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COMMISSION STAFF WORKING DOCUMENT

**Report on European Union implementation of the Aarhus Convention in the area of
access to justice in environmental matters**

1. INTRODUCTION

1.1 The political context

This report and the related external study deliver a key part of the European Commission's commitment to developing a response to critical positions taken by an international body, the Aarhus Convention Compliance Committee ('the ACCC'), *vis-à-vis* the European Union ('the Union'). These critical positions – formally referred to as 'findings' - are to the effect that the Union does not provide members of the public, including environmental associations, with enough possibilities through administrative or judicial review to legally challenge acts of the Union institutions for violations of Union environmental law.

The Union response to these findings concerning its system of administrative and judicial redress is important for several reasons. First, the findings touch on the accountability of the Union institutions in a subject-area, environmental policy, on which the Union aspires to global leadership and which surveys consistently show to be a top priority of the European public. Second, the findings touch on the protection of rights and interests that are linked to the environment, such as the safeguarding of the public from the health impacts of pollution. The concept of a Europe that protects is therefore central to what is at stake. Third, the Union works through and is committed to the multi-lateral legal order.

But the importance of the report does not stop there. The ACCC findings touch on a basic principle of the Union legal order, which is the principle of judicial protection by means of the system of remedies provided for in the Treaties in order to protect rights derived from Union law. This is one of the fundamental principles of the EU legal order. Thus, it is not possible to think of dislodging and replacing such a principle. The Union response must therefore respect and work within its existing legal order.

In addressing the findings, the Commission services have endeavoured to be analytical, consultative and constructive. They have looked in detail at all the forms of administrative and judicial review that feature in the findings and have consulted the general public and Member States. The Parliament has also been invited to participate in events where progress was presented. While representing an important step, the report and the study do not conclude the matter. Further decision-making will be necessary, based on a continuation of the constructive approach that the Commission is committed to following.

1.2 The decisions leading to this report

The Union is a Party to the Convention on access to information, public participation and access to justice in environmental matters (the ‘[Aarhus Convention](#)’)¹, as are its Member States. In order to contribute to the implementation of the Aarhus Convention, the Union legislator adopted the ‘[Aarhus Regulation](#)’, 1367/2006².

Following a complaint by a non-governmental organisation (NGO) in 2008, the ACCC, which verifies whether Parties correctly implement the Convention, considered the Union to be in breach of the Convention's rules on access to administrative or judicial review set out in its Article 9(3) and (4). This is case ACCC/2008/32.

According to the Committee’s [findings](#) of 17 March 2017³, neither the case-law of the Court of Justice of the European Union (CJEU)⁴ on access to the CJEU, nor the Aarhus Regulation provide adequate administrative or judicial review of non-legislative environmental acts⁵. The Committee recommended that the CJEU modifies its case-law or that the Union amends the Aarhus Regulation or adopts new legislation. The findings have not yet been endorsed by a meeting of the parties (MOP).⁶

The MOP which took place in Budva in September 2017 could not agree on this case and decided to postpone consideration to its next session in 2021. The Union declared its intention to ‘*continue to explore ways and means to comply with the Aarhus Convention in a way that is compatible with the fundamental principles of the Union legal order and with its system of judicial review, taking into account concerns expressed within the Convention.*’ This is the Budva Declaration and it has guided the preparation of this report.

On 8 May 2018, the Commission published a [Roadmap](#) on Union implementation of the Aarhus Convention in the area of access to justice in environmental matters⁷, which sets out the follow-up to the declaration. It announced the launch of an external study on the redress possibilities in environmental matters which are available both directly before the

¹ 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, OJL 124, 17.5.2005, p1.

² Regulation (EC) No 1367/2006 of the European Parliament and the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access Information, Public participation in Decision-making, and Access to Justice in Environmental Matters to Community institutions and bodies, OJL 264, 25.9.2006, p13.

³ This was the second part of findings in the case, which have appeared in two parts. Part I issued on 24 August 2011 and is available at https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-32/ece.mp.pp.c.1.2011.4.add.1_as_submitted.pdf. Part II is available at: <https://www.unece.org/fileadmin/DAM/env/pp/compliance/CC-57/ece.mp.pp.c.1.2017.7.e.pdf>

⁴ The CJEU consists of the General Court and the Court of Justice. The Report sometimes refers to these separately.

⁵ Legislation is excluded from the Convention’s scope.

⁶ Pursuant to the rules on review of compliance of the MoP. Ssee Decision on review of compliance I/7, Rule 35; see also Aarhus Implementation Guide, pages 224-225.

⁷ https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2432060_en.

CJEU and via the courts of the Member States. The study was to evaluate the system of administrative and judicial review, identify any shortcomings, examine options for addressing them and assess their impact. In line with the Commission's procedures, the study would appear with a Staff Working Document (SWD) of the Commission services, which is the present report.

In the same vein, the Council adopted on 18 June 2018 [Decision \(EU\) 2018/881](#)⁸, based on Article 241 of the Treaty on the Functioning of the European Union (TFEU). It requested the Commission to submit, by 30 September 2019, a study on the Union's options for addressing the findings, and to submit, by 30 September 2020, if appropriate in view of the outcomes of the study, a proposal for amending the Aarhus Regulation, or otherwise to inform the Council on other measures.

The study started on 14 August 2018 and progressed according to the indications in the Roadmap. An open public consultation ran until 14 March 2019. This served to gather information and views on the effectiveness of access to justice in environmental matters and how the Union has implemented the Convention. [The final study document](#) is being made available at the same time as the present report.

1.3 The ACCC findings in the context of the Union legal order

The Union is a committed Party to the Aarhus Convention, and indeed Union law played a significant role in shaping it.⁹ The Commission has recently, in the framework of the [Sibiu Declaration](#) of 9 May 2019¹⁰, reaffirmed its commitment to working with its international partners to jointly preserve the environment. However, the Union can only deliver within the remit of its competences and pursuant to the fundamental principles of Union law.

The Union indicated the extent of its competence in declarations ('[Declarations](#)') when it signed and approved the Convention. Accordingly, the Union institutions apply the Convention within the framework of the relevant Union rules.¹¹ As the Union outlined during the procedure in case ACCC/2008/32, this does not mean that the Union does not intend to properly implement the obligations of the Aarhus Convention to which it is a Party, or that it somehow requests a lower standard of implementation than state parties. It rather means that the specific features of the Union legal order should not be ignored. Indeed, as the CJEU has recalled, the Convention was '*manifestly designed with the*

⁸ 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, OJL 155, 19.6.2018, p.6.

⁹ See page 16 of the Aarhus Convention Implementation Guide.

¹⁰ <https://www.consilium.europa.eu/en/press/press-releases/2019/05/09/the-sibiu-declaration/>.

¹¹ The relevant text from the Declarations, as well as other relevant articles for the purpose of this document, are quoted in the Annex to the present report.

national legal orders in mind, and not the specific legal features of institutions of regional economic integration, such as the European Union'.¹²

The Aarhus Convention concluded by the Union binds its institutions and prevails over acts of secondary Union legislation. However, in the context of the Union legal order, Union primary law, such as the Treaties, takes precedence over the Aarhus Convention.¹³ No change of the Treaties was considered necessary when the Union adhered to the Convention, and the above-mentioned Declarations further guard against it. The present report therefore takes as its point of departure the premise that no modification of Union primary law is requested or needed to fulfil the obligations under the Aarhus Convention.

The primacy of the Treaties over the Aarhus Convention equally implies that the fundamentals and the logic of the Union system of judicial redress have to be preserved. The ACCC findings focus on administrative review under the Aarhus Regulation and on direct access to the CJEU, dismissing the role of redress via the courts of the Member States¹⁴. The national courts are, however, an integral part of the Union system of judicial redress: they are ordinary courts of Union law, and linked to the CJEU within the system of references established under Article 267 TFEU. They are accessible by both individuals and environmental NGOs. In that framework, the national courts can ask the CJEU to rule on the validity of acts of EU institutions, bodies, offices or agencies. This system is a cornerstone of Union law and part of the 'legal context' to which the Declarations refer. Therefore, this report needs to look at the Union system of judicial redress as a whole, taking account of the national courts as well as the CJEU.

As to the Committee's criticisms of CJEU case-law (which are very extensive and relate to how the CJEU has interpreted provisions of Union primary law), and the Committee's recommendation regarding a modification of this case-law, it has to be borne in mind that, in the Union legal order, the authority to interpret Union law rests with the Union judicature.¹⁵ An international agreement such as the Aarhus Convention cannot affect the allocation of powers fixed by the Treaties, or consequently, the autonomy of the Union legal order.¹⁶

Certainly, case-law may evolve and become more comprehensive. However, any such development is decided by the Union judicature itself. The EU underlined in Budva that in view of the separation of powers it is not possible in the Union legal order for instructions to be given to the CJEU regarding its judicial activities. There are therefore clear limits set by the Union legal system to any follow-up to the ACCC findings via CJEU case-law.

¹² Case C-612/13 P, *ClientEarth*, see notably paragraphs 40 and 41; ECLI:EU:C:2015:486.

¹³ See Case T-600/15, *PAN Europe e.a.*, ECLI:EU:T:2016:601.

¹⁴ See paragraph 90 of Part I of the ACCC findings.

¹⁵ Article 19(1), first subparagraph, Treaty on European Union (TEU).

¹⁶ See Opinion 1/92 [1992], ECLI:EU:C:1992, paragraph 32, Opinion 1/17 [2019] EU:C:2019:341, paragraphs 109 and 110.

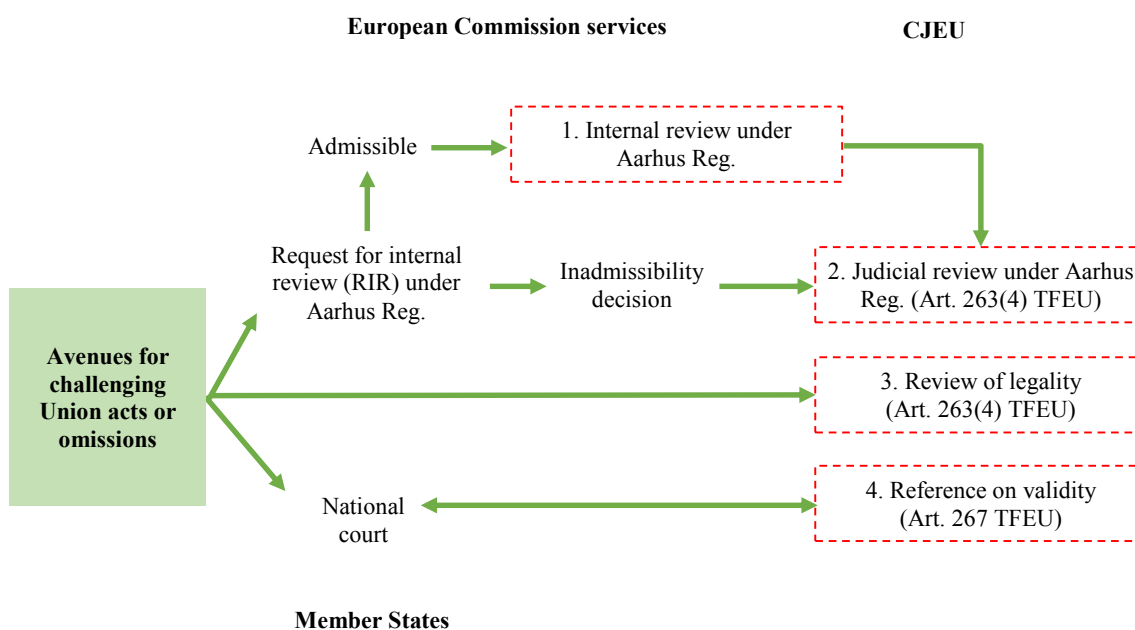
2. SCOPE AND OBJECTIVES OF THE REPORT

2.1 Scope

For the reasons explained in Section 1.3, the report covers the entire Union system of administrative and judicial redress. It outlines how the Aarhus Convention is applied in the Union with regard to legal challenges to acts and omissions of Union institutions, agencies and bodies relating to the environment¹⁷. It looks at how access to justice works, both via administrative review under the Aarhus Regulation and direct judicial challenges at Union level (Article 263(4) TFEU), on the one hand, and via Member States' courts (through the validity reference mechanism under Article 267 TFEU), on the other. It also looks at the plea of illegality under Article 277 TFEU. Taken together, all of these make up the Union system of administrative and judicial redress that the report examines. For ease of reference, key texts are set out in the annex to the report.

A graphic display of the different means of administrative and judicial redress is set out below.

Figure 1: Union system of administrative and judicial review



Article 263(4) TFEU allows natural or legal persons to institute proceedings directly before the CJEU (the General Court) against an act addressed to them (first limb) or an act which is of direct and individual concern to them (second limb) or a regulatory act which is of direct concern to them and does not entail implementing measures (third limb).

¹⁷ These are referred to in the report as Union acts.

The Lisbon Treaty, which entered into force in 2009, added this last limb: applicants no longer need to show that they are individually concerned by a contested act, provided that the other admissibility conditions are met.

As the CJEU has held on a number of occasions,¹⁸ Article 9(3) of the Aarhus Convention is not directly applicable in the Union legal order and cannot be invoked as a criterion to judge the legality of Union acts. The Parties have wide discretion to implement it. Article 9(3) only applies where ‘*the criteria, if any, laid down by ... national law*’ are met.¹⁹ Article 9(3) is thus subject, in its implementation and effects, to the adoption of subsequent measures.

This is where the Aarhus Regulation, which preceded the Lisbon Treaty, comes in, as it grants administrative review possibilities specifically to environmental NGOs. Under the Regulation, NGOs meeting certain criteria²⁰ are deemed to have a legal interest to bring certain proceedings on behalf of the environment. According to its Article 10, qualified NGOs can make a request for an administrative review (referred to as an ‘*internal review*’) to the Union institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act.

Article 12 grants NGOs the right to appeal a negative decision adopted in reply to this administrative review request before the CJEU. The negative decision brings into play the first limb of Article 263(4) TFEU, referred to above. The Aarhus Regulation therefore not only created a new remedy, the administrative review, it also established a means whereby environmental NGOs could use the first limb of Article 263(4) TFEU.

Article 263(4) TFEU and the Aarhus Regulation do not exhaust the system of redress, which also includes Article 267 and Article 277 TFEU.

Article 267 TFEU opens the possibility for natural and legal persons – including environmental NGOs - to question the validity of Union acts before national courts and seek to have the latter make a validity reference to the Court of Justice.

Finally, Article 277 TFEU allows indirect challenges to an act of general scope. It can be triggered even after the expiration of the time limit in Article 263. However, it can only be invoked in the course of another procedure, usually an action for annulment under Article 263, on the same grounds of review as provided for in the latter. It may result in a declaration of inapplicability of the indirectly contested act.

¹⁸ See for example judgment by the CJEU in Joined Cases C-404/12 P and C-405/12 P, *Stichting Natuur en Milieu and Pesticides Action Network*, paragraphs 47 and 51; ECLI:EU:C:2015:5. See equally judgment in Joined Cases C-401/12 P to C-403/12 P, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, paragraph 55; ECLI:EU:C:2015:4.

¹⁹ See Case C-240/09, *Lesoochránárske zoskupenie (Slovak Bears I)*, ECLI:EU:C:2011:125

²⁰ These are set out in Article 11 of the Aarhus Regulation.

2.2 Objectives

This report assesses the extent to which, taken as a whole, the Union system of administrative and judicial redress provides access to justice in environmental matters at Union level in a way which is consistent with the Aarhus Convention while at the same time being aligned with the fundamental principles of the Union legal order. In doing so, it takes account of the findings of the ACCC.

The aim of the report is to facilitate the Union's response to the findings. As it is a Staff Working Document, it cannot, however, prejudge any decision on follow-up, which falls under the Commission's right of initiative, or a decision on any Commission legislative proposal, which falls under the responsibility of the Union legislature.

The external study presents more detailed information and evidence about the subject-matter examined, and covers all the aspects mentioned in the Roadmap and referred to in Section 1.2 of the present report.

3. OVERVIEW OF UNION ACTS CONCERNED AND IMPLEMENTATION IN PRACTICE OF ADMINISTRATIVE AND JUDICIAL REVIEW

This section presents an overview of the different types of Union acts likely to be affected by use of administrative review and judicial review. It then looks at the implementation in practice of each of the administrative and judicial review mechanisms, providing boxes with examples to help the reader understand how each mechanism operates.

3.1 Overview of Union acts concerned

Article 9(3) of the Aarhus Convention refers to administrative review and judicial review in relation to '*acts and omissions*'.

Union institutions, bodies, offices or agencies ²¹adopt many different types of act, and there may be corresponding omissions²². Some acts are addressed to specific natural or legal persons. The invoicing decision mentioned in Box 6 below is one such act: other examples are the Commission decisions on administrative review addressed to specific environmental NGOs and mentioned in Boxes 2 and 3. Other acts are not addressed to specific natural or legal persons but are nevertheless acts of individual scope. Finally, there are acts which are much broader in scope: these are acts of general application. The Commission implementing decision in Box 5 is an example.

To further understand the context, it is useful to mention Articles 6, 7 and 9 of the Aarhus Convention. These refer to three tiers of decision-making, in particular '*decisions on proposed activities*'²³, the '*preparation of plans and programmes*'²⁴ and the '*preparation*

²¹ To facilitate reading of the present report, references will generally be to the Commission.

²² To facilitate reading, omissions are not mentioned further.

²³ Article 6.

*of executive regulations and/or generally applicable legally binding normative instruments.*²⁵

The last-mentioned upper tier is the most significant so far as the European Commission decision-making is concerned. Using delegated or implementing powers, the European Commission supplements Union legislation with detailed subsidiary provisions of general application. As for the first two tiers, land-use consents and environmental permits as well as land-use plans and programmes are, in contrast, a matter for decision-makers within the Member States.

The upper-tier acts of general application adopted by the Commission can be described as *'regulatory acts'*. *'Regulatory acts'* have been given a broad meaning in the context of Article 263(4). So far as the study is concerned, they cover all non-legislative acts of general application²⁶.

The study has prepared an inventory of types of Union acts which, according to the study, might be considered as relating to the environment. This inventory concerns the Commission. The study documents in detail the method, data and evidence used to compile it.

The study's estimates indicate that there may be in the order of 490 legal provisions in Union legislation (*'parent legislation'*) that require or enable the Commission to adopt a regulatory act related to the environment. The estimates also indicate that, since 2006, when the Aarhus Regulation was adopted, in the order of 1,700 acts have been adopted under these provisions. The most common kinds include implementing rules and adaptations to technical or scientific progress. Although it accounts for the majority of such acts, the Commission is only one relevant decision-maker. There are others, as Box 6 in Section 3.5.2 below shows.

3.2 Implementation of administrative and judicial review pursuant to the Aarhus Regulation

3.2.1 The administrative review mechanism

The Aarhus Regulation sets out the rules governing administrative review of an administrative act by the Union institutions. A review can be requested by qualified NGOs, but not by individuals.

The administrative act needs to be *'of individual scope'*, to have *'legally binding and external effects'* and to be adopted *'under environmental law'*.

Furthermore, Article 2(2) of the Regulation excludes from the notion of administrative acts measures taken by a Union institution in its capacity as an administrative review body, notably under competition rules, and infringement, Ombudsman and OLAF

²⁴ Article 7.

²⁵ Article 8.

²⁶ See judgment in Joined Cases C-622/16P to C-624/16P, *Montessori*, ECLI:EU:C:2018:873, paragraph 28.

proceedings. Recital 11 of the Regulation states that ‘Given that acts adopted by a Community institution or body acting in a judicial or legislative capacity can be excluded, the same should apply to other inquiry procedures where the Community institution or body acts as an administrative review body under provisions of the Treaty.’ This alludes to Article 2(2) of the Aarhus Convention, which *inter alia* excludes from the definition of ‘public authority’ bodies or institutions acting in a judicial capacity.

Acts of ‘individual scope’ are not defined in the Aarhus Regulation, but the CJEU has explained their opposite, i.e. acts of general application. An act of general application ‘applies to objectively determined situations and entails legal effects for categories of persons envisaged generally and in the abstract’.²⁷

Article 2(1)(f) defines ‘environmental law’ as Union legislation, which ‘irrespective of its legal basis’, contributes to the pursuit of the objectives of Union policy on the environment as set out in the Treaty.

As described in Article 10, the procedure for administrative review is quite simple. The request needs to be in writing, be lodged within six weeks of the administrative act, and state the grounds for review. As for the burden of proof, the Court of Justice has confirmed that ‘a party requesting the internal review of an administrative act under environmental law is required to put forward the facts or legal arguments of sufficient substance to give rise to serious doubts as to the assessment made in that act by the EU institutions or body’.²⁸

The Union institution has to consider the request, unless it is clearly unsubstantiated. It is required to state its reasons in a written reply within 12 weeks, in exceptional cases 18 weeks.

3.2.2 Experience with administrative review

The study notes that, since its adoption, the Aarhus Regulation has seen 43 requests for administrative review submitted to the European Commission²⁹, of which 29 were considered inadmissible.

The main reason for inadmissibility was that the Commission considered that the challenged act was not of individual scope. Other reasons for inadmissibility were that the challenged act did not have legally binding and external effects, or that the challenged act fell into categories of act – namely, acts relating to competition law and infringements – specifically excluded by the Aarhus Regulation. Some requests were examined as to their merits, but were dismissed. Box 1 below illustrates the use of the administrative review in practice.

²⁷ See e.g. Order of the General Court of 17 July 2015 in Case T-565/14, *EEB*, paragraph 40; ECLI:EU:T:2015:559.

²⁸ See judgment of the Court of Justice of 12 September 2019 in Case C-82/17 P, *TestbioTech v Commission*, at paragraph 69.

²⁹ The [Repository](#) on the Europa website lists requests addressed to the European Commission. It should be noted, however, that other EU bodies can – and do - also receive requests.

Box 1: Request for administrative review of a Commission decision under the Union scheme for greenhouse gas emission allowance trading

On 16 August 2012, an environmental NGO, Ekologický právní servis (subsequently known as the Frank Bold Society), requested the Commission to carry out an administrative review of a Commission decision of 6 July 2012 approving an application by the Czech Government to make a free allocation of emissions trading allowances for the modernization of electricity generation. The Czech Government application and the challenged Commission decision were made under derogation provisions of Directive 2003/87/EC establishing a scheme for greenhouse gas emission allowance trading. These inter alia required the Commission to assess information submitted by the Czech Government in order to avail of a derogation.

On 12 November 2012, the Commission adopted a decision rejecting the request for administrative review on the ground that it was inadmissible. In particular, the Commission relied on the fact that the decision relating to the transitional free allocation was not a measure of individual scope and, therefore, fell outside the Aarhus Regulation's provisions.

The Commission has generally respected the time limits; a few, technically complex cases took longer. In addition, and as the study notes, the Commission has shown flexibility towards some applications which were submitted late. To foster timely replies, the Commission has put the following comment on the Europa website where it reports review requests: *‘Potential applicants are further informed that, in cases involving identical claims from several applicants, a single request co-signed by all applicants and with one NGO as designated contact point to which the Commission’s reply can be sent, is preferred to individual requests.’*

3.2.3 The judicial review mechanism under the first limb of Article 263(4) TFEU following an administrative review

According to Article 12 of the Aarhus Regulation, an entitled NGO can institute proceedings before the CJEU against a decision related to the administrative review request, *‘in accordance with the relevant provisions of the Treaty’*. The reply by the institution constitutes an *‘act addressed to that person’* as referred to in the first limb of Article 263(4) TFEU. Thus, and this is important in the context of the current report, the possibility for administrative review automatically leads to standing for judicial review.

The judicial review relates to the decision by the Union institution on the review request, but does not extend to the merits of the initial act.³⁰

The proceedings before the CJEU are governed by the CJEU rules of procedure³¹. The General Court adjudicates. An appeal to the Court of Justice may follow. Whereas the

³⁰ Judgment of the General Court in Case T-177/13, *TestBioTech eV*, paragraph 56, ECLI:EU:T:2016:736. This judgment was appealed in Case C-82/17 P, but in its own judgment of 12 September 2019 the Court of Justice rejected the appeal. See also further observations on this point under Section 4.4 of the present report.

³¹ https://curia.europa.eu/jcms/upload/docs/application/pdf/2012-10/rp_en.pdf

duration of the administrative review can be counted in months, that of the judicial review must be counted in years – two to four being the general range. Article 263(6) sets out a two-month time-limit for instituting proceedings.

3.2.4 Experience with judicial review of administrative review decisions

The study notes that 20 of the decisions taken on the previously-mentioned 43 requests for administrative review were challenged before the General Court under the first limb of Article 263(4) TFEU. Three cases have been subject to subsequent appeals to the Court of Justice. 4 cases decided by the General Court were considered admissible; thus far, only one has led to the Commission decision on the administrative review being annulled.³² It should be noted that a number of applications were withdrawn before any adjudication took place.

Box 2: Application for judicial review of the Commission decision on administrative review in relation to the Union scheme for greenhouse gas emission allowance trading

On 11 January 2013, the environmental NGO which requested the administrative review mentioned in Box 1 made an application to the General Court seeking to annul both the Commission decision rejecting its request and the earlier Commission decision relating to the free allocation of emissions trading allowances.

The General Court gave its ruling on 29 June 2015³³, rejecting the NGO application. It agreed with the Commission that the decision relating to the transitional free allocation was not a measure of individual scope, and so fell outside the ambit of the administrative review. It also found that the applicant had not challenged the initial act within the time-frame set out in Article 263(6) TFEU.

3.2.5 Conclusions

While the Aarhus Convention does not distinguish in its requirements between acts of general scope and acts of individual scope, currently only acts of individual scope can be made subject to administrative review under the Aarhus Regulation by qualified NGOs. The category is not without meaning: there have been requests for administrative review which have been examined as to their merits by the Commission. However, while most of the environmental NGOs who have tried to use the administrative review mechanism have been treated as eligible, over two-thirds of their requests have been treated as inadmissible at the administrative review stage itself – mostly because the acts were not deemed to be of individual scope. Almost half of the decisions on administrative review subsequently became subject to applications for judicial review under the first limb of Article 263(4) – although not all were ultimately pursued. This shows a high use of this judicial redress mechanism.

³² Judgment of the General Court in Case T-33/16, *TestBioTech eV*, ECLI:EU:T:2018:135

³³ Judgment of the General Court in Case T-19/13, *Frank Bold Society*, ECLI:EU:T:2015:520

3.3 Implementation of judicial review under Article 263(4) TFEU where there is no prior administrative review

3.3.1 The judicial review mechanism under Article 263(4) TFEU

As has been seen, the first limb of Article 263(4) TFEU can be used in conjunction with the Aarhus Regulation. What of use of Article 263(4) when there is no prior administrative review? In this context, environmental NGOs enjoy no special recognition as they do under the Aarhus Regulation.

The first limb of what is now Article 263(4) already existed when the Aarhus Regulation was adopted.

Similarly, the second limb of what is now Article 263(4) already existed when the Aarhus Regulation was adopted.

The Lisbon Treaty entered into force in 2009, three years after the adoption of the Aarhus Regulation. As noted, it modified the standing conditions in Article 263(4) by adding the third limb, which drops the requirement to show individual concern.

3.3.2 Experience with judicial review under Article 263(4) TFEU

The challenge to the invoicing decision mentioned in Box 6 illustrates the potential relevance of this first limb of Article 263(4) independently of the Aarhus Regulation³⁴.

Prior to adoption of the Aarhus Regulation, there had already been attempts by environmental NGOs and individuals to use what is now the second limb of Article 263(4) to challenge Union acts on environmental grounds. These were, however, unsuccessful, because the applicants were unable to show that they were individually concerned by the contested acts.

Box 3: Pre-Aarhus and pre-Lisbon application for judicial review of a Commission funding decision

In a judgment of 2 April 1998, the Court of Justice dismissed an appeal by an environmental NGO against the rejection by what was then the Court of First Instance of the NGO's application for judicial review of a Commission funding decision in respect of the construction of two power plants in Spain.³⁵ The NGO had inter alia submitted arguments based on EU secondary legislation on environmental impact assessment. The Court ruled that the NGO did not satisfy the standing requirements for a direct challenge. It noted the possibility of judicial redress through the national courts as well as the possible use of the reference mechanism³⁶.

The study shows that, since adoption of the Aarhus Regulation, there have been over 30 applications for judicial review of acts not subject to administrative review requests. A

³⁴ In terms of the possible relevance of the first limb, it may be noted that some environmental NGOs may be the addressees of specific funding decisions of the European Commission. Although no first-limb legal challenges by NGOs to such funding decisions have arisen to date, they are conceivable.

³⁵ Case C-321/95 P, *Greenpeace and Others*, ECLI:EU:C:1998:153.

³⁶ *Ibid*, paragraph 33.

majority of these have been brought by economic operators. Only a handful have been brought by environmental NGOs. Some applications post-date Lisbon. It is therefore possible to compare the approach of the CJEU to applications over different periods, including the period post-Lisbon.

In broad terms, the modifications introduced by the Lisbon Treaty have not triggered major changes in the case-law with respect to the possibilities for environmental NGOs – which still need to fulfil the criterion of ‘direct concern’ under the third limb – to challenge Union acts. An act is of direct concern when it directly affects the applicant’s legal situation and leaves no discretion to the addressees responsible for its implementation. In a recent judgment, the General Court has acknowledged that local authorities may be directly concerned.³⁷ It has also shown some leeway in terms of the legal effects and other aspects that applicants can invoke in order to show admissibility³⁸.

However, there is no case yet where an environmental NGO was considered directly concerned by the contested act. In Case T-600/15, *PAN Europe e.o.*, mentioned in Box 4 below, the General Court confirmed that a representative association has standing where it represents the interests of its members, who, in turn, have to show themselves to be directly concerned by the challenged measure; however, it may be impossible to show that the members of an environmental NGO are directly concerned.³⁹ Outside of the domain of environmental policy, there is further case-law on the circumstances in which a representative association might be accorded standing⁴⁰.

Box 4: Post-Lisbon application by environmental NGO for judicial review of a Commission decision on a chemical substance

On 22 October 2015, a number of environmental NGOs applied to the General Court for a judicial review of a Commission implementing regulation which had approved the active substance sulfoxaflor under parent Regulation (EC) No 1107/2009 concerning the placing of plant protection products on the market. In its ruling of 28 September 2016, the General Court ruled that the application was inadmissible because the environmental NGOs could not show direct concern. The General Court considered but rejected several arguments submitted by the NGOs as to why they should be considered as having direct concern – arguments based on the right to property and the right to conduct a business; the impact on the objectives of the campaigns pursued by the NGOs; their participation in the decision-

³⁷ Judgment of the General Court in Joined Cases T-339/16, T-352/16 and T-391/16, *Ville de Paris e.a.*, see notably paragraph 84; ECLI:EU:T:2018:927. It should be noted that these cases have been appealed to the Court of Justice and the appeals were still pending at the time of preparation of this report.

³⁸ Case C-204/18 P, *Pebagua*, paragraph 55, ECLI:EU:C:2019:425

³⁹ Case T-600/15, *PAN Europe e.o.*, ECLI:EU:T:2016:601.

⁴⁰ See Case T-456/14, *TAO-AFI and SFIE-PE v Parliament and Council*, paragraph 55 ECLI:EU:T:2016:493. The General Court noted that actions brought by associations have been held to be admissible in three types of situations: ‘(i) where a legal provision expressly confers on professional associations a number of powers of a procedural nature; (ii) where the association represents the interests of its members which themselves have locus standi; and (iii) where the association is differentiated by reason of the impact on its own interests as an association, in particular because its position as a negotiator has been affected by the measure of which the annulment is sought (see, to that effect, orders of 8 September 2005, *Lorte and Others v Council*, T-287/04, EU:T:2005:304, paragraph 64 and the case-law cited, and 3 April 2014, *CFE-CGC France Télécom-Orange v Commission*, T-2/13, not published, EU:T:2014:226, paragraphs 27 to 31).’

A final point to note under this heading is a possibility in some circumstances for environmental NGOs to intervene in direct actions brought by other applicants under Article 263 TFEU. This is not equivalent to an independent standing to challenge. Nevertheless, it does show that it may be possible for an environmental NGO to be heard before the CJEU in Article 263 proceedings⁴¹.

3.3.3 Conclusions

Most direct challenges using Article 263(4) fail because the applicants do not satisfy the required conditions under the second and third limbs. It cannot be excluded that the third limb of Article 263(4) will see further CJEU case-law developments, but the existing case-law indicates that, in most circumstances, environmental NGOs are unlikely to be able to successfully invoke it. Post-Lisbon, environmental NGOs must therefore still generally resort to the Aarhus Regulation if they hope to secure the necessary standing to use Article 263(4) at all.

3.4 Validity references under Article 267 TFEU

3.4.1 The validity reference mechanism

Article 267 TFEU is best known for providing national courts with a means of referring questions of interpretation of Union law to the CJEU. However, it also allows national courts to make a reference to the CJEU to decide on the validity of a Union act. The procedural rules are provided in Article 23 of the Statute of the CJEU⁴² and in Title III of the Rules of Procedure of the Court of Justice.⁴³

The role of national courts has been underlined by the Lisbon Treaty, which added a subparagraph to Article 19(1) of the Treaty on European Union (TEU) providing that ‘*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.*’

Article 267 TFEU gives the possibility to lower courts to refer a case to the CJEU and requires national courts of final appeal to refer cases. The discretion of lower court judges is, however, restricted in validity cases. In Case C-314/85, *Foto-Frost*⁴⁴, the CJEU held that national courts cannot themselves rule Union acts invalid but must refer cases involving the question of validity to the CJEU via the reference procedure. This applies when there is a doubt about the validity of a Union act, and the Union act is relevant to

⁴¹ See order of the General Court in Case T-57/11, *Castelnuovo Energia SL* ECLI:EU:T:2014:1021

⁴² Statute of the Court of Justice of the European Union (Consolidated Version), August 2016, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-08/tra-doc-en-div-c-0000-2016-201606984-05_00.pdf

⁴³ Consolidated version of the Rules of Procedure of the Court of Justice of the European Union of 25 September 2012.

⁴⁴ Case C-314/85 *Foto-Frost v Hauptzollamt Luebeck-Ost* [1987] ECR 4199.

the case before the national judge. Hypothetical questions are inadmissible.⁴⁵

The validity reference under Article 267 TFEU generally applies where an act implementing a Union act has been adopted at national level. Here, the question of the validity of the Union act on which it is based arises incidentally.

In cases where there is no implementing act, two different situations can be envisaged: first, the third limb of Article 263(4) TFEU caters for situations where there is no implementing measure, either at national or Union institutional level, and provides for the possibility to challenge the act directly before the CJEU by those having a direct concern; second, a direct challenge to the Union act in front of national courts with a reference to the Court of Justice for a ruling on validity is also possible. Case-law shows that the issue of the validity of a Union implementing act without national measures can be raised under Article 267 TFEU.⁴⁶

3.4.2 Experience with validity references

Validity references represent a small sub-set of cases brought under Article 267 – and validity references related to the environment have been very rare.

The study refers to two cases involving regulatory acts in the domain of the environment, the case presented in Box 5 below, and a case involving a challenge to a Commission directive under the Packaging Waste Directive, 94/62/EC⁴⁷.

Box 5: Use of a validity reference to invalidate a Commission implementing decision on habitat protection

In 2016, following judicial review proceedings brought by an environmental NGO, the Dutch Council of State asked the CJEU to rule on the validity of a Commission implementing decision under the Habitats Directive, 92/43/EEC. This Commission decision had endorsed the reduction by the Netherlands of a site protected under the directive. In earlier national litigation, the Council of State had annulled a unilateral government decision to reduce the same site on the basis that it was inconsistent with an earlier Commission implementing decision which had listed a bigger protected site. To overcome this set-back, the Netherlands had proposed and the Commission had accepted a revision of the site via a new Commission implementing decision. However, in its judgment of 19 October 2017, the CJEU found that the Commission had exceeded its discretion when adopting the later act. In particular, there was no evidence of a scientific error in the original site listing which would justify a subsequent site reduction.⁴⁸

A number of points can be made about the rarity of validity references.

⁴⁵ Case C-83/91 *Meilicke*, 16 July 1992, Case C-82/13 *Società cooperativa Madonna dei miracoli*, 7 October 2013, para. 12, 14; *Unio de Pagesos de Catalunya v Administracion del Estado*, 15 September 2011, ECLI:EU:C:2011:590.

⁴⁶ Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECR I-11453, para. 37ff., and Case C-308/06 *International Association of Independent Tanker Owners and Others*, para. 33-34.

⁴⁷ Joined cases C-313/15 and C-530/15, *Eco-Emballages SA*, ECLI:EU:C:2016:859

⁴⁸ Case C-281/16, *Vereniging Hoekschewaards Landschap*, ECLI:EU:C:2017:774

First, there is an issue of choice. Some applicants have preferred to seek judicial review via Article 263(4) TFEU, despite the strict admissibility conditions that apply – and (as the CJEU case-law shows) the poor chances of success. In a number of cases, the CJEU has signalled that the correct approach would have been to proceed via Article 267 instead⁴⁹. Indeed, reflecting the wording of the Treaty, the case-law suggests that Article 267 should usually be treated as the default means of judicial redress (with the caveat that, where an applicant can clearly challenge a measure under Article 263(4), they *cannot* at the same time ask a national judge to refer the issue of validity to the CJEU⁵⁰). For some, however, including many stakeholders in the public consultation, the Article 267 mechanism is not a means they favour.

Second, use of Article 267 presupposes that an applicant will be recognised as having standing. As the Commission’s Notice on access to justice in environmental matters shows⁵¹, CJEU case-law has been steadily strengthening the basis for giving standing before national courts. Both the Aarhus Convention and the Charter of Fundamental Rights have featured in this case-law development, and individuals and environmental NGOs have both benefited. The CJEU has stressed the importance of national courts protecting rights and interests derived from environmental law, which include certain health and property-related rights and the general interest of nature protection.

Nevertheless, as the study indicates, there are still problems with legal standing in a number of Member States. The Union legislature has not adopted general access to justice provisions proposed by the Commission. Furthermore, although it has accepted some proposed specific access to justice provisions in some Union environmental legislation, it has rejected others⁵². Standing before national courts therefore significantly depends on the extent to which such courts align themselves with the access-to-justice case-law of the CJEU.

Third, a validity reference under Article 267 TFEU presupposes that a national court will recognise that it should have a role in the dispute. This may not be a problem where the dispute includes a national implementing measure linked to the contested Union act – as in the validity reference from the Netherlands set out in Box 5. However, national judges may see difficulty in addressing Union regulatory acts not entailing implementing measures – especially in continental law systems (although examples exist of where the difficulty was overcome by national courts in common law jurisdictions). This helps explain the Lisbon Treaty rationale of opening up a new avenue in Article 263(4) TFEU to challenge Union regulatory acts not entailing implementing measures.

Finally, there is an issue of familiarity and practice in the use of the validity reference. The extent to which Article 267 TFEU is used to seek CJEU interpretative rulings means that the preliminary reference has become a mechanism familiar to a great many national

⁴⁹ See for instance Case C-321/95 P, *Greenpeace and Others*, mentioned in Box example 3.

⁵⁰ C-135/16, *Georgsmarienhütte*, ECLI:EU:C:2018:582.

⁵¹ Commission Notice on access to justice in environmental matters, C(2017) 2616 final, 28 April 2017, p. 12.

⁵² See point 10 of the Commission Notice on access to justice in environmental matters.

judges. This is still not the case, however, with validity references⁵³.

3.4.3 Conclusions

Despite it being enshrined in the Treaties as a key judicial redress mechanism, and despite the importance the CJEU attaches to it, the validity reference has been rarely used to challenge Union acts relating to the environment. There are issues to do with standing, the familiarity of legal practitioners and potential applicants with the mechanism, and the receptiveness of both applicants and national courts to its use.

At the same time, the insertion by the Lisbon Treaty of a third limb into Article 263(4) indicates that the Treaties themselves recognise a role for direct challenges before the CJEU in situations where the contested EU act does not entail implementing measures.

3.5 Plea of illegality under Article 277 TFEU

3.5.1 The Article 277 TFEU mechanism

Article 277 allows an applicant to trigger an incidental review of legality also after the expiration of the two-month time limit set out in Article 263(6) TFEU. Article 277 can, however, only be invoked in the course of another procedure, usually an action for annulment under Article 263 TFEU,⁵⁴ and on the same grounds of review as those provided for in the latter. Such a review may result in a declaration of inapplicability of the contested act. The effects of this declaration are only ‘*inter partes*’, i.e. they cannot go beyond the parties to the dispute.

3.5.2 Experience with the Article 277 mechanism

There appears to be very limited use of this mechanism, but the example below illustrates its use in relation to a piece of environmental legislation.

Box 6: Use of Article 277 in relation to a decision of an EU body

On 2 October 2014, the General Court uphold a plea of illegality in respect of a decision on administrative charges made by the European Chemicals Agency, ECHA⁵⁵. The plea had been raised by an economic operator as part of an application for judicial review of an invoicing decision made by ECHA pursuant to the decision on administrative charges. While it could challenge the invoicing decision under the first limb of Article 263(4), the economic operator did not have standing under Article 263(4) to challenge the earlier decision on which it was based. Nevertheless, it could raise a plea of illegality – and did so successfully, the Court finding that the administrative charges provided for were disproportionate.

⁵³ Meeting of national judges organised in January 2019 in connection with the present report.

⁵⁴ Paragraph 14 of the findings.

⁵⁵ Case T-177/12, *Spraylat GmbH v ECHA*, ECLI:EU:T:2014:849

3.5.3 Conclusions

Given the limited use in practice of Article 277, it is difficult to draw conclusions other than that it may cater for certain specific circumstances in which use of Article 263 is not possible.

4. ANALYSIS IN LIGHT OF THE ACCC FINDINGS WITH REGARD TO THE AARHUS REGULATION

4.1 The issues

Table 1: Summary of views expressed by ACCC with reference to Aarhus Regulation

Views	Comments
The Aarhus Regulation administrative review mechanism should be opened up beyond NGOs to other members of the public ⁵⁶ .	<i>This represents an issue of ‘who’ should be entitled to seek administrative or judicial review.</i>
Review should encompass general acts and not only acts of individual scope.	<i>This represents an aspect of which kinds of act an administrative or judicial review should be able to address.</i>
Every administrative act that is simply ‘relating’ to the environment should be challengeable, not only acts ‘under’ environmental law ⁵⁷ .	<i>This represents another aspect of which acts administrative or judicial review should be able to address</i>
Acts that do not have legally binding and external effects should also be open to review.	<i>This represents a further aspect of which acts administrative or judicial review should be able to address.</i>

Drawing on the experience of each mechanism already presented, this section examines issues arising from the ACCC findings (summarised in Table 1 above), but in the context of the Union’s full system of administrative and judicial redress, and not simply that of the Aarhus Regulation – for the reasons already set out in Section 1.3.

In addition, this section considers a number of further issues:

⁵⁶ Paragraph 93 of the ACCC findings reads as follows: ‘The Committee notes that article 9, paragraph 3, may not be used to effectively bar almost all members of the public from challenging acts and omissions. The term “members of the public” in the Convention includes, but is not limited to, NGOs. It follows that, 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.’

⁵⁷ Paragraph 100 of the ACCC findings reads as follows: ‘It is clear that, under the Convention, an act may “contravene” laws relating to the environment without being “adopted” under environmental law within the meaning of article 10, paragraph 1, of the Regulation. So it is not consistent with article 9, paragraph 3, of the Convention to exclude from the scope of article 10, paragraph 1, any act or omission made under European Union legislation which does not “contribute to the pursuit of the objectives of Community policy on the environment as set out in the Treaty”. Depending on the circumstances, such an act or omission may contravene a law relating to the environment. The correct test is not whether an act is adopted under law of any description.’

- the scope of review. *This has to do with the extent and level of scrutiny that each form of review provides. Unless the extent and level of scrutiny is satisfactory, the review will be open to question;*
- the time-frames governing review mechanisms. *Article 9(4) of the Aarhus Convention requires review mechanisms to be timely. In the case of administrative review, time-frames are also relevant to ensure the effectiveness of the right to good administration, set out in Article 41 of the Charter of Fundamental Rights;*
- the costs of administrative and judicial review. *Policy-makers, the Union institutions, bodies and stakeholders concerned have an interest in knowing the costs that arise from administrative and judicial review; according to Article 9(4) of the Aarhus Convention, these costs cannot be prohibitively expensive;*
- responses of stakeholders and others. *The report touches on the results of the consultations carried out under the Commission's Roadmap.*

4.2 Applicants: who is entitled to administrative or judicial review?

This topic considers *who* can challenge, i.e. who is entitled to administrative or legal review or, in other words, who has ‘*standing*’ to use these mechanisms. Standing may be granted directly before EU bodies or the CJEU (under the Aarhus Regulation or Articles 263(4) and 277 TFEU) or via national courts (Article 267 TFEU).

The Aarhus Regulation grants standing to environmental NGOs, but not to individuals. Its mechanism is ‘*meant to facilitate for “qualified entities” access to justice which those entities would not have under Article 263(4) TFEU as interpreted by the Court*’⁵⁸. The following question arises: does the exclusion of individuals in the Aarhus Regulation affect overall compliance by the EU with the Aarhus Convention?

Article 9(3) provides that ‘*members of the public*’ are to have access to review. Its Article 2(4) defines ‘*the public*’ as ‘*one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or group*’. It is to be noted that the Convention speaks of ‘*members of the public*’ rather than ‘*the members of the public*’, suggesting that not every person need be given review possibilities in all circumstances. Furthermore, the Convention also employs the concept of ‘*the public concerned*’ to limit the scope of the right of review in certain circumstances⁵⁹.

If Article 9(3) of the Convention were considered as requiring access to justice across the board, such a broad interpretation would be tantamount to imposing on Parties the establishment of an ‘*actio popularis*’, which the ACCC itself has expressly declared in previous cases⁶⁰ as not being what the Convention requires.

Article 9(3) of the Aarhus Convention does not, therefore, oblige Parties to grant every member of the public unconditional access to every review procedure. Article 9(3) aims

⁵⁸ Cf. Opinion of Advocate-General Szpunar, Case C-82/17 P, *TestBioTech*, paragraph 36.

⁵⁹ Article 9(2) of the Convention.

⁶⁰ See e.g. paragraph 35 of the findings in Case ACCC/C/2005/11 concerning Belgium or paragraph 29 of the findings in Case ACCC/C/2006/18 concerning Denmark.

to enhance the enforcement of measures relating to the environment. Put into the context of the Aarhus Regulation, this objective can be more than sufficiently achieved by means of a scheme whereby environmental NGOs are entitled to seek administrative review.

In any event, as this report underlines, the Aarhus Regulation represents only one part of the framework of EU administrative and judicial redress. While administrative review is confined to environmental NGOs, natural persons already have access to the CJEU, in accordance with the relevant provisions of the Treaty, and in interaction with the courts of the Member States. The CJEU has repeatedly held that, in order to determine if it is aligned with the Aarhus Convention, the EU system needs to be assessed as a whole, i.e. by taking into account also the role of national courts as ordinary courts of EU law:

*‘[I]t cannot be considered that, by adopting Regulation No 1367/2006, which concerns only EU institutions and moreover **concerns only one of the remedies available to individuals for ensuring compliance with EU environmental law, the European Union was intended to implement the obligations [...] which derive from Article 9(3) of the Aarhus Convention with respect to national administrative or judicial procedures, which, as EU law now stands, fall primarily within the scope of Member State law**’ [emphasis added].⁶¹*

Article 263(4) TFEU grants any natural or legal person standing, under the relevant conditions. Environmental NGOs, individuals or other entities are all in the same situation, and each must comply with the same requirements if they are to have access to the CJEU. The same goes for applicants under Article 277 TFEU.

Where natural or legal persons are unable to challenge an act directly before the CJEU because of the admissibility conditions under Article 263(4) TFEU, they are protected against the application of an act by the ability to challenge the implementing measures that the act may entail.⁶² This is provided for by Article 267 TFEU, under which the national courts may - and if they are last instance courts, must - submit questions concerning the validity of Union acts to the CJEU, by way of a reference. Under Article 267 TFEU, any natural or legal person has the right to challenge, pursuant to the national procedural provisions applicable, the implementing measures which the Union act entails at national level.⁶³

It is legitimate to differentiate between different categories of applicants. Differentiation is a feature of the national legal systems of many Aarhus Parties other than the Union. Indeed, the Aarhus Convention itself acknowledges the special role of environmental NGOs. The Aarhus Regulation recognises that special role as well. It supplements rather than restricts an overall framework that already provides substantial judicial review possibilities to individuals via national courts.

⁶¹ Judgment in Joined Cases C-404/12 P and C-405/12 P, *Stichting Natuur en Milieu and Pesticides Action Network*, paragraph 52, ECLI:EU:C:2015:5. See equally judgment in Joined Cases C-401/12 P to C-403/12 P, *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, paragraph 60 ECLI:EU:C:2015:4; both quoted above.

⁶² Case C-456/13 P, *T&L Sugars Ltd and Sidul Açucares*, ECLI:EU:C:2015:284.

⁶³ Case C-456/13 P, *T&L Sugars Ltd and Sidul Açucares*, paragraph 42.

In particular, legal standing in national law must be interpreted consistently with the requirements of Article 9(3) of the Aarhus Convention, Article 19(1) TFEU and Article 47 of the Charter of Fundamental Rights. The CJEU has recognised that obligations placed on public authorities under EU environmental law may give rise to procedural and substantive rights for individuals and their associations. These rights need to be protected by national courts⁶⁴.

Member States therefore need to provide sufficient access to justice in environmental matters. A Member State will be in breach of the Treaties if it does not make it possible for applicants to have access to its courts in order to raise there an issue of validity under Article 267 TFEU where, as indeed may happen, the conditions for use of Article 263(4) TFEU are not met.

The study provides further information on access to justice in the Member States and quotes several other studies that have been carried out for that purpose. The overall picture is that access varies throughout the Member States but has increased over time, in particular in response to CJEU case-law.

Taken as a whole, the Union system thus grants every category of applicant access to a redress mechanism (while not giving *every* category of applicant access to *every* redress mechanism).

There are nevertheless a number of areas of difficulty. In principle, use of Article 267 TFEU should benefit from the widest level of standing, since the CJEU has stressed the importance of judicial protection through national courts of procedural and substantive environmental rights derived from Union law – to the benefit of both environmental NGOs and individuals. However, evidence indicates that in practice there continue to be general problems with standing in environmental matters in quite a few Member States.

Furthermore, there is a particular problem with standing before the CJEU to challenge Union regulatory acts that do not require implementing measures. The insertion of the third limb of Article 263(4) was meant to address this, but in practice environmental NGOs are unlikely to be able to meet the condition of direct concern set out in that provision. The Aarhus Regulation provides environmental NGOs with a means to obtain standing under the first limb to challenge administrative review decisions on acts of individual scope. However, the Aarhus Regulation pre-dates Lisbon and the Regulation has not been updated to allow administrative review of regulatory acts of the kind referred to in the third limb of Article 263(4).

4.3 Challengeable acts

This topic concerns *what* can be challenged.

Article 2(1)(g) of the Aarhus Regulation covers acts of individual scope under environmental law that have legally binding and external effects. Is this sufficient? Three

⁶⁴ Commission Communication, Commission Notice on access to justice in environmental matters, C(2017) 2616 final, 28 April 2017, p. 12.

aspects deserve to be examined: the limitation of challenges to acts of individual scope; the limitation to acts under environmental law; and the limitation to acts with legally binding and external effects.

Limitation of Aarhus Regulation to acts of individual scope

As noted in Section 3.2, acts of individual scope are amongst the types of act adopted by the European Commission, but are not the only type. The Convention requirements apply equally to acts of general and of individual scope. With regard to the Aarhus Regulation's limitation to acts of individual scope, experience with administrative and related judicial review shows that this has proved to be the main limitation for the admissibility of requests for administrative review submitted by environmental NGOs. In many cases, environmental NGOs have sought to use the Aarhus Regulation to challenge regulatory acts – which fall outside the scope of the Regulation, but not of the Convention. One consequence is that, to hope to challenge acts of general application, environmental NGOs must look to other forms of redress. The third limb of Article 263(4) TFEU allows challenges to a broader category of acts, i.e. regulatory acts not entailing implementing measures. However, applicants must show direct concern in order to gain standing, and, as has already been noted, it is unlikely that environmental NGOs would be able to show such direct concern.

As for what is challengeable via national courts and validity references under Article 267 TFEU, this may depend on whether the Union regulatory act entails implementing measures and whether those implementing measures are themselves challengeable by individuals and/or environmental NGOs. In theory, all acts that may affect rights and interests protected under Union law should be challengeable in this way. Nevertheless, there are difficulties, as has already been noted.

Limitation of Aarhus Regulation to acts under environmental law

The formulation used in Article 9(3) of the Aarhus Convention (and invoked by ACCC) covers challenges to acts which contravene law '*relating to the environment*'. Thus, the challengeable act does not itself have to have an environmental purpose. For it to be challengeable, it is sufficient that it runs counter to environmental requirements that apply to it.

Article 11 of the TFEU creates an overarching obligation that environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities. This means that environmental protection is a legal requirement that applies to all Union acts. To be consistent with the Aarhus Convention, the system of Union administrative and judicial redress thus needs to allow for scrutiny of all Union acts for compliance with the integration principle, as just clarified.

Only an act '*under environmental law*' is challengeable pursuant to the Aarhus Regulation. In Case T-33/16, *TestBioTech*⁶⁵, the General Court stressed the broadness of

⁶⁵ Case T-33/16, paragraphs 44 to 46.

the concept of ‘*environmental law*’, noting that the concept covers any Union legislation, irrespective of its legal basis, which contributes to the pursuit of the objectives of Union policy on the environment, namely preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems⁶⁶. Notwithstanding this, the case-law does not yet unequivocally confirm that the broadness of the concept would allow for review of all acts by reference to the integration principle.

It may be added that neither formulation – i.e. ‘*under environmental law*’ or ‘*relating to the environment*’ – is relevant to the use of judicial review under Article 263(4) and Article 267 TFEU independently of the Aarhus Regulation, since these provisions are general and do not limit judicial review to environmental cases.

Limitation of the Aarhus Regulation to acts with legally binding and external effects

The Aarhus Regulation confines administrative review to administrative acts having legally binding and external effects. There are sound Treaty-related reasons for this. By granting administrative review, the Aarhus Regulation opens the door to judicial review under the first limb of Article 263(4). Administrative and judicial review are therefore inextricably linked.

To put Article 263(4) TFEU within the wider context of Article 263, Article 263(1) gives the CJEU jurisdiction to review the legality of ‘*legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties.*’ Recommendations and opinions (which are non-binding) are clearly excluded from its scope. Article 263(5) TFEU, which concerns judicial review of acts of bodies, office and agencies of the Union refers to acts intended to produce legal effects in relation to natural or legal persons.

In a case involving the European Parliament and the notion of challengeable act under what is now Article 263 TFEU, the Court of Justice referred to legal effects in terms of the contested act governing the rights and obligations of the third parties concerned⁶⁷.

The indications are therefore that Article 263 relates to the judicial review of acts governing rights and obligations⁶⁸.

Were the Aarhus Regulation to purport to open up both administrative and judicial review to acts not creating such external legal effects, it would exceed what Article 263 was designed to address. Compliance with the Convention cannot lead to a conflict with

⁶⁶ ‘*Environmental law*’ as defined in Article 2(1)(f) of the Aarhus Regulation mirrors wording on the objectives of Union policy on the environment found in Article 191(1) TFEU.

⁶⁷ Case C-294/83, *Les Verts v Parliament*, paragraph 27, ECLI:EU:C:1986:166

⁶⁸ It may be added that what counts is the *nature* of the challenged act, not necessarily its *form*, See Case C-57/95, *France and Spain v Commission*, paragraph 22, European Court reports 1997 Page I-01627.

the primary law of the Union and ensuring adherence to the Treaties and to the fundamental principles of Union law is in line with the Budva declaration mentioned in Section 1.2.

There are other good reasons justifying a focus on acts having external legal effects. The Union is based on a separation of powers. Extending judicial review to cover purely internal acts would represent an intrusion by the judicial branch of the Union into the domains of the other institutions and would upset the inter-institutional balance⁶⁹. Furthermore, acts having external legal effects are clearly the ones that have the greatest consequences and generate the greatest interest. Although there have been attempts to challenge a few non-binding internal acts, use of administrative and judicial review is overwhelmingly focused on acts having external legal effects. In addition, the results of the open public consultation suggests that regulatory acts – that have legally binding and external effects - are the main focus of interest of respondents.

Finally, the wording of Article 9(3) of the Aarhus Convention refers to the possibility of challenging acts and omissions by private persons and public authorities which ‘*contravene*’ provisions of national law relating to the environment. Acts and omissions can only contravene national environmental law if they have legal effects.

4.4 Scope of review

The required scope of review relates to both the substantive and procedural legality of the act challenged. All the forms of administrative review and judicial review addressed in this report cover substantive and procedural legality.

However, some stakeholders have raised an issue with regard to the scope of judicial review arising from a prior administrative review. As noted, the CJEU will review the decision on the administrative review rather than the initial act that was the object of the administrative review. Some stakeholders seek to extend the scope of the CJEU review to the initial act and give a possibility for its annulment. While not reaching a conclusion on this point, the ACCC has signalled its expectation that the judicial review should also cover the substance of the initial act⁷⁰.

In Case T-108/17, *Client Earth*, the General Court rejected a request by the applicant to annul *both* the initial act and the administrative review decision⁷¹ in a judicial review application that followed a Commission administrative review. Nevertheless, as this ruling itself demonstrates, provided the applicant submits grounds addressing the substantive and procedural legality of the initial act when seeking an administrative review⁷², any subsequent judicial review will look in probing detail at how the institution concerned addressed those grounds. The judicial review can thus consider the initial act to the extent that the grounds of administrative review address it. However, the Court of

⁶⁹ The balance of powers is a characteristic of the institutional structure of the EU, see Case C-9/56, *Meroni* ECLI:EU:C:1958:7.

⁷⁰ Paragraphs 117-119.

⁷¹ Case T-108/17, *ClientEarth*, paragraphs 24-30, ECLI:EU:T:2019:215.

⁷² Case T-108/17, *ClientEarth*, paragraphs 55-58, ECLI:EU:T:2019:215.

Justice has held that the judicial review proceedings ‘cannot be founded on new grounds or on evidence not appearing in the request for review, as otherwise the requirement, in Article 10(1) of Regulation No 1367/2006, relating to the statement of grounds for such a request would be made redundant and the object of the procedure initiated by the request would be altered.’⁷³

If account is taken of the existing case-law, the architecture of Article 263(4) TFEU does not appear to allow the CJEU to go further, since the only act that the Aarhus Regulation can open up to judicial review is the decision on the administrative review. As this report makes clear, the Union legal order contains an alternative avenue to address the substance of the initial act, namely the validity reference under Article 267 TFEU.

In any event, any limits in the scope of judicial review of the reply to a request for administrative review should not matter, as Article 9(3) of the Aarhus Convention seeks to ensure access to administrative *or* judicial procedures, implying that administrative procedures on their own are a sufficient means of redress.

4.5 Timeliness of procedures

Article 9(4) of the Aarhus Convention *inter alia* requires remedies to be timely. Furthermore, with regard to judicial review, Article 47 of the Union Charter of Fundamental Rights refers to an entitlement to a hearing within a reasonable time.

If account is taken of all potential procedural stages, the duration of the different forms of judicial review carried out by the CJEU all appear broadly comparable⁷⁴.

The duration of administrative review is the shortest of the review mechanisms. The right to good administration set out in Article 41 of the Union Charter of Fundamental Rights is relevant not only in terms of its reference to a person’s right to have their affairs handled within a reasonable time but also its reference to affairs being handled impartially and fairly and to decisions being reasoned. This indicates that sufficient time must be allowed to enable fulfilment of the standard of good administration. The study indicates that the time-limits foreseen in the Aarhus Regulation for administrative review – be they for environmental NGOs requesting a review, or the Union institutions responding – would benefit from a modest extension. The mechanism would still remain timely.

4.6 Costs

Depending on the form of review and the parties involved, administrative and judicial reviews entail case-handling costs for the Union institutions concerned (including the Court of Justice), national institutions (including national courts), and applicants. Over

⁷³ See judgment of the Court of Justice of 12 September 2019 in Case C-82/17, *TestbioTech*, paragraph 39.

⁷⁴ See accompanying study.

and above the costs of handling individual cases, there are the costs of the associated administrative case-handling structures and arrangements.

However, costs are inherent in any redress system, and cost considerations find their limitations in this context.

In terms of cost considerations, it may be added that Article 9(4) of the Aarhus Convention refers to procedures not being prohibitively expensive.

The overall number of relevant administrative and judicial review applications that have been documented in the accompanying study and the present report is not particularly high, given that the time-frame examined spans more than a decade. However, the study also shows that applications have tended to be concentrated in some specific sectors.

Against this background, the study indicates that the overall monetised cost to the Commission of handling different forms of review has been in the order of EUR 90,000 on average per year. Judicial reviews are more demanding in resources than administrative reviews. The estimated monetised unit cost of handling the former are in the range of approximately EUR 11,000 to EUR 22,000, with those of the latter in the range of approximately EUR 3,000 to 8,000. Additional judicial review costs may arise for the Commission where it loses a case and is ordered to pay the applicant's costs.

Monetised costs do not give the full picture. The nature of reviews means that a range of specialist staff must be mobilised within tight time-constraints to respond to each procedural stage. This is in a context where staff resources are already scarce relative to the overall work allocation of the Commission, and available specialist staff often very few in number to handle individual reviews – in particular, where these are concentrated in some sectors.

This said, with regard to administrative review and judicial review under Article 263(4) TFEU, the study did not find evidence of cases where the costs were perceived as unacceptable by those who bear them. With regard to judicial review via Article 267 TFEU, high litigation costs are a concern in some national jurisdictions. However, CJEU case-law already addresses in some detail the requirement of cost protection of judicial review applicants⁷⁵.

4.7 Responses of stakeholders and others

An open public consultation took place for 12 weeks between December 2018 and March 2019, and gave respondents the opportunity to provide their evidence and views on the subject of the study. This consultation elicited a significant number of answers (175), mainly from respondents already familiar with the Aarhus Convention and the Aarhus Regulation. Most of the responses were submitted by individual Union citizens, followed by environmental organisations, public authorities (mainly at regional and local level, no national government responded) and economic operators. Responses submitted by

⁷⁵ See section 5 of the Commission Notice on access to justice in environmental matters.

environmental organisations and individual Union citizens showed a largely negative perception of existing means of redress against Union acts. On the other hand, a mainly positive perception emerged in responses submitted by economic operators and public authorities. Further details of the results of the open public consultation can be found in the accompanying study.

Separately from the open public consultation, the Commission services convened a meeting of national judges to explore use of the validity mechanism. The results are reflected in the present report.

The Commission services also held a number of meetings with Member State experts and representatives to inform them of progress on the study, inviting them to comment on different aspects⁷⁶. The work presented did not elicit any particular comments, other than with regard to standing rights in certain Member States to challenge national implementing measures linked to acts of the Union institutions (confirming that there are standing issues). The European Parliament was invited to send participants to some of these meetings but was unable to attend.

Finally, the Commission services convened several meetings with stakeholders⁷⁷ at which it presented progress on the study. Some NGO stakeholders expressed reservations about including an examination of the Article 267 mechanism, given the ACCC's dismissal of this. This point is addressed in Section 1.3 of the present report. NGOs also expressed reservations about the adequacy of the judicial review of administrative review decisions, arguing that it should also cover the initial act. This point is addressed in Section 4.4 of the present report.

5. OVERALL CONCLUSIONS

The ACCC findings focus on the Aarhus Regulation – or other possible future secondary legislation⁷⁸ - on the basis that, for the ACCC, Article 267 TFEU is not relevant and the CJEU interpretation of Article 263(4) TFEU is unsatisfactory. The findings start from the premise that the Aarhus Regulation – or other future secondary legislation - must make up for the shortcomings (as the ACCC sees it) in the primary law of the Union on judicial redress as interpreted by the CJEU.

However, as this report shows, the Aarhus Regulation is itself governed by, and must respect the limits of, Union primary law. Furthermore, and as the CJEU has emphasised, when it comes to administrative and judicial redress against acts of Union institutions, the Union's implementation of the Aarhus Convention was never intended to rest on the

⁷⁶ The issue was addressed in meetings of the Commission Expert Group on Aarhus Implementation held on 15 October 2018, 11 March and 12 April 2019. Moreover, information on the study was shared with participants in the second and third meeting of the Environmental Compliance and Governance Forum, held on 7 December 2018 and 14 May 2019, respectively.

⁷⁷ Stakeholder Meetings on Environmental Compliance and Governance held on 30 November 2018 and 29 May 2019. These meetings involved mainly environmental NGOs and economic operators. As part of the research work underpinning the study, independent focus group meetings with stakeholders were also organised by the contractors (for details please refer to the study).

⁷⁸ This is one of the possibilities the ACCC alludes to.

Aarhus Regulation alone: judicial redress under primary Union law, including Article 267 TFEU also needs to be taken into account.

In particular, it is unrealistic to expect that access to justice in relation to Union acts can be governed in its entirety by an act of Union secondary legislation that is not circumscribed by and can circumvent the provisions of Article 263 TFEU as they now stand. Access to Article 263 TFEU is expressly limited in terms of potential applicants and challengeable acts in ways that Article 267 TFEU is not, and this circumscription cannot be changed by secondary legislation alone.

The Aarhus Convention recognises the special role that environmental NGOs play in environmental protection. The Aarhus Regulation reflects this by giving environmental NGOs *additional* means of redress. It does not purport to restrict the redress that they enjoy under primary Union law. Furthermore, CJEU case-law has supported standing for environmental NGOs in disputes brought to national courts – one of the possible avenues for questioning the validity of acts of Union institutions.

With these caveats, this report and the study nevertheless show that there are a number of difficulties with the functioning of the current system of administrative and judicial redress.

Despite steady advances in the CJEU case-law already highlighted by the Commission in 2017⁷⁹, the study shows that environmental NGOs and individuals can still face significant hurdles in using national courts, thereby limiting possible recourse to validity references under Article 267 TFEU to challenge EU-level acts. Furthermore, although not inevitable, there may be difficulties in raising before a national court the validity of an EU act that does not entail implementing measures – the precise category of act that became subject to the new possibility of redress in Article 263(4) TFEU inserted by the Lisbon Treaty.

Turning then to direct judicial redress under Article 263(4) TFEU, the present report and the study show that, in practice, it has not been possible for environmental NGOs to satisfy the conditions attached to use of the second and third limbs. As a result, the new limb inserted by the Lisbon Treaty does not help environmental NGOs seeking redress.

This leaves the Aarhus Regulation as a means of redress. The study and this report show the Aarhus Regulation can be, and has been, used by environmental NGOs both to seek administrative review under the Regulation and judicial review under the first limb of Article 263(4) TFEU. The most significant constraint in practice is the limitation to acts of individual scope. This means that environmental NGOs cannot obtain administrative review of acts of general application – including acts of general application covered by the third limb of Article 263(4) TFEU. Many applications for administrative review have been rejected for this reason.

This raises the question of how to address these difficulties, while remaining within the

⁷⁹ See Commission Notice on access to justice in environmental matters, already quoted.

legal boundaries defined by the Union legal order. For the reasons explained in Section 1.3, the Union's response to the ACCC findings cannot include commitments on behalf of the Union judicature. Nor is change to the Treaty provisions on judicial review contemplated.

The possibilities for improvement open to Union decision-makers other than the Union judicature (notably the European Commission and the Council and Parliament as co-legislators) therefore relate to the scope and workings of the Aarhus Regulation and to the barriers to use of validity references under Article 267 TFEU.

In line with the Roadmap, the study presents a number of possible non-legislative and legislative measures and options and assesses their impacts. The reader is referred to the study for further details.

The non-legislative measures that the study examines include raising awareness with regard to use of the Aarhus Regulation and the validity reference mechanism. The legislative measures that it examines include modifying the Aarhus Regulation to enlarge the category of acts that can be made subject to administrative review and extending the time-frames governing review applications and handling.

Feasibility is a factor when it comes to decision-making. The Commission's competences and powers would allow it to adopt non-legislative measures by itself. As for legislative options, the Commission has a right of initiative but only the Union legislature can adopt legislation. As noted in Section 3.4.2, the Union co-legislators have either rejected or failed to adopt several Commission proposals on environmental access to justice. In terms of future perspectives for addressing the ACCC findings, this pattern is to be noted.

Annex: Glossary and texts relevant to legal framework

Glossary

<i>Term or acronym</i>	<i>Meaning or definition</i>
Aarhus Convention	Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters
CJEU	Court of Justice of the European Union
ACCC	Aarhus Convention Compliance Committee
EU	European Union
MOP	Meeting of the Parties to the Aarhus Convention
NGOs	Non-governmental organisations
SWD	Staff Working Document
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

The Aarhus Convention:

Article 9(3) and (4) of the Aarhus Convention provide as follows:

'3. In addition and without prejudice to 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.

4. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. [...]

The EU Declarations:

The EU Declarations point out that, *'within the institutional and legal context of the Community [...] the Community institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of Community law in the field covered by the Convention.'*

The Budva Declaration by the EU:

At the MOP in Budva, Montenegro, in September 2017, the EU declared its intention to *'continue to explore ways and means to comply with the Aarhus Convention in a way that is compatible with the fundamental principles of the Union legal order and with its system of judicial review, taking into account concerns expressed within the Convention.'*

Relevant articles of the Treaty on the Functioning of the European Union:

Article 263(4) TFEU reads:

'Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them and against a regulatory act which is of direct concern to them and does not entail implementing measures.'

Article 267 TFEU provides as follows:

'The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:

[...]

(b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. [...]

Article 277 TFEU provides as follows:

'Notwithstanding the expiry of the period laid down in Article 263, sixth paragraph, any party may, in proceedings in which an act of general application adopted by an institution, body, office or agency of the Union is at issue, plead the grounds specified in

Article 263, second paragraph, in order to invoke before the CJEU the inapplicability of that act.'

Relevant provisions of the Aarhus Regulation:

According to Article 10 of the Aarhus Regulation, '[a]ny non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law, or, in the case of an alleged administrative omission, should have adopted such an act.'

Article 2(1)(f) defines 'environmental law' as 'Community legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of Community policy on the environment as set out in the Treaty: preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems'.

Article 2(1)(g) defines an 'administrative act' as 'any measure of individual scope under environmental law, taken by a Community institution or body, and having legally binding and external effects'.

Article 12 provides:

'1. The non-governmental organisation which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.

2. Where the Community institution or body fails to act in accordance with Article 10(2) or (3) the non-governmental organisation may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty. '