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INFORMATION NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee/Council
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 - Outcome of the European Parliament's first reading (Strasbourg, 4-7 October 2021)

I. INTRODUCTION

In accordance with the provisions of Article 294 of the TFEU and the Joint declaration on practical arrangements for the codecision procedure[1], a number of informal contacts have taken place between the Council, the European Parliament and the Commission with a view to reaching an agreement on this file at first reading.

[1] OJ C 145, 30.6.2007, p. 5.

In this context, the rapporteur, Christian DOLESCHAL (EPP, DE), presented a compromise amendment (amendment 48) to the abovementioned proposal for a Regulation on behalf of the Environment, Public Health and Food Safety and one amendment to the draft legislative resolution containing the statement by the Commission (amendment 49). These amendments had been agreed during the informal contacts referred to above. No other amendments were tabled.

II. VOTE

When it voted on 5 October 2021, the plenary adopted the compromise amendment 48 to the abovementioned proposal for a Regulation, as well as the amendment 49 to the draft legislative resolution. The Commission's proposal as thus amended constitutes the Parliament's first-reading position which is contained in its legislative resolution as set out in the Annex hereto[2].

The Parliament's position reflects what had been previously agreed between the institutions. The Council should therefore be in a position to approve the Parliament's position.

The act would then be adopted in the wording which corresponds to the Parliament's position.

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[2] The version of the Parliament's position in the legislative resolution has been marked up to indicate the changes made by the amendments to the Commission's proposal. Additions to the Commission's text are highlighted in ***bold and italics.*** The symbol " ▌ " indicates deleted text.

P9_TA(2021)0397

Environment: The Aarhus Regulation ***I

European Parliament legislative resolution of 5 October 2021 on the proposal for a regulation of the European Parliament and of the Council 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 (COM(2020)0642 – C9-0321/2020 – 2020/0289(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

– having regard to the Commission proposal to Parliament and the Council (COM(2020)0642),

– having regard to Article 294(2) and Article 192(1) of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C9-0321/2020),

– having regard to Article 294(3) of the Treaty on the Functioning of the European Union,

– having regard to the opinion of the European Economic and Social Committee of 27 January 2021[3],

– after consulting the Committee of the Regions,

– having regard to the provisional agreement approved by the responsible committee under Rule 74(4) of its Rules of Procedure and the undertaking given by the Council representative by letter of 23 July 2021 to approve Parliament's position, in accordance with Article 294(4) of the Treaty on the Functioning of the European Union,

– having regard to Rule 59 of its Rules of Procedure,

– having regard to the opinion of the Committee on Legal Affairs,

– having regard to the report of the Committee on the Environment, Public Health and Food Safety (A9-0152/2021),

[3] OJ C 123, 9.4.2021, p. 66.

1. Adopts its position at first reading hereinafter set out[4];

2. Takes note of the statement by the Commission annexed to this resolution;

3. Calls on the Commission to refer the matter to Parliament again if it replaces, substantially amends or intends to substantially amend its proposal;

4. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

[4] This position replaces the amendments adopted on 20 May 2021 (Texts adopted, P9_TA(2021)0254).

P9_TC1-COD(2020)0289

Position of the European Parliament adopted at first reading on 5 October 2021 with a view to the adoption of Regulation (EU) 2021/… of the European Parliament and of the Council amending Regulation (EC) No 1367/2006 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[5],

After consulting the Committee of the Regions,

Acting in accordance with the ordinary legislative procedure[6],

Whereas:

[5] OJ C 123, 9.4.2021, p. 66.

[6] Position of the European Parliament of 5 October 2021.

(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')[7], 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[8] 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 of 11 December 2019 on the*** European Green Deal, the Commission committed itself to considering revising Regulation (EC) No 1367/2006 to improve access to administrative and judicial review at Union level for citizens and environmental non-governmental organisations that have ***specific*** concerns about the compatibility with environmental law of ***administrative acts*** that have effects on the environment. The Commission also committed to taking action to improve the access of citizens and non-governmental organisations to justice before national courts in all Member States. To that end, it issued ***the c***ommunication ***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'.***

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7 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).

8 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).

(4) Without prejudice to the CJEU'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.

(5) Taking into account the provisions of Article 9(3) ***and (4)*** of the Aarhus Convention ***and the findings and advice of*** the Aarhus Convention Compliance Committee in case ACCC/C/2008/32, 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 its system of judicial review.

(6) ***By Decision (EU) 2018/881[9] the Council requested a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee*** in case ACCC/C/2008/32***, to be followed, if appropriate, by a proposal to amend Regulation (EC) No 1367/2006. Furthermore, the European Parliament requested the amendment of Regulation (EC) No 1367/2006 in its resolutions of 15 November 2017 on an Action Plan for nature, people and the economy[10], of 16 November 2017 on the EU Environmental Implementation Review (EIR)[11] and of 15 January 2020 on the European Green Deal[12].***

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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 (OJ L 155, 19.6.2018, p. 6).***

10 ***OJ C 356, 4.10.2018, p. 38.***

11 ***OJ C 356, 4.10.2018, p. 84.***

12 ***OJ C 270, 7.7.2021, p. 2.***

(7) ***Article 9(3) of the Aarhus Convention provides that, within the framework of its national law, each Party is to ensure that members of the public, 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 provided for in Regulation (EC) No 1367/2006 complements the overall Union system of judicial review that enables members of the public to have administrative acts reviewed through direct judicial challenges at Union level, namely under Article 263, fourth paragraph, of the Treaty on the Functioning of the European Union (TFEU), and, in accordance with Article 267 TFEU, through national courts. The right and obligation of national courts to make a request to the CJEU for a preliminary ruling under Article 267 TFEU are essential elements of that system. Under Article 267 TFEU, as interpreted by the CJEU, Member States' national courts form an integral part of the system of judicial protection of the Union as ordinary courts of EU law[13].***

[13] ***Opinion of the Court of 8 March 2011, Creation of a unified patent litigation system, 1/09, ECLI:EU:C:2011:123, paragraph 80.***

(8) 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 the non-admissibility of requests made by environmental non-governmental organisations for internal review under Article 10 of that Regulation, including 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 general scope.

▌

(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 an 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 could, because of their effects, contravene environmental law, it is necessary to consider whether such provisions could have an adverse effect on the attainment of the objectives of Union policy on the environment set out in Article 191 TFEU. ***Where that is the case,*** the internal review procedure should also cover acts that have been adopted in the implementation of policies other than Union policy on the environment.

(11) Under Article 263 TFEU, as interpreted by the CJEU, an act is considered to have external effects, and thus to be capable of being subject to a request for review, if it is intended to produce legal effects vis-à-vis third parties. Preparatory acts, recommendations, opinions and other non-binding acts that do not produce legal effects vis-à-vis third parties and cannot therefore be considered to have external effects, in accordance with the case law of the CJEU, should, therefore, not be considered to constitute administrative acts under Regulation (EC) No 1367/2006[14].

(12) In order to ensure legal consistency, an act is considered to have legal effects, and thus to be capable of being subject to a request for review, in accordance with Article 263 TFEU, as interpreted by the CJEU[15]. 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 content[16].

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14 ***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.***

15 ***See judgment in Case C-583/11 P, paragraph 56.***

16 ***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.***

(13) In order for there to be enough time to carry out a proper review process, it is appropriate to extend the time limits laid down in Regulation (EC) No 1367/2006 for requesting administrative review and the time limits applicable to Union institutions and bodies for responding to such requests.

(14) ***In accordance with*** the case law of the CJEU[17], environmental non-governmental organisations ***or other members of the public that*** request internal review of an administrative act are required to put forward, when stating the grounds for their request for review, facts or legal arguments of sufficient substance to give rise to serious doubts.

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

(15) The scope of review proceedings under Regulation (EC) No 1367/2006 should cover both the substantive and procedural legality of the act challenged. In accordance with the case law of the CJEU, proceedings under Article 263, fourth paragraph, 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 altered[18].

(16) Acts adopted by public authorities of the Member States, including national implementing measures adopted at Member State level required by a non-legislative act adopted under Union law, do not fall within the scope of Regulation (EC) No 1367/2006, in accordance with the Treaties and the principle of the autonomy of the national courts.

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18 ***See judgment in Case C-82/17 P, paragraph 39.***

(17) ***Environmental non-governmental organisations and other members of the public should have the right to request internal review of administrative acts and omissions by the Union's institutions and bodies in accordance with the conditions laid down in Regulation (EC) No 1367/2006, as amended by this Regulation.***

(18) ***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.***

(19) ***Members of the public are not required to demonstrate that they are directly and individually concerned within the meaning of Article 263, fourth paragraph, TFEU, as interpreted by the CJEU[19]. However, in order to avoid members of the public having 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, for example in the case of an imminent threat to their own health and safety, or of prejudice caused to a right to which they are entitled pursuant to Union legislation, resulting from the alleged contravention of environmental law, in accordance with the case law of the CJEU[20].***

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19 ***Judgment of the Court of 15 July 1963, Plaumann v Commission, Case 25/62, ECLI:EU:C:1963:17.***

20 ***Judgments of the Court of 25 July 2008, Janecek, C-237/07, ECLI:EU:C:2008:447;of 1 June 2017, Folk, C-529/15, ECLI:EU:C:2017:419, and of 3 October 2019, Wasserleitungsverband Nördliches Burgenland and Others, C-197/18, ECLI:EU:C:2019:824.***

(20) 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 in combatting climate change, and that their request for review is supported by a sufficient number of natural or legal persons across the Union by collecting their signatures either physically or digitally.

(21) In order to ensure effective internal review procedures, and in particular 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 body[21], 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, as amended by this Regulation, or by a lawyer authorised to practise before the court of a Member State.

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[21] See judgment in Case C-82/17 P, paragraph 69.

(22) ***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 requests for review dealt with in the same procedure.***

(23) ***In order to ensure that case handling is effective, the Union's institutions and bodies should endeavour to apply the criteria set out in Article 11 of Regulation (EC) No 1367/2006 in a consistent manner.***

(24) ***For the sake of transparency and effective case handling, Union institutions and bodies should be allowed to establish online systems for receipt of requests for internal review.***

(25) Since the objective of this Regulation, namely to lay down detailed rules on the application of the provisions of the Aarhus Convention to Union institutions and bodies, cannot be sufficiently achieved by the Member States, but can rather, by reason of its scale and effects, 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 (TEU). 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 that objective.

(26) 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 TEU.

(27) 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) ***in Article 2(1), points (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 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 other members of the public*** that ***meet*** the criteria set out in Article 11 ***shall be*** entitled to make a request for internal review to the Union institution or body that adopted the administrative act or, in the 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 requests shall 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 administrative 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 administrative act or administrative 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 the second subparagraph of paragraph 1***.';

(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 ***of the expiry of the eight weeks deadline set out in the second subparagraph of paragraph 1***.';

(3) Article 11 is amended as follows:

(a) the following paragraph is inserted:

'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 Union 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 five Member States, with at least 250 members of the public coming from each of those Member States.

In the cases referred to in the first subparagraph, the members of the public shall be represented by a non-governmental organisation which meets the criteria set out in paragraph 1 or by a lawyer authorised to practise before a court of a Member State. That non-governmental organisation or lawyer shall cooperate with the Union institution or body concerned in order to establish that the quantitative conditions in point (b) of the first subparagraph 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 that the criteria and conditions mentioned in paragraph 1 and the second subparagraph of paragraph 1a are applied in a transparent and consistent manner.';

(4) the following article is inserted:

'Article 11a

Publishing of requests and final decisions, and online systems for receipt of requests

1. Union institutions and bodies shall publish all requests for internal review as soon as possible after their receipt, as well as all final decisions on those requests as soon as possible after their adoption.

2. Union institutions and bodies may establish online systems for receipt of requests for internal review and may require that all requests for internal review be submitted via their online systems.';

(5) 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 other members of the public that 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.';

(6) throughout the text of the Regulation, references to provisions of the Treaty establishing the European Community (EC Treaty) shall be replaced by references to the corresponding provisions of the TFEU and any necessary grammatical changes shall be made;

(7) throughout the text of the Regulation, including in the title, the word 'Community' shall be replaced by the word 'Union' and any necessary grammatical changes shall be 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 1, point (3)(a), shall apply from ... [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 …,

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

Commission statement

The Commission remains committed to ensuring that the EU respects its international obligations in matters pertaining to the Aarhus Convention and in that context acknowledges the concerns expressed and findings adopted by the Aarhus Convention Compliance Committee in case ACCC/C/2015/128[22] as regards state aid on 17 March 2021. The findings call on the EU to 'take the necessary legislative, regulatory and other measures to ensure that the Aarhus Regulation is amended, or new European Union legislation is adopted, to clearly provide members of the public with access to administrative or judicial procedures to challenge decisions on state aid measures taken by the European Commission under article 108(2) TFEU which contravene EU law relating to the environment, in accordance with article 9(3) and (4) of the Convention'.

The Commission is currently analysing the implications of the findings and assessing the options available. The Commission will complete and publish this assessment by the end of 2022. If appropriate, by the end of 2023, the Commission will come forward with measures to address the issue, in light of the obligations of the EU and its Member States under the Aarhus Convention and taking into account the rules of Union law concerning state aid.

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[22] For the ACCC/C/2015/128 case please see https://unece.org/env/pp/cc/accc.c.2015.128_european-union, para 131.