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NOTE

From:	General Secretariat of the Council
To:	Council
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Subject:	Proposal for a Regulation of the European Parliament and of the Council on amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies – General approach

1. On 14 October 2020, the Commission transmitted to the Council a Proposal¹ 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 bodies².

¹ Doc. 11853/20.

² OJ L 264 of 25.9.2006, p.13.

2. The proposal aims at addressing findings by the Aarhus Convention Compliance Committee (ACCC) of 2017 in case ACCC/C/2008/32³ concerning the EU's compliance with the Convention, while fully respecting the fundamental principles of the EU legal order and its system of judicial review. In particular, the proposal seeks to broaden the range of acts which can be subject to administrative review.
3. In complement to the proposal, the Commission submitted a Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions entitled "Improving access to justice in environmental matters in the EU and its Member States"⁴. The Communication sets out a number of priority actions to facilitate access to justice for NGOs in environmental matters at national level and in the EU.
4. On 1 December 2020, the European Parliament has appointed Mr Christian Doleschal (EPP, DE) as Rapporteur on the file for the Committee on the Environment, Public Health and Food Safety (ENVI). The EP is expected to vote on its position in plenary in May 2021.
5. The European Social and Economic Committee has informed the Council that it intends to adopt its opinion at its plenary meeting of 26-28 January 2021. The Committee of Regions has informed the Council that it will not deliver an opinion.
6. The proposal was examined at working party level in a number of meetings, resulting in broad agreement on a Presidency compromise text aiming to clarify certain provisions of the Commission proposal⁵. The text was subsequently put under an informal silence procedure which was not broken.

³ See <https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html>

⁴ Doc. 11854/20.

⁵ Doc. 13018/20.

7. On 9 December 2020, the Permanent Representatives Committee confirmed the agreement on the compromise text as set out in Annex to this note, and agreed to forward the text to the Council in view of agreeing on a general approach at the Council (Environment) on 17 December 2020. SE indicated that it maintained a parliamentary scrutiny reservation which was expected to be lifted before the Council meeting of 17 December.
8. The text in Annex to this note reflects this compromise. Additions to the Commission proposal are underlined, deletions are marked by ~~striketrough~~.
9. The Council is invited to examine the compromise text as set out in the Annex to this note with a view to reaching agreement on a general approach.
10. The General approach will constitute the Council's mandate for future negotiations with the European Parliament.

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on amending Regulation (EC) No 1367/2006 of the European Parliament and of the Council of
6 September 2006 on the application of the provisions of the Aarhus Convention on Access to
Information, Public Participation in Decision-making and Access to Justice in Environmental
Matters to Community institutions and bodies**

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee ¹,

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

Acting in accordance with the ordinary legislative procedure,

Whereas:

¹ OJ C , , p. .

² OJ C , , p. .

- (1) The Union and its Member States are Parties to the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ('the Aarhus Convention')³, each with its own as well as shared responsibilities and obligations under that Convention.
- (2) Regulation (EC) No 1367/2006 of the European Parliament and of the Council ⁴ was adopted in order to contribute to the implementation of the obligations arising under the Aarhus Convention by laying down rules on its application to Union institutions and bodies.
- (3) In its Communication to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions of 11 December 2019, entitled 'The European Green Deal' the Commission committed itself to consider revising Regulation (EC) No 1367/2006 to improve access to administrative and judicial review at Union level for citizens and environmental non-governmental organisations who have concerns about the compatibility with environmental law of decisions with effects on the environment. The Commission also committed to take action to improve their access to justice before national courts in all Member States; to this end, it issued a Communication on '*Improving access to justice in environmental matters in the EU and its Member States*'.
- (4) Taking into account the provisions of Article 9(3) of the Aarhus Convention, as well as concerns expressed by the Aarhus Convention Compliance Committee ⁵, Union law should be brought into compliance with the provisions of the Aarhus Convention on access to justice in environmental matters in a way that is compatible with the fundamental principles of Union law and with its system of judicial review.

³ Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ L 124, 17.5.2005, p. 1).

⁴ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.9.2006, p. 13).

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

- (4a) In this regard, a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee was requested by Decision (EU) 2018/881 ⁶ of the Council, to be followed, if appropriate, by a proposal for amending Regulation (EC) No 1367/2006. Further, the European Parliament in its resolutions of 15 and 16 November 2017 ⁷ and on 15 January 2020 ⁸ requested an amendment of Regulation (EC) No 1367/2006.
- (5) The limitation of the internal review provided for in Regulation (EC) No 1367/2006 to administrative acts of individual scope is the main obstacle for environmental non-governmental organisations seeking to have recourse to internal review under Article 10 of that Regulation also as regards administrative acts that have a wider scope. It is therefore necessary to broaden the scope of the internal review procedure laid down in that Regulation to include non-legislative acts of a general scope.
- (6) The definition of an administrative act for the purposes of Regulation (EC) No 1367/2006 should include non-legislative acts. However, a non legislative act might entail implementing measures at national level against which environmental non-governmental organisations can obtain judicial protection, including before the Court of Justice of the European Union (CJEU) through a procedure for preliminary ruling under Article 267 TFEU. Therefore, it is appropriate to exclude from the scope of the internal review those provisions of such non-legislative acts for which Union law requires implementing measures at national level.

⁶ Council Decision (EU) 2018/881 of 18 June 2018 requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006, ST/9422/2018/INIT, OJ L 155, 19.6.2018, p. 6–7.

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

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

- (7) In the interest of legal certainty, in order for any provisions to be excluded from the notion of administrative act, Union law must explicitly require the adoption of implementing acts for those provisions.
- (8) In order to ensure effectiveness, the review of those provisions of an administrative act for which Union law explicitly requires implementing measures at Union level may also be sought when the review of the Union-level implementing measure is requested.
- (9) The scope of Regulation (EC) No 1367/2006 covers acts adopted under environmental law. By contrast, Article 9(3) of the Aarhus Convention covers challenges to acts that ‘*contravene*’ law relating to the environment. Thus, it is necessary to clarify that internal review should be carried out in order to verify whether an administrative act contravenes environmental law.
- (10) When assessing whether an administrative act contains provisions which may, ~~because of their effects~~, contravene environmental law, it is necessary to consider whether such provisions may have an adverse effect on the attainment of the objectives of Union policy on the environment set out in Article 191 TFEU. As a result, the internal review mechanism should also cover acts that have been adopted in the implementation of policies other than Union policy on the environment.
- (10a) In line with the case law of the CJEU⁹, 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.
- (11) In order to allow enough time to carry out a proper review process, it is appropriate to extend time limits laid down in Regulation (EC) No 1367/2006 for requesting an administrative review and those applicable to the Union institutions and bodies to respond to such a request.

⁹ Joined Cases 1/57 and 14/57 Usines à tubes de la Sarre v High Authority [1957] ECR 105, p. 114; Case 22/70 Commission v Council [1971] ECR 263, ECLI:EU:C:1971:32, para 42; Case C-325/91 France v Commission [1993] ECR I-3283 para 9; case C-57/95 France v Commission ECLI:EU:C:1997:164, para 22; Joined Cases C 463/10 P and C 475/10 P, Deutsche Post and Germany v Commission, ECLI:EU:C:2011:656, para 36.

- (12) According to the case law of the CJEU ¹⁰, environmental non-governmental organisations requesting an internal review of an administrative act are required to put forward facts or legal arguments of sufficient substance to give rise to serious doubts when stating the grounds for their request of review.
- (13) Since the objectives of this Regulation, namely to lay down detailed rules to apply the provisions of the Aarhus Convention to Union institutions and bodies, cannot be achieved by the Member States, but can only be achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve those objectives.
- (14) This Regulation respects the fundamental rights and observes the principles recognised by the Charter of Fundamental Rights of the European Union (the Charter), in particular the right to good administration (Article 41) and the right to an effective remedy and to a fair trial (Article 47). This Regulation contributes to the effectiveness of the Union system of administrative and judicial review, and as a result, strengthens the application of Articles 41 and 47 of the Charter and thereby contributes to the rule of law, enshrined in Article 2 of the Treaty on European Union (TEU).
- (15) Regulation (EC) No 1367/2006 should therefore be amended accordingly.

HAVE ADOPTED THIS REGULATION:

Article 1

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

1. Article 2(1)(g) is replaced by the following:

¹⁰ Judgment of the Court of Justice of 12 September 2019 in Case C-82/17 P, *TestBioTech v Commission*, ECLI:EU:C:2019:719, at para 69.

‘(g) ‘administrative act’ means any non-legislative act adopted by a Union institution or body, which has legally binding and external effects ~~and contains provisions that may, because of their effects, contravene environmental law within the meaning of point (f) of Article 2(1), excepting those provisions of this act for which Union law explicitly requires implementing measures at Union or national level;~~

2. Article 10 is amended as follows:

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

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

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.

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

2. The Union institution or body referred to in paragraph 1 shall consider any such request, unless it is clearly unsubstantiated. The Union institution or body shall state its reasons in a written reply as soon as possible, but no later than 16 weeks after receipt of the request.’

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

‘In any event, the Union institution or body shall act within 22 weeks from receipt of the request.’

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

4. Throughout the text of the Regulation, including in the title, the word ‘Community’ is replaced by the word ‘Union’ and any necessary grammatical changes are made.

Article 2

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

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

Done at Brussels,

For the European Parliament

The President

For the Council

The President