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INFORMATION

From:	General Secretariat of the Council
To:	Working Party on the Environment
Subject:	Aarhus Regulation amendment: Follow-up to WPE on 21 October 2020: Explanatory notes from the Commission

In follow-up to WPE of 21 October, delegations will find attached two notes from the Commission with further explanations/examples regarding the Aarhus Regulation amendment proposal.

Commission Proposal to amend the Aarhus Regulation

Working document based on the proposal and the explanatory memorandum (27/10/2020)

Aarhus Regulation	Commission proposal
Article 2 (1) (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;	• (g) 'administrative act' means any **non-legislative act adopted by a Union institution or body, which has legally binding and external effects and contains provisions that may, because of their effects, contravene environmental law within the meaning of point (f) of Article 2(1), excepting those provisions of this act for which Union law explicitly requires implementing measures at Union or national level**;

Explanation:

The amendment broadens the definition of 'administrative act'. This will ensure that any non-legislative act adopted by an EU institution or body, having legally binding and external effects and that may, because of its effects, contravene environmental law within the meaning of Article 2(1)(f), may now be subject to internal review.

These typically mean decisions or regulations/directives (implementing or delegated acts) adopted by an EU institution or body in a non-legislative capacity. Those provisions for which EU law explicitly requires implementing measures at EU or national level are excluded.

The proposal continues to cover only non-legislative acts. The requirement for these non-legislative acts to have legally binding and external effects also remains the same as before. The definition of omissions under the Aarhus Regulation also remains untouched, these remain challengeable.[1] The key changes are explained below.

Broadening of scope to include acts of general scope

The system currently in place allows NGOs to challenge only individual decisions, for example, marketing authorizations for specific GMO products, addressed to a single company. However, the general, systemic decisions on which the individual decisions are based cannot be challenged. The legislative proposal is significantly broadening these opportunities and will also allow NGOs to challenge general decisions, such as exemptions for a Member State from the EU Air Quality Directive. There is no longer a requirement that the act must be '*of individual scope'*.

References to environmental law

The proposal also significantly broadens the scope in another respect. Under the new rules, environmental NGOs will be able to ask the Commission to review decisions in any policy

[1]Article 2(1)(h): *'administrative omission'* means any failure of a [Union] institution or body to adopt an administrative act as defined in (g).

area, be it environment, transport, energy or health. This includes matters that are of keen interest to the European public. The proposal allows environmental NGOs to request a review if they have reasoned concerns that a decision breaches environmental laws.

This means we are going beyond acts that were specifically adopted to address environment and climate policy objectives. This is to ensure consistency in our actions. We cannot regulate in support of the environment one day, only to undermine that the day after with a decision in another field.

The amendment provides clarity and legal certainty on the fact that any administrative act that contains provisions, which may contravene EU environmental law may be challenged, irrespective of the act's legal basis or policy objective, as it is required under Article 9(3) of the Aarhus Convention. There is no longer a requirement that the act must be adopted *'under environmental law'*.

At the same time, the definition preserves the link between the administrative act whose review is requested and environmental policy objectives. It does so by allowing the internal review of only those acts which contain provisions which may, because of their effects, contravene EU environmental law within the meaning of Article 2(1)(f) of the Regulation.

Acts entailing national implementing measures

Under the proposal, those provisions of an administrative act for which EU law explicitly requires implementing measures at national level are not subject to administrative review.

This does not mean that acts entailing national implementing measures are altogether excluded from the scope of the proposal. Many provisions of these acts – those which do not require national implementing measures – can be challenged. It is only those specific provisions that are requiring national implementing measures, which are excluded from the scope of the proposal.

Where national implementing measures are required, the provision of a decision made at EU level produces consequences at national level, where the measures are taken. NGOs can challenge such measures before a national court, and ultimately, they may be referred to the Court of Justice of the EU for preliminary ruling.

Therefore, the exclusion from the scope of the Aarhus Regulation simply means that NGOs can challenge the national implementing measures in national courts. This makes sense, as national courts will be closest to where the consequences take place and can take the adequate remedial measures. It is also important to underline that the proposal only covers review of acts and omissions by EU institutions and bodies. The Communication on Access to Justice accompanying the proposal addresses the national level and describes how the EU legal system depends on well-functioning national courts and where further improvements are necessary.

Acts entailing EU-level implementing measures

Acts entailing EU-level implementing measures are also not altogether excluded from the scope of the proposal. The vast majority of the provisions of these acts – which do not require EU-level implementing measures – can be challenged immediately.

The EU-level implementing measures can also be challenged once they have been adopted. For these provisions, in accordance with the provisions of the Treaties, much like any other individual or organisation accessing justice under Article 263 TFEU, NGOs can only submit a request at this stage, when the EU-level implementing act in question is adopted. At this point, NGOs can also challenge the provision of the non-legislative act requiring the EU-level implementing measure. (See second sub-paragraph of Article 10 (1)).

In conclusion, challenging the decision is always possible, it is just a matter of timing, in accordance with the Treaties.

Aarhus Regulation	**Commission proposal**
Article 10 **Request for internal review of administrative acts** 1. Any non-governmental organisation 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.	1. Any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Union institution or body that has adopted an administrative act or, in case of an alleged administrative omission, should have adopted such an act, **on the grounds that such an act or omission contravenes environmental law.** **Where an administrative act is an implementing measure at Union level required by another non-legislative act, the non-governmental organisation may also request the review of the provision of the non-legislative act for which that implementing measure is required when requesting the review of that implementing measure.**

Explanation:

Similarly to Article 1(1), which amends the definition of 'administrative act', this amendment removes the 'under environmental law' requirement also from the first paragraph of Article 10(1) of the Regulation.

The new provision also clarifies that only those acts and omissions that contravene EU environmental law may be subject to a request for review. Therefore, the amendment ensures that the wording of the Regulation reflects the requirements of Article 9(3) of the Convention.

Regarding the second sub-paragraph, concerning implementing measures at Union level, see previous section under '**Acts entailing EU-level implementing measures'.**

Illustrative examples of administrative acts that can be challenged under the legislative proposal to amend the Aarhus Regulation

As requested by the Presidency following the 21 October 2020 informal meeting of the Working Party for the Environment (WPE), the objective of this non-paper is to provide illustrative examples of the decisions that may come under the scope of the draft Aarhus Regulation. The examples do not, in any way, pre-empt the assessment of each future internal review request on its merits, and are shared purely for illustrative purposes to assist delegations understand the practical implications of the legal text.

1. How will the proposal improve the current system of review?

- The system currently in place allows NGOs to challenge only individual decisions, for example, marketing authorizations for specific GMO products, addressed to a single company. However, the general, systemic decisions on which the individual decisions are based cannot be challenged. The legislative proposal is significantly broadening these opportunities and will also allow NGOs to challenge general decisions.

- The proposal is also opening up for review decisions under any policy area, be it environment, transport, energy or health. What matters is that the NGO has evidence and reasoned concerns that a decision undermines the achievement of EU environmental policy objectives.

2. Examples of decisions that NGOs can now challenge (and that they could not before)

The examples below are based on the publicly available Commission repository, which shows all internal review requests submitted and the replies received.[1] The examples are provided across various policy areas.

- **Environment:** Under the current rules, the Commission rejected a request filed by an NGO for the review of a Commission decision, which allowed a Member State to apply more lenient rules on air quality. [2]

  - The new rules will allow NGOs to challenge decisions of general scope like these.

- **Climate:** Under the current rules, the Commission rejected a request to review a Commission decision allowing a national government to allocate free emissions trading allowances for the modernization of electricity generation.[3]

  - The new rules will allow NGOs to challenge decisions of general scope like these.

[1] A structured overview of the requests is also available under the Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters published in 2019. (See Annex 2: List of cases.)
[2] Reference number in repository: 8.
[3] Reference number in repository: 16.

- **Energy:** Under the TEN-E Regulation, the Commission periodically adopts a Union list of projects of common interest. Under the current rules NGO requests to challenge these decisions were rejected, on grounds that they were of general scope, and also because they were not adopted under environmental law.[4]

  - The new rules will allow NGOs to challenge decisions of general scope like these, and even if they were adopted in another policy area (energy policy). What matters is whether they *'contain provisions that may, because of their effects, contravene environmental law'*.

- **Chemicals:** When it comes to decisions (implementing acts) on pesticides, NGOs, thus far, were able to challenge only decisions that applied to individually concerned businesses. Requests for review were inadmissible when a decision applied to all businesses in a similar situation, such as several sellers or purchasers of the same product.[5]

  - The new rules will allow NGOs to challenge also decisions of general scope like these.

3. Example of an act adopted by other institutions that NGOs cannot challenge under the draft Regulation, because they will require further implementing measures at national or EU level

- **Fishing activities:** the Council adopted a Regulation on fishing opportunities to ensure Member States keep fishing at sustainable levels.

  - This is a non-legislative act of general scope, and therefore, can be challenged under the proposal.
  - This is with the exception of those provisions of the Regulation that make reference to national implementing measures. An example may be Article 6, which requires Member States to determine the total allowable catch (TAC). Article 6 cannot be directly challenged under the Aarhus Regulation. However, the national measures can be challenged before a national court, and ultimately, they may be referred to the Court of Justice of the EU for preliminary ruling.
  - There are also provisions of the Regulation that entail EU level implementing measures (see under Annex II.B of the Regulation, points 7.5, 11.4, etc.). In these instances, under the new rules, NGOs will be able to request the review after the implementing measures are adopted by the Commission. At this point, they can challenge both the Council Regulation and the Commission implementing measures.

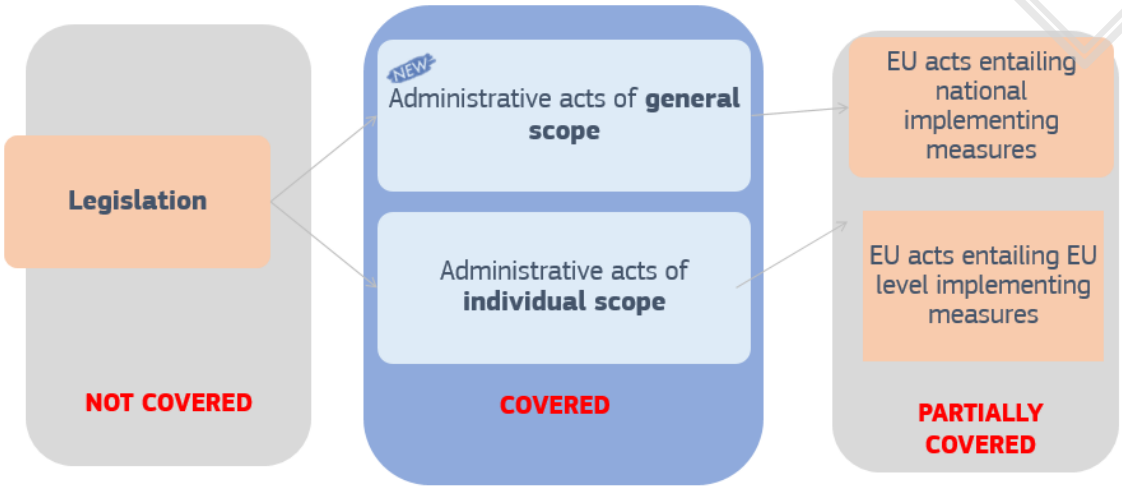
[4] Reference number in repository: 20 and 21.
[5] Reference number in repository: 36.

4. Other types of administrative (non-legislative) acts that can be challenged under the new rules

The proposal continues to cover only non-legislative acts. The requirement for these non-legislative acts to have legally binding and external effects also remains the same as before.

In practice, a large number of these acts are Commission decisions or Commission regulations/directives (implementing or delegated acts). As the example above on the Fishing opportunities Regulation adopted by the Council shows, however, other EU institutions and bodies may also adopt non-legislative acts that can be challenged under the draft Regulation.

Illustrative table 1: types of acts covered under the draft Regulation.



Illustrative table 2: examples of the types of acts covered under the draft Regulation.