Background paper analysing the Study and Report submitted by the Commission to the Council in relation to Council Decision (EU) 2018/881

On 18 June 2018, the Council requested the Commission to prepare a study on the options for the EU to address the findings of the Aarhus Convention Compliance Committee (ACCC) and, "if appropriate in view of the outcomes of the study", a proposal to amend Regulation 1367/2006 (the "Aarhus Regulation").[1] On 10 October 2019, the Commission submitted the requested study prepared by an external consultant (the study)[2] to the Council together with a Commission Staff Working Document (the Report).[3]

This paper presents a short synthesis of the extensive study and Commission Report with a focus on the key findings and takeaways. It then concludes with a recommendation on next steps.

I. Key findings & conclusions of the Commission Report

Following an introduction (section 1) and explanation of its scope (section 2), which for the sake of brevity are not discussed further here, the Commission Report explains which Union acts are concerned and outlines the way these acts can be challenged by way of the different redress routes available in the EU system (section 3). The Report then analyses to what extent the redress provided complies with the Aarhus Convention in light of the findings of the ACCC (section 4) before concluding (section 5).

Some elements in the introduction and conclusion offer an interpretation of the relationship between the Union's legal order and international law which is at the very least questionable. Moreover, certain statements in parts of the Report about the existing remedies provided at EU level create a certain confusion and raise concerns that the Commission still fails to recognize some of the deficiencies in the way access to justice is provided. However, as this does not have much bearing on the immediate steps required to bring the EU into compliance with the Convention, we do not explore these issues further here.

Section 3: Acts covered & available means of redress

Union acts concerned

The Report first states that acts/omissions for the purpose of Article 9(3) of the Convention are acts of both individual and general scope (p. 7 & 11).

[1] Council Decision (EU) 2018/881 of 18 June 2018 requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006, OJ L155/6.

[2] Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters - Final report, September 2019, 07.0203/2018/786407/SER/ENV.E.4

[3] Commission Staff Working Document: "Report on European Union implementation of the Aarhus Convention in the area of access to justice in environmental matters" (Brussels, 10.10.2019) SWD(2019) 378 final.

Requests for internal review under the Aarhus Regulation + subsequent annulment action (263 TFEU)

Turning to the available means of redress, the Report first considers the possibility to file a request for internal review under article 10 of the Aarhus Regulation (pp. 8-9). It highlights that 29 of the 43 requests filed by NGOs since the introduction of the mechanism were considered inadmissible. It states that the most common reason for inadmissibility was that the Commission did not consider the challenged act to be of individual scope but that there were also other reasons for inadmissibility, such as the fact that the act was not considered to have external or legally binding effects or related to competition or infringement proceedings (pp. 9-10).

Annulment action (263 TFEU) without prior administrative review

As regards the possibility to rely directly on article 263(4) TFEU, the Report finds that "[i]n broad terms, the modifications introduced by the Lisbon Treaty have not triggered major changes in the case-law with respect to the possibilities for environmental NGOs – which still need to fulfil the criterion of 'direct concern' under the third limb – to challenge Union acts" and that "there is no case yet where an environmental NGO was considered directly concerned by the contested act" (p. 13). It concludes that "environmental NGOs must therefore still generally resort to the Aarhus Regulation" to have standing (p. 14).

Validity references from national courts (267 TFEU)

As regards the possibility of a preliminary reference challenging the validity of an EU act, the Report notes that there have been only two cases identified by the study involving regulatory acts in the domain of the environment (p. 15). It then highlights that there are various reasons that prevent reliance on this mechanism in practice, including lack of standing at national level, lack of possibilities to challenge EU acts not entailing implementing measures in particular in continental legal systems and lack of familiarity and practice by national judges with the mechanism (pp. 16-17). Later on, the Report also confirms that high litigation costs are a concern in some national jurisdictions as regards article 267 TFEU (p. 26) and that meetings with Member States confirmed problems with standing at national level (p. 27). The Report moreover emphasizes that the existence of article 263(4) TFEU in itself recognizes the role of direct challenges in the EU system (p. 17) contradicting the notion that article 267 TFEU can in itself be sufficient for effective access to justice.

Plea of illegality (277 TFEU)

As regards article 277 TFEU, the Report confirms that this mechanism can "only be invoked in the course of another procedure, usually an action for annulment under Article 263 TFEU" (p. 17). This possibility is accordingly equally affected by the limitations set out above.

Section 4: Analysis in light of the ACCC findings with regard to the Aarhus Regulation

Based on these identified shortcomings in the available means of redress, the Report then provides an analysis structured in accordance with the findings of the ACCC regarding the Aarhus Regulation (p. 18 onwards).

Applicants: who is entitled to administrative or judicial review?

The Report first states that there is no requirement to provide an *actio popularis* under article 9(3) of the Convention and that it can be justified to grant additional rights to NGOs as opposed to individuals (pp. 19-20). It then refers to the possibility for individuals to use article 263 and 267 TFEU, while however also recognizing the problems mentioned above (pp. 20-21).

Limitation of Aarhus Regulation to acts of individual scope

As regards the requirement that acts subject to internal review must be of individual scope, the Report reiterates that the Convention applies "equally to acts of general and of individual scope". It finds that "[i]n many cases, environmental NGOs have sought to use the Aarhus Regulation to challenge regulatory acts – which fall outside the scope of the Regulation, but not of the Convention." It also reiterates the lack of alternatives to challenge acts of general scope, referring to the lack of standing for NGOs under article 263 TFEU and the difficulties to challenge national measures that implement acts of EU law before national courts and to obtain a preliminary reference to the CJEU under article 267 TFEU (all p. 22).

Limitation of Aarhus Regulation to acts under environmental law

The Report first states that for the purposes of the Aarhus Convention an act "does not itself have to have an environmental purpose", rather "it is sufficient that it runs counter to environmental requirements that apply to it". Given that article 11 TFEU establishes environmental protection as a requirement applicable to all environmental acts, the Report therefore states that redress "needs to allow for scrutiny of all Union acts" (p. 22). The Report finds that the current case law does not yet "unequivocally confirm" that review of all acts would be possible (p. 23).

Limitation of the Aarhus Regulation to acts with legally binding and external effects

As regards this criterion, the Report highlights that Article 263(5) TFEU is limited in its application to acts "intended to produce legal effects" in relation to natural or legal persons (p. 23). The Report accordingly suggests that it would be important to maintain a restriction that would exclude acts that would not fall under Article 263 TFEU (p.24).

Scope of review

The Report highlights that the "ACCC has signalled its expectation that the judicial review should also cover the substance of the initial act" challenged, rather than only the underlying reasons of the review decision adopted by the institution in reply to the internal review request (p. 24). It relies on the case-law of the Court of Justice to state that review of the substance of the act is guaranteed if the applicant submits grounds addressing the substantive legality of the initial act when seeking an administrative review (p. 24). The subsequent judicial review will then scrutinise these grounds. This point is currently being reviewed by the Court of Justice in an appeal brought by ClientEarth.

Timeliness of procedures

The Report highlights the study's finding that the time limits foreseen in the Aarhus Regulation "would benefit from a modest extension", while referring to article 41 of the Charter of Fundamental Rights (p. 25).

Section 5: Conclusion

In conclusion, the Report confirms that:

a. The "study shows that environmental NGOs and individuals can still face significant hurdles in using national courts, thereby limiting possible recourse to validity references under Article 267 TFEU to challenge EU-level acts"
b. "in practice, it has not been possible for environmental NGOs to satisfy the conditions" of Article 263(4) TFEU to obtain access to the EU courts;

c. Internal review under the Aarhus Regulation "can be, and has been, used by environmental NGOs" but significant constraints remain, most significantly (but not only) relating to the individual scope criterion (p. 28).

In light of these shortcomings, the Report concludes that possibilities for improvement relate to the scope and workings of the Aarhus Regulation and to the barriers to making use of validity references under Article 267 TFEU (p. 29). The Report then refers to the study for the details on these options, a summary of which is therefore included below.

II. Main findings of the study on which options effectively remedy the shortcomings

The Study proposes five policy options:

1. Option 0: Maintain the status quo (pp. 228-9 & 253);
2. Option A: Guidance on the application of the Aarhus Regulation and a Guidance on article 267 (only adopt non-legislative acts; pp. 253-4);
3. Option B: Amendment to the Aarhus Regulation and adoption of a new Access to Justice Directive governing access to justice at national level (only legislative action; pp. 254-5);
4. Option AB1: Combines the Guidance under Option A with an amendment to the Aarhus Regulation (pp. 255-7);
5. Option AB2: Adds to AB1 a proposal for a new Access to Justice Directive governing national access to justice, instead of a Guidance on article 267 (p. 257).

The study assesses for each of these options to what extent they will be effective to remedy the identified shortcomings in NGOs' access to justice also highlighted in the Commission Report (see first line of table 71, p. 258). It concludes that maintaining the status quo (Option 0) would in fact be moderately negative because there would be no change in the ability for environmental stakeholders to challenge acts (p. 253). It finds that only taking non-legislative action (Option A) would lead to no change or, at best, be slightly positive because it would likely have only a limited effect on removing challenges faced by NGOs for instance in challenging acts of general scope not entailing implementing measures (p. 253).

As the Study specifies, a non-binding guidance on the application of the Aarhus Regulation (measure A1) may improve consistency in its application (p. 204) but, "if not accompanied with legislative measures, it will have a limited impact on addressing the situations where environmental NGOs experience difficulties in challenging EU acts or decisions" (p. 205). Equally, a non-binding judicial review guidance (measure A2) would "not provide a solution" in these situations (p. 209). This is because these non-binding measures would neither change the restrictive admissibility criteria in the Aarhus Regulation nor remove obstacles resulting from binding national procedural rules. NGOs would still only be allowed to challenge acts of "individual scope adopted under environmental law", limitations which are not in line with the Aarhus Convention. Taking no action (Option 0) or only non-legislative action (Option A) would accordingly leave the EU in violation of the Aarhus Convention, a situation that neither the Commission nor the Council should perpetuate.

The study therefore concludes that the only options that provide an effective response to the lack of access to justice identified in the findings of the Aarhus Compliance Committee and the Commission Report are legislative in nature (B, AB1 and AB2), being the only ones ranked as unequivocally positive (table 71). Options B and AB2 perform better than option AB1 because they include the amendment of the Aarhus Regulation and an Access to Justice Directive, i.e. a second binding act which can "be expected to have a more positive impact" (p. 259).

As the Study explains, this is because “there are situations where access to a reasonably effective redress mechanism cannot be obtained” that derive from the admissibility requirements contained in the Aarhus Regulation, when considering that alternative avenues are not accessible (p. 210). Amending these admissibility requirements is therefore crucial. Specifically, to remove the requirement in the Aarhus Regulation that acts need to be of “individual scope” (measure B1) would remove the “main barrier” for NGOs to use the internal review mechanism (p. 212) and thereby to have access to an effective remedy. Amending the reference to “under environmental law” (measure B2), to ensure that indeed all acts which contravene provisions of EU law relating to the environment can be challenged, would “provide legal certainty” and ensure compliance with the Convention (pp. 213-14). These amendments could therefore address key elements of the ACCC findings. In addition, an Access to Justice Directive (measure B4) would “ensure harmonised access to justice standards in all EU Member States” (p. 216).

Given that the Commission Report emphasizes at the outset that the present issue relates to environmental policy, in “which the Union aspires to global leadership and which surveys consistently show to be a top priority of the European public” (Report, p. 1), it is also relevant to mention that the legislative options (B, AB1 and AB2) are the only options that perform unequivocally positively as regards their environmental impact (table 71, p. 258). As for effectiveness, the options also including a new Access to Justice Directive (B and AB2) perform slightly better than only an amendment to the Aarhus Regulation (AB1).

Our recommendation

It follows from the above that the only effective options proposed in the study to address the shortcomings in access to justice identified in the findings of the ACCC and recognized in the Commission Report are those that involve legislative action, notably an amendment to the Aarhus Regulation. It is therefore clear that “it is appropriate in view of the outcomes of the study” in the sense of Decision 2018/881 that such an amendment be prepared.

Accordingly, we call on all the Member States acting through the Council to request the Commission to issue a legislative proposal to amend the Aarhus Regulation addressing the identified limitations by the ACCC within the first 100 days of its mandate to increase the chances that the EU can report to the next Meeting of the Parties that it has adopted the necessary measures to bring about compliance with the Convention.

Moreover, the foregoing shows that the additional adoption of an Access to Justice Directive would lead to further positive environmental outcomes. The Council should also call on the Commission to commence preparatory work for a proposal for a new Directive to provide access to justice in environmental matters in national courts.