

Access to the EU courts

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Limitations in the jurisprudence of the EU courts and in the Aarhus Regulation

- The *Plaumann* test and the too narrow definition of administrative acts in the Aarhus Regulation
- Very narrow interpretation by the EU courts of the direct and individual concern criteria provided in Article 263(4)TFEU
- Consequence of applying this test to environmental and health issues: no member of the public is ever able to challenge a decision before the EU courts, diffuse interests
- The definition of administrative acts in the Aarhus Regulation limited to acts of « individual scope » « adopted under environmental law » and having « external effects »; exemptions and challenge limited to the reply to the RIR

Findings of the ACCC

- Communication by ClientEarth to the ACCC in 2009 – Findings adopted in 2017
- EU found in violation of Article 9(3)(4)
- It is clear that Article 263(4) TFEU could be interpreted so as to provide standing for qualified individuals and NGOs
- Neither the jurisprudence of the courts nor the Aarhus Regulation provide access to justice to the members of the public for the purpose of the Convention
- Recommendation to amend the Aarhus Regulation and interpret the provisions of the Treaty in compliance with Aarhus Convention and its own case-law on access to justice at national level (brown bear case)

Pressure from the Council

- No MOP decision was adopted because of the opposition of NGOs, Switzerland, Norway and the Chair of the MOP.
- Commitment of the EU to explore ways and means to bring EU law in line with the AC
- Organisation of a public consultation by the EC following adoption of a roadmap
- Council decision on basis of Article 241 TFEU – invite the EC to submit a study by Sept. 2019 and revision of the Aarhus regulation « if appropriate ». Unprecedented use of this procedure in environmental matters.
- Milieu report

Commission Roadmap – March 2020

- 2 possible ways identified by the EC to revise the Aarhus Regulation:
 - Get rid of the individual scope criteria to broaden the scope of review to include non-legislative regulatory acts reflecting the change to the TFEU brought by Lisbon Treaty
 - Specify that the administrative acts and omissions covered by the internal review mechanism are those that contravene provisions of environmental law
 - Extending the time for procedural steps for NGOs to make the RIR and the institution to reply to it

Revision of the Aarhus Regulation

- Risk that the EC will propose to rely on the same criteria than in the Treaty to allow NGOs to challenge non-legislative regulatory acts which do not entail implementing measures – not in line with the Aarhus Convention – leads to interpretation of the EU institutions and then the Courts – lack of legal certainty
- Exemptions of decisions adopted by EU institutions in their capacity as administrative review bodies : State aid decisions should be challengeable
- Possibility to challenge the procedural and substantial legality of decisions
- The proposal should also include that costs should not be prohibitively expensive

Thank you!

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