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Subject:	Proposal for a Regulation of the European Parliament and of the Council on amending 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 <ul style="list-style-type: none">– Letter to the Chair of the European Parliament Committee on the Environment, Public Health and Food Safety (ENVI)

Following the Permanent Representatives Committee meeting of 23 July 2021 which endorsed the final compromise text with a view to agreement, delegations are informed that the Presidency sent the attached letter, together with its Annex, to the Chair of the European Parliament Committee on the Environment, Public Health and Food Safety (ENVI).



Council of the European Union
General Secretariat

SGS 21 / 003382

Brussels, 23 July 2021

Mr Pascal CANFIN

Chair, European Parliament Committee on the Environment, Public Health and Food Safety
European Parliament
60, rue Wiertz
1047 BRUSSELS

Subject: *Proposal for a Regulation of the European Parliament and of the Council on amending 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 (2020/0289 (COD))*

Dear Mr Canfin,

Following the informal meeting between the representatives of the three institutions held on 12 July 2021, a draft overall compromise text was agreed today by the Permanent Representatives' Committee.

I am therefore now in a position to confirm that, should the European Parliament adopt its position at first reading, in accordance with Article 294 paragraph 3 of the Treaty, in the form set out in the compromise text contained in the Annex to this letter (subject to revision by the legal linguists of both institutions), the Council would, in accordance with Article 294, paragraph 4 of the Treaty, approve the European Parliament's position and the act shall be adopted in the wording which corresponds to the European Parliament's position.

On behalf of the Council I also wish to thank you for your close and cooperation which should enable us to reach agreement on this file at first reading.

Yours sincerely,

Tamara WEINGERL-POŽAR

Chair of the Permanent Representatives Committee (Part 1)

copy to: Virginijus SINKEVIČIUS, Commissioner
Christian DOLESCHAL, Rapporteur

REGULATION (EU) 2021/...
OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of ...

on amending 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 EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 192(1) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Having regard to the opinion of the Committee of the Regions²,

¹ OJ C , , p. .

² On 22 December 2020, the Committee of the Regions informed that it had decided not to issue an opinion and not to include the dossier into its ongoing work as the topic was partially addressed by the opinions adopted on "EU environment law: improving reporting and compliance" and on "Environmental Implementation Review".

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The Union and its Member States are Parties to the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('the Aarhus Convention')³, each with its own as well as shared responsibilities and obligations under that Convention.
- (2) Regulation (EC) No 1367/2006 of the European Parliament and of the Council⁴ was adopted in order to contribute to the implementation of the obligations arising under the Aarhus Convention by laying down rules on its application to Union institutions and bodies.
- (3) In its communication on the European Green Deal, the Commission committed itself to consider revising Regulation (EC) No 1367/2006 to improve access to administrative and judicial review at Union level for citizens and environmental non-governmental organisations who have specific concerns about the compatibility with environmental law of administrative acts with effects on the environment. The Commission also committed to take action to improve their access to justice before national courts in all Member States; to this end, it issued the communication of 14 October 2020 on improving access to justice in environmental matters in the EU and its Member States, in which it affirms that 'access to justice in environmental matters, both via the Court of Justice of the EU (CJEU) and the national courts as Union courts, is an important support measure to help deliver the European Green Deal transition and a way to strengthen the role which civil society can play as watchdog in the democratic space'.

³ Council Decision 2005/370/EC of 17 February 2005 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 in environmental matters (OJ L 124, 17.5.2005, p. 1).

⁴ 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 (OJ L 264, 25.9.2006, p. 13).

- (3a) (new) Without prejudice to the Court’s prerogative to apportion costs, court proceedings under Regulation (EC) No 1367/2006 are not to be prohibitively expensive, in line with Article 9(4) of the Aarhus Convention. Accordingly, the Union’s institutions and bodies will endeavour only to incur and thus to request reimbursement for reasonable costs in such proceedings.
- (4) Taking into account the provisions of Article 9(3) and 9(4) of the Aarhus Convention and the findings and advice of the Aarhus Convention Compliance Committee⁵, Union law should be brought into compliance with the provisions of the Aarhus Convention on access to justice in environmental matters in a way that is compatible with the fundamental principles of Union law and with its system of judicial review.
- (4a) (new) A study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee was requested by Decision (EU) 2018/881⁶ of the Council, to be followed, if appropriate, by a proposal for amending Regulation (EC) No 1367/2006. Further, the European Parliament in its resolutions of 15 and 16 November 2017⁷ and on 15 January 2020⁸ requested an amendment of Regulation (EC) No 1367/2006.

⁵ See findings and advice of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 at <https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html> and https://unece.org/env/pp/cc/accc.m.2017.3_european-union .

⁶ Council Decision (EU) 2018/881 of 18 June 2018 requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006, OJ L 155, 19.6.2018, p. 6–7.

⁷ European Parliament Resolution of 15 November 2017 on an Action Plan for nature, people and the economy adopted on 15 November 2017 (2017/2819(RSP)) and European Parliament Resolution of 16 November 2017 on the EU Environmental Implementation Review (EIR) (2017/2705(RSP)).

⁸ European Parliament Resolution of 15 January 2020 on the European Green Deal (2019/2956(RSP)).

- (4b) (new) Article 9(3) of the Aarhus Convention provides that, within the framework of its national legislation, each Party is to ensure that members of the public concerned where they meet the criteria laid down in its national law, have access to judicial or other review procedures to challenge the substantive and procedural legality of any decision, act or omission which contravenes provisions of its national law relating to the environment. The administrative review procedure under the Aarhus Regulation complements the overall Union system of judicial review that enables members of the public to have administrative acts reviewed via direct judicial challenges at Union level, namely under Article 263(4) TFEU, and, in accordance with Article 267 TFEU, via national courts. The rights and obligations of national courts to make a request to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU plays an essential role in this system. According to Article 267 TFEU, Member States' national courts are part and parcel of the system of judicial protection of the EU as ordinary courts of EU law⁹.
- (5) The limitation of the internal review provided for in Regulation (EC) No 1367/2006 to administrative acts of individual scope has been the main ground for non-admissibility for environmental non-governmental organisations seeking to have recourse to internal review under Article 10 of that Regulation also as regards administrative acts that have a wider scope. It is therefore necessary to broaden the scope of the internal review procedure laid down in that Regulation to include non-legislative acts of a general scope.
- (6) [...]
- (7) [...]
- (8) [...]

⁹ Opinion 1/09 of the Court (Full Court) of 8 March 2011, pursuant to Article 218(11) TFEU, Creation of a unified patent litigation system, ECLI:EU:C:2011:123, para 80.

- (9) The scope of Regulation (EC) No 1367/2006 covers acts adopted under environmental law. By contrast, Article 9(3) of the Aarhus Convention covers challenges to acts or omissions that ‘*contravene*’ law relating to the environment. Thus, it is necessary to clarify that internal review should be carried out in order to verify whether an administrative act contravenes environmental law.
- (10) When assessing whether an administrative act contains provisions which may, because of their effects, contravene environmental law, it is necessary to consider whether such provisions may have an adverse effect on the attainment of the objectives of Union policy on the environment set out in Article 191 TFEU. Where this is the case, the internal review mechanism should also cover acts that have been adopted in the implementation of policies other than Union policy on the environment.
- (10a) (new) In view of Article 263 TFEU, as interpreted by the CJEU¹⁰, an act is to be considered to have external effects, and thus can be subject to a request for review, if it is intended to produce legal effects vis-à-vis third parties. Preparatory acts, recommendations, opinions and similar non-binding acts that do not produce legal effects vis-à-vis third parties and cannot be considered to have external effects, in line with the case law of the CJEU¹¹, should, therefore, not constitute administrative acts under Regulation (EC) No 1367/2006.

¹⁰ Judgment of the Court of Justice of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, ECLI:EU:C:2013:625, paragraph 56.

¹¹ Judgment of the Court of Justice of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, C-583/11 P, ECLI:EU:C:2013:625, paragraph 56.

- (10b) (new) In order to ensure legal consistency, an act is considered to have legal effects, and thus can be subject to a request for review, in accordance with Article 263 TFEU, as interpreted by the CJEU¹². Considering an act to have legal effects implies that an act can be subject to a request for review, regardless of its form, as its nature is considered with regard to its effects, objective and its content¹³.
- (11) In order to allow enough time to carry out a proper review process, it is appropriate to extend time limits laid down in Regulation (EC) No 1367/2006 for requesting an administrative review and those applicable to the Union institutions and bodies to respond to such a request.
- (12) In line with the case law of the CJEU¹⁴, the environmental non-governmental organisations or other members of the public requesting an internal review of an administrative act are required to put forward facts or legal arguments of sufficient substance to give rise to serious doubts when stating the grounds for their request of review.
- (12a) (new) The scope of review proceedings under Regulation (EC) No 1367/2006 should cover both the substantive and procedural legality of the act challenged. In line with the case law of the CJEU, proceedings under Article 263(4) TFEU and Article 12 of Regulation (EC) No 1367/2006 cannot be founded on grounds or on evidence not appearing in the request for review, since otherwise the purpose for the requirement, in Article 10(1) of Regulation (EC) No 1367/2006, relating to the statement of grounds of review for such a request, would be made redundant and the object of the procedure initiated by the request would be altered¹⁵.

¹² Judgment of the Court of Justice of 3 October 2013, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, Case C-583/11 P, ECLI:EU:C:2013:625, paragraph 56.

¹³ The judgments of the Court of Justice of 10 December 1957, *Usines à tubes de la Sarre v High Authority*, 1/57 and 14/57, ECLI:EU:C:1957:13, p. 114; of 31 March 1971, *Commission v Council*, 22/70, ECLI:EU:C:1971:32, paragraph 42; of 16 June 1993, *France v Commission*, C-325/91, ECLI:EU:C:1993:245, paragraph 9; of 20 March 1997, *France v Commission*, C-57/95, ECLI:EU:C:1997:164, paragraph 22; and of 13 October 2011, *Deutsche Post and Germany v Commission*, C-463/10 P and C- 475/10 P, ECLI:EU:C:2011:656, paragraph 36.

¹⁴ Judgment of the Court of Justice of 12 September 2019 in Case C-82/17 P, *TestBioTech v Commission*, ECLI:EU:C:2019:719, paragraph 69.

¹⁵ Judgment in Case C-82/17 P, paragraph 39.

- (13) Since the objectives of this Regulation, namely to lay down detailed rules to apply the provisions of the Aarhus Convention to Union institutions and bodies, cannot be achieved by the Member States, but can only be achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (13a) (new) Acts adopted by public authorities of the Member States, including national implementing measures adopted at Member State level required by a non-legislative act under Union law, do not fall within the scope of Regulation (EC) No 1367/2006, in line with the Treaties and the principle of the autonomy of the national courts.
- (14) This Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union (the Charter), in particular the need to integrate a high level of environmental protection into the policies of the Union (Article 37), the right to good administration (Article 41) and the right to an effective remedy and to a fair trial (Article 47). This Regulation contributes to the effectiveness of the Union system of administrative and judicial review, and as a result, strengthens the application of Articles 37, 41 and 47 of the Charter and thereby contributes to the rule of law, enshrined in Article 2 of the Treaty on European Union (TEU).
- (14 a) (new) Environmental non-government organisations and other members of the public have the right to request internal review of administrative acts and omissions by Union's institutions and bodies under the conditions set out by Regulation (EC) No 1367/2006, as amended by this Regulation.
- (14b) (new) When demonstrating impairment of their rights, members of the public should demonstrate a violation of their rights. This may include an unjustified restriction or obstacle to the exercise of such rights.

- (14c) (new) Members of the public are not required to demonstrate that they are directly and individually concerned under Article 263, fourth paragraph, TFEU, as interpreted by the CJEU¹⁶. However, in order to avoid that any member of the public has an unqualified right to request internal review (‘actio popularis’), which is not required under the Aarhus Convention, they should demonstrate that they are directly affected in comparison with the public at large. This may be the case of an imminent threat to their own health and safety or of a prejudice to a right to which they are entitled pursuant to Union legislation resulting from the alleged contravention of environmental law, in line with the case law of the CJEU¹⁷.
- (14d) (new) When demonstrating sufficient public interest, members of the public should collectively demonstrate both the existence of a public interest in preserving, protecting and improving the quality of the environment, protecting human health, prudent and rational utilisation of natural resources, or combatting climate change and that their review request is supported by a sufficient number of natural or legal persons across the Union by collecting their signatures either physically or digitally.
- (14e) (new) In order to ensure effective internal review procedures, and notably that the review requests meet, where applicable, the criteria set out by Regulation (EC) No 1367/2006 and put forward facts or legal arguments of sufficient substance to give rise to serious doubts as to the assessment made by the Union institution or body¹⁸, members of the public should be represented either by an environmental non-governmental organisation meeting the criteria set out in Regulation (EC) No 1367/2006 or by a lawyer authorised to practise before the court of a Member State.

¹⁶ Case 25/62 Plaumann v Commission [1963] ECR 95, 107.

¹⁷ Case C-197/18; Case-529/15 (Folk) and Case-237/07 (Janecek).

¹⁸ See judgment of the Court of Justice of 12 September 2019 in Case C-82/17 P, TestBioTech v Commission, ECLI:EU:C:2019:719, paragraph 69.

- (14f) (new) In the event that a Union institution or body receives multiple requests for review of the same act or omission and it combines such requests to assess them in a single procedure, the Union institution or body should consider each request on its own merits in its reply. In particular, if any such request is considered inadmissible on procedural grounds or if it is rejected on substance, this should not prejudice the consideration of the other review requests assessed in the same procedure.
- (14g) (new) In order to ensure effective case handling, the Union's institutions and bodies will endeavour to apply in a consistent manner the criteria set out in Article 11 of Regulation (EC) No 1367/2006.
- (14h) (new) For the sake of transparency and effective case handling, Union institutions and bodies may establish on-line systems for receipt of internal review requests.
- (15) Regulation (EC) No 1367/2006 should therefore be amended accordingly.

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 1367/2006 is amended as follows:

1. Article 2 is amended as follows:

Article 2(1)(g) and (h) are replaced by the following:

- ‘(g) ‘administrative act’ means any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may, because of their effects, contravene environmental law within the meaning of point (f) of Article 2(1);
- (h) ‘administrative omission’ means any failure of a Union institution or body to adopt a non-legislative act which has legal and external effects where such failure may contravene environmental law within the meaning of point (f) of Article 2(1).’

2. Article 10 is amended as follows:

(a) paragraphs 1 and 2 are replaced by the following:

‘1. Any non-governmental organisation or members of the public which meet the criteria set out in Article 11 are entitled to make a request for internal review to the Union institution or body that has adopted an administrative act or, in case of an alleged administrative omission, should have adopted such an act, on the grounds that such an act or omission contravenes environmental law within the meaning of point (f) of Article 2(1).

Such a request must be made in writing and within a time limit not exceeding eight weeks after the administrative act was adopted, notified or published, whichever is the latest, or, in the case of an alleged omission, eight weeks after the date when the administrative act was required. The request shall state the grounds for the review.

2. The Union institution or body referred to in paragraph 1 shall consider any such request, unless it is manifestly unfounded or clearly unsubstantiated. In the event that a Union institution or body receives multiple requests for review of the same act or omission, the institution or body may combine the requests and treat them as one. The Union institution or body shall state its reasons in a written reply as soon as possible, but no later than 16 weeks after the expiry of the eight weeks deadline set forth in paragraph 1, subparagraph 2 above.’

(b) in paragraph 3, the second subparagraph is replaced by the following:

‘In any event, the Union institution or body shall act within 22 weeks after the expiry of the eight weeks deadline set out in paragraph 1, subparagraph 2 above.’

2.a (new)

Article 11 is amended as follows:

(a) A new paragraph 1a. is inserted as follows:

‘1a. A request for internal review may also be made by other members of the public, subject to the following conditions:

- (a) they shall demonstrate impairment of their rights caused by the alleged contravention of environmental law and that they are directly affected by such impairment in comparison with the public at large; or
- (b) they shall demonstrate a sufficient public interest and that the request is supported by at least 4 000 members of the public residing or established in at least 5 Member States, with at least 250 members of the public residing or established in each of those Member States.

(c) In both cases, the members of the public shall be represented by a non-governmental organisation which meets the criteria set out in the first paragraph above or by a lawyer authorised to practise before a court of a Member State. That lawyer or non-governmental organisation shall cooperate with the Union institution or body concerned in order to establish that the quantitative conditions in paragraph 1a(b) above are met, where applicable, and shall provide further evidence thereof upon request.’

(b) Paragraph 2 is replaced by the following:

‘2. The Commission shall adopt the provisions which are necessary to ensure transparent and consistent application of the criteria and conditions mentioned in paragraphs 1 and 1a(c).’

2.b (new)

A new Article 11a is inserted as follows:

‘Article 11a

Union institutions and bodies shall publish all internal review requests as soon as possible after their receipt, as well as all final decisions on those requests as soon as possible after their adoption. Union institutions and bodies may establish on-line systems for receipt of internal review requests and may require that all internal review requests shall be submitted via their online systems.’

2.c (new)

Article 12(2) is replaced by the following:

‘2. Where the Union institution or body fails to act in accordance with Article 10(2) or (3) the non-governmental organisation or members of the public 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.’

3. Throughout the text of the Regulation, references to provisions of the Treaty establishing the European Community (EC Treaty) are replaced by references to the corresponding provisions of the Treaty on the Functioning of the European Union (TFEU) and any necessary grammatical changes are made.
4. Throughout the text of the Regulation, including in the title, the word ‘Community’ is replaced by the word ‘Union’ and any necessary grammatical changes are made.

Article 2

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 11(1a) shall apply eighteen months after the date of entry into force of this Regulation.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament

The President

For the Council

The President