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# elni REVIEW

# *CONTENTS*

# Editorial

The current issue of elni Review is inter alia dedicated to a subject that has been on the Top Agenda in 2016: The Comprehensive Free Trade Agreement between the EU and Canada.

On 8 September 2016 an ELNI Forum on CETA took place at the St. Louis Faculty of Law in Brussels. A small group of environmental lawyers debated intensively different aspects of this far-reaching agreement and its impact on environmental law in Europe in particular. Delphine Misonne gives an introduction on the potential impact of CETA on environmental law, Laurens Ankersmit and Wybe Th. Douma analyse the dispute settlement schemes under CETA and shortcomings of the agreement concerning sustainability and precautionary aspects. Nicolas de Sadeleer then explains the sophisticated ratification process for CETA and the legal uncertainty surrounding it. Details of these analyses can be found in the articles of *Delphine Misonne*, *Laurens Ankersmit* and *Wybe Th. Douma*.

Besides a number of legal details, the interesting general aspect of *who should negotiate* such types of agreements arose during the discussion in the Forum. Given that CETA claims to be a progressive environmental agreement (which it is obviously not), it must be criticised that it has been negotiated only by trade experts and not by environmental experts. Whatever the outcome of this dossier is in the end, it has to be noted that public pressure and the scientific debate improved the Agreement considerably, even though it is still not sufficient from an environmental point of view.

Another persistent environmental issue in 2016 – and foreseeably also well beyond – is the so-called 'Volkswagen Scandal'; a symbol for a confidence crisis caused by and affecting not only the VW AG but also other major car manufacturers. A contribution by *Ludwig Krämer*, 'The Volkswagen Scandal – Air Pollution and Administrative Inertia' deals with the manipulation of NOx emissions from Volkswagen diesel cars on the one hand, and the manipulation of $CO_2$ emissions from its diesel and petrol cars on the other. Not all details of the manipulations have been made public until now. A number of conclusions may nevertheless already be drawn. In this context, the editors would also like to draw the readers' attention to the related analysis by Défense Terre ('Strengthening the regulation of defeat devices in the European Union', Legal Note, June 2016) as well as to the expert opinion by Martin Führ for the German Bundestag's Committee of Inquiry with respect to the car emissions affair.

A further article addresses the Aarhus Regulation which provides an opportunity for environmental non-governmental organisations (ENGOs) to request an internal review of an EU institution or body that has adopted an administrative act under environmental law, or should have done so in the case of an alleged administrative omission. *Thirza Moolenaar* and *Sandra Nóbrega* investigate whether the criteria that have to be met for an ENGO to be entitled to make such a motion are sufficiently clear, and whether they contribute to the objective of providing wide access for ENGOs to the internal review procedure.

This elni Review's *Recent Developments* section starts off with a report of C-673/13 Commission v. Greenpeace and PAN Europe by *Bondine Kloostra*, the representative of the two NGOs involved. In its Judgment of 23 November 2016 the CJEU rules that the concept of 'emissions into the environment' is not limited to emissions from industrial installations. Rather it includes the release into the environment of substances such as pesticides and biocides. This landmark decision will most likely influence future access to information practice – not limited to the context of pesticides. Lastly, *Elhoucine Chougrani* examines the opportunities and the challenges in applying environmental law and enforcing the sustainable development goals in Morocco and *Lynn Gummow* reports on the 5th Lucerne Law and Economics Conference.

The editors welcome submissions of contributions to the next elni Review until 1 April 2017. Please refer to www.elni.org for further detail on the call and for the author guidelines.

*Gerhard Roller/ Julian Schenten*

December 2016

# Access to Justice: Environmental Non-Governmental Organisations According to the Aarhus Regulation

*Thirza Moolenaar and Sandra Nóbrega*

## 1 Introduction

Article[1] 10 of the Aarhus Regulation[2] provides an opportunity for environmental non-governmental organisations (hereafter ENGOs) to request an internal review to an EU institution or body that has adopted an administrative act under environmental law, or should have done so in the case of an alleged administrative omission. The criteria that have to be met for an ENGO to be entitled to make this request are defined in Article 11 of the Regulation.[3] Together, these criteria can be regarded as the criteria which define an ENGO at the European Union level.

The internal review procedure has been critically addressed in literature.[4] It has been remarked that the internal review procedure *"does not function adequately"* as the "*vast majority of the launched requests has been declared inadmissible"*.[5] This is mainly due to the narrow definition of 'administrative act' in Article 10 of the Regulation.[6] These analyses are therefore related to the subject of an internal review, not the standing criteria.[7] Specifically regarding Article 11, Darpö briefly stresses that the time criterion laid down in the Article constitutes a barrier to access to justice for ad hoc organisations.[8] However, there is no substantial review of the Article 11 criteria. The aim of this article is therefore to investigate whether these criteria are sufficiently clear and whether they contribute to the objective of providing wide access for ENGOs to the internal review procedure. After all, the criteria in Article 11 directly delineate the scope of access to the internal review procedure for ENGOs.

In order to understand the aim the EU institutions had in mind when they decided on the standing criteria, section two examines how these criteria were selected by analysing the legislative documents that resulted in the adoption of the Aarhus Regulation. It will help to identify whether the Commission is currently interpreting these criteria in line with the spirit with which they have been defined. In section three, internal review requests which provide insights into the scope of the Article 11 criteria have been selected in order to understand how the European Commission currently interprets the standing criteria. In the final section, a conclusion is provided on the questions raised, together with recommendations for improvement and further research.

## 2 From proposal to adoption

The Aarhus Regulation was adopted on 6 September 2006 and was part of the proposed 'Aarhus Package', consisting also of a proposal for a Directive on Access to Justice in Environmental Matters[9] and the proposal to ratify the Aarhus Convention.[10] The objective of the Regulation is to contribute to the implementation of

1 The authors wish to thank Prof. Dr. Marjan Peeters and Dr. Mariolina Eliantonio for their valuable guidance on previous versions of this article.

2 Regulation 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, [2006] OJ L264/13.

3 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.

4 M. Pallemaerts, 'Environmental human rights: Is the EU a Leader, a Follower, or a Laggard?', 15 Oregon Review of International Law 1, 2013, pp. 7-41.

5 G. J. Harryvan and J. H. Jans, 'Internal Review of EU Environmental Measures. It's True: Baron van Munchausen Doesn't Exist! Some Remarks on the Application of the So-Called Aarhus Regulation', 3 Review of European Administrative Law 2, 2010, pp. 53-65, 53.

6 *Id.*, p. 55.

7 This definition is not further discussed within the scope of this article since the aim of this paper is the analysis of Article 11. For an overview of all the internal review requests and the reply letters, see: http://ec.europa.eu/environment/aarhus/requests.htm. More has been written about the possible broadening locus standi for ENGOs before the Court of Justice of the European Union (CJEU) as a result of the internal review procedure, which is made possible under Article 12 of the Aarhus Regulation. See *e.g.*: Jans, J. H., & Vedder, H. H. B. (2012), *European Environmental Law*. Groningen: Europa Law Publishing, pp. 560, 246-247; Kiss & Černý, 'The Aarhus Regulation and the future of standing of NGOs/public concerned before the ECJ in environmental cases', 2008; G. J. Harryvan and J. H. Jans, 3 Review of European Administrative Law 2, *supra* note 5, pp. 53-65; M. Schaap, 'Access to Environmental Justice for NGOs: Reviewing the EU Legal Standing Criteria in Light of the Aarhus Convention', Newsletter Nr. 8/13 AJV, pp. 1-8;
ACCC, communication ACCC/C/2008/32 (part I) concerning compliance by the European Union, ECE/MP.PP/C.1/2011/4/add.1(24 August 2011); A.M. Keessen, European Administrative Decisions; How the EU Regulates Products on the Internal Market, European Administrative Law Series (2), Groningen 2009, pp.151-153;
S. Marsden, 'Direct Public Access to EU Courts: Upholding Public International Law via the Aarhus Convention Compliance Committee', 81 Nordic Journal of international Law 2, 2012, pp. 175-204, 189;
T. Crossen, V. Niessen, 'NGO Standing in the European Court of Justice-Does the Aarhus Regulation open the door?', 16 Review of European, Comparative & International Environmental Law 3, 2007, pp. 332- 340, 332.

8 J. Darpö, 'Article 9.2 of the Aarhus Convention and EU Law', 11 Journal for European Environmental & Planning Law 4, 2014, pp. 367-391, 383.

9 Proposal for a Directive of the European Parliament and of the Council 24 October 2003 on access to justice in environmental matters (presented by the Commission), COM(2003) 624 final. The European Commission has withdrawn this proposal in 2014. Withdrawal of obsolete commission proposals (2014/C 153/03) OJ C 153/3.

10 Proposal for a Council Decision on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision making and access to justice regarding environmental matters, COM/2003/625 final.

the obligations arising under the Aarhus Convention[11] by laying down rules to apply the provisions of the Convention to Community institutions and bodies.[12] Art. 9(3) of the Aarhus Convention lays down the obligation for each Party to the Convention to ensure that when they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.[13] It is thus a provision creating access to justice for members of the public[14] which is intended to ensure effective environmental protection.[15] At the European level Article 10 of the Aarhus Regulation provides for the internal review procedure and is limited to ENGOs which fulfil the Article 11 criteria:[16] establishing a similar right of access to justice for every natural or legal person was not considered to be a reasonable option.[17] Further, Article 12 of the Aarhus Regulation states that ENGOs which made a request for internal review may initiate proceedings before the Court of Justice of the European Union (CJEU) 'in accordance with the relevant provisions of the Treaty'. Starting a procedure for an ENGO following this provision will not pose additional standing problems for ENGOs, since they are the addressee of the challenged decision.[18] The Aarhus Regulation however does not widen locus standi for ENGOs before EU courts.[19] Since the focus of this paper is on Article 11 criteria, the procedure for appeal to the Court of Justice will not be further discussed.

### 2.1 First proposal of the Regulation

In the first proposal for the Aarhus Regulation[20], the proposed criteria for the organisations that would give access to the internal review procedure (first defined as qualified entity) to meet in order to request internal review were the following:

a) It must have legal personality. It must operate on a non-profit basis and in the general interest of the environment: it may not pursue economic activities other than those that relate to the principal objective of the organisation.
b) It must be active at Community level. Where it acts in the form of several coordinated associations, those must cover at least three Member States.
c) It must have been legally constituted since more than two years and during that period have been actively pursuing objectives concerning the protection of the environment according to its statutes.
d) It must have its annual statement of accounts for the two preceding years certified by a registered auditor.

The aim of the Commission was to "*include groups, associations or organisations whose main statutory objective is the protection of the environment.*"[21] The proposal explained that a right of access to justice for these entities is justified by "*the increasingly important role in national and international environmental protection played by them.*"[22] The Commission proposal stipulated that these entities would not have to prove a sufficient interest in the subject matter or to maintain the impairment of a right, in order to have access to the internal review procedure.[23]

### 2.2 The opinion of the EESC

The European Economic and Social Committee (EESC) welcomed the inclusion of the term qualified entity, which, it stated, would facilitate access to justice, "*especially as such entities are not required to*

11 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998; in force 30 October 2001) ('Aarhus Convention').
12 See Aarhus Regulation, Preamble, Recital 17.
13 The CJEU that it is "*for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organisation […] to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law*." See Case 240/09 Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky (2011), para. 52.
14 In this regard, Recital 18 of the Preamble of the Aarhus Convention states that "*effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced*".
15 Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, *supra* note 13, para. 46.
16 See Aarhus Regulation, *supra* note. 2, Preamble, Recital 17 and Article 1(1). Berthier, A. Rulings in Joined Cases C-401/12P to C-403/12P and Joined Cases C-404/12P and C-405/12P: The Lack of Proper Implementation of Article 9(3) of the Aarhus Convention, Journal of European Environmental Law & Planning Law 12 (2015), pp. 207-213, 208.
17 The proposal mentions the following: "*One group of interested parties in particular considered it was not justified to limit access to justice to 'qualified entities', arguing that the introduction of an 'actio popularis' was not likely to have the effect of over-burdening European courts*." The Commission did consider this limitation to be in line with Article 9(3), as this provision gives the possibility to the Contracting Parties to lay down criteria for the members of the public to be granted legal standing. Furthermore, the Commission explained, "*establishing a similar right for every natural and legal person has not been considered a reasonable option. This would imply an amendment of Articles 230 and 232 of the EC-Treaty and could hence not be introduced by secondary legislation*''. See: COM (2003) 622, pp. 7, 16.
18 Jans, J. H., & Vedder, H. H. B. (2012), European Environmental Law. Groningen: Europa Law Publishing, pp. 560, 250.
19 Backes, C. & Eliantonio, M. (2013), 'Access to Courts for Environmental NGOs at European and National Level: What Improvements and What Room for Improvement since Maastricht?', in: Visser, M. de; Mei, A.P. van der; and Visser, M. (eds.), Twenty Years Treaty on European Union 1993-2013: Reflections from Maastricht. Cambridge, Antwerp, Portland: Intersentia, 2013, pp. 557-580, 567.
20 Proposal for a Regulation of the European Parliament and of the Council of 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 EC institutions and bodies (presented by the Commission), COM(2003) 622.
21 *Id*., p. 17.
22 *Id*., p. 17.
23 *Id*., p. 17.

*have a sufficient interest or maintain the impairment of a right*".[24] The EESC put forward that the concept of qualified entity is not found in the Aarhus Convention.[25] Further, the EESC proposed that it would be more appropriate in the European context to also recognize organisations that have social and economic objectives as admissible to request an internal review, alongside environmental organisations.[26]

Secondly, the EESC did not believe the field of activity of an ENGO should cover several countries, thus disagreeing with criterion b) of the proposed article.[27]

Lastly, the EESC stressed that criterion d) was in conflict with the principle of subsidiarity: it should be left to the Member States to control compliance of the accounting requirements applicable to such organisations.[28]

In the agreement and later with the adoption of the common position of the Council[29], the term 'qualified entity' was not used.[30] Furthermore, the criterion for an ENGO to be active at Community level was removed. Later, the Commission confirmed the common position of the Council by stating that an organisation was no longer specifically required to be active at Community level. Yet it was considered that any requests for internal review have to address Community level issues and be consistent with the definition of 'environmental law'.[31] Furthermore, the common position no longer required the organisation to have its annual statement of accounts by a registered auditor.[32]

The Commission highlighted that they were satisfied with maintaining that organisations must have as its primary objective the promotion of environmental protection in the context of Community environmental policy.[33] The term 'qualified entity' was removed from the proposal.[34]

### 2.3 Second reading

For the second reading on the Council common position, the Committee on the Environment, Public Health and Food Safety suggested an inclusion of the phrase "*and/or of promoting sustainable development*" next to the objective of the promotion of environmental protection.[35] In this regard, the Committee considered that given the wide definition of 'Environmental Law', administrative acts and omissions do not only affect NGOs active in the field of environment, but a much broader range of organisations, such as trade unions.[36] Therefore, a broader range of organisations should be entitled to request an internal review.[37]

At the second reading, the European Parliament proposed a new criterion: it adopted the view that NGOs active in the field of environmental protection should be law-abiding organisations. Moreover, the European Parliament confirmed the view of the Committee on the Environment, Public Health and Food Safety that NGOs that promote sustainable development should be equally entitled to request an internal review.[38] In the second reading, the following criteria were proposed[39],

a) it is an independent, law-abiding, 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 and/or of promoting sustainable development; (emphasis added)
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.

24 Opinion of the European Economic and Social Committee [EESC] on the Proposal for a Regulation, CESE/2004/666.
25 *Id*., note 3.4.1.1.
26 *Id*.
27 *Id*. note 4.1.5. The EESC did not however clarify this statement.
28 *Id*. note 4.1.6.
29 See the Agreement of the Council common position on the adoption of a Regulation of the European Parliament and of the Council 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, CS/2005/5172. Article 11 reads: Conditions liées à l'habilitation au niveau communautaire
1. Une organisation non gouvernementale est habilitée à introduire une demande de réexamen interne conformément à l'article 9, à condition que:
a) cette organisation soit une personne morale indépendante et sans but lucratif en vertu du droit ou de la pratique d'un État membre;
b) cette organisation ait pour objectif premier explicite de promouvoir la protection de l'environnement dans le cadre du droit de l'environnement;
c) cette organisation existe depuis plus de deux ans et qu'elle poursuive activement son objectif visé au point b);
d) l'objet de la demande de réexamen interne introduite par cette organisation s'inscrive dans le champ de son objectif et de ses activités;
30 The text solely spoke about "*toute organisation non gouvernementale satisfaisant aux critères […]*".
31 Adoption of common position by the Council on 18 July 2005 with a view to the adoption of the European Parliament and of the Council 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, 6273/2/05, REV 2 ADD 1, note 3.2.2.
32 See the Agreement of the Council common position, *supra* note 29; resp. The adoption by the Commission of declaration on the common position, COM (2005) 410 Final.
33 See Adoption by the Commission of declaration on the common position, *id*, p. 6.
34 *Id*., p. 4, note 3.2.3.
35 Recommendation for Second Reading on the Council common position for adopting a regulation (Presented by the Committee on the Environment, Public Health and Food Safety), A6-0381/2005.
36 *Id*.
37 *Id.*, p. 22.
38 In the recitals of this proposal, the element of sustainable development was not included: "*Non-governmental organisations active in the field of environmental protection which meet certain criteria, in particular in order to ensure that they are independent, law-abiding organisations whose primary objective is to promote environmental protection, should be entitled to request internal review at Community level of acts adopted or of omissions under environmental law by a Community institution or body, with a view to their reconsideration by the institution or body in question.*"
39 Position of the European Parliament adopted at second reading on 18 January 2006 with a view to the adoption of a Regulation, P6_TC2-COD(2003)0242.

The European Parliament did not motivate the proposed inclusion of the requirement for an organisation to be 'law-abiding', nor did it explain what the term 'law-abiding' would entail.

In the adoption by the Commission of the European Parliament amendments at the second reading, the Commission considered it could not accept the proposed amendments.[40] The requirement for ENGOs to be 'law-abiding' would prove difficult for a Community institution or body to verify. Moreover, it did not appear justified in the light of the objectives of the Regulation.[41] Furthermore, the Commission did not accept the inclusion of organisations promoting sustainable development to be entitled to request internal review. It considered this criterion to be potentially very wide.[42]

As a result of the above discontentment, a Conciliation Committee was convened.[43] The Committee took the view that the term 'sustainable development' referred to a broad range of activities, not directly related to the protection of the environment, but also related to globalization and employment. Moreover, it considered the primary objective of the Regulation to assure access to justice for ENGOs, and not for all kind of NGOs. Finally, the inclusion of the term 'law abiding' was to be removed. A reference in the recitals to 'accountable' NGOs were to be sufficient.[44]

### *2.4 Current criteria*

Finally, after a legislative procedure of three years, the Aarhus Regulation was adopted.

Article 11 reads:

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.
2. The Commission shall adopt the provisions which are necessary to ensure transparent and consistent application of the criteria mentioned in paragraph 1.

In light of Article 11(2), the Commission Decision 2008/50/EC has been adopted. Article 3 of this Decision states that an organization needs to give evidence that it satisfies the criteria in Article 11 of the Aarhus Regulation by providing the EU institution or body to which the request is addressed with the documents in the Annex of the decision.[45]

The analysis of the legislative documents demonstrates that on the one hand there was controversy with respect to the criteria regarding the objective of ENGO to be entitled to request an internal review, and for an ENGO to have legal personality; on the other hand very little considerations were dedicated to the requirements laid down in the final Article 11(1)(c) and (d) Aarhus Regulation. These documents therefore did not provide a thorough understanding as to the aim with which the criteria have been selected.

## 3 The criteria in the internal review procedure and case law

This section analyses the standing criteria in accordance with the order in which they are enumerated in Article 11.[46] The analysis is supported by the reply letters from the Commission in three internal review requests that thus far have provided insights into the scope of the Article 11 criteria; and the subsequent CJEU cases which shed light on the scope of the standing criteria of Art. 11 Aarhus Regulation.

### *3.1 Independent non-profit-making legal person*

On 8 July 2012, the European Platform Against Windfarms (EPAW) requested the Commission to carry out

40 Adoption by the Commission of the Opinion on EP amendments on second reading, COM (2006) 81 final.

41 *Id*., p. 6. The Commission equally omitted to further elaborate on the term 'law-abiding', and to explain why this inclusion would not be justified in light of the objectives of the Regulation.

42 *Id*. In this regard, the Commission had already highlighted that the Aarhus Convention granted non-governmental organisations promoting environmental protection a privileged status. This status should thus not be shared with organisations promoting sustainable development. See: The adoption by the Commission of declaration on the common position, *supra* note 32.

43 Report on the joint text approved by the Conciliation Committee for a Regulation (presented by the European Parliament delegation to the Conciliation Committee), A6-0230/2006.

44 The term 'accountable' does not, therefore, constitute a separate criterion for organisations to satisfy. The reasoning for this replacement is lacking in the report document of the Conciliation Committee. Nor is it specified in the report what the consequence of the inclusion in the recitals of the term 'accountable' may be for environmental organisations. See the recitals of the Regulation, no. 20.

45 See for the requested documents that ENGOs should provide according to Article 3 (1) of Commission Decision 2008/50/EC, the Annex of that Decision:
1. Statute or by-laws of the non-governmental organisation, or any other document fulfilling the same role under national practice, in respect of those countries where national law does not require or provide for a non-governmental organisation to adopt statute or by-laws.
2. Annual activity reports of the non-governmental organisation of the last two years.
3. In respect of non-governmental organisations established in countries where the fulfilment of such procedures is a prerequisite for a non-governmental organisation to obtain legal personality, copy of the legal registration with the national authorities (public registry, official publication, or any other relevant document).
4. Where relevant, documentation that the non-governmental organisation has previously been acknowledged by a Community institution or body as being entitled to make a request for internal review.

46 See *supra* note 3.

an internal review.[47] The request for internal review concerned a Communication from the European Commission to the Council, the EESC and the Committee of the Regions, on renewable energy.[48] In the reply letter, the Commission confirmed EPAW to be an organisation with an independent, non-profit-making character.[49] It was considered a legal person registered in France with the primary objective of promoting environmental protection in the context of environmental law.[50] Furthermore, the Commission regarded EPAW to be actively pursuing the objective of environmental protection as described in their e-mail that came with the request.

The challenged Communication was, however, not seen as an act of individual scope within the meaning of Art. 10 Aarhus Regulation, and it was therefore declared inadmissible.

On 21 January 2013, the General Court (GC) ruled on an action for annulment launched by EPAW which challenged the same act as in the internal review.[51] The GC stated that the admissibility of an action for annulment brought by a body under the fourth paragraph of Art. 263 TFEU depends, first and foremost, on that body's status as a legal person.[52] However, the applicant did not provide the Court with the requested instruments constituting and regulating it, or any other proof of its existence in law.[53]

As a first argument, EPAW brought forward that as it is mainly based in Ireland[54], it must be recognized as having legal personality under Irish law; Irish law does not contain an obligation to be registered with the national authorities.[55] In this regard, EPAW referred to the provisions of section 37(4)(c) to (e) of the Planning and Development Act 2000. Yet, the GC stressed that this section of Irish Law provided a limited right to bring an action before a body of which the judicial nature has not been fully demonstrated.[56] Therefore, together with the absence of any proof of EPAW's existence in law, the argument was found unsatisfactory to bring an action before the European Union Courts on the basis of the fourth paragraph of Art. 263 TFEU.[57] Equally insufficient was the inclusion of EPAW on the Transparency Register of the European Union.[58] The Court recalled that, 'networks, platforms or other forms of collective activity which have no legal status or legal personality but which constitute de facto a source of organized influence and which are engaged in activities falling within the scope of the register are expected to register'.[59] EPAW's inclusion did not, therefore, constitute a valid argument for its legal existence.

Secondly, EPAW stated that the Commission had recognized EPAW as an ENGO meeting the requirements set out in Art. 11 Aarhus Regulation. In this regard, the GC rebutted by stressing that Art. 11(1)(a) Aarhus Regulation states that an ENGO is admissible when it is an independent legal person in accordance with a Member State (MS)'s national law or practice. However, as the GC already pointed out, EPAW had not established that its legal personality was recognized in accordance with any MS' national law or practice.[60]

Thereupon, the GC referred to settled case law of the CJEU addressing the puzzle of legal personality[61]: "*an applicant is a legal person if, at the latest by the expiry of the period prescribed for proceedings to be instituted, it has acquired legal personality in accordance with the law governing its constitution or if it has been treated as an independent legal entity by the European Union institutions.*" As the GC had already contended that EPAW could not fulfil the first criterion embedded in this phrase, it proceeded to evaluate the second. Following the invoked case law, three factors need to be taken into consideration for the purpose of determining whether an applicant has been treated as an independent legal entity by an institution[62]: "*first, the representative character of the entity in question, second, its independence, necessary in order to act as a responsible body in legal matters, as ensured by its constitutional structure under its rules, and, third, the fact that a European Union institution recognised the entity in question as a negotiating body*".[63] The GC stated that in absence of notification by EPAW of its constitutive instruments or of any other document

47 Request from the European Platform Against Windfarms (EPAW) and other NGOs, 8 July 2012.

48 Commission Communication Renewable Energy: A Major Player in the European Energy Market – COM (2012) 271.

49 Reply letter from the Commission to EPAW, 21 January 2013. Available at: http://ec.europa.eu/environment/aarhus/pdf/requests/13.Reply.letter.to.EPAW.Jan.2013.pdf

50 In France a voluntary registration procedure for the recognition of organisations exists. This procedure gives an association standing before a French Court (thus in the context of the participation rights at a Member State level) but does not preclude other NGOs if they can prove an 'interest to act'. See: 'L'association agréée': http://www.associations.gouv.fr/630-l-association-agreee.html. Last accessed on 7.7.2015.

51 Case T-168/13, European Platform Against Windfarms (EPAW) v European Commission (2014).

52 *Id.*, para. 9.

53 *Id.*, para. 11.

54 "*The applicant states, moreover, that, contrary to the address mentioned in the application, its principal office is, in fact, in Ireland. The information in the application indicating an address in France is, it submits, incorrect, since that address is that of its chairman and of the principal office of a non-governmental organisation, registered in France, which is one of its members.*" *Id.*, para. 13.

55 *Id.*, *supra* note 51, para. 13.

56 *Id.*, para. 17.

57 *Id.*, para. 18.

58 *Id.*, para. 19.

59 *Id.*, para. 19.

60 *Id.*, para. 22.

61 *Id.*, para. 23.

62 *Id.*, para. 24.

63 It appears that the content of Commission Decision 2008/50/EC reflects the case law cited by the General Court in paragraph 23, *supra* note 51: one of the documents listed in the Annex of this Decision is, where relevant, documentation that the non-governmental organisation has previously been acknowledged by a Community institution or body as being entitled to make a request for internal review.

relating to its constitutional structure and internal processes, the file did not contain any evidence that the applicant enjoyed the independence necessary to act as a responsible body in legal matters.[64]

Finally, EPAW's argumentation regarding its fulfilment of the criteria in Art. 11 Aarhus Regulation could not stand since this conclusion resulted from incorrect information sent by the applicant.[65]

Taking all the above into account, the GC concluded that EPAW could not be valued as a legal person admissible to request an action for annulment under Art. 263(4) TFEU. It is not evident whether EPAW would have been regarded as a legal person if it would have sent documents relating to its structure and internal processes with the request for internal review. EPAW did not appeal the General Court's decision.[66]

On 7 February 2014, the Commission found inadmissible a new request for internal review lodged by EPAW for an alleged failure of the European Commission to comply with the Aarhus Convention with the adoption of a list of 248 Projects of Common Interest.[67] This time, the Commission considered that EPAW did not satisfy the criteria laid down in Art. 11(1)(a)(b)(d) Aarhus Regulation. The Commission highlighted that EPAW had stated in a letter of 12 December 2013 that it was not registered under the national law of any country. Moreover, they had not provided the Commission with any documents giving proof of its legal personality. Furthermore, the Commission recalled that EPAW had equally omitted to put forward any evidence on its legal personality before the GC in Case T-168/13.[68]

Where a MS' national law or practice does not require an organisation to be registered in order for it to be recognized as a legal person, an ENGO ought to provide the addressee of the request for internal review with other documents giving proof of its legal personality.[69] According to Article 4(2) of Commission Decision 2008/50/EC, if the institution or body concerned cannot fully assess whether the non-governmental organisation meets the criteria set out in Article 11(1) Aarhus Regulation, it shall request additional information. In this particular context, the Commission could have asked the Irish authorities for information about the national practice for recognition of organisations.[70] The EPAW situation shows that it might be more difficult for ENGOs which are not registered in a MS to prove their legal personality, even when a MS does not impose a legal obligation to be registered in the national competent authority. This practice may constitute a limitation to access to internal review for ENGOs. However, it could be solved by providing evidence that the ENGO has legal personality according to national law or practice. It remains to be seen what "*other documents fulfilling the same role under national practice*", apart from what is listed in the Annex of the Commission Decision 2008/50/EC, will be accepted by the Commission as proof of legal personality.

It is clear that in accordance with Art. 11(1)(a) Aarhus Regulation only organisations with legal personality are entitled to make a request for internal review, even if a MS, in accordance with their national law or practice, recognizes organisations without legal personality. Such a limitation, however, is not in contradiction with the Aarhus Convention. The Implementation Guide states "*that associations, organisations or groups without legal personality may also be considered to be members of the public under the Convention. This addition is qualified, however, by the reference to national legislation or practice*"[71] (emphasis added). It means that a stipulation of a requirement of legal personality at EU level is in compliance with the Aarhus Convention since discretion remains for the parties to the Convention with regard to the implementation of such criteria. However, it goes without saying that any requirements "*must comply with the Convention's objective of securing broad access to its rights*".[72]

### *3.2 Primary stated objective*

Another reason for inadmissibility stated in the reply letter of 7 February 2014 by the Commission was that EPAW did not have as their primary objective the promotion of environmental protection. The Commission, citing the text in the documents sent by EPAW, reminded EPAW that it had stated that their primary objective was to defend the interest of their members. The Commission concluded that whilst the primary objective of their members may be the protection of the environment, EPAW itself did not have a clearly stated objective to promote environmental protection. Additionally, the Commission found that the subject matter of the internal review request was not covered by EPAW's objectives and activities: the applicant had not been able to provide the Commission with any supporting documents to prove otherwise.[73]

64 *Id*., para. 25.
65 *Id*., para. 26.
66 EPAW decided not to appeal this decision because "*In some respects the issues have moved into a different forum*", see Communication ACCC/C/2013/96; "*a cost ruling, the order of magnitude of which was undefined*"; and the unpredictability of an effective remedy. Personal communication with EPAW, 8 January 2016.
67 Reply letter from the Commission to EPAW, 7 February 2014. See: http://ec.europa.eu/environment/aarhus/pdf/requests/20/reply.pdf.
68 See note 5 in the reply letter of 7 February 2014.
69 Article 3(1) Commission Decision 2008/50/EC.
70 Article 4(3) of the Commission Decision: "*Where relevant, the Community institution or body concerned may consult the national authorities of the non-governmental organisation's country of registration or origin to verify and assess the information provided by that organisation*".
71 The Aarhus Convention: An Implementation Guide, United Nations Economic Commission for Europe, Second edition, 2014, p. 55.
72 *Id*.
73 Reply letter of 7 February 2014, *supra* note 67, p. 2.

The question that follows is whether the Commission does not interpret Art. 11(b) Aarhus Regulation too strictly. EPAW promotes the interests of 908 member organisations, of which 649 are associations of 'wind-farm victims' across Europe. On their website, it is stated that the aim of EPAW is to defend the interests of its members.[74] The enumeration of the mentioned interests does seem to suggest that by defending the interests of their members, EPAW is committing itself to promote the protection of the environment. In light of this, one of the mentioned interests can serve as an example: defending of the flora, fauna and landscapes from damage caused by wind farms. It shows that the requirement for an association to have as primary objective the promotion of environmental protection needs to be directly stated and cannot be identified through the interests of their members.

### *3.3 Duration of existence and active pursuit of the objective*

One of the first cases dealing with the interpretation of the standing criteria of Article 11 of the Aarhus Regulation is the PAN Europe case.[75] Pesticide Action Network Europe, (PAN Europe), an association under Belgian law, is a network of over 600 NGOs worldwide working to minimize the negative effects and replace the use of harmful pesticides with ecologically sound alternatives.[76] On December 2011, PAN Europe submitted to the Commission a request for internal review of Implementing Regulation No 1143/2011. This request was declared inadmissible by the Commission[77] on the grounds that when PAN Europe made its request for internal review on 21 December 2011, it had not existed for more than two years, as required by Article 11(1) (c) of Aarhus Regulation.[78] It was consequently not entitled to request internal review.

PAN Europe contested this decision before the GC by arguing that whilst it is true that PAN Europe was established as an entity under Belgian law on 21 May 2010, PAN Europe had been a duly registered entity in the United Kingdom since 2003.[79] PAN Europe in the United Kingdom and PAN Europe in Belgium are, it submitted, one and the same entity, the registered office of which was moved to Brussels in 2010. Additionally, it argued that the similarities in the statutes of both PAN Europe in Belgium and PAN Europe in the United Kingdom and its 2009 and 2010 annual reports showed that PAN Europe in the United Kingdom and PAN Europe in Belgium are one and the same entity.[80]

However, the GC concluded that the fact that PAN Europe in the United Kingdom and PAN Europe in Belgium are engaged in the same activities and have the same objects is not sufficient for them to be regarded as being the same organisation.[81] What would have been sufficient to contribute to the uniformity of the entities in the GC's view does not seem apparent.

The GC concluded PAN Europe's plea was manifestly unfounded.[82] Consequently, the action by PAN Europe was dismissed. PAN Europe did not appeal this decision. A possible explanation for this could be that by the time of the Court's decision (12/03/2014) the ENGO already existed for more than two years, thus fulfilling the criteria.[83] It shows that due to the length of the judicial process, an attempt of an ENGO to challenge a misapplication of Article 11(c) Aarhus Regulation will not have a concrete timely effect for the applicant. However, a Court decision which brings clarification on the application of the criteria will always help other organisations that may face the same issues.

The PAN Europe case enlightens three points. Firstly, the requirement that an ENGO needs to exist for more than two years is a mechanism by which an EU institution may verify whether an ENGO is active. The Commission and the GC decided to interpret this criterion in a relatively narrow manner. It can be concluded from this case that this criterion in practice means that an organisation should have existed for more than two years in the same country, despite the fact that the Article does not mention the need for an ENGO to be registered in the same country for more than two years. It appears that the wording of Article 11(1)(c) was thus not sufficiently clear. However, case law has now provided clarification of the scope of this criterion.

Secondly, the consequence of the interpretation as set out by the GC is quite remarkable. The internal review procedure creates a possibility for ENGOs to request a review of administrative acts adopted by the EU institutions and bodies. These acts are adopted in light of environmental law at the European level. If an ENGO is to challenge an EU measure, the necessity for the organisation to have existed for more than two years *in the same Member State* does not seem relevant and can thus be questioned. Such a restrictive interpreta-

74 See: http://www.epaw.org/about_us.php?lang=en.
75 Case T-192/12, Pesticide Action Network Europe (PAN Europe) v. Commission (CFI, 12 March 2014).
76 See: http://www.pan-europe.info/About/index.html.
77 Reply letter of the Commission to Greenpeace and Pan Europe, 9 March 2012, p. 2. See: http://ec.europa.eu/environment/aarhus/pdf/requests/11_reply.pdf
78 *Id.*
79 Case T-192/12, *supra* note 75, para. 18.
80 *Id.*, para. 23.
81 *Id.*, para. 23.
82 *Id.*, para. 28.
83 See *e.g.* another request for internal review in which PAN Europe was considered to fulfil Article 11 criteria: Request for an internal review (13 August 2012) of Commission Implementing Regulation (EU) No 582/2012 of 2 July 2012. This concerned a joined request for internal review by Pan Europe (Belgium), ClientEarth and Générations Futures. See: http://ec.europa.eu/environment/aarhus/pdf/requests/15.Request%20for%20internal%20review%20PAN%20Europe.pdf.

tion put aside an organisation which is a network of over 600 NGOs worldwide. PAN Europe's expertise and knowledge with such a large network could have been of added value with regard to the review of Implementing Regulation No 1143/2011. Therefore, doubts remain as to whether this criterion contributes to the aim of providing broad access for ENGOs to the internal review procedure, in line with the spirit of the Aarhus Convention.

Finally, upholding this requirement means that ad hoc ENGOs that emerge in quick response to a particular environmental proposal are de facto denied from having access to the internal review procedure.[84]

The UNECE has published the Implementation Guide to the Aarhus Convention.[85] Although a non-legally binding document,[86] "*its contents were taken into consideration by the Court of Justice of the European Union ('CJEU')*"[87] and the document has been recognized as a valuable tool for the purpose of interpreting the Convention.[88] With regard to ad hoc formations, the Aarhus Convention Implementation Guide mentions the following: "*ad hoc formations can only be considered to be members of the public where the requirements, if any, established by national legislation or practice are met. Such requirements, if any, must comply with the Convention's objective of securing broad access to its rights.*"[89]

Taking all the above into account, it can be concluded that the standing criterion laid down in Article 11(1)(c) of the Aarhus Regulation may constitute an obstacle for providing wide access for ENGOs to the internal review procedure.

### 3.4 Subject matter covered by objective and activities

Article 9(3) of the Aarhus Convention gives members of the public access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment. Unlike 'the public concerned' contained in paragraph 2, the term 'the public' does not signify that these natural or legal persons, and in accordance with national legislation or practice, their associations, organisations or groups, should be affected or likely to be affected by, or having an interest in, the environmental decision-making. This rationale has been emphasized by the Commission proposal of the Aarhus Regulation which stipulated that these organisations would not have to have a sufficient interest or to maintain the impairment of a right to have access to review procedures before the Court of Justice, and by the EESC, which underlined that such organisations[90] "*are not required to have a sufficient interest or maintain the impairment of a right*".[91]

However, by requiring an ENGO to be directly linked by its objective and activities to the subject matter in respect of which the request is made, it looks as if they still need to demonstrate the EU body or institution a sufficient interest in the decision-making. This seems to be in contradiction with the principles and reasoning that gave the possibility for ENGOs in the Aarhus Regulation to request internal review, and contrary to the aim of the Aarhus Convention to provide wide access to justice. However, such an interpretation has not yet been considered, either by the CJEU or the Compliance Committee of the Aarhus Convention.

### 3.5 Commission reply letters

Lastly, a more general remark can be made with regard to the communications sent from the Commission to applicants requesting internal review. It appears that the Commission does not consistently address the entitlement criteria of Article 11 in the reply letters.[92] In most of the responses, the Commission does not address them at all. In the letters where the Article is indeed addressed, the Commission generally does not illustrate why it concludes an organisation meets the criteria, thereby not contributing to legal certainty for ENGOs with regard to the standing criteria in Article 11 of the Aarhus Regulation.[93]

## 4 Conclusion

In this article, the standing criteria that entitle ENGOs to request an internal review under the Aarhus Regulation were explored in order to analyse whether they are sufficiently clear in terms of legal certainty; whether the criteria are providing ENGOs with wide access to justice.

84 As mentioned in the introduction, Darpö shares this concern, see *supra* note 8. With regard to ad hoc formations, the Aarhus Convention Implementation Guide mentions the following: 'ad hoc formations can only be considered to be members of the public where the requirements, if any, established by national legislation or practice are met. Such requirements, if any, must comply with the Convention's objective of securing broad access to its rights.'

85 The aim is to be "*a convenient non-legally binding and user-friendly reference tool to assist policymakers, legislators and public authorities in their daily work of implementing the Convention*". See: The Aarhus Convention: An Implementation Guide, United Nations Economic Commission for Europe, Second edition, 2014, p. 9.

86 Case C 204/09, Flachglas Torgau GmbH v. Federal Republic of Germany, para. 36.

87 Banner, C. (2015). The Aarhus Convention: A Guide for UK Lawyers, Bloomsbury Publishing. p. 8.

88 Case C-182/10 Marie-Noëlle Solvay and Others v. Région wallonne ECLI:EU:C:2012:82, para. 27.

89 See: The Aarhus Convention: An Implementation Guide, United Nations Economic Commission for Europe, Second edition, 2014, p. 55.

90 The Opinion still referred to 'qualified entities'. See *supra* note 24.

91 *Id.*

92 See for an overview of the reply letters: http://ec.europa.eu/environment/aarhus/requests.htm.

93 The following may serve as an example: "*After analysing the request and all supporting documents that you submitted, we can conclude that all the eligibility criteria laid down in Article 11 of Regulation No. 1367/2006 are respected by Greenpeace European Unit, WWF European Policy Office, Nature Code (Carbon Market Watch), Sandbag Climate Campaign and Climate Action Network Europe, who are therefore entitled to make a request for internal review.*" See: C (2015) 1539 final.

Solid argumentation with regard to the wording of the criteria was lacking in the legislative documents leading to the adoption of the Aarhus Regulation. These documents therefore did not fully clarify the aim with which the criteria have been selected. Subsequently, three requests for internal review to the Commission have been reviewed. Case law has given clarification to the wording of some of the criteria, which, as the reply letters from the Commission demonstrated, were not sufficiently clear. However, it became clear that the GC tends to interpret the criteria of Article 11 in a relatively strict manner.

Although Art. 11(1)(a) Aarhus Regulation states that an ENGO should be an independent non-profit-making legal person in accordance with a MS' national law or practice, the Commission has so far interpreted this criterion as meaning an independent non-profit legal person, *registered* in accordance with a MS' national law. The GC seems to have confirmed this interpretation. Thus far, it appears it will be more difficult for ENGOs based in a MS which does not require a registration to request an internal review procedure.

From the EPAW case, it can be concluded that in order to satisfy the criteria, an ENGO needs to describe its objectives in a very specific manner, not leaving any room for doubt as to whether the main objective of the ENGO is the promotion of the protection of the environment. It is uncertain whether such a narrow interpretation is in line with the spirit of the Aarhus Convention.

The PAN Europe case showed that the requirement that an ENGO needs to exist for more than two years, de facto means that an ENGO needs to exist for more than two years in the same country. The question of why an ENGO needs to exist in the same country for more than two years to be entitled to address an administrative act adopted by the EU institutions, should be addressed in literature and by the European institutions. Moreover, this criterion hinders wide access to justice for ENGOs as it prevents access to the internal review procedure for ad hoc ENGOs. However, no obligation to provide for access to such ENGOs can be derived from the provisions of the Aarhus Convention.

It can be questioned whether, for the purpose of Article 9(3) of the Aarhus Convention, the requirement for an ENGO to show that the subject matter in respect of which the request for internal review is made is covered by its objective and activities, is in compliance with the Convention's definition of 'the public'.

The current practice with regard to the reply letters from the Commission does not prove to contribute to a transparent and consistent application of the criteria as stressed by Art. 11(2) Aarhus Regulation. Therefore, in order to improve legal certainty for ENGOs, the Commission should start developing a more consistent practice while reviewing the requests of ENGOs for internal review, in which it would describe more precisely how an ENGO fulfils the criteria of Art. 11 Aarhus Regulation.

Finally, it is important to acknowledge that a limitation on access to the internal review procedure means a limitation of access to justice, which is one of the main objectives of the Aarhus Convention.[94]

94 Article 1 of the Aarhus Convention.

## Imprint

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*In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.*

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