



**COUNCIL OF
THE EUROPEAN UNION**

Brussels, 30 November 2004

15435/04

LIMITE

**JUR 478
ENV 653**

CONTRIBUTION OF THE LEGAL SERVICE

to : the Proceedings of the "Environment" Working Party

No. prev. doc. : 14587/04 of 17.11.2004

Subject : Proposal for a Regulation of the European Parliament and of the Council on the application of 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 (Doc. 14152/03 of 30.10.2003)

DOCUMENT PARTIALLY ACCESSIBLE TO THE PUBLIC (19.04.2021)

1. At the meeting of the "Environment" Working Party on 19 November 2004, the representative of the Council Legal Service made a preliminary statement on the question of the compatibility of Articles 9 to 11 of the above proposal with the EC Treaty. This contribution confirms and elaborates in writing on that statement.
2. According to Article 9(3) of the Aarhus Convention " ... *each Party shall ensure that, where 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*".

3. Title IV of the Commission's proposal sets out the implementing rules of the Aarhus Convention for access to justice in environmental matters. Article 9 institutes a new procedure for the internal review of administrative acts and omissions at the request of a qualified entity, e.g. an NGO. Article 10 lays down the criteria the entity must comply with in order to have legal standing according to Article 9. Article 11(1) provides for review by the Court of Justice of the substantive and procedural legality of the decision pursuant to Article 9 in accordance with Article 230(4) of the EC Treaty. If a decision has not been taken according to Article 9, Article 11(2) provides that the qualified entity may institute proceedings before the Court of Justice in accordance with Article 232(3) of the EC Treaty.

4. In the explanatory memorandum the Commission explains its proposal as follows:

"To align Community law to the Convention's provisions of Article 9(3) on access to justice, the establishment of a right of access to justice in environmental matters 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. The present proposal provides to limit legal standing to environmental organisations at European level, which meet a number of conditions - the "qualified entities"¹ ...

... Qualified entities may submit a request for internal review of an administrative act or omission that in their opinion has contravened environmental law. This request is to be addressed to the relevant Community institution or body and must precede any judicial action"² ...

... This preliminary procedure was introduced in order not to interfere with the right to access to justice under Article 230 EC Treaty, under which a person may institute proceedings with the Court of Justice against decisions of which it is individually and directly concerned. The addressee of the decision of internal review may have recourse to Article 230 EC Treaty;"³

¹ Page 16, third indent.

² Page 16, fifth indent.

³ Page 16, sixth indent.

5. During the discussions in the Working Party, the Commission representative has stressed that the act to be reviewed by the Court of Justice is the decision addressed directly to the qualified entity and not the underlying previous administrative act adopted by the institution or body. The Commission representative also pointed out that the Court has held that the existence of special circumstances, such as the involvements by an association in the procedure leading up to the adoption of an act, may support the admissibility of an action brought by an association whose members are not directly and individually concerned by the act.⁴
6. The Council Legal Service recalls that Article 230(4) of the EC Treaty defines the conditions in which any natural or legal person may institute proceedings for annulment. Settled case-law regarding that provision has established that an action brought by a private person against an act other than a decision addressed to that person is admissible only if the applicant establishes that the act is of direct and individual concern to him. In order for private persons to be held to be directly concerned, the case-law requires them to establish that a decision "*affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually just as in the case of the person addressed*".⁵
7. This case-law has recently been confirmed by the Court of Justice in Case C-50/00 P⁶, where it examined the possibility of extending admissibility to applicants which had no other legal remedy available at either national or Community level. The Court held that:
- "according to the system for judicial review of legality established by the Treaty, a natural or legal person can bring an action challenging a regulation only if it is concerned both directly and individually. Although this last condition must be interpreted in the light of the principle of effective judicial protection by taking account of the various circumstances that may distinguish an applicant*

⁴ See joined Cases 67, 68 and 70/85, *Kwekerij Gebroeders, van der Kooy and others v Commission*, ECR 1988 p. 219; Case C-313/90, *CIRFS and others v Commission*, ECR 1993, I p. 1125 and Case T-84/01, *ACHE v Council and European Parliament*, ECR 2002, II p. 99.

⁵ Judgment of 15.07.1963, Case 25/62, *Plaumann v Commission*, [1963] ECR 1995 p. 107.

⁶ Judgment of 25.07.2002, Case C-50/00 P, *Union de Pequenos Agricultores v Council*, ECR 2002, I p. 6677.

*individually (see, for example, Joined Cases 67/85, 68/85 and 70/85 Van der Kooy v Commission [1988] ECR 219, paragraph 14; Extramet Industrie v Council, paragraph 13, and Cordoniu v Council, paragraph 19), such an interpretation cannot have the effect of setting aside the condition in question, expressly laid down in the Treaty, without going beyond the jurisdiction conferred by the Treaty on the Community Courts."*⁷

*"While it is, admittedly, possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the founding Treaty and never amended as to its principles, it is for the Member States, if necessary, in accordance with Article 48 EU, to reform the system currently in force".*⁸

8. In the light of this case-law the Legal Service has carefully examined Articles 9 to 11 of the proposal and the Commission's argumentation as regards their conformity with the Treaty.

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⁷ Point 44.

⁸ Point 45.