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General Secretariat

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**Interinstitutional files:  
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**Brussels, 02 July 2021**

**WK 8850/2021 INIT**

**LIMITE**

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## **MEETING DOCUMENT**

From:	General Secretariat of the Council
To:	Working Party on the Environment
Subject:	Aarhus Regulation amendment: Informal videoconference of the WPE on 2 July 2021 (pm): Presidency Non-paper informing delegations on compromise proposals tabled at technical level

Delegations will find attached a non-paper of the Presidency with compromise proposals tabled by the Commission and the Parliament in the preparations of or in follow-up to the 4th technical meeting with EP. This non-paper was already circulated by the Presidency yesterday evening in a mail to WPE attaches.

Contrary to the texts in the four column table circulated this morning, the texts in the attachment to this WK are not yet provisionally agreed at technical level.

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WK 8850/2021 INIT

**LIMITE**

**EN**

**Non-Paper by the Presidency  
Aarhus Regulation Amendment  
1 July 2021**

## **1. Introduction**

In light of the discussion at the 3<sup>rd</sup> technical meeting, the Parliament and the Commission redrafted certain compromise proposals for examination at the 4<sup>th</sup> technical meeting. This Non-Paper contains some redrafted proposals that were already presented in the joint PT-SI Non-Paper that was circulated to delegations on 28 June 2021, as well as certain additional compromise proposals.

In view of tomorrow's discussion at the WPE, the Presidency considers important to inform delegations on the state of play on key issues, also taking into account the very short timeline regarding this file.

In this regard, delegations will find below compromise proposals from the Parliament or the Commission on the following issues:

- Standing and Criteria (AM 29, AM 30),
- Costs (AM 3, AM 34),
- Standards for Review (AM 5, AM 20, AM 32),
- Possibility for comments from third parties (AM 17, AM 28),
- Access to information (AM 25, AM 14),
- Register (AM 31),
- and AM 4, AM 13, AM 15 and AM 19.

The Presidency invites delegations to examine the proposals and, if possible, give first reactions at the WPE.

## **2. Standing and Criteria (AM 29, AM 30)**

*Text proposed by the Commission*

Article 11

Article 11

Criteria for entitlement at Community level

1. A non-governmental organisation shall be entitled to make a request for internal review in accordance with Article 10, 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.

***1a. A request for internal review may also be made by other members of the public, subject to the following conditions:***

- (a) they shall 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; or***

(b) *they shall demonstrate a sufficient public interest and that the request is supported by at least [xxx] members of the public residing or established in at least [xxx] Member States, with at least [xxx] members of the public coming from each of those Member States.*

(c) *In both cases, the members of the public shall be represented by a non-governmental organisation which meets the criteria set forth in the first paragraph above or by a lawyer authorised to practice before a court of a Member State. That lawyer or non-governmental organisation shall confirm compliance with the quantitative conditions in paragraph 1a(b) above when applicable and shall provide evidence thereof upon request.*

2. The Commission shall adopt the provisions which are necessary to *ensure effective handling of requests and minimise the administrative burden on Union institutions and bodies. In particular, these provisions shall* ensure transparent and consistent application of the criteria *and conditions* mentioned:

(a) *in paragraphs 1 and 1a; and*

(b) *in the first sentence of Article 10(2) as regards manifestly unfounded or clearly unsubstantiated requests.*

Article 10(2)

*'2. The Union institution or body referred to in paragraph 1 shall consider any such request, unless it is manifestly unfounded or clearly unsubstantiated. In the event that a Union institution or body receives multiple requests for review of the same act or omission—~~citing the same grounds~~, the institution or body may decide to combine the requests and treat them as one. ~~In such a case, the Union institution or body shall as soon as possible notify that decision to all those who have made a request for internal review of that same act or omission. Within four weeks of submission of such a request, third parties directly affected by the request may submit comments to that Union institution or body.~~ The Union institution or body shall state its reasons in a written reply as soon as possible, but no later than 16 weeks after ~~receipt of the request~~ the expiry of the eight weeks deadline set forth in paragraph 1, subparagraph 2 above.'*

Recitals (new)

A) This Regulation provides environmental non-government organisations and other members of the public access to request internal review of administrative decisions adopted by Union institutions and bodies under certain conditions.

B) When demonstrating impairment of their rights, members of the public must show violation of their rights. This may include the unjustified restriction or obstacle to the exercise of such rights. Members of the public are not required to demonstrate that they are directly and individually concerned<sup>1</sup>. However, in order to avoid 'actio popularis', which is not required under the Aarhus Convention, they must demonstrate that they are directly affected in comparison with the public at large. This may be the case, in particular, by reason of an imminent threat to their own health and safety or by reason of prejudice to a right they have to obtain access to a natural resource such as clean air or clean water, resulting from the alleged contravention of Union environmental law, in line with the case law of the CJEU.<sup>2</sup>

<sup>1</sup> Case 25/62 *Plaumann v Commission* [1963] ECR 95, 107.

<sup>2</sup> Case C-197/18; Case-529/15 (*Folk*) and Case-237/07 (*Janecek*).

- C) When demonstrating sufficient public interest, members of the public must show both the existence of a public interest in preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, or combatting climate change and that their review request is supported by a sufficient number of people across the Union.
- D) In order to ensure effective review procedures and notably that the review requests meet the admissibility criteria and put forward facts or legal arguments of sufficient substance to give rise to serious doubts as to the assessment made in the administrative act by the Union institution or body<sup>3</sup>, members of the public should be represented either by an environmental non-governmental organisation meeting the criteria set forth in this Regulation or by a lawyer authorised to practice before the court of a Member State.

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<sup>3</sup> See judgment of the Court of Justice of 12 September 2019 in Case C-82/17 P, *TestBioTech v Commission*, ECLI:EU:C:2019:719, at para 69

E) In the event that a Union institution or body receives multiple requests for review of the same act or omission and it combines such requests to assess them in a single procedure, the Union institution or body should consider each request on its own merits in its reply. In particular, if any such request is considered inadmissible or if it is rejected on substance, this should not prejudice the consideration of the other review requests assessed in the same procedure.

Final provisions (new)

Article 11(1a) shall come into effect two years as of the date of entry into force of this Regulation, as amended.

### 3. Costs (AM 3, AM 34)

*Text proposed by the Parliament*

Recital 3a (new)

**‘(3a) ~~Review—Without prejudice to the Court’s prerogative to apportion costs, Court proceedings under Article 10 12 of Regulation (EC) No 1367/2006 should be effective and in accordance with Article 9(4) of the Aarhus Convention not be prohibitively expensive. Accordingly, it is important that the Union’s institutions or bodies only make reasonable requests for the reimbursement of costs.~~**

*Text proposed by the Commission*

Recital 3a (new)

**(3a) ~~Without prejudice to the Court’s prerogative to apportion costs, Court proceedings under Article 10 12 of Regulation (EC) No 1367/2006 should~~ and in accordance with Article 9(4) of the Aarhus Convention, which requires costs to be non-prohibitive, it is important that the Union’s institutions or bodies only make reasonable requests for the reimbursement of costs.**

### 4. Standards for Review (AM 5, AM 20, AM 32)

*Text proposed by the Commission*

Recital 4a

(4a) The Aarhus Convention requires, ~~within the framework of its national legislation,~~ each Party ~~is to ensure that members of the public concerned where they meet the criteria-laid down in its national law,~~ have access to judicial or other review procedures to challenge the substantive and procedural legality of any decision, act or omission which contravenes provisions of the its national law of the contracting Party relating to the environment. The administrative review procedure under the Aarhus Regulation complements the overall Union system of administrative and judicial review that enables members of the public to have administrative acts reviewed via direct judicial challenges at Union level, namely under Article 263(4) TFEU, and, in accordance with Article 267 TFEU, via national courts, which form an integral part of the Union system under the Treaties.

Recital 12d (new)

(12d) The scope of review proceedings under Regulation (EC) No 1367/2006 should cover both the substantive and procedural legality of the act challenged. In line with the case law of the CJEU, proceedings under Article 263(4) TFEU **and Article 12 of Regulation (EC) No 1367/2006** cannot be founded on grounds or on evidence not appearing in the request for review, since otherwise the purpose for the requirement, in Article 10(1) of Regulation (EC) No 1367/2006, relating to the statement of grounds of review for such a request, would be made redundant and the object of the procedure initiated by the request would be altered<sup>1a</sup>.

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<sup>1a</sup> *Judgment in Case C-82/17 P, paragraph 39.*

## 5. Possibility for comments from third parties (AM 17, AM 28)

*Text proposed by the Parliament*

Either as part of Art. 10(2) or as an Article 10 – paragraph 2a (new)

[...] **Legal persons directly affected by the request may submit their comments to the Union institution or body referred to in paragraph 1 within a period of two weeks following the submission of the request. [...]**

Recital 12a

**Legal persons that are directly affected by a request for internal review of an act of individual scope, such as companies or public authorities, may submit their comments to the Union institution or body concerned.**

*Text proposed by the Commission*

Article 10(2)

*'2. The Union institution or body referred to in paragraph 1 shall consider any such request, unless it is manifestly unfounded or clearly unsubstantiated. In the event that a Union institution or body receives multiple requests for review of the same act or omission ~~citing the same grounds,~~ the institution or body may decide to combine the requests and treat them as one. In such a case, the Union institution or body shall as soon as possible notify that decision to all those who have made a request for internal review of that same act or omission. Within four weeks of submission of such a request, third parties directly affected by the request may submit comments to that Union institution or body. The Union institution or body shall state its reasons in a written reply as soon as possible, but no later than 16 weeks after receipt of the request the expiry of the eight weeks deadline set forth in paragraph 1, subparagraph 2 above.'*

## 6. Access to information (AM 25, AM 14)

*Text proposed by the Parliament*

Article 4(2)

‘2. The environmental information to be made available and disseminated shall be updated as appropriate. In addition to the documents listed in Article 12(2) and (3) and in Article 13(1) and (2) of Regulation (EC) No 1049/2001, the **following shall be included in the databases or registers without undue delay as soon as they are consolidated:**

- (a) texts of international treaties, conventions or agreements, and of **Union** legislation on the environment or relating to it, and of policies, plans and programmes relating to the environment;
- (aa) ***the positions of Member States as expressed in decision-making procedures leading to the adoption of Union legislation or administrative acts on or relating to the environment the votes and abstentions expressed by each Member State representative, throughout all stages of the advisory examination and appeal procedures provided for in Regulation (EU) No 182/2011, accompanied by the reasons for the vote or abstention, and, where the act concerns particularly sensitive areas, such as the protection of consumers, the health or safety of humans, animals or plants, or the environment, the accompanying case-specific detailed reasons for the vote or abstention;***
- (b) progress reports on the implementation of the items referred to under (a) where prepared or held in electronic form by **Union** institutions or bodies;
- (c) steps taken in proceedings for infringements of Community law from the stage of the reasoned opinion pursuant to Article 258(1) of the Treaty;
- (d) reports on the state of the environment as referred to in paragraph 4;
- (e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;
- (f) authorisations with a significant impact on the environment, and environmental agreements, or a reference to the place where such information can be requested or accessed;
- (g) environmental impact studies and risk assessments concerning environmental elements, or a reference to the place where such information can be requested or accessed.’

## AM 14

*Text proposed by the Commission*

Recital 10d (new)

**(10d) Early and effective means of public participation in the creation and adoption of Union legislative and non-legislative acts are important in order to be able to address concerns at an early stage ~~and to assess whether there is a need for a further proposal to improve public participation horizontally.~~**

## 7. Register (AM 31)

*Text proposed by the Commission*

Article 11a (new)

**‘Article 11a**

**~~Public register of requests for internal review~~ Transparency of review requests and replies**

**~~‘Union institutions and bodies shall establish, by 31 December 2021 at the latest, a register of all requests that meet the eligibility requirements set out in Article 11 as well as of the applicants that meet those requirements and submitted the requests. That register shall be regularly updated. publish all internal review requests as soon as possible after their receipt, as well as all final decisions on those requests as soon as possible after their adoption. For the sake of transparency and effective case handling, Union institutions and bodies may establish on-line systems for receipt of internal review requests and may require that all internal review requests shall be submitted via their online systems.’~~**

Recital (new)

**For the sake of transparency and effective case handling, Union institutions and bodies may establish on-line systems for receipt of internal review requests. .**

## 8. Other amendments

### AM 4

*Text proposed by the Commission*

Recital 4

(4) Taking into account the provisions of Article 9 (3) **and (4)** of the Aarhus Convention, and **the findings and advice of** the Aarhus Convention Compliance Committee<sup>5</sup>, Union law should be brought into compliance with the provisions of the Aarhus Convention on access to justice in environmental matters in a way that is compatible with the fundamental principles of Union law, **including its treaties, and** with its system of judicial review. **~~Regulation (EC) No 1367/2006 should be amended accordingly.~~**

<sup>5</sup> **Findings and advice** ~~Advice of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32. ACCC/M/2017/3 and ACCC/C/2015/128 available at <https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html> [https://unece.org/env/pp/ee/acec.m.2017.3\\_european\\_union](https://unece.org/env/pp/ee/acec.m.2017.3_european_union) and [https://unece.org/env/pp/ee/acec.c.2015.128\\_european\\_union](https://unece.org/env/pp/ee/acec.c.2015.128_european_union).~~

## AM 13

*Text proposed by the Commission*

Recital 10c (new)

**(10c) Any procedural deadlines for the administrative review and/or judicial control should apply only once the content of the administrative act has been adopted, notified or published, whichever is the latest. ~~relating to a major public interest protected by environmental law and that is the subject subsequently of a challenge is actually known by the persons having an interest, especially in cases in which the individual administrative act concerned is obsolete. This is necessary in order to avoid practices that could go against Article 9 of the Aarhus Convention and the case law of the CJEU, in particular the judgment of the Court of 12 November 2019 in Case C-261/18, Commission v. Ireland<sup>1a</sup>.~~**

<sup>1a</sup> ~~Judgment of the Court of Justice of 12 November 2019, C-261/18, Commission v. Ireland, ECLI:EU:C:2019:955.~~

## AM 15

*Text proposed by the Commission*

Recital 11a (new)

**(11a) Given the key role of environmental non-governmental organisations in raising awareness and taking legal action, and the important role of the public in general in this regard, the Union's institutions or bodies should ensure that there is adequate access to information, participation and justice.**

## AM 19

*Text proposed by the Commission*

Recital 12c (new)

**(12c) Regulation (EC) No 1367/2006 lays down the common provisions, scope and definitions on access to information, public participation in decision-making and access to justice in environmental matters at Union level. This is appropriate and contributes to providing legal certainty and increasing the accountability of the Union institutions and bodies increasing the transparency of the implementation measures taken pursuant to the obligations arising under the Aarhus Convention.**

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