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PROPOSAL

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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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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

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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

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• A. Reasons for and objectives of the proposal

The EU institutions need to engage with members of the public if the European Green Deal[1] is to succeed and deliver lasting change. The public is and should remain a driving force of the transition and should have the means to get actively involved in developing and implementing new policies.

Engaging with the public means not only engaging with individuals but also engaging with civil society. Across Europe, environmental non-governmental organisations (NGOs) play a crucial advocacy role for the environment. This implies that, under certain conditions, they should have the right to seek the review of decisions taken by public authorities on the grounds that these contravene environmental laws.

As Advocate General Sharpston said, 'the natural environment belongs to us all and its protection is our collective responsibility. The Court has recognised that the rules of EU environmental law, for the most part, address the public interest and not merely the protection of the interests of individuals as such. Neither water nor the fish swimming in it can go to court. Trees likewise have no legal standing'.[2]

When carried out by the public administration, the review is called an 'administrative review'. When carried out by a court, it is called a 'judicial review'.

The objective of the proposal is to revise the administrative review mechanism created in 2006 for the benefit of NGOs with regard to administrative acts and omissions of EU institutions and bodies. The mechanism is found in Regulation 1367/2006, known as the Aarhus Regulation (the Regulation)[3].

The proposal aims to improve the implementation of the Aarhus Convention[4] following the adoption of the Lisbon Treaty and to address the concerns expressed by the Aarhus Convention Compliance Committee (the Committee) regarding the EU's compliance with its international obligations under the Convention. It aims to do so in a way that is compatible with the fundamental principles of the EU legal order and with its system of judicial review. The amendment of the Regulation is called for by the European Parliament and the Council and was anticipated by the Commission in its Communication on the European Green Deal, as detailed in section 1.A.II below.

The proposal broadens the possibilities currently available to NGOs to seek administrative review. Whereas currently an administrative review can only be requested for acts of

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1 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal, COM/2019/640 final.

2 Opinion of Advocate General Sharpston, delivered on 12 October 2017 in Case C- 664/15, *Protect Natur*, ECLI:EU:C:2017:760, para 77.

3 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. 13-19.

4 United Nations Economic Commission for Europe (UNECE) Convention on access to information, public participation in decision-making and access to justice in environmental matters.

'individual scope' (acts which are directly addressed to a person or where the person affected can be distinguished individually), in the future NGOs will also be able to request review of administrative acts of 'general scope'.

The proposal also aims to change the references to environmental law: while currently the administrative acts subject to review needs to contribute to the pursuit of environmental policy objectives, it is proposed that, in the future, any administrative act that contravenes EU environmental law may be subject to review, irrespective of its policy objectives.

Finally, it is proposed to extend the time frames for requests and replies, in order to improve the quality of the administrative review process.

As the CJEU recalled in landmark judgments concerning the relevance of the Aarhus Convention in the EU legal order, judicial and administrative procedures concerning access to justice in environmental law currently fall 'primarily' within the scope of national law.[5] Therefore, any improvement in the access to administrative and judicial review at EU level is complementary to the proper functioning of access to justice in EU environmental matters in the national courts of the Member States.

In particular, national courts are under an obligation to grant access to justice in environmental matters under Articles 9(2) and 9(3) of the Convention, also when implementing EU environmental law.

Where implementing measures of an administrative act adopted by an EU institution or body should exist at national level, the NGOs concerned should first seek redress before the competent national court of the Member State which has adopted the measure. They then have subsequent access to the CJEU under the preliminary reference procedure under Article 267 TFEU. This procedure can also concern the validity of acts of the EU institutions.

Therefore, the Commission puts forward this legislative proposal as part of a wider effort to improve access to justice in environmental matters. The role of the Member States and national courts will be outlined in an accompanying Communication[6].

I. The requirements of Article 9(3) of the Convention and the findings of the Aarhus Convention Compliance Committee

The EU adopted the Regulation in order to contribute to the implementation of the obligations arising from the Convention. The EU formally became a Party to the Convention in 2005[7].

Article 9(3) of the Convention states that each Party to the Convention must 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

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5 Joined Cases C-401/12 P to C-403/12 P, *Council and Commission* v *Vereniging Milieudefensie,* EU:C:2015:4, par 60; Joined Cases C-404/12 P and C-405/12 P, *Council and Commission* v *Stichting Natuur en Milieu*, EU:C:2015:5, para 52.

6 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on improving access to justice in environmental matters in the EU and its Member States. [Add COM ref once available.]

7 2005/370/EC: Council Decision 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. 1–3.

environment.' In the EU context, national law means EU law and members of the public include NGOs.

The Regulation made it possible for NGOs to request EU institutions and bodies to review certain decisions – acts of individual scope – adopted under environmental law. However, the Convention does not distinguish between acts of individual scope and acts of general scope in its Article 9(3).

The Committee, set up to review the Parties' compliance with the Convention, found that the EU does not fully comply with its obligations under the Convention's requirements on access to justice in environmental matters (case ACCC/C/2008/32[8]).

More specifically, the Committee considered that: (i) the Regulation should also encompass general acts and not only acts of individual scope; (ii) that every administrative act that is simply 'relating' to the environment should be challengeable, not only acts that fall 'under' environmental law; (iii) that the administrative review mechanism should be opened up beyond NGOs to other members of the public; and (iv) that acts that do not have legally binding and external effects should also be open to review.

In September 2017, at the most recent Meeting of the Parties to the Convention, the EU declared that it will 'continue to explore ways and means to comply with the Aarhus Convention in a way that is compatible with the fundamental principles of the Union legal order and with its system of judicial review, taking into account concerns expressed within the Convention' (the Budva Declaration).

The case will be discussed again at the next Meeting of the Parties to the Convention in October 2021.

II. The inter-institutional response to the Committee's findings

In 2018, in its Decision (EU) 2018/881[9], the Council requested that the Commission submit the following, based on Article 241 of the Treaty on the Functioning of the European Union (TFEU):

- a study on the EU's options for addressing the findings, by 30 September 2019,
- a proposal to amend the Regulation (or to inform the Council of other measures), by 30 September 2020.

On 10 October 2019, the Commission published a detailed external study[10] on the functioning of access to justice in environmental matters in relation to acts and omissions of EU institutions and bodies, as well as the options for improving the current situation. This included a detailed examination of the administrative reviews carried out by the Commission under the Regulation. Based on this study, the Commission services reported on the EU's implementation of the Convention in the area of access to justice in environmental matters

8 See https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html

9 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, ST/9422/2018/INIT, OJ L 155, 19.6.2018, p. 6–7.

10 Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters, Final report, September 2019, 07.0203/2018/786407/SER/ENV.E.4.

(the Report)[11]. Both the study and the Report took account of the Committee's findings but were broader in scope; both addressed the findings in the context of the fundamental principles of the EU legal order and its system of judicial review, in line with the Budva Declaration, and in the context of the rights enshrined in the Charter of Fundamental Rights of the European Union (the Charter).

In the Communication on the European Green Deal, which followed on 11 December 2019, the Commission committed to 'consider revising the Aarhus Regulation to improve access to administrative and judicial review at EU level for citizens and NGOs who have concerns about the legality of decisions with effects on the environment' and to 'take action to improve their access to justice before national courts in all Member States'.

The European Parliament, in its resolution of 15 January 2020 on the European Green Deal[12], reiterated that 'it is essential to guarantee EU citizens the genuine access to justice and documents enshrined in the Aarhus Convention'; called on the Commission to 'ensure that the EU is complying with the Convention' and welcomed the Commission's consideration of revising the Regulation.

III. Key findings of the Report

With regard to the Committee's first two findings, based on analytical work and taking into account the changes introduced by the Lisbon Treaty in Article 263 TFEU, the Report identified two shortcomings in the Regulation that are now proposed to be remedied by way of legislative action:

- The current possibilities for administrative review under the Regulation extend only to administrative acts of individual scope and do not include acts of general scope. This has been identified as the main limitation for NGOs seeking to challenge administrative acts at EU level.
- The current scope only covers acts 'under' environmental law. Article 9(3) of the Convention uses a different wording, referring to acts 'which contravene provisions of (…) law relating to the environment'. Although the current wording in the Regulation, as interpreted by the case law of the Court of Justice (CJEU), is broad, there are doubts as to whether its scope accurately matches that of Article 9(3) of the Convention.

In addition, the Report found that there was scope for improvements as regards the time-frames for administrative review set out in the Regulation. In particular, it noted that the 12 weeks available for the EU institutions and bodies to respond to a request for administrative review, have proven to be too short and difficult to respect.[13]

IV. The changes introduced by the legislative proposal

IV.a. Broadening the review to include acts of general scope

The Commission proposes to broaden the definition of an 'administrative act' in order to make it possible for NGOs to request an administrative review of any non-legislative act adopted by an EU institution or body, which has legally binding and external effects and contains provisions that may, because of their effects, contravene environmental law within

[11] Commission Staff Working Document, Report on European Union implementation of the Aarhus Convention in the area of access to justice in environmental matters, SWD (2019)378 final.

[12] European Parliament resolution of 15 January 2020 on the European Green Deal (2019/2956(RSP)).

[13] See, in particular, Study, section 3.2.3.1.

the meaning of point (f) of Article 2(1), excepting those provisions of this act for which EU law explicitly requires implementing measures at EU or national level. This is a significant change of scope from the current legal text of the Aarhus Regulation, which refers to 'acts of individual scope' only.[14]

IV.b. Aligning the references to environmental law with the Convention's requirements

The proposal clarifies that the administrative act must contain provisions which may, because of their effects, contravene environmental law within the meaning of Article 2(1)(f) of the Regulation.

The current wording of Article 2(1)(g) of the Regulation allows the review of administrative acts 'under environmental law'. This means that, up until now, when assessing whether an act may be subject to a request for internal review, EU institutions and bodies have looked so far exclusively at whether the challenged administrative act was meant to contribute to environmental policy objectives, rather than focusing on whether or not it contravenes environmental law.

However, it is necessary to ensure that the internal review is possible for all those acts with effects on environmental policy objectives. Indeed, it is as regards 'environmental matters' that access to justice under Article 1 of the Convention has to be ensured,[15] and it is 'in the field covered by the Convention' that the EU committed to applying the 'relevant rules of EU law' when depositing its instrument of ratification of the Convention.[16]

In order to ensure effective access to justice, it is therefore necessary to adapt the definition of administrative acts to also include acts that were not adopted under environmental law, but which contain provisions which may, because of their effects, contravene EU environmental law as defined in Article 2(1)(f) of the Regulation.

This corresponds to the current status of integrating environmental considerations into other EU policies, under Article 11 of the TFEU, according to which 'environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.'

The scope of the internal review mechanism has to be made consistent with Article 9(3) of the Convention, which relates to those acts 'which contravene environmental law'. Therefore, it is the identification of a contravention of EU environmental law that is the decisive criterion in defining the grounds on the basis of which the internal review can be carried out.

As to the definition of what is EU environmental law, Article 2(1)(f) of the existing Regulation gives environmental law a broad definition. Accordingly, it defines 'environmental law' to mean '[Union] legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of [Union] policy on the environment as set out in

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14 Article 10 of the Regulation also allows challenges against omissions. Recital 11 clarifies that *'omissions should be covered where there is an obligation to adopt an act'*.

15 '*In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.*' (Emphasis added).

16 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. 1–3.

the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems'.[17]

It is proposed that the Regulation specifically provide that, when stating the grounds of the request for review, the applicant should demonstrate how the administrative act contravenes EU environmental law. As required by case law, 'in order to state in the manner required the grounds for conducting the [internal] review, a party requesting the internal review of an administrative act under environmental law is required to put forward the facts or legal arguments of sufficient substance to give rise to serious doubts as to the assessment made in that act by the EU institution or body'.[18]

IV.c. Extending deadlines for the internal review procedure

The proposal extends the deadlines for the internal review procedure to allow for an appropriate quality of assessment. In particular, it includes a two-week extension for NGOs and a four-week extension for EU institutions. The additional time available for NGOs should enable them to provide the necessary factual and legal arguments when calling into question administrative acts and omissions contravening EU environmental law. Extending the time available for EU institutions and bodies to provide a reply should make it possible for them to carry out more in-depth reviews. The additional time available should also strengthen the right to good administration under Article 41 of the Charter.

V. Who can request an administrative review?

The administrative review under the Regulation is only one of the ways in which the EU fulfils the requirements of Article 9(3) of the Convention. Compliance with Article 9(3) is not dependent on the Regulation alone.

Article 9(3) of the Convention can be implemented either through administrative review or through judicial review (or both). It is intended for the benefit of 'members of the public', within the meaning of Article 2(4) of the Aarhus Convention.[19] This covers both individuals and NGOs; precise entitlements are to be defined by (in this context) EU law, pursuant to Article 9(3) of the Convention.[20]

First, although individuals cannot request an administrative review under the Regulation, they have the possibility to request a judicial review of acts and omissions of EU institutions and bodies in cases where the conditions laid down in the TFEU are met, as explained below. The Convention requires Parties to make available either the administrative or the judicial review, but not necessarily both.

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17 '*Combating climate change',* mentioned in of Article 191 TFEU, which sets forth the objectives of EU policy on the environment, should also be understood to be included in the definition.

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, at para 69.

19 Article 2(4) defines *'the public'* to mean *'one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups*'.

20 Article 9(3) provides that *'... 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*' (emphasis added).

Where national implementing measures exist, individuals can challenge them before a national court and request the national court to make a reference to the CJEU to review the validity of the relevant EU act under Article 267 TFEU.

Furthermore, under the fourth paragraph of Article 263 TFEU, individuals can bring direct challenges to the General Court for: (i) acts addressed to them; (ii) acts of direct and individual concern to them; and (iii) regulatory acts of direct concern to them which do not entail implementing measures.

Second, the Convention itself recognises that NGOs should enjoy privileged access to justice as compared to individuals[21]. Limiting the use of the administrative review mechanism to NGOs is consistent both with this differentiation and with the need to provide NGOs with direct access to justice at EU level (by a challenge under the fourth paragraph of Article 263 TFEU against the reply to the request for internal review) without having to modify the Treaties[22].

Third, many acts adopted by EU institutions and bodies are of general scope. Granting NGOs access to the administrative review mechanism is justified by the fact that, as recalled above[23], NGOs are often best positioned to effectively represent public interest and civil society concerns in this area with professional, well-founded and substantiated argumentation.

Fourth, opening up administrative review to all individuals would amount to a situation similar to that described by the Aarhus Compliance Committee as actio popularis, which is not required under the Convention[24].

In turn, for regulatory acts which do not entail implementing measures, subject to them fulfilling the conditions of standing under the fourth paragraph of Article 263 TFEU, if the Regulation were to provide standing for individuals, this could mean giving individuals the right to request both administrative review and judicial review for the same subject-matter. Once again, however, this is not required by the Convention. Parties can provide for either administrative review or judicial review.

Fifth, consistency with the level of access to justice provided at national level under the Convention is also relevant. It would be inconsistent to create a right of review in favour of individuals at EU level without having an equivalent level of access at national level for similar categories of acts and omissions (such as national governmental decrees or other acts of general application).

In conclusion, although the redress mechanisms available to NGOs and individuals are different, the EU system grants each applicant access to administrative and/or judicial

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21 See in particular Article 9(2) of the Convention.

22 Under the fourth paragraph of Article 263 TFEU, NGOs have so far not been able to demonstrate direct concern, and therefore, have not been able to institute proceedings against an administrative act directly before the CJEU. Therefore, Article 10 of the Regulation provides NGOs with administrative review. In turn, under Article 12 of the Regulation, the NGO which made the request for internal review pursuant to Article 10 may subsequently institute proceedings before the CJEU.

23 See Opinion of Advocate General Sharpston, delivered on 12 October 2017 in Case C- 664/15, *Protect Natur,* ECLI:EU:C:2017:760, para 77, quoted on page 1 of this Explanatory Memorandum.

24 See findings of the Committee in case ACCC/C/2005/11 (Belgium), as cited on page 191 of the Aarhus Convention Implementation Guide.

redress.[25] As explained, the revision of the Aarhus Regulation is part of a broader effort to ensure effective access to justice in environmental matters for all.

VI. The issue of administrative acts which do not have legally binding and external effects

The Report also analysed the issue of excluding from the scope of the internal review those acts which do not have 'legally binding and external effects'. This is currently the case pursuant to the definition of administrative acts laid down in Article 2(1)(g) of the Regulation. This is a point also raised by the Committee in its findings.[26]

Although the terminology is not identical, the scope of this exclusion in the Regulation is consistent with the scope of Article 263(1) TFEU, as interpreted by CJEU case law.[27] Article 263(1) TFEU gives the CJEU jurisdiction to review 'the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties'. It further provides that the CJEU 'shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties'.

The wording of both the current Article 2(1)(g) of the Regulation and of Article 263(1) TFEU shows that acts that are not intended to produce legal effects fall out of the scope of, respectively, the administrative review under the Regulation and the judicial review under the Treaties. This is confirmed by the fact that recommendations and opinions (which are non-binding) are excluded from the scope of Article 263(1) TFEU.[28]

As regards the requirements of access to justice according to the Aarhus Convention, it should be recalled that only acts that are intended to produce legal effects are capable of 'contravening' environmental law, as indicated in Article 9(3) of the Convention. Clearly, acts that do not produce legal effects cannot then be considered as contravening environmental law, within the meaning of Article 9(3) of the Aarhus Convention.

Based on the foregoing, and as the ACCC in its findings took into account the internal review mechanism provided for in the Aarhus Regulation only as a way to 'compensate' the requirements applicable to access to justice under Article 263 TFEU,[29] it is not appropriate to allow administrative review of acts that are not intended to produce legal effects.

At the same time, case law confirms that the name or form of the measure is irrelevant. What is crucial is its effects, content and scope.[30] Measures with binding legal effects despite their

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25 See Report, section 4.2.

26 See Findings, Part II, quoted above, para. 102 and following.

27 Case C-583/11 P, ECLI:EU:C:2013:625, para 56.

28 See SWD (2019) 378 final, pages 23-24.

29 ACCC findings in case ACCC/2008/32, part II, quoted, at para. 122.

30 In case 22/70 *Commission v Council* [1971] ECR 263, ECLI:EU:C:1971:32, the Court held that an action for annulment must be available in the case of all measures adopted by the institutions, whatever their nature or form, which may have legal effects (para 42). See also case C-57/95. ECLI:EU:C:1997:164.

label and which may affect the applicant's interests, changing his legal position, may be contested.[31]

- **B. Consistency with existing policy provisions in the policy area**

The proposal is consistent with and complementary to existing provisions in the area of access to justice. These include, in particular:

– Article 6(2) of the Access to Environmental Information Directive[32];

– Article 13 of the Environmental Liability Directive[33];

– Article 25 of the Industrial Emissions Directive[34];

– Article 11 of the Environmental Impact Assessment Directive[35]; and

– Article 23 of the Seveso III Directive[36] 2012/18/EU[37].

These cover decisions, acts and omissions concerning requests for environmental information, those subject to the public participation provisions of the EIA Directive, industrial permits and those concerning environmental liability.

- **C. Consistency with other Union policies**

The proposal contributes to strengthening the rule of law, in accordance with the current Commission priorities on the European Green Deal and on protecting our European way of life.[38] In particular, it contributes to the effectiveness of the EU system of administrative and judicial review and, as a result, strengthens the application of Articles 41 and 47 of the Charter.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **A. Legal basis**

The legal basis for action in this area is Article 192(1) TFEU. This is consistent with the original legal basis of the Regulation the proposal aims to amend (Article 175(1) of the Treaty

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31 See the judgment in Case C-325/91 *France v Commission* [1993] ECR I-3283; Joined Cases 1/57 and 14/57 *Usines à tubes de la Sarre* v *High Authority* [1957] ECR 105; Joined Cases 316/82 and 40/83 *Kohler v Court of Auditors* [1984] ECR 641.

32 Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41, 14.2.2003, p. 26–32.

33 Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143, 30.4.2004, p. 56–75.

34 Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010, p. 17–119.

35 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, p. 1–21.

36 Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC, OJ L 197, 24.7.2012, p. 1–37.

37 See also recital 27 of the National Emissions Ceiling Directive, (EU) 2016/2284, which makes a specific reference to the case-law of the CJEU on access to justice, under para 28 of Commission Notice on access to justice in environmental matters, C/2017/2616 OJ C 275, 18.8.2017, p. 1–39.

38 Commission political guidelines, https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf

establishing the European Community), now Article 192(1) TFEU.[39] The proposal aims to improve the protection of the environment, by improving the administrative review procedure available to NGOs as regards administrative acts and omissions of EU institutions and bodies where those contravene environmental law.

- **B. Subsidiarity (for non-exclusive competence)**

The EU has shared competence with its Member States to regulate on environmental issues. This means that it can only legislate as far as the Treaties allow, and must respect the principles of necessity, subsidiarity and proportionality.

Action at EU level is necessary here because the EU is a Party to the Convention and must comply with the obligations under the Convention which is binding on the EU in accordance with Article 216 TFEU. The initiative concerns the application of the Convention's provisions on the administrative or judicial review of certain categories of EU acts. Therefore, the objectives can only be achieved at EU level and the initiative's EU added value is confirmed.

At the same time, it is appropriate to exclude from the scope of the proposed amendment those provisions of administrative acts for which EU law explicitly requires implementing measures at national level.

This is because these measures will be directly challengeable before national courts. According to Article 267 TFEU, Member States' national courts are part and parcel of the system of preliminary references on validity and interpretation as ordinary courts of EU law.[40]

- **C. Proportionality**

The proposal does not go beyond what is necessary to achieve compliance with the Convention's provisions. The policy choices made confirm the proportionality assessment. In particular, the proposal:

- Broadens the scope of the internal review mechanism to also include non-legislative acts of general scope; however, it excludes those provisions of these acts for which EU law explicitly requires implementing measures at EU or national level;
- Specifies that only non-legislative acts and omissions that may, because of their effects, contravene environmental law are covered. This wording matches the wording and policy objectives of the Convention, and thereby ensures legal certainty and compliance with the Convention;
- Does not aim to include acts not having legally binding and external effects, consistently with the nature of the EU system of judicial review, reflected, in particular, in Article 263(1) TFEU;
- Brings added value by providing NGOs, as representatives of civil society and public interest, additional opportunities to seek review of administrative acts that contravene environmental law. For the reasons explained above, however, it does not extend the rights granted under the proposed amendment to individuals.

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39 It is notable that Article 192(1) is not mentioned under Article 106a(1) of the Euratom Treaty, which concerns the application of certain provisions of the TEU and the TFEU. See also Judgment of the General Court (First Chamber) of 27 February 2018 in cases T-307/16 - CEE ECLI:EU:T:2018:97, para 49.

40 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.

The proposal is based on the findings of the Report and the accompanying study. The policy choice was confirmed by a detailed analysis that found that there are no viable options apart from the proposed measures.

- **D. Choice of the instrument**

The legal instrument chosen is a Regulation, as was the legal instrument that it proposes to amend.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **A. Ex-post evaluations/fitness checks of existing legislation**

The proposal is based on evidence gathered in the Report; further evidence and analysis is available in the published study. The documents provided a comprehensive ex-post assessment of the Regulation's provisions on access to justice in environmental matters at the EU level.

- **B. Stakeholder consultations**

In line with the Better Regulation Guidelines, a 12-week public consultation was launched on 20 December 2018 to support the study on EU implementation of the Convention in the area of access to justice in environmental matters. It remained open until 14 March 2019. The consultation featured an online questionnaire in all EU languages disseminated via the EU Survey tool.

The public consultation followed up on the initial roadmap on the topic of EU implementation of the Convention in the area of access to justice in environmental matters, which was published for feedback between 8 May 2018 and 5 June 2018; the results are available online[41]. The process was complemented by other targeted consultations involving stakeholders from a broad range of interest groups, including businesses, NGOs, academia, Member States, national judiciaries and EU institutions.

The public consultation[42] received 175 replies; the highest percentage came from individuals (30%). It also elicited contributions from environmental organisations, including NGOs (19.4%) and public authorities (18.9%). Businesses and business associations accounted for 17% of total replies received.

Responses submitted by environmental organisations, including NGOs and individuals showed a dissatisfaction with existing means of redress against EU acts and called for action. On the other hand, responses submitted by businesses, business associations and public authorities showed mainly a positive perception of the current situation. The consultation results confirmed the priorities identified by the Commission on issues that raised concerns as regards the Regulation. In particular, the issues that were accorded the highest degree of importance by respondents were the fact that the act or omission to be challenged must be of individual scope and that the Regulation limits challenges to acts or omissions under environmental law. Most businesses and business associations considered the importance of

41 https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/1743-EU-implementation-of-the-Aarhus-Convention-in-the-area-of-access-to-justice-in-environmental-matters.

42 Results available online at https://ec.europa.eu/environment/aarhus/consultations.htm.

these and other issues low. In contrast, environmental organisations and NGOs gave these issues a high degree of importance overall.[43]

In addition, the contractor who carried out the study organised two stakeholder focus group meetings on 22 January 2019, with the participation of industry representatives and NGOs.[44] The results of these meetings confirmed the findings of the public consultation.

The Commission also held a number of meetings with Member State experts,[45] to inform them of progress on the study and to exchange views. These meetings confirmed that certain Member States have issues concerning the right to challenge national implementing measures.

Furthermore, the Commission convened several meetings with other stakeholders at which they presented progress on the study and exchanged views:

- two stakeholder meetings under the Environmental Compliance and Governance Forum with NGOs, industry and Member States (30 November 2018 and 29 May 2019);
- an ad hoc meeting between the Commission and national judges concerning Article 267 TFEU in relation to access to justice in environmental matters (29 January 2019).

Finally, a roadmap outlining the legislative initiative was published on 6 March 2020 and was open for feedback until 3 April[46]. This elicited a total of 175 replies, approximately two thirds from individuals and one third from organisations, including business and environmental associations. The analysis of the replies confirmed that most concerns had already been raised during prior stakeholder consultations. As such, they had already been assessed in detail in the study and the Report, and were taken into account in the proposal.

Most individuals raised concerns as regards access to justice at national level. These concerns will be addressed by the actions outlined in the Communication accompanying the proposal. Some people also asked for the possibility to introduce complaints and petitions directly to the EU institutions; such mechanisms are already available.[47]

Several business associations also contributed. As before, they expressed concerns about possible additional burden and economic consequences. Based on the extensive assessment of the available evidence base, it was concluded that the legislative changes proposed and the actions under the Communication adopted would not result in significant additional administrative burden or legal uncertainty, and would provide a balanced approach.

Environmental NGOs also reiterated a number of important issues. These were not new and were all carefully assessed. However, one merit particular attention.

It was raised that the proposal should also include EU acts entailing national implementing measures. In this regard, and for the reasons explained in section IVa.3, reliance on national

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43 Further details of the results of the open public consultation can be found in the study.

44 Minutes available under Annex 6 of the study.

45 Three meetings with the Commission's Expert Group on Aarhus implementation (15 October 2018, 11 March 2019 and 12 April 2019).

46 Available online at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12165-Access-to-Justice-in-Environmental-matters

47 See in particular the role of the Committee on Petitions of the European Parliament, the European Ombudsman and the complaint-handling mechanism of the European Commission.

courts is justified: NGOs must indeed have workable possibilities at national level to contest national implementing measures and the Commission, as guardian of the Treaties, will work together with Member States to help ensure compliance on the ground. In turn, national courts must make it possible for NGOs to access the CJEU through the preliminary ruling procedure under Article 267 TFEU.

Based on the results of the public consultation, including feedback on the roadmap, and the extensive analysis carried out by the Commission in the Report based on the accompanying study, and taking into account the concerns expressed by the Committee[48], it was considered that there are no other viable options than to remedy the two main identified issues with the Regulation by way of a legislative proposal (see more details in the section on impact assessment).

The consultation activities covered all relevant issues so no further public consultation was necessary on the details of the proposal.

- **C. Collection and use of expertise**

The Commission Report on the EU's implementation of the Convention in the area of access to justice in environmental matters and the underlying study supported by the extensive consultation process are the main sources of expertise and serve as the evidence-base for the proposal.

- **D. Impact assessment**

The comprehensive study and the Commission Report analysing the functioning of the provisions on access to justice in environmental matters at the EU level provide a strong factual evidence-base for the present initiative.

In accordance with Tool #9 of the Better Regulation toolbox on 'When is an impact assessment necessary?', an impact assessment was deemed unnecessary, for the following reasons:

- The study examined all options to remedy the shortcomings identified following an assessment of the Committee's findings in case ACCC/C/2008/32[49], measured their impact and made clear that the only option that can effectively address the shortcomings identified in the study is the amendment of the Regulation, i.e. legislative action. No action or only non-legislative action are clearly insufficient. It is also clear there is no real alternative to amending the Regulation and no further realistic choice over the policy content of the initiative.
- The study did not find any appreciable social impact (see in particular Chapter 5 on assessment of impacts and options) on employment, working conditions and income distribution, social protection and inclusion.
- There are also no significant economic impacts expected as a result of the legislative initiative, apart from an increase in administrative burden on the EU institutions and the CJEU due to expected additional case-load.

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48 See draft findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 at https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html; further details in section I of the Explanatory Memorandum.

49 See https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html

- **E. Regulatory fitness and simplification**

A number of references and terms in the Regulation pre-date the Lisbon Treaty and the current proposal only includes some partial updates. The Regulation therefore requires a codification. However, considering the political priority of enabling a swift amendment of the Regulation in light of the EU's international commitments, the Commission intends to come forward with a proposal for codification once the current proposal has been adopted, in conformity with paragraph 46 of the Interinstitutional agreement on better law-making.[50]

- **F. Fundamental rights**

The Report and the study addressed the fundamental rights aspects of the proposed legislative measures. It was found that these measures would contribute to improving the effectiveness of the EU system of administrative and judicial review, and as a result, would strengthen the rule of law and application of Articles 41 and 47 of the Charter (see for example Section 3.4.2 of the study).

In particular, Article 41, the right to good administration, will be strengthened. As a result of a broader and more precise definition of the scope of challengeable administrative acts and grounds for review, qualified NGOs will have more legal certainty and a more effective way to ask for a review of administrative acts where these contravene environmental law. Furthermore, extending the time available for the public administration to consider requests and provide a reply is expected to result in more in-depth analysis and assessment. Hence, the additional time available will strengthen the requirements of good administration under Article 41 of the Charter.

The Regulation will be amended only in terms of the conditions for administrative review. However, NGOs may seek a judicial review of any reply provided by the EU institution or body before the CJEU. Therefore, the amendment will also have an indirect effect on the possibilities for judicial review, and will strengthen the application of Article 47 of the Charter.

4. BUDGETARY IMPLICATIONS

The Report and the accompanying study carefully assessed the impact of the different options on internal resources for EU institutions, in particular, for the Commission and the CJEU. They concluded that such impact will be limited if the options introduced by the proposal are followed. The extent of the impact on resources is explained by several factors:

– The proposed amendments will modify the existing system of administrative review and not create a new system. The existing system already involves a certain deployment of resources; this may need to be adjusted in order to adapt to the new situation.

– The main proposed amendment will expand the types of acts that can be reviewed to also make it possible for acts of general scope to be challenged. As it stands, the Commission can be asked – and, in part because of insufficient clarity as regards admissibility criteria, is in fact often asked – to review acts outside the current scope of the Regulation. Resources are needed to address such requests and services may review the merits of decisions, regardless of admissibility. It is expected that

[50] Interinstitutional agreement between the European Parliament, the Council of the European Union and the European Commission on better law-making, OJ L 123, 12.5.2016, p. 1–14.

although expanding the admissibility conditions could create an increase in the current workload, this may be partly compensated by clearer admissibility criteria, which simplify the assessment of admissibility.

– The proposed amendments will not increase the number of potential applicants for review. As at present, only eligible NGOs will be able to submit requests for internal review. The Commission proposal does not envision a change in the qualification criteria for NGOs nor to grant standing for individuals. Therefore, broadening the range of administrative acts will not necessarily be followed by a commensurate increase in the number of requests. Rather, it may improve NGOs' ability to better prioritise the cases in which to submit requests, because the admission criteria will be more clearly defined and there will be more time available to prepare well-substantiated requests.

– The proposal extends the time frames for handling requests for review. This will give services more time to process requests.

– Finally, although it is essential that no decisions made by EU institutions and bodies are exempt from the checks and balances provided in the EU legal order, case law shows that the CJEU allows EU institutions and bodies a considerable margin of discretion with regard to the decision they take during an internal review.[51]

Further guidance on the internal review procedure under the Regulation will be provided to case handlers and NGOs. The Commission's internal working arrangements will also need to be reviewed in light of the new requirements resulting from the proposed amendments, to minimise the negative effects of the extra workload that will highly likely flow from the changes. It will be necessary to further improve the effectiveness and efficiency of the internal review procedures, for example, by:

– reviewing whether some procedural adjustments could apply for certain categories of cases, based on criteria such as the number of similar cases, novelty, complexity and impact; and

– making available collaborative IT workspaces, templates, frequently asked questions and other forms of guidance, mentoring case handlers, including sharing best practice examples to further facilitate and standardise case handling and output.

Despite these initiatives, there will be an extra administrative burden on the Commission, including some of its agencies, but it could, to a certain extent, be mitigated, subject to respecting the above considerations. However, it is also clear that the future impacts are also a function of the actual number of cases and their distribution between policy areas. While at present it is not possible to quantify these, it is necessary to observe if there is a significant overall increase in the workload and how it impacts specific policy areas. It will therefore be necessary to continuously monitor the developments in the workload and its distribution to allow action to be taken if required.

[51] See judgment of the General Court of 15 December 2016 in Case T-177/13. ECLI:EU:T:2016:736, paras 52-55 (as upheld by judgment of the Court of Justice of 12 September 2019 in Case C-82/17 P, *TestBioTech v Commission*, ECLI:EU:C:2019:719).

5. OTHER ELEMENTS

• A. Implementation plans and monitoring, evaluation and reporting arrangements

The accompanying Communication outlines further actions to facilitate implementation of the Convention in the area of access to justice in environmental matters at national level. Further guidance on the internal review procedure under the Regulation will also be provided both for the public and for the EU institutions and bodies, to help them adapt to the new requirements.

• B. Explanatory documents (for directives)

Not applicable.

• C. Detailed explanation of the specific provisions of the proposal

Article 1(1)

Article 1(1) amends the definition of administrative acts under Article 2(1)(g) of the Regulation.

Broadening the review to include acts of general scope

The amendment broadens the definition of 'administrative act' to ensure that any non-legislative act adopted by an EU institution or body, having legally binding and external effects and that may, because of its effects, contravene environmental law within the meaning of Article 2(1)(f), may now be subject to internal review. Should however be excluded those provisions for which EU law explicitly requires implementing measures at EU or national level. Accordingly, under the new definition, a measure can be the subject of an internal review whether or not it has an individual or general scope. Until now, only acts of individual scope were included in the definition.

Acts entailing implementing measures

The extension of the definition aims to cover those non-legislative measures that correspond to 'regulatory acts' under the fourth paragraph of Article 263 TFEU. In doing so, the amendment uses the elements of established case law[52] on the notion of 'regulatory act' under Article 263 TFEU.

Under the fourth paragraph of Article 263 TFEU, those directly concerned may obtain a judicial review from the CJEU of regulatory acts that have been adopted by the EU institutions and bodies and do not entail implementing measures. CJEU case law has clarified that, for the purposes of the fourth paragraph of Article 263 TFEU, it does not matter if the implementing measure is to be taken at EU or at national level.[53] The Court has also confirmed that, for the purposes of this new possibility introduced by the Lisbon Treaty, regulatory acts encompass all acts of general application other than legislative acts.[54]

Accordingly, under the Proposal, those provisions of an administrative act for which EU law explicitly requires implementing measures at national level would not be subject to

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52 See judgment in Joined Cases C-622/16P to C-624/16P, *Montessori,* ECLI:EU:C:2018:873, paras 28 and 29.

53 Judgment in Case C-456/13 P,T & L *Sugars et Sidul Açúcares v Commission*, EU:C:2015:284, para 30.

54 Judgment in Joined Cases C-622/16P to C-624/16P, *Montessori*, ECLI:EU:C:2018:873.

administrative review. As regards these provisions, it is possible to seek remedy before the national jurisdiction, with further access to the CJEU under Article 267 TFEU.

To ensure consistency with the fourth paragraph of Article 263 TFEU, the review of those provisions of an administrative act for which EU law explicitly requires implementing measures at EU level may be sought when the review of the Union-level implementing measure is requested.

In order to ensure legal certainty, the new definition clearly specifies that only those provisions of the act for which EU law explicitly requires implementing measures at EU or national level are excluded from the scope of internal review. Ascertaining whether this requirement exists, one must not look at the administrative act as a whole, but rather whether the contested provisions of the administrative act entail implementing measures. It is not relevant whether or not other, unrelated provisions of the administrative act entail implementing measures. There may be situations where some provisions of the administrative act subject to administrative review require implementing measures, whereas other provisions are directly applicable. For example, some provisions of a Commission regulation may be directly applicable, while others may require implementing measures at EU or national level[55].

In such situations, where the national implementing measure concerns the contested provisions of the administrative act, NGOs may only request review of the implementing measure before the national jurisdictions. Similarly, where the EU-level implementing measure concerns the contested provisions of the administrative act, NGOs must wait until the implementing act is adopted, or, in case of omissions, until it should have been adopted. In contrast, if the implementing measures concern only unrelated provisions of the act, the directly applicable provisions of the administrative act can be challenged in the administrative review under the Regulation.

As a result, an NGO would have different possibilities for implementing acts that entail implementing measures at EU level, depending on which provisions they wish to challenge.

NGOs would be entitled to request an internal review of those provisions of the regulatory act, which do not entail EU-level implementing measures.

However, as internal review is provided in order to improve access to justice in environmental matters, whose system of remedies is laid down in the TFEU, and in keeping with the possibilities available under Article 263 of the TFEU, NGOs would not be able to make a request for internal review directly against the provisions of the regulatory acts entailing EU-level implementing measures.

Rather, much like any other individual or organisation accessing justice under Article 263 TFEU, NGOs can only submit a request at a later stage, when the EU-level implementing act in question is adopted.[56] A request to review those provisions of the non-legislative act which entail the implementing measure can also only be made at this time.

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55 Judgment of the Court (Grand Chamber) of 19 December 2013 in Case *Telefónica v Commission*, C-274/12 P, EU:C:2013:852.

56 This is because those provisions of the regulatory acts that entail EU- level implementing measures would not be directly challengeable before the CJEU. Consequently, the NGOs (much like any other individual or organisation) would need to wait for the adoption of the EU-level implementing measure

References to environmental law

The amendment removes the phrase ‘under environmental law’ from the definition of administrative act. Instead, it requires that the administrative act must contain ‘provisions which may, because of their effects, contravene environmental law within the meaning of Article 2(1)(f)’. This amendment should be read jointly with Article 1(2) below, which specifies that only those acts or omissions which contravene EU environmental law can be subject to review.

The amendment builds on applicable case law, which has interpreted the current wording of the Regulation in light of the Convention's objectives.[57] It provides clarity and legal certainty on the fact that any administrative act that contains provisions which may contravene EU environmental law may be challenged, irrespective of the act's legal basis or policy objective, as it is required under Article 9(3) of the Convention.

At the same time, the definition preserves the link between the administrative act whose review is requested and environmental policy objectives. It does so by allowing the internal review of only those acts which contain provisions which may, because of their effects, contravene EU environmental law within the meaning of Article 2(1)(f) of the Regulation.

Article 1(2)

References to environmental law

Similarly to Article 1(1), which amends the definition of ‘administrative act’, this amendment removes the ‘under environmental law’ requirement also from the first paragraph of Article 10(1) of the Regulation. The new provision also clarifies that only those acts and omissions that contravene EU environmental law may be subject to a request for review. Therefore, the amendment ensures that the wording of the Regulation reflects the requirements of Article 9(3) of the Convention.

Extension of time limits

Article 1(2) also amends the second paragraph of Article 10(1) to extend the time limit available for NGOs to introduce an internal review from the current six to a proposed eight weeks. It also amends Article 10(2) to extend the time available to EU institutions and bodies to reply to the request for internal review from the current 12 to a proposed 16 weeks.

As a logical consequence of the above, for cases where an EU institution or body is unable to reply within 16 weeks despite exercising due diligence, Article 1(2) also amends the second paragraph of Article 10(3) to extend the overall time available to EU institutions and bodies to reply to a request for internal review from the current 18 to a proposed 22 weeks.

The amendments would provide a two-week extension for NGOs and four-week extension for EU institutions and bodies. The extension for NGOs aims to improve the quality of submissions, whereas the extension for EU institutions and bodies aims to improve the quality and depth of the review. The additional time will allow more in-depth analysis, which should result in a more solid evidence-base and clearer justifications provided in the final internal

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and challenge the implementing measure before the General Court, if they succeed in demonstrating that they have standing.

[57] Judgment of the General Court of 14 March 2018 in Case T-33/16, *TestBioTech v Commission*, ECLI:EU:T:2018:135, paras 44 to 46.

review decision. Thus, the extension will also have an impact on the principle of good administration and will improve public confidence in EU decision-making processes.

2020/0289 (COD)

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

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 Committee[1],

Having regard to the opinion of the Committee of the Regions[2],

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 Council[4] 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 to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 December 2019, entitled '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 concerns about the compatibility with environmental law of decisions with effects on the environment. The Commission also

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1 OJ C , , p. .

2 OJ C , , p. .

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).

committed to take action to improve their access to justice before national courts in all Member States; to this end, it issued a Communication on *'Improving access to justice in environmental matters in the EU and its Member States'*.

(4) Taking into account the provisions of Article 9(3) of the Aarhus Convention, as well as concerns expressed by the Aarhus Convention Compliance Committee[5], 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.

(5) The limitation of the internal review provided for in Regulation (EC) No 1367/2006 to administrative acts of individual scope is the main obstacle 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) The definition of an administrative act for the purposes of Regulation (EC) No 1367/2006 should include non-legislative acts. However, a non legislative act might entail implementing measures at national level against which environmental non-governmental organisations can obtain judicial protection, including before the Court of Justice of the European Union (CJEU) through a procedure for preliminary ruling under Article 267 TFEU. Therefore, it is appropriate to exclude from the scope of the internal review those provisions of such non-legislative acts for which Union law requires implementing measures at national level.

(7) In the interest of legal certainty, in order for any provisions to be excluded from the notion of administrative act, Union law must explicitly require the adoption of implementing acts for those provisions.

(8) In order to ensure effectiveness, the review of those provisions of an administrative act for which Union law explicitly requires implementing measures at Union level may also be sought when the review of the Union-level implementing measure is requested.

(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 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. As a result, the internal review mechanism should also cover acts that have been adopted in the implementation of policies other than Union policy on the environment.

(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.

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[5] See findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 at https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html.

(12) According to the case law of the CJEU[6], environmental non-governmental organisations 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.

(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.

(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 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 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).

(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(1)(g) is replaced by the following:

‘(g) ‘administrative act’ means any non-legislative act adopted by a Union institution or body, which has legally binding 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), excepting those provisions of this act for which Union law explicitly requires implementing measures at Union or national level;’

2. Article 10 is amended as follows:

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

‘1. Any non-governmental organisation which meets the criteria set out in Article 11 is 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.

Where an administrative act is an implementing measure at Union level required by another non-legislative act, the non-governmental organisation may also request the review of the provision of the non-legislative act for which that implementing measure is required when requesting the review of that implementing measure.

[6] Judgment of the Court of Justice of 12 September 2019 in Case C-82/17 P, *TestBioTech v Commission*, ECLI:EU:C:2019:719, at para 69.

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 clearly unsubstantiated. The Union institution or body shall state its reasons in a written reply as soon as possible, but no later than 16 weeks after receipt of the request.'

(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 from receipt of the request.'

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*.

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

Done at Brussels,

For the European Parliament	*For the Council*
The President	*The President*