JUSTICE AND ENVIRONMENT
European Network of Environmental Law Organizations

The RIR

Practical Application of the Request for Internal Review

Public Guidance

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1. What is RIR short for?

RIR is a common abbreviation of the legal instrument **Request for Internal Review** (or at least the environmental legal jargon knows this instrument also by this name). The RIR was created by the so-called Aarhus Regulation, i.e. the Regulation (EC) 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.

The Aarhus Regulation is an EU legal act implementing the provisions of the Aarhus Convention to European Community (now Union) institutions and bodies. In a simplified sense, the Aarhus Regulation is the law that guarantees that Brussels institutions and processes are transparent and accountable, at least in environmental matters.

2. What is the RIR good for?

The RIR is **a kind-of appeal process**. It is available for a limited number of NGOs only and can be used only against so-called administrative acts that the EU institutions or bodies make. Its detailed provisions can be read at the above link; however, the most important requirements are that

- a RIR has to be addressed to the Community institution or body that has adopted an administrative act under environmental law (we do not pay attention to the scenario when there is an alleged administrative omission, i.e. the Community institution or body should have adopted an act but did not);
- the request must be made in writing and within six weeks after the administrative act was adopted, notified or published;
- the request shall state the grounds for the review.

These are the criteria towards the request. Not very demanding, we must admit...

Nevertheless, there are certain criteria defined also towards the NGOs that can submit such a request and these are first of all regulated in the Aarhus Regulation. These are that

- it has to be an independent non-profit-making legal person in accordance with a Member State's national law or practice;
- it has to have a primary stated objective of promoting environmental protection in the context of environmental law;
- it has to have existed for more than two years and must actively pursue the objective of promoting environmental protection etc.;
- the subject matter in respect of which the request for internal review is made has to be covered by its objective and activities.

There are a number of EU legal acts that further regulate the question, e.g.

- a Commission Decision of 13 December 2007 laying down detailed rules for the application of Regulation (EC) No 1367/2006 of the European Parliament and of the Council on the Aarhus Convention as regards requests for the internal review of administrative acts (Aarhus Regulation Commission Decision);
- a Commission Decision of 30 April 2008 amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) No 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 institution and bodies (Rules of Procedure Commission Decision).

In a more plain language, the Aarhus Regulation Commission Decision precisely defines how the NGO planning to submit such a request has to prove its eligibility for this action, while the Rules of Procedure Commission Decision defines how the Commission will make a decision on the matter.

3. Are we going to analyze their rules in detail?

Absolutely not.

But why, since these may be of paramount importance for an NGO potentially planning to submit a RIR?

Because in our view, **the entire RIR is defunct** and there is no reason or use whatsoever to devote much time and energy to the analysis of such a legal instrument until it has so huge shortcomings and until its practice proves its impracticability.

4. These are tough words, aren't they?

Certainly, but **reality** - case law since the entry into force of the Aarhus Regulation, since 2007 - **proves us right**.

5. What are our major objections against the RIR and its practical application?

First and foremost, the number of decisions that may be "appealed" by this instrument is extremely low.

The Aarhus Regulation itself does not say what acts (exactly) can be appealed, but **the criteria** it applies to the administrative acts of Community (Union) institutions and bodies that can be submitted for review **are prohibitive**. These administrative acts are those, pursuant to Art. 2.1.g of the Aarhus Regulation, that are

> "…any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects".

These criteria are very hard to meet. Justice & Environment has run a survey both in 2009 and 2011, monitoring each volume of the Official Journal (Series L) of the EU, looking for individual decisions published and eligible for being subject to RIR, i.e. meeting the criteria of an administrative act.

We have come to the following conclusion:

Question	2009	2011
Number of environmental decisions eligible for RIR	5	16
Number of environmental decisions not eligible for RIR	44	49
Ratio of eligible environmental decisions within the total	10,2%	24,6%
Topics of eligible environmental decisions	ozone depleting substances, GMO products	biocides, nitrates, pesticides, ozone depleting substances, GMO products, sustainability criteria, CO_2 emissions
Topics of non-eligible environmental decisions	dangerous substances, Natura 2000 sites, BREF document, waste management, aviation emissions, GHG emissions, nitrates, nuclear waste, ecolabel criteria, GMO products	biofuels, dangerous substances, ecolabel criteria, Natura 2000 sites, CCS, GHG emissions, bathing water, MS reporting questionnaire, carbon leakage, EMAS, air quality, waste shipment, energy efficiency
Reasons for non-eligibility	mostly not a measure of individual scope	mostly not a measure of individual scope

We can conclude after having read this brief survey that the Aarhus Regulation, originally supposed to guarantee wide access to the European Union public to EU decisions on a broad range of topics, eventually became a legal instrument that is applicable for 2-3 issues only (with some exaggeration): ozone depleting substances, GMOs and pesticides, i.e. quite marginal areas of interest within the entire realm of the protection of environment.

The second reason why the RIR is a defunct legal instrument is somehow connected to the first. Because the RIR can only be applied to a very limited and specific set of topics, **there is a need for a very specific** – ozone, GMO, pesticide, etc. related – **knowledge** to be present at the NGO that intends to use the RIR. However, this is not the case with regard to most of the European Union environmental NGOs, even the largest ones. These very specific areas of interest require either a very special in-house expertise that is available only in the small minority of the organizations, or the hiring of a quite expensive external expert. This latter is again not a realistic scenario.

Maybe this is the reason for the lack of popularity of this legal instrument as well. According to the website of the European Commission dedicated to the RIR, only 8 such applications have been submitted so far. First of all, **this number is not true**. Justice & Environment is positive about the false nature of the number (8 requests) because it was J&E itself that submitted the 9th such claim to DG SANCO in 2010, therefore the total number cannot be lower than that. But even if the official number (8 or 9) is not true, the real total number cannot be much more that 10-15.

6. Can we call it a successful legal instrument with 3 requests per year on the average?

Hardly.

7. And what happens with the RIR once submitted?

This is again a reason for failure. The Community institution or body considers the request, unless it is clearly unsubstantiated. The Community institution or body shall state its reasons in a written reply as soon as possible, but no later than 12 weeks after receipt of the request, or maximum within 18 weeks from receipt of the request.

8. Has any request ever been decided positively, i.e. accepting the reasoning of the claimant in the dispute, reconsidering the decision subject to the RIR?

Not any from those 8 that the Commission admits to have received.

The reasons are different, but show a lack of awareness on the NGOs' side mostly. In fact, 7 out of the 8 RIRs mentioned above were procedurally inadmissible, and only the 1 submitted by J&E was eligible for further (substantive) consideration. We know little about the fate of the subsequent RIRs, due to the lack of information and updating on the website of the Commission. But we know for sure that even the 9th request (submitted by J&E) was refused in merits.

9. But is it really the error of the NGOs to have submitted ineligible requests?

Is it not rather the high hopes attached to this instrument that were behind the tide of requests that ultimately failed, realizing how rigidly this request can only be applied and to how small an area is covered by this legal instrument?

We think that **the error is more on the side of the European legislator** in this matter than on the one of NGOs, wanting purely to have access to remedies.

10. Why are the RIRs refused even when found admissible?

Well, one reason can be that the claims are not substantiated well enough. We cannot establish that the Commission follows a trend that such RIRs are refused. We do not know for sure, we simply have no sufficient number of cases to date, as was mentioned before (only 1 or 2 cases admissible from 10 in the case law of the RIR).

But the **refusal is also built into the system of deliberation** by the Commission. The EC has adopted the Rules of Procedure Commission Decision (see above) that says - in a plain language - that

> a) procedural refusals based on inadmissibility are to be decided by the Director-General or the head of department concerned, while
> b) decision concerning the substance of the request is made by the collegium of the Commission

In such circumstances, who from among the DG directors or heads of departments would want to burden the Commission with such insignificant matters like a RIR of an NGO? To be on the safe side means refusing the RIR for procedural reasons.

11. And where to go further?

There are two venues open for some kind of a remedy against the refusal by the EU institution or body: going to the Court of Justice of the European Union or to the European Ombudsman.

12. Is there access to the Court of Justice of the European Union?

Well, the uncertainty of the answer to this question may be another reason why the RIR is unsuccessful and unpopular. In fact, nobody surely knows (yet) what can happen with the decision of the EU institution or body after the RIR phase once taken to the court.

The Aarhus Regulation says the following:

> "The non-governmental organisation which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty."

13. But what does this mean?

How can a dispute in fact be taken to the court? There are three conflicting views, ranging from the most conservative to the most liberal, from the most flexible to the most rigid.

a) **the most flexible**: the NGO that submitted the RIR can go and take the EU institution to court and the court will examine in merits the legality of both the original administrative act (i.e. the decision against which the RIR was submitted) and the answer sent by the EU institution or body;

b) **a medium option**: the NGO that submitted the RIR can go and take the EU institution to court but the court will only examine in merits the legality of the answer sent by the EU institution or body to the RIR;

c) **the most rigid**: the NGO has no legal standing whatsoever before the court because the issue does not directly affect it, therefore the criteria set by the EU Treaty are not met.

14. What can be said about the chances of the above scenarios?

The most rigid scenario is probably just a manifestation of the fear shared by many environmental activists of the total lack of remedies against decisions of the EU. Therefore it is most probably not going to come true.

The medium option is certainly the most feasible one, however, it is not as fully satisfactory for the NGO sector as it seems.

First, the experience of J&E in RIR cases shows that the answers of EU institutions (i.e. the Commission in most of the cases) in such matters are rather brief. Thus, there is not much to examine by the court in the first place. Second, again most probably only the procedural legality of such an answer will be subject to examination. The reason is if the court started to examine the substantive legality of the answer (i.e. whether the underlying administrative act was lawful or not) then the court would immediately find itself examining the original EU act's legality - which is not possible within this scenario. However, if only the procedural legality of the answer can be examined by the court, that means there is not too much to examine:

- was the answer sent to the claimant in time?
- does the answer contain reasoning?
- is the reasoning plausible (from a formal point of view)? - do not forget: analyzing the answer's substance in detail by the court would mean examining the legality of the original act which is not possible within this scenario!
- was the RIR considered and taken into account? - this was partly touched upon already by the previous point

So it is not too much of an exaggeration to say that such scenario would result in a more formalistic approach only which again does not deliver real justice to environmental NGOs in these cases.

Finally, many say that the only acceptable scenario - that also avoids many of the traps we listed above - is the more flexible one that would ensure that once an application is submitted to the court, it examines both the answer of the EU institutions, the RIR and the original administrative act that gave rise to the entire legal dispute.

15. What are the chances that the most flexible scenario will prevail?

Well, it is hard to tell, but we are working on it (literally). Many NGOs contemplate starting RIRs against EU administrative act, and some – including Justice & Environment – have already cases (T-405/10) pending before the Court of Justice of the EU against refusals of RIRs.

What we can promise is that we will do our best to ensure wide access to justice on the EU level as well, and inform everybody about the developments in this matter what – we think – is of importance for all. All you have to do is visit us frequently:

www.justiceandenvironment.org

16. Can we take the refusal of the RIR to the European Ombudsman?

Certainly yes. This stems not only from the Treaty itself but also the Commission calls attention to this remedy in the Rules of Procedure Commission Decision Art. 7 of the Annex.

17. What are the criteria of turning to the Ombudsman and what can the Ombudsman do with the refusal?

Well, since this guidance document is not about the procedure before the European Ombudsman, we only refer to the plethora of materials available on the internet in this matter, first and foremost the own website of the Ombudsman himself.

18. Can I find any more detailed instructions on the application of the RIR?

Well, to date, the only one that is more detailed than this paper is available on the website of the Commission and provides a fair presentation of the legal opportunities, indeed without the critical approach towards the practical applicability of this legal instrument. But even that does not say more either than the following:

> "28. What happens if the request for internal review is refused?
>
> The reply informing the NGO that the act or alleged omission referred to in its request is not in breach of environmental law must state the reasons for the decision and mention the remedies open to the NGO, namely instituting court proceedings against the Commission, or making a complaint to the Ombudsman, under the conditions laid down in Articles 230 and 195 of the EC Treaty, respectively."

19. Was it always the intention to have a legal instrument with such a limited scope of usability?

Well, this may require a longer and deeper research into the preparatory materials of the legislative process which we can save if we believe our verbal but still official sources at the Commission DG Environment who say: the Aarhus Regulation was originally intended to circumvent the practice of the Court of Justice that limits legal standing before the Court; however, the Council "killed" the chance that the original act (the administrative act giving rise to a RIR) be taken to the Court. Thus only the Commission's (or any other Union institution's) response on the RIR can be taken to the Court so **the entire idea lost most of its steam**.

20. Is there any chance to amend the Aarhus Regulation?

Well, if that depends on the EU internally, there is not much of a chance to see that happen. But there are certain signs, pressures from outside that may stimulate such change. Principal among these is the finding of the Aarhus Convention Compliance Committee of the UNECE. This finding was made in a case raised by an NGO against the EU, exactly for the limited nature of legal standing before the Court of Justice of the EU. The Compliance Committee found in this case No. ACCC/C/2008/32 that

> "…if the jurisprudence of the EU Courts, as evidenced by the cases examined, were to continue, unless fully compensated for by adequate administrative review procedures, the Party concerned [the EU] would fail to comply with article 9, paragraphs 3 and 4, of the [Aarhus] Convention."

The possibility of the EU being in non-compliance with the Aarhus Convention is in itself interesting. But what is even more interesting for us is that the Compliance Committee alternatively calls for the establishment of an "**adequate administrative review procedure**". This could be a well functioning RIR. But as the previous paragraphs show, this is not quite the case…

21. So what should be changed?

Well, first of all this is already obvious that there needs to be a change in how the RIR operates (or does not really operate). We have a few suggestions for improvement, i.e.

- the RIR has to be made available for a much larger circle of applicants, e.g. individuals and NGOs even if the latter do not operate on the EU level but only within the EU;
- the administrative acts that are eligible for RIR have to cover a much broader field, and not remain so marginal as of today, and for this, the conditions of eligibility have to be eased;
- the mechanism that inspires DGs and heads of departments to dismiss RIRs should be removed thus making sure that each RIR is examined in the merits by the respective Union institution or body;
- the RIR should not be decided by the same institution or body that made the original administrative act and a real appeal procedure should be set up;
- the appellate body overseeing the procedural as well as the substantive legality of an administrative act should either be a real superior institution or organ or a special review board created for this purpose.

We think that the currently quite empty and unsuccessful RIR could be transformed into a useable and handy legal tool by adopting the above changes.

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