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OPINION OF THE LEGAL SERVICE[1]

From:	Legal Service
Subject:	Commission proposal for a Regulation amending the "Aarhus Regulation" (Regulation (EC) No 1367/2006) – Scope of application of the proposal, and 2021 Advice of the Aarhus Convention Compliance Committee on the proposal

I. INTRODUCTION

1. On 3 December 2020, during an informal videoconference, the members of the Working Party on Environment requested the Council Legal Service (CLS) to provide a written opinion concerning the scope of the proposal for a Regulation of the European Parliament and the Council amending Regulation (EC) No 1367/2006[2] 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 "Proposal")[3].

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2 Hereinafter, the "Aarhus Regulation".

3 COM(2020) 642 final.

2. The request for a CLS opinion concerned the following issues:

   a) whether the inclusion of acts of general scope in the definition of "administrative act" in Article 1(1) of the Proposal (which will be subject to the system of internal review pursuant to Article 10 of the Aarhus Regulation) is compatible with Article 263, fourth paragraph, TFEU; and

   b) whether this definition includes (i) Council decisions adopted pursuant to Article 218 TFEU, and (ii) acts adopted on the basis of the Treaty establishing the European Atomic Energy Community (the "Euratom Treaty").

3. At the same time, the CLS was requested to provide this legal opinion together with an assessment of the advice provided by the Aarhus Convention Compliance Committee ("ACCC") on the Proposal, once that ACCC advice was issued. The Commission had requested the ACCC to provide this new advice at the time of adoption of its Proposal, given that the Proposal was designed to address the concerns expressed by the ACCC in 2017 with regard to the Union's compliance with its international obligations under the Aarhus Convention. These concerns had been expressed in findings of the ACCC adopted on 17 March 2017 (hereinafter referred to as the "ACCC 2017 Findings")[4]. The ACCC's advice on the Commission Proposal was issued on 12 February 2021 (hereinafter referred to as the "ACCC 2021 Advice")[5].

4. This written opinion aims to respond to those requests and will first deal with the questions raised by delegations concerning the scope of the Proposal, as set out above in paragraph 2, and then comment on the ACCC 2021 Advice, building on the CLS opinion set out in document 8445/17 of 25 April 2017 (hereinafter the "CLS 2017 Opinion") which analysed, among other issues, the ACCC 2017 Findings.

[4] ACCC Findings and Recommendations on Communication ACCC/2008/32 (part II), relating to "Case C-32".

[5] https://unece.org/sites/default/files/2021-02/M3_EU_advice_12.02.2021.pdf .

5. The CLS notes that in September 2017, at the last meeting of the Parties to the Convention, following the ACCC's 2017 Findings, the Union 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 (...)*". The CLS considers that it is beyond the scope of this opinion to address the ACCC's criticisms of the Union's system of judicial review, which is provided for by primary law, as interpreted by the Court of Justice of the European Union. Therefore, those criticisms are not analysed in this opinion.

II. FACTUAL AND LEGAL FRAMEWORK

6. It is recalled that the Aarhus Convention[6] was signed on behalf of the European Community in 1998 and concluded in 2005[7].

Article 9(3) ("*Access to justice*") of the Aarhus Convention reads:
"(...) "3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, 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).

[6] UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

[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. 1–3.

7. In this regard, to provide for measures concerning, inter alia, access to justice as regards the Union's institutions and bodies, the European Parliament and the Council adopted the Aarhus Regulation. Given that the Aarhus Regulation only concerns application of the Aarhus Convention to Union institutions and bodies, and that it only concerns one of the remedies available to individuals to ensure compliance with Union environmental law, the Court of Justice has consistently held that the Aarhus Regulation is only one of the instruments by which the obligations stemming from the Aarhus Convention are met[8].

   In these cases the Court of Justice has also held that Article 9(3) of the Aarhus Convention cannot be relied on in order to assess the legality of the Aarhus Regulation, because the content of that provision is not unconditional and sufficiently precise[9].

8. It is against this legal background that the ACCC[10] elaborated its 2017 Findings. Those Findings were to the effect that the Union was not fully in compliance with its obligations under Article 9(3) of the Aarhus Convention. The ACCC 2017 Findings can be summarised as follows:

   a) The first finding concerns the limitation of the Union acts which may be the subject of internal review under the Aarhus Regulation to those of individual scope. The ACCC considered that the Convention does not support such a restriction, since Article 9(3) refers to "acts" generally[11].

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8 C-784/18 P, *Mellifera v Commission*, EU:C:2020:630, paragraph 88; Joined Cases C-404/12 P and C-405/12 P, *Council of the European Union and European Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, EU:C:2015:5, paragraph 52; Joined Cases C-401/12 P and C-403/12 P, *Council of the European Union and others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, EU:C:2015:4, paragraph 60.

9 Joined Cases C-404/12 P and C-405/12 P, *ibid.*, paragraphs 46-47; Joined Cases C-401/12 P and C-403/12 P, *ibid.*, paragraphs 54-55.

10 The ACCC was established by Decision I/7, adopted by the first MoP to the Aarhus Convention, in 2004, *"for the review of compliance by the Parties with their obligations under the Convention."* The power to decide on an eventual declaration on non-compliance, however, lies with the Meeting of the Parties - see paragraph 37 of the section XII of Decision I/7 *("Consideration by the Meeting of the Parties").*

11 See paragraphs 53 and 95 of the ACCC 2017 Findings.

b) The second concerns the restriction of the right of standing in the Aarhus Regulation to "qualified entities", although the Convention also refers to members of the public[12].

c) The third concerns the limitation in the Aarhus Regulation of the type of Union acts that may be challenged to those which have been adopted "under" environmental law, while the Convention refers to acts that "contravene" environmental law[13].

d) The fourth relates to the fact that only Union acts having "legally binding and external effects" fall under the scope of the Aarhus Regulation, which the ACCC found overly restrictive[14].

9. Following the ACCC 2017 Findings, at its 6th session in September 2017, the Meeting of the Parties (MOP) to the Aarhus Convention decided by consensus to postpone the discussions on draft decision VI/8f concerning the European Union[15] to the next ordinary session of the MOP to be held in 2021. At the same time, the MOP requested the ACCC to review any developments that had taken place regarding the above, and to report to the MOP accordingly[16].

12 Ibid., see paragraph 94.
13 Ibid., see paragraphs 99-101.
14 Ibid., see paragraph 104.
15 Draft decision VI/8f concerning compliance by the European Union with its obligations under the Convention.
16 Economic Commission for Europe - Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Report of the sixth session of the Meeting of the Parties, paragraphs 62 and 63. https://unece.org/fileadmin/DAM/env/pp/mop6/English/ECE_MP.PP_2017_2_E.pdf

10. Following this, in October 2019 the Commission published a study[17] on the Union's options for addressing these findings. The study had been requested by the Council in Decision (EU) 2018/8819[18]. That Decision also requested the Commission, if appropriate, to make a legislative proposal on the matter. The Proposal follows up on this request.

11. The Proposal addresses the first and the third of the ACCC 2017 Findings, namely those related to the limitation of the acts which may be the subject of internal review to those (i) of individual scope, and (ii) adopted *"under"* environmental law.

12. The current definition of "administrative act" under Article 2(1)(g) of the Aarhus Regulation, reads: *"(...)'administrative act' means any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects; (...)"*.

13. Article 1(1) of the Proposal now includes acts of general scope within the definition of "administrative act" covered by the Aarhus Regulation, and clarifies that acts which contravene environmental law, regardless of the legal basis on which they are adopted, fall within its scope[19].

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17 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.

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

19 Article 1 *"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;(...) (emphasis added).

14. Article 1(1) of the Proposal also provides that internal review of Union acts (or of their provisions) requiring implementation at Member State level is not possible. However, in case of a Union non-legislative act requiring implementation at Union level, Article 1(2) provides that internal review of the relevant provisions of that act is possible together with internal review of such implementing measures, once those are adopted[20].

15. The Council's General Approach on the Proposal was approved on 17 December 2020[21]. The General Approach redrafted Article 1(1) and (2) as follows[22]:

"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 (...)[23];

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 within the meaning of point (f) of Article 2(1).

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20 Article 1(2) "*Article 10* (of the Aarhus Regulation) *is amended as follows:*
(a) paragraphs 1 and 2 are replaced by the following:
'1. (...)
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." (emphasis added).

21 ST 13937/20.

22 Additions underlined.

23 A new Recital 10(a) states:
"(10a) In line with the case law of the CJEU, an act is considered legally binding, and thus can be subject to a request of review, regardless of its form, as its nature as legally binding is considered with regard to its effects, objective and content." (citation of case law omitted).

Those provisions of an administrative act for which Union law explicitly requires implementing measures at Union or national level cannot be object of a request for internal review.(...).

Where an administrative act is an implementing measure at Union level required by another non-legislative act, the non-governmental organisation may, however, 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."

16. The ACCC 2021 Advice on the Proposal can be summarised as follows:

a) the first finding repeats the criticism from 2017 of the restriction of the standing under the Aarhus Regulation to *"qualified entities"*[24];

b) the second finding concerns the new definition of "administrative act" in Article 2(1)(g); in relation to which the ACCC expresses concern *"about the implications of the use of the term "adopted" in this context and whether it limits the scope of acts that may be subject to challenge under article 9(3) of the Aarhus Convention"*[25];

c) the third finding repeats the ACCC's criticism from 2017 that the requirement for the acts in question to have "legally binding effects" is too restrictive[26];

d) in its fourth finding, concerning the exclusion of administrative acts (or provisions thereof) requiring implementing measures at Member State level from the scope of the Aarhus Regulation, the ACCC, while acknowledging that Member States' implementing measures cannot be reviewed by Union institutions or bodies, considers that it should be possible to review the Union act once such national implementing measures are adopted[27]. (emphasis added).

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24 Paragraph 37 of the ACCC 2021 Advice.
25 Ibid., paragraph 46.
26 Ibid., paragraphs 52-55.
27 Ibid., paragraphs 65-68.

17. Finally, the ACCC also recommends that the Union should 'bear in mind' the findings and recommendations on communication ACCC/C/2015/128 in the legislative process, once issued. This concerns the exclusion, in the Aarhus Regulation, of decisions on state aid measures taken by the Commission pursuant to Article 108(2) TFEU. The Proposal does not introduce any amendments in this respect. These findings were issued subsequently, on 17 March 2021, and do not form part of the proceedings that the Proposal is designed to address[28]. Therefore, they are not addressed in this opinion either.

III. PRELIMINARY REMARKS ON ASPECTS OF THE AARHUS REGULATION AND OF THE AMENDMENTS PROPOSED THERETO

A. The provisions on internal review and access to justice

18. Before addressing the issues raised by the delegations and the ACCC, it is useful to outline the main elements of the internal review system provided for by the Aarhus Regulation. It should be noted that, in line with Article 2(2) of the Aarhus Convention, these provisions do not apply to the Union's institutions when acting in a judicial or legislative capacity[29].

19. It is recalled that Article 9(3) of the Aarhus Convention requires either administrative or judicial remedies to be available for acts contravening environmental law. It does not require both.

20. Article 10 of the Aarhus Regulation provides for a system of "internal review" by qualified entities in relation to "administrative acts" of Union institutions and bodies under environmental law.

[28] Case C-32; see footnote 4 above.
[29] Article 2(1)(c) of the Aarhus Regulation.

21. NGOs fulfilling the criteria under Article 11 of the Regulation (the "qualified entities") are entitled to ask the Union institution or body that has adopted such an administrative act (or, in case of an alleged administrative omission, which should have adopted such an act), to proceed to an internal administrative review of that act. The institution must consider any such request, unless it is clearly unsubstantiated, and provide a written reply within a certain timeframe[30]. This constitutes the decision of the institution or body on the internal review.

22. According to Article 12 of the Aarhus Regulation, the qualified entity may then challenge the decision (or the failure to take a decision) on the internal review, in accordance with the relevant provisions of the Treaty. It should be noted that such a right of action only concerns the decision on the internal review which has been addressed to the qualified entity (or the failure to adopt such a decision if it was entitled to receive one). For example, a qualified entity may request an internal review of a marketing authorisation issued by the Commission to another party. It may challenge the outcome of that review before the Court of Justice of the European Union, in accordance with Article 263, fourth paragraph, TFEU. However, such action before the Court does not concern the possible annulment of the marketing authorisation itself, which the qualified entity does not have standing to challenge. The qualified entity's action before the Court only concerns the possible annulment of the Commission decision on its request for internal review, of which it is the addressee.

B. The definition of "administrative act"

23. The definition of "administrative act" under Article 2(1)(g) of the Aarhus Regulation also merits attention.

[30] If it is unable to provide a reply in time, it must inform the qualified entity within a certain timeframe of the reasons for its failure to act and when it intends to do so.

24. In this regard, the General Court has recently examined whether the current definition of acts "*having legally binding and external effects*" under Article 10 of the Aarhus Regulation, in respect of which internal review can be requested, should be read as corresponding to the wording of Article 263 TFEU. In *ClientEarth v EIB* (Case T-9/19)[31], the General Court recalled that the result of the internal administrative review procedure provided for in Article 10 may be the subject of judicial proceedings before the Court pursuant to Article 12, and that such proceedings must be brought in accordance with the conditions laid down in Article 263 TFEU.

The Court continued: "*In view of the link that thus exists between the concept of an act having "legally binding and external effects", within the meaning of Article 2(1)(g) of the Aarhus Regulation, and that of an act producing legal effects vis-à-vis third parties, within the meaning of Article 263, it is reasonable, in the interests of general consistency, to interpret the former in accordance with the latter*"[32].

25. The Court thereby relies on the wording of Article 263 TFEU in order to interpret the scope of the administrative acts defined in Article 2(1)(g) of the Aarhus Regulation, despite the fact that the vocabulary used is different.

26. It is furthermore noted that the current definition of administrative act concerns only acts of "individual scope". Certain types of measures are also excluded from the definition of "administrative act" under the Aarhus Regulation, pursuant to Article 2(2) thereof. This provides that measures taken by a Union institution or body in its capacity as an administrative review body, such as in the context of competition rules and infringement proceedings, are not included in the definition of "administrative act". No change has been proposed to Article 2(2).

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31 Case T-9/19**,** *ClientEarth, v European Investment Bank (EIB),* EU:T:2021:42.

32 Ibid.**,** paragraph 149. It should however be noted that this judgment is currently under appeal, although the grounds of appeal are not yet public (Cases C-212/21 P, and C-223/21 P).

27. As explained, the Proposal, as amended by the General Approach, aims to expand the definition of administrative act to include "*any non-legislative act adopted by a Union institution or body, which has legally binding and external effects"*, excluding those explicitly requiring implementing measures at Union or national level. This exclusion is now reflected in an amendment to Article 10 of the Aarhus Regulation, set out in Article 1(2) of the Proposal, together with the exception relating to the possibility to request internal review of the Union implementing measure, once adopted, together with the provision of the non-legislative act providing for that implementing measure. This definition includes measures both of individual and of general scope.

28. It is noted that in its explanatory memorandum, the Commission explains that *"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*"[33]. It indicates that in excluding regulatory acts requiring implementing measures, it has followed the case-law of the Court interpreting the fourth paragraph of Article 263 TFEU.

[33] The concept of "regulatory acts" has been clarified by the Court of Justice in a Grand Chamber judgment of 3 October 2013, *Inuit Tapiriit Kanatami a.o. v Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraphs 58 to 61). There, the Court found that the term refers to *"acts of general application other than legislative acts"*. Recently, in a Grand Chamber judgment of 6 November 2018, *Scuola Elementare Maria Montessori v Commission,* the Court specifically indicated that the term extends to all non-legislative acts of general application without exception. (C-622/16 P, EU:C:2018:873, paragraphs 24 to 28). This case, however, concerned competitors of beneficiaries of a state aid decision which, the Court found, *"directly affected their legal situation"* (Ibid., paragraph 51) and *"produced effects purely automatically on the basis of the EU rules alone without the application of other intermediate rules"* (Ibid., paragraph 54).

29. It is true that the exclusion of non-legislative acts requiring implementing measures from the internal review procedure corresponds to the exclusion of regulatory acts requiring such measures from the possibility of challenge by a non-privileged applicant pursuant to Article 263, fourth paragraph TFEU.[34]. However, the CLS considers that the proposed definition of administrative acts, as set out in Article 1(1) of the Proposal (as modified by the General Approach), can be interpreted as permitting qualified entities to request internal review of any Union non-legislative measures having legally binding and external effects, whether or not the other conditions of the fourth paragraph of Article 263 TFEU are fulfilled (i.e. regardless of whether such measures are capable of challenge pursuant to Article 263, fourth paragraph, TFEU by non-privileged applicants). It is only by a combined reading of paragraphs (1) and (2) of Article 1 that the exclusion (at least in part) of the possibility to request internal review of acts requiring implementing measures becomes apparent.

The CLS considers that it would be advisable to make it clearer, either in the operative part of the text or in a recital, that the concept of "administrative act" covers both acts of individual scope and regulatory acts capable of challenge pursuant to Article 263, fourth paragraph TFEU.

IV. COMPATIBILITY OF THE PROPOSAL WITH THE FOURTH PARAGRAPH OF ARTICLE 263, TFEU

30. Certain delegations have suggested that the proposed extension of the scope of internal review provided for by the Aarhus Regulation beyond acts of individual scope is incompatible with Article 263, fourth paragraph, TFEU.

[34] A "non-privileged applicant" means a natural or legal person who may challenge the legality of Union acts before the Court only where the conditions of the first, second and fourth paragraphs of Article 263 TFEU are met. A "privileged applicant" (such as a Member State) does not need to meet the conditions of the fourth paragraph of that Article in order to bring such a challenge.

31. The CLS has previously considered this question in the CLS 2017 opinion. In this opinion, it advised that it would be legally possible for acts of general scope to form the subject of a right to request internal review under the Aarhus Regulation, while acknowledging that such an extension of scope would inevitably create practical and administrative burdens for the Union institutions and bodies concerned (paragraphs 30-36 of the CLS 2017 opinion).

32. In this context, the CLS explained that such an approach would be compatible with the Court's case law, which indicates that a party other than the addressee of a measure can claim to be directly and individually concerned by that measure where it derives specific procedural rights from applicable Union legislation. However, the precise scope of that right of action depends on the legal position of the party in question, as defined by the Union legislature in the relevant Union legislation, with a view to protecting its legitimate interests. As explained in paragraph 22 above, the right of action created by the Aarhus Regulation (the right to request internal review) does not mean that the substantive measure in question can subsequently be the subject of an action for annulment by that party. Instead, the party's right of action concerns the decision on the internal review, pursuant to the procedural rights which have been afforded to it by the Aarhus Regulation.

33. The Court has confirmed this approach in several cases, notably in the *TestBioTech* case[35], where the Court of Justice rejected the appellants' challenge in respect of the Commission's decision on its request for internal review of a Commission decision authorising the placing on the market of products containing, consisting of, or produced from, certain genetically modified soybean.It found that such a review related only to the reassessment of the marketing authorisation in question, and not the marketing authorisation itself (paragraphs 37-38)[36].

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35 Case C-82/17 P, *TestBioTech eV a.o. v Commission*, EU:C:2019:719.

36 See also Case C-352/19 P, *Région de Bruxelles-Capitale v Commission*, where the Court of Justice confirmed that Article 9 of the Aarhus Convention "*cannot have the effect of modifying the conditions of admissibility of actions for annulment laid down in the fourth paragraph of Article 263*", EU:C:2020:978, paragraph 26.

The judgment at first instance had further specified that the qualified entity requesting internal review "*cannot require, at the end of the internal review, that a specific measure be taken by the institution or body concerned*" and that the "*choice of measures to be adopted following an internal review is entirely discretionary*" for the institution or body in question[37].

34. Similarly, in Case T-108/17, *ClientEarth v Commission*[38], the General Court explained in some detail why the applicant's head of claim seeking the annulment of the authorisation decision in question was inadmissible (paragraphs 24-31), including the fact that such a claim would be contrary to the system of judicial remedies established by the Treaties. It went on to consider (and reject) the applicant's claims concerning the purported illegality of the Commission's decision rejecting the applicant's request for internal review of that authorisation decision.

35. The CLS considers that the same approach can legally be taken in respect of non-legislative acts of general scope adopted by Union institutions, as set out in the Proposal. Thus, a qualified entity which would not have standing to challenge the adoption of such an act, pursuant to Article 263, fourth paragraph, TFEU, may be granted the right to request internal review of that act, and to challenge the decision on that internal review before the Court. Such an approach is compatible with Article 263, fourth paragraph, TFEU, whether acts of individual or of general scope are concerned[39].

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37 Case T-177/13, *TestBioTech eV a.o. v Commission*, EU:T:2016:736, paragraph 55

38 EU:T:2019:215.

39 It should be noted that, in the context of such a challenge, it cannot be excluded that in certain cases it may be possible for a qualified entity to invoke a plea of illegality in relation to the administrative act which is the subject of the internal review, pursuant to Article 277 TFEU, although the circumstances in which such a plea is admissible are relatively strict.

V. ACTS ADOPTED PURSUANT TO ARTICLE 218 TFEU

36. Some delegations have asked whether Council decisions adopted pursuant to Article 218 TFEU could be the subject of an internal review, if the Aarhus Regulation is amended as proposed. Delegations have asked in particular about Council decisions pursuant to Article 218(6) TFEU, concerning the conclusion of international agreements, and to Article 218(5) TFEU, concerning the signature of such agreements. Both types of decisions will be addressed in turn, before referring to decisions pursuant to Article 218(3) and (4) TFEU, and decisions pursuant to Article 218(9) TFEU. It is recalled that all such decisions constitute binding legal acts of the Union pursuant to Article 288 TFEU.

A. Council Decisions under Article 218(6) TFEU

37. It is clear that Council decisions approving the conclusion of international agreements pursuant to Article 218(6) TFEU are legally binding in nature and may be challenged by privileged applicants. Furthermore, the Court has consistently ruled that, by virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding upon its institutions[40].

38. However, the Court of Justice has not specifically ruled on the question as to whether there are circumstances in which such decisions may be challenged by non-privileged applicants pursuant to Article 263, fourth paragraph, TFEU. In an *obiter dictum* in a case concerning citizens' initiatives (as provided for in Article 11 TEU and Article 24 TFEU), the General Court has commented that Council decisions pursuant to Article 218(6) TFEU produce "*independent legal effects*", given that international agreements concluded by the EU entail a *"modification of European Union law"*, due to the inclusion of the agreement in the Union's legal framework[41], without expressly ruling on the subject.

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[40] See Case C-366/10, *Air Transport Association of America a.o. v Secretary of State for Energy and Climate Change,* EU:C:2011:864, paragraph 50, and case-law cited therein. It is recalled that, according to constant case-law, international agreements themselves may not be the subject of an action of annulment; see Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakaat International Foundation v Council and Commission,* EU:C:2008:461, paragraph 286.

[41] T-754/14, *Efler and others v Commission*, EU:T:2017:323, paragraph 43.

39. This question as to whether non-privileged applicants may challenge decisions adopted pursuant to Article 218(6) TFEU is under consideration by the General Court in several pending cases.

40. Two of these cases involve *Front Polisario*. In Case T-279/19, *Front Polisario* is challenging a Council Decision[42] concerning the conclusion of certain amendments to two Protocols of the Euro-Mediterranean association agreement with Morocco. In Case T-344/19, *Front Polisario* is challenging Council Decision (EU) 2019/441 on the conclusion of the sustainable Fisheries Partnership Agreement between the EU and the Kingdom of Morocco, the Implementation Protocol thereto and the Exchange of Letters accompanying the Agreement[43]. The question of standing is at issue in both cases. These cases follow two judgments concerning an earlier Council Decision pursuant to Article 218(6) TFEU, where *Front Polisario* was found to have standing at first instance, but this ruling was overturned on appeal[44].

41. There are other cases pending before the General Court in which the same question of standing is raised in respect of the Withdrawal Agreement between the EU and the United Kingdom[45]. These cases should also clarify the position in relation to the circumstances, if any, in which such decisions can be challenged by non-privileged applicants.

42. It is suggested that relevant considerations include the nature of the decision in question, the nature of the agreement concerned, and any rights or obligations of third parties provided for by the agreement.

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42 Council Decision 2019/217/EU of 18 January 2019 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco on the amendment of Protocols 1 and 4 to the Euro- Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ L 34, 6.2.2019, p. 1).

43 OJ L 77, 20.3.2019, p.4.

44 Case T-512/12, *Front Polisario v Council*, EU:T:2015:953, overturned on appeal by Case C-104/16 P, *Council v Front Polisario*, EU:C:2016:973.

45 Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community and its annexes (OJ L 29, 31.1.2020, p.1–6). See pending Cases T-198/20, *Shindler a.o. v Council;* T-231/20, *Price v Council;* T-252/20, *Silver v Council.*

A further consideration relates to the fact that in many cases international agreements concluded by the Union require various implementing measures before they are capable of affecting the legal position of third parties. In such cases, it is the implementing measures (whether at Union or at national level) which may be challenged in accordance with the Union's system of judicial review (including a possible preliminary reference to the Court of Justice by a national court seized of a dispute in relation to such implementing measures). It is clear that where such implementing measures are required, a Council decision on the conclusion of such an international agreement cannot, in any event, be challenged pursuant to Article 263, fourth paragraph, TFEU.

43. In conclusion, the CLS considers that it is as yet unclear whether Council decisions approving the conclusion of international agreements may, at least in certain circumstances, be treated as capable of challenge pursuant to Article 263, fourth paragraph, TFEU. In the absence of clear case-law on the matter, it is not possible to state that those decisions will never be capable of being challenged by non-privileged applicants.

44. Therefore, the extension of scope of the definition of "administrative acts" in the Proposal means that it cannot be excluded that in certain cases qualified entities, within the meaning of the Aarhus Regulation, may be entitled to request the Council to conduct an internal review of such decisions, or at least that they will have grounds for arguing that they have a right to do so, and that they would subsequently be able to challenge the result of that internal review before the Court.

45. During discussions on the Proposal, it has been informally suggested that Council decisions pursuant to Article 218(6) TFEU cannot be considered as falling within the scope of the internal review provided for therein. It is argued that the purpose of such decisions is simply to allow the conclusion of the international agreement, and that the decision is thus procedural in nature and, as such, cannot modify the legal situation of natural or legal persons nor affect their interests.

46. However, in light of the considerations set out in paragraphs 38, 42 and 43 above, the CLS considers that it is uncertain whether the Court would accept this argument.

B. Council Decisions under Article 218(5) TFEU

47. The situation in relation to Council decisions pursuant to Article 218(5) TFEU concerning the signature of an international agreement may be distinguished from decisions on conclusion under Article 218(6) TFEU.

48. The CLS considers that there are strong grounds for arguing that a Council decision simply providing for signature of an international agreement cannot, as such, be the subject of an action by non-privileged applicants pursuant to Article 263, fourth paragraph, TFEU. Such decisions merely authorise the signature of the agreement in question and authorise the President of the Council to designate the person empowered to sign the agreement on behalf of the Union[46].

49. However, the position is less clear where the Council decision on signature also contains provisions on provisional application of all or part of the international agreement. Some or all of the agreement's provisions are thus rendered operational by the decision on signature itself, in advance of the decision on conclusion to follow. This means that a decision on signature and provisional application, in terms of its potential legal effects on natural and legal persons, could be considered as equivalent to the legal effects of decisions on conclusion, and the considerations set out in paragraphs 38 and from paragraph 42 to paragraph 46 above would also be relevant.

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[46] In certain cases it may also contain provisions concerning conditions precedent to the conclusion of the agreement. See, for example, Article 4 of Council Decision (EU) 2019/1915 of 14 October 2019 on the signing, on behalf of the Union, of the Agreement between the European Union and the Republic of Belarus on the facilitation of the issuance of visas (OJ L 297, 18.11.2019, p. 1–2):"*The Commission shall assess the security and integrity of Belarus' system of issuance of biometric diplomatic passports and their technical specifications, and it shall communicate its assessment to the Council. The Council shall decide, in the light of such assessment, on the conclusion of the Agreement*."

C. Council Decisions under Article 218(3) and (4) TFEU

50. Paragraphs (3) and (4) of Article 218 TFEU provide for Council decisions authorising the opening of negotiations for an international agreement, nominating the negotiator or the head of the negotiating team, addressing directives to the negotiator, and designating a special committee in consultation with which the negotiations must be conducted.

51. According to established case law, a Council decision under Article 218 (3) and (4) TFEU must be considered to constitute a preparatory act in relation to a possible subsequent decision to sign and conclude such an agreement. As a preparatory act, it produces legal effects between the European Union and its Member States as well as between the institutions of the European Union, but it does not produce effects vis-à-vis natural and legal persons and it therefore cannot affect the rights or obligations of such persons[47].

52. Therefore, such decisions are not capable of challenge pursuant to Article 263, fourth paragraph, TFEU.

D. Council Decisions under Article 218(9) TFEU

53. Article 218(9) TFEU provides for the adoption of Council decisions establishing the positions to be adopted by the Union in a body set up by an international agreement, when that body is called upon to adopt acts having legal effects, or of decisions suspending application of an agreement.

54. It can be argued that Council decisions establishing the positions to be adopted by the Union do not have legal effects vis-à-vis natural and legal persons, such as to be capable of challenge pursuant to Article 263, fourth paragraph, TFEU as they merely define the position to be upheld by the Union's representative in the international body in question. Such a decision is thus of a preparatory nature.

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[47] Case T-376/18, *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v Council*, EU:T:2019:77, paragraph 28; T-458/17, *Shindler a.o. v Council*, EU:T:2018:838, paragraphs 39-41; Case T-754/14, see footnote 41, paragraph 34; Case C-425/13, *Commission* v *Council*, EU:C:2015:483, paragraph 28; Case C-114/12, *Commission* v *Council*, EU:C:2014:2151, paragraph 40.

Council decisions adopted pursuant to Article 218(9) TFEU do not necessarily result in decisions being taken by that international body. Nor will the decisions of the international body themselves necessarily have legal effects vis-à-vis natural and legal persons. However, in the absence of clear case-law on the matter, and given the very wide variety of Council decisions adopted pursuant to Article 218(9) TFEU, it is not possible to state with certainty that such decisions will never fall within the scope of the internal review provided for in the Proposal.

55. The same is true concerning Council decisions pursuant to Article 218(9) TFEU suspending application of an agreement. It is recalled that it is only in exceptional cases that the Council takes such a decision. It cannot be excluded that, in certain circumstances, it could be argued that such a decision has legal effects vis-à-vis natural and legal persons. As in the case of decisions concluding international agreements, the assessment would depend on the nature of the decision and of the agreement concerned, and on the rights or obligations of the third parties with respect to the agreement, and on whether the international agreement itself is capable of having direct effect towards third parties or needs implementing measures at Union or national level. Thus, it cannot be excluded that the right to internal review provided for in the Aarhus Regulation could be applicable in respect of such decisions, at least in certain circumstances.

E. Intermediate conclusion on acts adopted pursuant to Article 218 TFEU

56. In conclusion on Article 218 TFEU, as outlined above, in the absence of clear case-law on the matter, it cannot be excluded that Council decisions on the conclusion of international agreements pursuant to Article 218(6) TFEU could in certain circumstances be considered to fall within the scope of the acts subject to internal review under the Proposal. The same may be true in respect of Council decisions on signature of international agreements pursuant to Article 218(5) TFEU, insofar as that decision provides for provisional application of all or part of the agreement in question, and in respect of certain Council decisions pursuant to Article 218(9) TFEU.

VI. ACTS ADOPTED UNDER THE EUROPEAN ATOMIC ENERGY COMMUNITY (EURATOM) TREATY

57. Some delegations have asked whether acts adopted pursuant to the Euratom Treaty are capable of being the subject of internal review pursuant to the Aarhus Regulation, as amended by the Proposal.

58. The General Court has recently addressed the question whether the Aarhus Regulation (as currently drafted) applies to a measure adopted on the basis of the Euratom Treaty, in a case concerning the refusal to provide access to documents drawn up concerning that measure (Case T-307/16, *CEE Bankwatch Network v Commission*, EU:T:2018:97).

59. In paragraph 46 of that judgment the Court found that: *"according to its title, its recitals and its provisions, Regulation No 1367/2006 applies to information obligations concluded within the framework of an international convention to which the European Atomic Energy Community is not a party, namely the Aarhus Convention. As is clear from Article 1 of Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Aarhus Convention (OJ 2005 L 124, p. 1), the convention was approved solely on behalf of the European Community, now the European Union. Not being a party to the convention, the European Atomic Energy Community, in the absence of any indication to the contrary, cannot be subject to the obligations contained in the regulation applying that convention."* (emphasis added).

60. The Court went on to recall that measures adopted under the Euratom Treaty are not necessarily subject to the obligations applicable within the framework of the European Union. The European Atomic Energy Community and the European Union are separate organisations, established by separate treaties, and with separate legal personalities (paragraph 47 and the case-law cited therein).

61. It pointed out that Article 106a of the Euratom Treaty renders applicable certain provisions of the TEU and of the TFEU. Article 192 of the TFEU, which is the legal basis of the Aarhus Regulation, is not among those provisions. It follows that measures adopted on the basis of Article 192 TFEU cannot be applied within the framework of Euratom (paragraphs 48-49).

62. The Court concluded that the Aarhus Regulation only applied within the framework of the European Union, and not to institutions and bodies of Euratom (paragraph 50).

63. In principle, it is therefore clear that acts adopted on the basis of the Euratom Treaty are not subject to the provisions of the Aarhus Regulation.

64. Conversely, it is true that in an appeal concerning a recent state aid case, the Court of Justice has found that the TFEU has much more far-reaching aims than the sectoral aims of the Euratom Treaty, and that, given that the TFEU *"confers upon the European Union extensive competences in numerous areas and sectors, the rules of the TFEU apply in the nuclear energy sector when the Euratom Treaty does not contain specific rules. Accordingly, since the Euratom Treaty does not contain rules concerning State aid, Article 107 TFEU may be applied in that sector."* (Case C-594/18 P*, Austria v Commission*)[48] (emphasis added).

65. The Court continued that the Euratom Treaty did *"not deal exhaustively with the environmental issues that concern the nuclear energy sector. Therefore, the Euratom Treaty does not preclude the application in that sector of the rules of EU law on the environment."* (paragraph 41) (emphasis added). This was the case both for provisions of primary law, such as Article 11 TFEU, and for provisions of secondary law. In that regard, the Court recalled that Directive 2011/92/EU, concerning environmental impact assessments, applies to nuclear power stations and other nuclear reactors (paragraphs 42 and 43).

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[48] EU:C:2020:742. This echoes the earlier case-law whereby the Court has found that, in the absence of specific rules in the Euratom Treaty, the provisions of the EC Treaty may apply. See Opinion 1/94, EU:C:1994:384, where the Court recalled that the provisions of the EC Treaty could not derogate from those of the Euratom Treaty, but ruled that, since the Euratom Treaty contained no provisions relating to external trade, "*there is nothing to prevent agreements concluded pursuant to Article 113 of the EC Treaty (now Article 207 TFEU) from extending to international trade in Euratom products*" (paragraph 24).

66. The CLS considers that it follows from these two cases that the provisions of the Aarhus Regulation apply to measures adopted pursuant to the TFEU (or TEU) which concern the field of nuclear energy. They do not, however, apply to measures adopted pursuant to the Euratom Treaty itself, i.e. to decisions based on the Euratom Treaty. There is nothing in the Proposal which changes this analysis.

VII. RESTRICTION OF STANDING TO REQUEST INTERNAL REVIEW TO "*QUALIFIED ENTITIES*"

67. The ACCC 2021 Advice reconfirms its analysis in 2017 to the effect that, in relation to the right to request internal review: "*by barring all members of the public except NGOs meeting the criteria of its article 11, the Aarhus Regulation fails to correctly implement article 9, paragraph 3*" of the Aarhus Convention[49].

68. Some delegations have expressed doubts as to whether an extension of scope of the Aarhus Regulation allowing a broader category of qualified entities, or even members of the public, to request internal review of administrative acts would be compatible with the Treaties.

69. The CLS also commented on this criticism in the CLS 2017 opinion (paragraphs 37 and 38). The CLS continues to consider that it would be legally possible for the Aarhus Regulation to be amended so as to broaden the scope of the right to request internal review beyond that provided for in the current version of the Aarhus Regulation (Article 11 thereof sets out the criteria which NGOs must meet in order to be eligible to request internal review of administrative acts). This is essentially a matter for the co-legislators when deciding how best to reflect the requirements of the Aarhus Convention with respect to the application of the provisions of that Convention to Union institutions and bodies.

[49] Paragraph 37 of the ACCC 2021 Advice.

70. In this regard, the CLS notes that Article 9(3) of the Convention itself envisages that Parties may lay down criteria to be met before members of the public[50] may have access to administrative review procedures with respect to acts and omissions considered to contravene its environmental law. The ACCC has also acknowledged that opening up administrative review to all individuals would amount to an *actio popularis* which is not required under the Convention[51]. Instead, the ACCC has commented, with respect to NGOs, that the criteria imposed must not be so strict that they "*bar all or almost all environmental organisations from challenging such acts or omissions*." In this regard, it is recalled that the Court of Justice has found that the Contracting Parties to the Aarhus Convention "*have a broad margin of discretion when defining the rules for the implementation of the 'administrative or judicial procedures'* " provided for in Article 9(3) of the Aarhus Convention[52] (emphasis added).

VIII. COMMENTS OF THE ACCC ON THE DEFINITION OF ADMINISTRATIVE ACTS IN THE PROPOSAL

A. Acts having "legally binding and external effects"

71. The ACCC 2021 Advice has reaffirmed its suggestion, first made in 2017, to amend the term "*having legally binding and external effects*" (emphasis added), which is one of the requirements for an act to be considered as falling within the definition of "*administrative act*" both in the current version of the Regulation, and in the amended version of this definition in the Proposal (see paragraphs 12 and 13 and footnote 19 above). The ACCC considers that this term is too restrictive, and should be amended so that it refers to acts "*having legal and external effects*" (emphasis added). It acknowledges that an act needs to produce legal effects in order to contravene environmental law, but it considers that the inclusion of the term "*binding*" might exclude certain acts from the scope of the Proposal[53].

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50 Article 2(4) of the Convention defines "*the public*" to mean "*one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups*".

51 See page 194 of the Aarhus Convention Implementation Guide, quoting the findings of the Compliance Committee in Case ACCC/C/2005/11.

52 Joined Cases C-401/12 P to C-403/12 P, see footnote 8, paragraph 59.

53 It is generally understood that the term "*external effects*" has the same meaning as "*effects vis-à-vis third parties*".

72. In order to address this suggestion, it is necessary to consider whether the deletion of the word "*binding*" would change substantially the scope of the definition.

73. It is recalled that the Court has, on occasion, drawn a distinction between acts "*having legal effects*" and "*legally binding*" acts. In the OIV case, concerning the definition of acts having legal effect in relation to Council decisions pursuant to Article 218(9) TFEU, the recommendations made by the International Organisation of Wine and Vine, although not in themselves legally binding, were considered to have legal effects since they were "*capable of decisively influencing the content of* [Union] *legislation*"[54].

74. More generally, concerning the concept of acts having legal effects under Article 263 TFEU, the case-law of the Court provides that in order to determine whether an act has legal effects, the form of the act is irrelevant. Instead, what is crucial is the effects, content and scope of the act in question[55]. In some of these cases the Court has used the term "*legal effects*"[56], in line with the wording of Article 263, paragraph 1, TFEU, while in others it has referred to acts under Article 263 TFEU as being acts of "*binding nature*"[57] or having "*binding force*" (and "*legal effects*")[58], while, in some instances, it has referred to these acts as having "*binding legal effects*"[59].

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54 Case C-399/12, *Germany v Council*, EU:C:2014:2258, paragraphs 61 to 64.

55 As also flagged in the Explanatory Memorandum to the Proposal, see pages 8 and 9. See Joined Cases 1/57 and 14/57, *Usines à tubes de la Sarre v High Authority*, ECR 1957-1958 p.105; Case 60/81, *IBM* v *Commission*, EU:C:1981:264, paragraph 9; Case 22/70, *Commission v Council*, EU:C:1971:32, paragraph 42; Case C-325/91, *France v Commission*, ECR I-3283, paragraph 9; case C-57/95, *France v Commission*, EU:C:1997:164, paragraph 22;
Case C-147/96, *Netherlands* v *Commission* [2000] ECR I-4723, paragraph 27; Joined Cases C-463/10 P and C - 475/10 P*, Deutsche Post and Germany v Commission*, EU:C:2011:656, paragraph 36. In this sense, C-303/90, *France v Commission*, [1991] ECR I-5315, paragraphs 8 and 10; Joined Cases C-213/88 and C-39/89, *Grand Duchy of Luxemburg v Parliament* [1991] ECR I-5643, paragraph 15; C-366/88, *France v Commission*, [1990] ECR I-3571, paragraphs 8 and 11.

56 Joined Cases 1/57 and 14/57, ibid.

57 Case C-57/95, see footnote 55, paragraph 22; Case C-325/91, see footnote 55, paragraph 26.

58 Case C-325/91, see footnote 55, paragraph 30.

59 Joined Cases C-463/10 P and C-475/10 P*,* see footnote 55, paragraph 36; see also Case 60/81, footnote 55, paragraph 9 ("*legal effects…which are binding*").

75. In this context, it is recalled that Article 12 of the Aarhus Regulation provides for the possibility to institute proceedings before the Court "*in accordance with the relevant provisions of the Treaty*" and, therefore, in compliance with the conditions laid down in Article 263 TFEU. As mentioned in paragraph 24 above, the General Court has interpreted the concept of an act having "*legally binding and external effects*", within the meaning of Article 2(1)(g) of the Aarhus Regulation, as being consistent with that of an act producing legal effects vis-à-vis third parties, within the meaning of Article 263 TFEU[60].

76. In the light of this case-law, it is reasonable to conclude that there is no difference of substance, for the purposes of the definition of an administrative act under the Aarhus Regulation, between the use of the terms "*having legal and external effects*" and "*having legally binding and external effects*". Consequently, the CLS considers that the amendment suggested by the ACCC would not alter the substantive scope of the definition of "administrative act" contained in the Proposal. This can be dealt with in a number of ways. The term "*legally binding and external effect"* could be retained, and the fact that this is to be considered as equivalent to the term "*having legal effects vis-à-vis third parties*" can be explained to the ACCC. Alternatively, the wording suggested by the ACCC could be accepted, and explanatory language could be inserted in a recital to explain that the definition should be read in line with Article 263 TFEU and the related case-law[61].

B. Acts "*adopted by a Union institution or body*"

77. The ACCC 2021 Advice also comments on one of the other changes made in the revised definition of "*administrative act*" under the Proposal. This refers to non-legislative acts "*adopted by a Union institution or body(...)*" (emphasis added). The ACCC considered that the use of the term "*adopted*" might limit "*the scope of acts that may be subject to challenge under Article 9(3) of the Aarhus Convention*"[62].

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60 Case T-9/19, see footnote 31, paragraph 149.

61 Another approach could have consisted in amending the wording of Article 2(1)(g) of the Aarhus Regulation so as to align it to the wording of Article 263 TFEU directly.

62 Paragraph 46 of the ACCC 2021 Advice.

78. The ACCC did not elaborate further on its concerns, but the CLS considers that it is possible to make the following general comments in response to this concern.

79. It is reasonable to interpret the term "adopted" as referring to acts which are no longer in draft form. Such acts have been finalised in accordance with the procedures applicable to them and are capable of being the subject of the internal review procedure provided for in Article 10 of the Aarhus Regulation, provided that they also meet the other requirements of the definition. As discussed above in paragraph 74, the Court has consistently found, in relation to Article 263 TFEU, that acts which have legal effects vis-à-vis third parties may be challenged, regardless of their form[63]. By analogy with this case-law, for the purposes of the internal review under the Aarhus Regulation, the precise term used in order to indicate that the act is definitive in nature ("*adopted*", "*endorsed*", "*approved*" etc.) does not matter for the purposes of determining whether it has "*legally binding and external effects*" pursuant to Article 2(1)(g) of the Aarhus Regulation.

80. Therefore, the CLS considers that the use of the term "*adopted*" in relation to the Union acts falling within the definition of "*administrative act*" in the Proposal does not limit the scope of acts which can be subject to internal review under the Aarhus Regulation.

81. It is recalled that there are many instances where the Treaties refer simply to acts "of" the institutions[64]. An alternative approach would be to use the same wording here; this would not alter the scope of the provision either.

IX. IMPLEMENTING MEASURES AT MEMBER STATE LEVEL

82. The Proposal makes a distinction between acts requiring implementing measures at EU level, for which internal administrative review is provided, but only at the moment at which the implementing measure in question is adopted, and acts requiring implementing measures at Member State level, for which internal review is not provided[65].

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63 In this sense, Case C-147/96, see footnote 55, paragraph 27.
64 See, notably, Article 4 TEU and Article 263 TFEU itself.
65 See Article 1(1) and (2)(a) of the Proposal.

83. The ACCC 2021 Advice indicates that it is not in compliance with the Aarhus Convention for Union acts requiring implementing measures at national level to be exempt from internal review. It acknowledges that the Union institutions and bodies could not conduct an internal review of the national implementing measures themselves. However, it argues that internal review of the Union act should be allowed once the national implementing measures are adopted.

84. The CLS considers that this Advice fails to take account of the specificity of the EU legal order, and of the different remedies available concerning Union and national acts in the field of environmental law. Where national implementing measures of a Union act are required, a qualified entity seeking to challenge that measure should seek redress in accordance with the applicable national remedies. This is consistent with the approach taken for regulatory acts entailing implementing measures in Article 263, fourth paragraph, TFEU which cannot be the subject of an action for annulment pursuant to this paragraph because of the possibilities which exist for challenging such implementing measures[66]. It is recalled that the scope of this paragraph was broadened by the Treaty of Lisbon, in order to provide for judicial review by non-privileged applicants of regulatory acts of direct concern to them, but only where they do not entail implementing measures. As indicated in paragraph 24 above, the General Court has found, in Case T-9/19 (*ClientEarth v EIB*), that acts capable of internal review pursuant to Article 10 of the Aarhus Regulation should be interpreted in accordance with the provisions of Article 263 (paragraph 149 of the judgment).

85. With respect to national remedies, in addition to any administrative possibilities for review of the national implementing measures which may exist, there are avenues of judicial redress which provide an appropriate forum to challenge the validity of the Union act on the basis of which those implementing measures have been taken.

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[66] CONV 636/03; CONV 619/03; Working Group II of the European Convention - Working Document no. 21 of 7 October 2002.

86. This can be achieved by instigating proceedings against the national implementing measures in judicial proceedings in the Member State in question, in which the applicant can plead the invalidity of the Union act requiring such national implementation. In that context, the national court must request a preliminary ruling from the Court, pursuant to Article 267 TFEU, concerning the validity of the Union act[67].

87. As indicated in paragraph 17 above, Article 9(3) of the Aarhus Convention requires administrative or judicial remedies to be made available for acts contravening environmental law, but does not require both. The CLS considers that the exclusion of Union acts requiring implementing measures at national level from internal review, as provided for in the Proposal, is consistent with the fundamental principles of the Union legal order and with its system of judicial review.

X. CONCLUSION

88. In conclusion, the Council Legal Service is of the opinion that:

a) the definition of "*administrative acts*" capable of internal review pursuant to Article 10 of the Aarhus Regulation should be further clarified in the draft text so as to make it clearer that this concept covers both acts of individual scope and regulatory acts capable of challenge pursuant to Article 263, fourth paragraph, TFEU;

b) the proposed extension of the internal review procedure to cover non-legislative acts of general scope, as set out in the Proposal, is compatible with Article 263, fourth paragraph, TFEU;

[67] C-456/13 P, *T & L Sugars e Sidul Açúcares v Commission*, EU:C:2015:284, paragraphs 29-31; C-274/12 P, *Telefónica v Commission*, EU:C:2013:852, paragraphs 27-29; C-583/11 P, see footnote 33, paragraph 93.

c) in the absence of clear case-law on the matter, it cannot be excluded that, in certain circumstances, Council decisions pursuant to Article 218(5) TFEU where provisional application is provided for, as well as Council decisions pursuant to Article 218(6) and Article 218(9) TFEU could be the subject of an internal review pursuant to the Aarhus Regulation, if it is amended as proposed;

d) the provisions of the Aarhus Regulation apply to measures adopted pursuant to the TFEU (or TEU) which concern the field of nuclear energy, but do not apply to measures adopted pursuant to the Euratom Treaty;

e) it is legally possible, if so decided by the Union legislature, for the Aarhus Regulation to be amended so as to broaden the scope of the right to request internal review beyond the notion of "*qualified entities*" provided for in Article 11 of the current version of that Regulation;

f) for the purposes of the Aarhus Regulation, and in the light of the case-law of the Court of Justice, there is no substantive difference between the term "*legally binding and external effects*" and the term "*legal and external effects*" in the definition of "*administrative act*";

g) the use of the term "*adopted*" (in the Proposal) with respect to administrative acts which may be the subject of an internal review does not restrict the scope of that review;

h) the exclusion (in the Proposal) from the internal review procedure of provisions of administrative acts requiring implementing measures at Member State level is consistent with the Union's system of judicial review and with Article 9(3) of the Aarhus Convention.