions are now opened up for review under any policy area, be it environment, transport, energy or health, such as major energy or transport infrastructure projects. Taxonomy-related delegated acts, fisheries quotas, national plans under the Common Agricultural Policy, and pesticides authorizations are recent examples where NGOs took advantage of the new possibilities for review. The expansion is a true game-changer: it means sweeping changes in the current system and new opportunities for NGOs to hold EU institutions accountable.

### **Why environmental NGOs?**

The main role of the access to justice provisions in the Aarhus Regulation is to provide access to justice to environmental NGOs. The rules of EU environmental law, for the most part, protect the public interest and not merely the interests of individuals or other stakeholders. This is why it is primarily NGOs, representing the public interest, rather than individuals or other legal entities such as manufacturers or industry lobbying organisations, who are given rights of review under the Aarhus Regulation.

### **Opening up of scope to other members of the public beyond environmental NGOs**

This brings me to the issue of access to internal review by other members of the public, beyond environmental NGOs. Although this was not included in the original Commission proposal, the review procedures as of 29 April this year, just a few short weeks away, will also be provided to other members of the public beyond environmental NGOs. Access for these cases is limited to two categories of people requesting review:

- those demonstrating an impairment of a right, or
- to a group of individuals or organisations acting collectively in the public interest.

Legal representation will also be required.

In the first case, those requesting the review must *‘demonstrate impairment of their rights caused by the alleged contravention of Union environmental law and that they are directly affected by such impairment in comparison with the public at large’*.

In the second case, they must *‘demonstrate a sufficient public interest and that the request is supported by at least 4 000 members of the public residing or established in at least five Member States, with at least 250 members of the public coming from each of those Member States’*.

### **Some statistics over the past year and a half**

Let me now turn to some statistics to give you a measure of the changes in the use of the new possibilities thus far.

- We have received 25 internal review requests (IRR) during the 17 months since the revision of the Aarhus Regulation in October 2021, 22 requests closed, 3 pending. Of the 22 closed cases, 13 were inadmissible, 9 admissible.
- Average of 1.3 requests per month: about four or five-fold increase in the number of requests since the revision of the Aarhus Regulation (49 IRRs before the revision of Aarhus Regulation during the period of 2007-2021).
- Additional increase in cases and workload is expected after 29 April 2023, when beyond environmental NGOs, also other members of the public will be allowed to submit internal review requests.
- On substance:
- The complexity and length of the requests overall tended to increase (up to 70 to 100 pages of legal argumentation in some cases, in the style and with the content of a court application). Most cases are professionally argued, touch upon highly relevant and often politically sensitive issues, and require cooperation among several Directorates General (DGs) and services.
- Topics include national energy and climate plans, projects of common interest, permitting for renewables, pesticides, taxonomy and state aid, approval of CAP strategic plans.
- Currently 16 DGs are members of the Aarhus inter-service group, and many of them are likely to be receiving requests in the future. DGs most heavily affected: ENER, SANTE, FISMA, COMP, CLIMA, AGRI, MARE, ENV, LS.
- Other institutions – Council and EIB also received their first requests.
- We have 11 court cases opened and pending challenging the Commission's reply. In other words: at least half of our replies, maybe more, are ending up before the Court of Justice of the European Union.

### **Some practical steps to help manage processes and workload**

- Lastly, I would like to mention three new developments that we hope will facilitate processing the increasing number of internal review requests:
  - First, a Commission decision on eligibility criteria (for NGOs and other members of the public) is about to be adopted. This will set out, in particular, the way how the necessary signatures for public support are to be collected – for this, the Commission will offer the use of an existing IT tool (EU-survey) that many of you may be familiar with.
  - Second, a mandatory IT tool will also be introduced for the submission of the requests themselves. This will replace the current system, whereby requests are sent to a functional email box.
  - Third, we are also launching a tender for a Commission framework contract for legal support, with a total budget of two million euros for a four-year period. The objective is to contract legal services to assist the European Commission with the preparation of replies to internal review requests. While the responsibility for the assessment of the internal review requests and the preparation of the replies rests with the Commission itself, considering the limited staff resources available to process these requests, it is suggested to outsource and entrust to a qualified contractor certain preparatory tasks. It must be emphasised that all work to be

carried out by the contractor is purely of preparatory nature and in no way prejudices the Commission's role to assess and reply to the requests.

Thank you for your attention. Happy to answer any questions.