ALLEN & OVERY

Access to environmental justice in Flanders in light of the Aarhus Regulation review: Contradiction or alignment?

1 Introduction

Recently, the Flemish Government published a proposal amending the functioning of *inter alia* the Council for Permit Disputes (a regional administrative court), which also has procedural ramifications for access to justice.[1] Simultaneously, the EU is reviewing the existing Regulation on the application of the Aarhus Convention within the EU and has made a legislative proposal available as well.[2] This contribution will connect the pending EU initiative on reviewing the application of the Aarhus Convention in the EU to the regional efforts amending access to justice (in environmental matters) in procedures before the administrative courts.

2. Aarhus Convention and EU Law

The Aarhus Convention, which was adopted on 25 June 1998 under the auspices of the United Nations Economic Commission for Europe (UNECE), creates a number of procedural rights for individuals and associations with respect to the environment. The three most substantial rights are:

i. The right of access to environmental information held by public authorities (access to environmental information);

ii. The right to participate in environmental decision-making, and

iii. The right to review procedures to challenge the public decisions made without respecting the previous two rights (access to justice).[3]

To implement these rights in practice, the parties must adopt the necessary provisions at national, regional or local level. When the European Union ratified the Convention in 2005, it adopted a Regulation (1367/2006) which was specifically designed to implement the provisions of the Aarhus Convention for Community institutions and bodies.[4] The Regulation resulted in European institutions, bodies, agencies and offices having to adapt their internal procedures and practices to the requirements of the Convention and Regulation. Furthermore, NGOs meeting certain criteria may request an internal review of administrative acts or omissions by the EU institutions.[5] As such, the significance of the EU's accession to the Aarhus Convention for the strengthening of individuals' and associations' procedural rights cannot be understated.

[1] Between 20 October and 24 November 2020, it also held a public inquiry on the application of the Aarhus Convention on access to environmental information in Belgium. Omgeving Vlaanderen, "Aarhus", available at https://omgeving.vlaanderen.be/aarhus.

[2] Proposal for a Regulation of the European Parliament and of the Council on amending Regulation no. 1367/2006 of the European Parliament and of the Council of 6 September 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, 24 October 2020, available at https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2020/0642/COM_COM(2020)0642_EN.pdf.

[3] European Commission, "Aarhus", available at https://ec.europa.eu/environment/aarhus/.

[4] Directive 2003/4/EC of the European Parliament and the Council of 28 January 2003 on public access to information and repealing Council Directive 30/313/EC; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EC and 96/61/EC; Regulation 1367/2006 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; European Commission, "Aarhus", available at https://ec.europa.eu/environment/aarhus/.

[5] European Commission, "Requests for internal review", consulted 3 May 2021, available at https://ec.europa.eu/environment/aarhus/requests.htm.

3. Review of the Aarhus Regulation

3.1 Shortcomings

However, fifteen years on and in the context of the European Green Deal, the Regulation could do with a makeover. In 2017, the Aarhus Convention Compliance Committee (**ACCC**) found that the EU's review procedures available under article 263(4) (the annulment procedure) and 267 (the preliminary reference procedure) of the TFEU were inadequate to comply with article 9(3) and 9(4) of the Aarhus Convention. It encouraged the EU to bring access to justice in environmental matters up to scratch by strengthening the existing legal remedies under EU and domestic law on multiple aspects.[6]

In particular, the ACCC findings highlighted issues for NGOs struggling to obtain legal standing when challenging environmental decisions. In order to obtain legal standing in an annulment procedure under article 263(4) against an act which is not directly addressed to them, applicants must satisfy the *Plaumann* test, ie show that they are individually and directly concerned by the challenged act. In practice, environmental NGOs can only satisfy standing requirements when (i) they are expressly granted procedural rights, (ii) when the members of the association themselves are entitled to bring proceedings or (iii) when the association's interests are affected as well, which has proven extremely difficult for environmental NGOs.[7] For example, in the *Carvalho* case, which we recently discussed (available here), the General Court rejected the applicants' argument that because the infringement of certain rights was different and unique for each individual, the applicants were individually concerned. It countered that the applicants' rights would not be infringed in a different way from other individuals' (ie non-applicants) rights, which would also likely be infringed and therefore, the applicants were not individually concerned.[8]

As regards the preliminary ruling procedure of article 267 TFEU (which the Commission puts forward as a crucial piece of the puzzle for a complete system of legal remedies), the ACCC commented that this indirect avenue was not commonly used by environmental NGOs because, *inter alia*, the decision to ask a preliminary question ultimately lies with the national court and is sometimes complicated by national procedural rules. Therefore, the preliminary reference procedure did not contribute as much for improving access to justice in environmental matters as initiating a direct action under article 263(4) TFEU. For instance, in the *Carvalho* case, the applicants could not turn to national courts for an effective legal remedy, as they were challenging an EU climate mitigation goal.[9] Nevertheless, in the *Slovak Brown Bear* case, a Slovak environmental NGO succeeded in having a national court bring a preliminary question to the ECJ.[10]

Additionally, the Commission published an Environmental Implementation Review of the Aarhus Regulation in 2019 identifying various systemic shortcomings for the practical implementation of access to justice in environmental matters at domestic level and at Union level.[11] For instance, while the current Aarhus Regulation addresses access to justice for environmental NGOs, it excludes non-environmental bodies and other members of the public.[12] Furthermore, only individual acts are challengeable under article 2(g) of the Regulation, which renders the scope of reviewable acts quite narrow. The review also identified other procedural obstacles such as high costs.[13]

[6] Findings and Recommendations of the Compliance Committee with regards to Communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union (adopted 14 April 2011); Findings and Recommendations of the Compliance Committee with regard to Communcation ACCC/C/2008/32 (Part II) concerning compliance by the European Union (adopted 17 March 2011); Ioanna Hadjiyianni, "Judicial Protection and the Environment in the EU legal order: Missing pieces for a complete puzzle of legal remedies", 2021 Common Market Law Review, p. 780.

[7] Ioanna Hadjiyianni, note 6, p. 781-782; see also ECJ, case T-330/18, *Carvalho*.

[8] ECJ, case T-330/18, *Carvalho*, par. 50.

[9] ECJ, case T-330/18, *Carvalho*, par. 32; Ioanna Hadjiyianni, note 6, p. 805.

[10] ECJ, case C-674-17, *Luonnonsuojeluyhdistys Tapiola Pohjois-Savo — Kainuu ry*.

[11] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions improving access to justice in environmental matters in the EU and its Member States, 14 October 2020, available at https://ec.europa.eu/environment/aarhus/pdf/communication_improving_access_to_justice_environmental_matters.pdf, p. 2.

[12] Ioanna Hadjiyianni, note 6, p. 792.

[13] Communication from the Commission, note 10, p.2; Ioanna Hadjiyianni, note 6, p. 792-793.

3.2 Solutions?

(a) European Commission proposal

This is why, on 24 October 2020, the Commission adopted a legislative proposal to allow for better public scrutiny on EU acts affecting the environment, as well as improve the possibilities to request EU institutions to review acts.[14] The proposal aims to revise the administrative and judicial review mechanisms for administrative acts and omissions of EU institutions for NGOs.[15] For example, while the current system only allows the challenge of individual decisions, the systemic decision on which the individual decision is based remains untouchable.[16] The proposal enhances the opportunities to challenge such acts of general application. However, the proposal still excludes provisions that require implementing measures at national or EU level (which is similar to the category of "regulatory acts" under article 263(4) TFEU).[17]

As regards the material scope of reviewable acts, the current Regulation only allows acts that contribute to the pursuit of environmental policy objectives to be reviewed, the proposal extends the scope of challengeable acts by stating that any administrative act contrary to EU law is reviewable, irrespective of its policy objectives. It also extends the timeframe for request and replies.[18] However, the definition does not encompass administrative acts without legally binding or external effects, which is justified by the Commission as being consistent with the concept of "reviewable act" in the sense of article 263(1) TFEU.[19]

Additionally, the majority of concrete decisions on environmental matters are taken at Member State level. Having the national courts function well is therefore of the utmost importance to ensure access to justice is properly safeguarded.[20] In general, the obligation for Member States to adopt remedies to efficient protection of individuals' rights stems from article 19(1) TFEU as well as the principle of loyal cooperation (article 4(3) TEU). The Aarhus Convention itself as well as the current Regulation reiterate these obligations for access to justice in environmental matters specifically.

(b) European Parliament position

The proposal was discussed on 20 May 2021 in the plenary in the first reading. In the spirit of the Commission's broadening of the reviewable acts under the Aarhus Regulation, the Parliament voted to render Commission state aid decisions, which can have substantial impacts on the environment, challengeable as well.[21] Additionally, it added a new recital confirming the right of members of the public to access to justice in environmental matters, if they meet the criteria laid down in national law.[22] However, the Parliament specified that, to avoid *actio popularis*, members of the public challenging an act should be able to prove that they are directly affected in comparison to the public at large. This still rings very close to the admissibility requirements (stemming from the *Plaumann* test) previously criticised by the ACCC as obstacles to access to justice in environmental matters.[23]

Following the Parliament's vote, the proposal will enter trilogue negotiations with the Council, after which it will be adopted into EU law.

[14] Proposal for a Regulation, note 2.

[15] Proposal for a Regulation, note 12, p. 1.

[16] European Commission Press Release, "Commission proposes to improve public scrutiny of EU acts related to the environment, 14 October 2020, available at https://ec.europa.eu/environment/news/commission-proposes-improve-public-scrutiny-eu-acts-related-environment-2020-10-14_en.

[17] Ioanna Hadjiyianni, note 6, p. 794.

[18] Proposal for a Regulation, note 2, p. 2; Communication from the Commission, note 10.

[19] Ioanna Hadjiyianni, note 6, p. 795.

[20] European Commission Press Release, "Commission proposes to improve public scrutiny of EU acts related to the environement, 14 October 2020, available at https://ec.europa.eu/environment/news/commission-proposes-improve-public-scrutiny-eu-acts-related-environment-2020-10-14_en.

[21] Clientearth, "EU Parliament champions compliance with international rule of law", 20 May 2021, available at https://www.clientearth.org/latest/press-office/press/eu-parliament-champions-compliance-with-international-rule-of-law/.

[22] European Parliament, Review of the Aarhus Regulation, first reading of 20 May 2021, recital 4a, available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0254_EN.html.

[23] European Parliament, Review of the Aarhus Regulation, first reading of 20 May 2021, article 11(2b) (c), available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0254_EN.html.

4. If at first you don't succeed…

At domestic level, the Flemish Government adopted a regional statute in 2017 amending the existing regional statute of 4 April 2014, which sets out the conditions under which individuals and associations have standing to challenge administrative decisions (*inter alia* on environmental matters). This is possible before the Council for Permit Disputes (*Raad voor Vergunningsbetwistingen*) through judicial review, as well as through administrative review with the awarding authority.[24]

In essence, the amendment (to article 35 of the Statute) added a new admissibility condition, stating that interested parties could only challenge the decision taken under the regular permit award procedure if they had previously submitted a reasoned opinion, remarks or objections during the public inquiry. The State Council (which advises *inter alia* on the legality of legislative proposals before they are adopted) remarked at the time that this additional condition turned the right to participate in decision-making through a public inquiry into a duty to participate. According to the State Council, this infringed the core of the right to access to justice.[25]

The legality of the additional admissibility condition of the claim was subsequently challenged by an environmental NGO before the Belgian Constitutional Court. The plaintiffs contended that the additional condition infringed the articles 10, 11 and 13 of the Constitution because it restricted the right to access to justice. The Constitutional Court agreed with the plaintiff's reasoning and held that the legislator's purpose (ie streamlining the procedure for the administrative courts) was disproportionate to the measure taken, after which it annulled the additional condition.[26]

5. ...Try, try again

Several years later, the Flemish Government has attempted to amend the regional Statute of 4 April 2014 again.[27] This time around, the government has formulated the additional condition for admissibility in a manner that only when an interested party has obviously (*kennelijk*) omitted to challenge the illegality when it had the possibility to do so during the administrative procedure, a subsequent administrative or judicial review application will be inadmissible. The provision also contains a reservation for challenges based on infringement of rules of public order, which are always admissible.[28]

Nevertheless, although the State Council (which advised on this legislative proposal as well) remarked that this proposal is less far-reaching than the previous amendment, it still expressed doubts on the actual scope of the additional condition (ie when obviously negligent behaviour is apparent). In the end, it found that it was unclear in which instances an obvious negligence in the sense of article 35, 3° of the Statute of 4 April 2014 is evident.[29]

6. What about the Aarhus Regulation Review proposal?

Contrary to the Commission's Communication on the application of the Aarhus Convention, the Flemish Government seems to lean the other way.[30] On the one hand, the Commission's Communication establishes that the activities of national courts in safeguarding the rights of individuals and NGOs to an effective remedy under EU law are an area for priority action for Member States. The Communication also promotes Member State action to remove undue restrictions on legal standing to ensure that EU law is fully functional. Furthermore, one of the key objectives of the Aarhus Regulation Proposal is to open up the administrative review mechanism to NGOs.[31] Nevertheless, the Proposal falls short when it refrains from increasing direct access to the ECJ under article 263(4) by leaving in place the onerous *Plaumann* test, the criteria of which are notably difficult to satisfy for environmental NGOs.

[24] Flemish Regional Statute of 4 April 2014 concerning the organisation and procedure of certain Flemish administrative courts; Flemish Regional Statute of 8 December 2017.

[25] Constitutional Court, nr. 46/2019 of 14 March 2019, available at https://www.const-court.be/public/n/2019/2019-046n.pdf, B.1.3, B.1.6 and B.1.8.

[26] Constitutional Court, nr. 46/2019 of 14 March 2019, available at https://www.const-court.be/public/n/2019/2019-046n.pdf.

[27] Proposal of the Flemish Government of 19 March 2021, available at https://docs.vlaamsparlement.be/pfile?id=1684243.

[28] Proposal of the Flemish Government of 19 March 2021, available at https://docs.vlaamsparlement.be/pfile?id=1684243.

[29] State Council, advice nr. 68/754/3 of 24 February 2021 on the proposal of regional statute of the Flemish Region concerning the amendment of the Statute of 4 April 2014 on the organisation and procedure before certain Flemish administrative courts, to optimalise these procedures, available at http://www.raadvst-consetat.be/dbx/adviezen/68754.pdf#search=68.754%2F3.

[30] Communication from the Commission, note 10, p. 8.

[31] Proposal for a Regulation, note 2, p. 7.

On the other hand, it seems almost the opposite is occurring at the level of the Flemish Government. With the current legislative proposal, it is potentially restricting access to the administrative and judicial review procedures for administrative acts, if the interested party (including NGOs) did not act at the appropriate stage of the administrative award procedure and this is deemed an obvious negligence. If this is the case, then the party's complaint is inadmissible.

The potential consequences of this amendment in practice remain to be seen. There is a lot to be said for the purpose of the legislator to streamline the procedure before the administrative courts, thereby reducing lead time and legal uncertainty, as well as already discovering potential grounds for review in the decision phase. This may also encourage environmental NGOs to keep up with pending administrative award procedures (especially with environmental consequences, as this is generally their area of expertise). *Ius est vigilantibus*. However, these efforts should not become a duty, as it were, to become involved with any and all pending procedures with potential environmental impacts. This may ultimately increase the lead time for the decision to be taken by the public authority due to a higher number of objections submitted, after which the NGO may lodge a request for administrative or judicial review regardless.

In conclusion, while at EU level the European Commission seems to be promoting (but only partially broadening the possibilities for (environmental) NGOs to challenge administrative acts by public authorities in practice) and calling upon Member States to do the same, the Flemish Government seems to be restricting the instances for which an NGO can challenge decisions by public authorities having environmental consequences by introducing an additional admissibility condition. If the legislative proposal is adopted and challenged again on constitutional grounds, it remains to be seen whether it will pass the test of the Constitutional Court.

Furthermore, while the current review of the Aarhus Regulation broadens the scope of reviewable acts, it does not do much to alleviate the stringent admissibility criteria for NGOs and members of the public and meet the ACCC's criticisms of the current Regulation. Moreover, the European Parliament does not seem to have remedied this point in its first reading. Considering the emphasis the Commission is placing on improving access to justice in environmental matters by strengthening the review procedures at domestic level and the ACCC findings painting a rather bleak picture on access to justice in environmental matters in practice, the Constitutional Court may see the Flemish proposal as contrary to article 4(3) TEU and article 19(1) TFEU when reading these articles together with article 13 of the Belgian Constitution.

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