13 February 2019

Answer to the Public Consultation on Access to Justice

The European Commission launched a public consultation on the EU's implementation of the Aarhus Convention in the area of access to justice. This is a follow-up of the decision of the Aarhus Convention Compliance Committee finding the EU in violation of Article 9(3) and (4) of the Convention for not providing members of the public access to either administrative or judicial proceedings to challenge EU institutions' decisions.

The input provided to the consultation will feed into the study that is being carried out for the Commission at the request of the Council to find ways to comply with the findings of the Aarhus Committee. Please find below ClientEarth answers to the online consultation

[Questions 1-9 omitted as answers depend on each individual participant]

Part 1 - General questions

10. The European Union is a party to the Aarhus Convention, which amongst other things seeks to promote access to justice in environmental matters. 'Access to justice' in environmental matters means that the public is offered the possibility to initiate procedures for the review of acts and decisions taken by authorities, or review procedures in cases where the authorities should have adopted acts and decisions but failed to do so. To help fulfil its obligations under the Convention, the EU adopted Regulation (EC) No 1367/2006 (the Aarhus Regulation).

Which of the following statements best describes your situation?

- I have never heard of the Aarhus Convention nor the Aarhus Regulation.

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- I have never heard of the Aarhus Convention nor the Aarhus Regulation but I am aware of the possibility to challenge non legislative environmental acts of the EU.
- I have heard about the Aarhus Convention, but I am not sure how it is implemented at national or EU level and therefore how it affects me.

X I am familiar with the Aarhus Convention and/or the Aarhus Regulation.

11. The available mechanisms to review EU acts, decisions or omissions (all referred to as "decisions" only in the table below for the sake of brevity) include requests for internal review through administrative procedures or actions brought to the EU Court of Justice according to different judicial procedures.
How would you rate the availability of each these means for individuals or NGOs?

	Very positively	Slightly positively	Neither positively nor negatively	Slightly negatively	Negatively	Don't know
a) How would you rate the current possibilities for individuals to request the EU to carry out an internal review of a decision it has made that impacts the environment?					X	
b) How would you rate the current possibilities for NGOs to request the EU to carry out an internal review of a decision it has made that imp acts the environment?					X	
c) How would you rate the current possibilities for individuals to bring an EU decision that impacts the environment before the EU Court of Justice?					X	
d) How would you rate the current possibilities for NGOs to bring an EU decision that impacts the environment before the EU Court of Justice?					X	
e) How would you rate the current possibilities for individuals to bring, before the court in					X	

your country, an EU decision that impacts the environment?						
f) How would you rate the current possibilities for NGOs to bring, before the court in your country, an EU decision that impacts the environment?					X	

12. Public participation in decision-making is also a possible way for the public to have a say in legally binding general acts and decisions relating to the environment before these are actually adopted.

To what extent do you agree or disagree with the following statements concerning EU decision-making on environmental matters?

	Very positively	Slightly positively	Neither positively nor negatively	Slightly negatively	Negatively	Don't know
a) How would you rate the current possibilities for individuals to participate in the decision-making processes at EU level regarding environmental matters?					X	
b) How would you rate the current possibilities for NGOs to participate in the decision-making processes at EU level regarding environmental matters?					X	
c) How would you rate the way the EU takes into account the views expressed by the public when taking decisions that affect the environment?					X	

13. Individuals and non governmental organisations (NGOs) can challenge EU acts before a national court, which can – and sometimes must - refer the case to the EU Court of Justice for a preliminary ruling (Article 267 TFEU).

Were you aware of this possibility as a way of challenging EU acts?

X Yes
No

14. Have you ever been involved in or affected by a procedure under Article 267 TFEU (reference for a preliminary ruling)? If yes, please provide a reference to the relevant case if possible (add a link or attach a pdf of the judgment).

X Yes
No

Please add a link

http://curia.europa.eu/juris/liste.jsf?language=en&num=C-404/13

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15. In your opinion, how does the mechanism enabling national courts to request the Court of Justice of the European Union to rule on an EU act (Article 267 TFEU) function in your country of residence?

Satisfactorily
X Unsatisfactorily
Don't know

16. Can you please explain your answer? Why do you think the established mechanism to challenge EU acts through national court (Article 267 TFEU) in your country of residence is functioning in a satisfactory or unsatisfactory manner?

500 characters maximum

Article 267 does not allow the public to challenge EU acts that are not implemented in national law. Moreover, judges are often unwilling to refer questions to the CJEU and proceedings involving a referral take many years. The face that, since the Lisbon Treaty, there have been only 3 references by NGOs/individuals on the validity of EU acts regarding the environment is indicative of the legal and practical barriers faced by members of the public in using this procedure (see Part I of Annex I).

17. Any person can also challenge EU acts by directly requesting the EU Court of Justice to rule on the legality of the act if that act is of direct and individual concern to that person (Article 263(4) TFEU).

Are you aware of this possibility as a way of challenging the EU acts?

X Yes
No

18. In your opinion, how does the established mechanism to challenge EU acts through the Court of Justice of the European Union (Article 263(4) TFEU) function?

- Satisfactorily
- X Unsatisfactorily
- Don't know

19. Can you please explain your answer? Why do you think the established mechanism to challenge EU acts through the Court of Justice of the European Union (Article 263(4) TFEU) is functioning in a satisfactory or unsatisfactory manner?

500 characters maximum

The CJEU's interpretation of "direct and individual concern" (see part II of Annex 1) means that, in practice, individuals and NGOs cannot use the Article 263(4) mechanism to challenge acts of EU institutions that violate environmental law. Indeed, with the exception of access to documents cases and challenges concerning requests for internal review, no NGO or individual has ever had standing to challenge an act in the public interest (i.e. to protect the environment).

20. The Aarhus Convention Compliance Committee noted several problems with respect to the EU's implementation of the Convention (for further information, please see https://www.unece.org/env/pp/compliance/Compliancecommittee/32TableEC.html). These problems are listed below.
How would you rate the importance of each of these problems?

	1-Least important	2	3	4-Most important
a) The Aarhus Regulation's internal review mechanism is open only to NGOs and not to members of the general public			X	
b) To be admissible for a review request, the act or omission to be challenged must have an individual scope or impact on the organization/individual bringing the request				X
c) The Regulation limits challenges to acts or omissions under environmental law				X
d) Only acts that are legally binding and have external effects (i.e. effects outside the administration taking the decision) can be open for review under the Regulation				X

21. Do the problems mentioned in Question 20 impact you, and if so, how?

500 characters maximum

These problems prevent internal review of any EU acts that are not addressed to specific companies. Since the Aarhus Regulation entered into force, 31 of 40 requests for internal review were rejected (see Annex 1). As an NGO seeking to protect the environment, these limitations prevent ClientEarth from using its Aarhus Convention rights to fulfil the mission set out in its statutes by challenging EU acts that contravene EU environmental law.

Part 2 - Specific questions

This part of the questionnaire seeks input on your experience with existing mechanisms to review EU environmental acts.

Administrative review

Regulation (EC) No 1367/2006 (the Aarhus Regulation) provides the possibility for an individual or an NGO to request reviews of EU administrative acts directly with the EU institutions (e.g. the Commission services) (internal review).

22. Have you ever been involved in or affected by a request/request(s) for internal review of a EU decision or act under environmental law?

X Yes
No

23. How would you rate the process?

Satisfactory
X Unsatisfactory
Neither satisfactory nor unsatisfactory
Don't know

24. Please further explain your answer to Question 23 with additional information including the subject of the request and concrete examples if possible.

500 characters maximum

CE has submitted 6 requests for internal review (Annex 2, part I). 4 were rejected on the grounds that the EU act was not of individual scope/the act did not have external and binding effects (Annex 1, part IIIa). 2 of the requests were admissible but were rejected – now subject of pending cases before the General Court (T-108/16 and T-436/17). The question of whether the General Court's review will consider the unlawfulness of the underlying EU act is still to be decided (Annex 1, part IIIc).

Judicial review

There are several ways to challenge the legality of an EU act before a court of law (judicial review). A case can be brought before the EU Court of Justice, either through the judicial review mechanism set up by Regulation (EC) No 1367/2006 (the Aarhus Regulation), or independently from the Regulation, directly in application of EU law (Article 263(4) TFEU). A case can also be brought before a national court, which would in turn bring the case to the EU Court of Justice for a preliminary ruling (Article 267 TFEU).

25. Have you ever been involved in or affected by the judicial review of legality of an EU act in the area of environment?

X Yes
No

26. Where was/were the request(s) lodged?

X EU Court of Justice
National court
EU Court of Justice and national court

27. Was the reason for lodging the request at EU Court of Justice or national court, or both based on any of the following?

	EU level	National level
a) Better chance of success		
b) Better knowledge of the system		
c) The expected costs of the procedure		
d) Lack of legal grounds to challenge a decision before that instance (e.g. absence of challengeable act at national level, legal standing, etc.)	X	

28. Please further explain your answer to Question 27.

500 characters maximum

The cases we have pursued through the internal review procedure would not have been challengeable at national level due to lack of national implementing measures (Annex 2, part I). There have further been acts/omissions of EU institutions that we consider have breached EU environmental law but where we did not pursue a challenge because they would have neither been considered an administrative act under the Aarhus Regulation (general scope etc), nor were there any national implementing measures.

29. Please consider your overall experience with regards to challenges before national courts, via preliminary ruling (Art. 267 TFEU). Did you experience/observe difficulties in relation to the following steps of the procedures:

	Major difficulties (prevented continuing the action)	Some difficulties (could be overcome)	Limited difficulties (did not impede the action)	Not at all	Don't know
a) Legal standing (i.e., right to bring the case to court)	X				
b) Nature of the act challenged (e.g. EU act not implemented at national level)	X				
c) Length of the procedure	X				
d) Costs	x				
e) Dependence upon the willingness of the judge in bringing the request before CJEU	x				
f) Potential lack of enforcement of the decision		X			
g) Other (please specify)					

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Please specify the nature of any difficulty

200 characters maximum

30. Please consider your overall experience with regards to direct challenge to the EU court (Art. 263(4) TFEU and Aarhus Regulation). Did you experience /observe difficulties in relation to the following steps of the procedures:

	Major difficulties (prevented continuing the action)	Some difficulties (could be overcome)	Limited difficulties (did not impede the action)	Not at all	Don't know
a) Legal standing (i.e., right to bring the case to court)	X				
b) Nature of the act challenged (EU non-legislative act 'under environmental law')	X				
c) Length of the procedure	X				
d) Costs	X				
e) Potential lack of enforcement of the decision		x			
f) Other (please specify)					

Please specify the nature of any difficulty

200 characters maximum

See

31. How would you rate the process(es)?

- Satisfactory
- X Unsatisfactory
- Neither satisfactory nor unsatisfactory
- Don't know

32. Please further explain your answer to Question 31 with additional information including the subject of the challenges and concrete examples if possible.

500 characters maximum

See Annex 2, parts II and III, for specific examples and case references.

Thank you for your contribution!

If you wish to add further information relevant to the scope of this questionnaire or expand on any of your answers, you can do so in the box below.

1000 characters maximum

The EU does not comply with the Aarhus Convention and therefore violates international law and primary EU law. The only option open for the Commission is to propose an amendment of the Aarhus Regulation, which ensures that:

1. all non-legislative acts and not only acts of individual scope;
2. all acts having legal effects and not only those with "legally binding and external effects"
3. that "contravene" EU law related to the environment and are not necessarily adopted under environmental law

are open to challenge (see part IV of Annex 1).

The Aarhus Regulation fails to comply with the Aarhus Convention on 2 further grounds:

1. Article 2(2) prevents review of state aid decisions, which are also acts that can contravene EU environmental law – this limitation must be deleted (see part III(b) of Annex 1).
2. Article 12 fails to ensure that the Court can consider the legality of the decision that gave rise to the internal review, which is necessary for adequate remedies (see part III(c) of Annex 1).

If you wish to submit additional documentation within the scope of this questionnaire, you can upload your file here. Please note that all uploaded documents will be published together with your contribution, and that you should not include personal data in the document, if you opted for anonymous publication.

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Annex 1: Further information on the General Questions

Part I: The inadequacy of Article 267 TFEU

The mechanism of the referral for preliminary ruling cannot be considered as a way to comply with Article 9(3) of the Aarhus Convention for several reasons.

Article 267 TFEU provides at most what might be considered as an indirect access to justice before national courts which does not satisfy Article 9(3) of the Convention. The EU cannot rely on the Member States to provide access to the CJEU. The EU as a party to the Convention may not benefit from a different status than the other parties. The fact that it is not a State does not justify any exemption. Article 2(2)(d) of the Convention states very clearly that institutions of a regional economic integration organization that is a Party to the Convention, i.e. the EU, are considered public authorities for the purposes of the Convention. They are therefore subject to all the provisions of the Convention and their acts must be challengeable under Article 9(3) of the Convention.

Acts not entailing national implementing measures

Many EU acts impacting on the environment do not lead to the adoption of national implementing measures. This was also recognized by the General Court in case T-396/09:

> *"As it is, not all measures of general application adopted by institutions of the European Union in the field of the environment have been transposed into national law by means of a measure which may be challenged before a national court."*[1]

This is a very simple truth that alone suffices to show that the preliminary reference mechanism is insufficient to provide for adequate access to justice.

[1] ECLI:EU:T:2012:301, para. 75. Case T-369/09 *Milieudefensie* was overruled on appeal but not on the basis that the Article 267 TFEU mechanism provided for adequate access to justice but because the Article 9(3) of the Aarhus Convention was found to not be directly effective. The conclusion of paragraph 75 was therefore not contradicted on appeal.

To further illustrate this point, below is a list of some examples of acts that have serious impacts on the environment and cannot be challenged under Article 267 TFEU because they do not entail implementing measures:

- A decision authorizing the use of a substance or a GMO;[2]
- An amendment to an Annex of a directive leading to the authorisation of the use or placing on the market of a chemical substance in a pesticide or biocide;[3]
- A Commission Decision providing a derogation to a Member State from the obligations of a Directive[4]
- Actions and decisions of EU institutions that affect citizens in countries that are not members of the EU, for example European Investment Bank or Commission funding of a project in Albania are not subject to an Article 267 procedure. Thus in such cases citizens are left entirely without any remedy.

This means that one would need to first breach the law to be able to challenge these type of acts and ask for a referral to the CJEU. Leaving aside that individuals and NGOs will often not even be in a position to breach the acts listed above, the third limb of Article 263(4)TFEU was adopted by the Lisbon Treaty to avoid exactly this situation but did not succeed in delivering because the CJEU reiterated its restrictive interpretation of the direct concern criteria according to which NGOs are not directly concerned.[5]

Hurdles in relation to standing at national level

While the above is enough to show that the preliminary ruling route is insufficient, it is also important to note that significant hurdles persist throughout the EU to obtain access to justice in national courts, even if there is a national implementing measure. The third pillar of the Convention has not been transposed at national level. There are still no minimum harmonised standards on access to the courts throughout the EU.

In 2013, a Study was prepared for the Commission that documented these existing challenges.[6] Nonetheless, the Commission decided in 2014 to withdraw a proposal for a Directive that could

[2] For example, Implementing Regulations under art. 13(2) and art. 78(2) of Regulation 1107/2009.
[3] For example, delegated acts under under art. 14 of Regulation 995/2010 amending or supplementing the list of timber and timber products in the Annex.
[4] Derogation under Article 22 of Directive 2008/50/EC on ambient air quality and cleaner air for Europe – this was at stake in case T-396/09 *Milieudefensie* and the Court held that it had not been shown that "the applicants could bring an action before a national court challenging the measure of general application in respect of which they have asked the Commission to conduct an internal review"
[5] Case T-600/15 *Pesticide Action Network Europe (PAN Europe) and Others v European Commissio*n. ECLI:EU:T:2016:601.
[6] See the "2012/13 Access to Justice studies" prepared by Professor Jan Darpö for the European Commission, accessible under <http://ec.europa.eu/environment/aarhus/access_studies.htm>.

have improved access to justice in environmental matters in the Member States.[7] While the CJEU has correctly applied the Aarhus Convention requirements when asked by national courts about the interpretation of the Convention,[8] these cases do not remedy these difficulties in practice.

Throughout the EU, NGOs and individuals continue to struggle to obtain access to the courts in many cases of non-compliance with EU environmental law, let alone in cases where EU acts contravene EU environmental law. This is especially the case in systems that require NGOs and individual applicants to show impairment of a subjective right, such as in Germany or Austria.

In these systems, individuals will usually not be able to show that acts implementing EU laws affect more than their factual interests, which will be insufficient to demonstrate a violation of a legal right. In the absence of standing for individuals, systems have usually introduced standing for environmental NGOs in certain specified cases. However, these only apply to a clearly define set of acts, usually related to permitting or where otherwise public participation is required. Specifically:

- Austria has been found to be in non-compliance by the Meeting of the Parties to the Aarhus Convention as there were no legal standing for NGOs to challenge acts outside of the context of the implementation of the EIA, IED, Seveso III Directives as well as the ELD.[9] A recent law has added water permits, waste permits and air quality plans to this list.[10] However, besides these specific permits and plans mandated by EU law, no other acts are open to challenge for NGOs, in particular no regulatory acts implementing EU delegated and implementing acts on national level.
- In Germany, standing of NGOs in the public interest is exhaustively defined under the Environmental Appeals Act. This Act gives standing to challenge (a) various permitting decisions, (b) decisions on environmental damage, (c) decisions on plans and programmes requiring SEA and monitoring measures in the context of (a), (b) or (c).[11] The Act does not give standing to challenge any acts of the public authorities not associated with permitting.

[7] Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM/2003/0624 final.
[8] Case C-240/09 *Slovak Bears*, ECLI:EU:C:2011:125, C-243/15 *Slovak Bears II*, ECLI:EU:C:2016:838 and C-664/15 *Protect*, ECLI:EU:C:2017:987.
[9] Decision VI/8b on compliance by Austria with its obligations under the Convention, excerpt from ECE/MP.PP/2017/2/Add.1, para. 3. See all related documents at: <https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/implementation-of-decisions-of-the-meeting-of-the-parties-on-compliance-by-individual-parties/sixth-meeting-of-the-parties-2017/austria-decision-vi8b.html>.
[10] Aarhus Participation Act, available at ibid.
[11] See report of the Compliance Committee to the Meeting of the Parties on compliance by Germany with its obligations under the Convention, ECE/MP.PP/2017/40, available at: < https://www.unece.org/fileadmin/DAM/env/pp/mop6/English/ECE_MP.PP_2017_40_E.pdf>.

This demonstrates how implementing acts of Austrian and German public authorities, which are based on an EU act that has been adopted in violation of EU environmental law, cannot be challenged in national court. Accordingly, there can also not be a preliminary reference in these cases.

To give some concrete case examples where NGOs were denied standing to challenge an implementing act and could therefore also not request a validity challenge:

- In Poland and Bulgaria, NGOs do not have standing to challenge, inter alia, the lack of national plans on air quality required under Directive 2008/50.[12]
- In Germany, NGOs were denied standing to challenge decisions relating to type approval for cars.[13]

Issues relating to costs

Next to legal barriers, such as standing restrictions, such hurdles also encompass in some jurisdictions the costs of going to court. In particular, in Ireland and the United Kingdom, costs prevent individuals and NGOs from bringing challenges. For the UK, this has also already been recognized by the Meeting of the Parties to the Aarhus Convention[14] and a similar finding for Ireland is likely to follow soon. Last year, Bulgaria has also introduced a considerable increase in court fees that will in many cases be prohibitively expensive.[15] The Bulgarian example demonstrates that access to justice in the EU is not necessarily improving but may also deteriorate in the absence of concrete EU action.

National courts fail to make preliminary references

Even where an act exists that implements EU law and can be challenged under national law, in many proceedings national courts are hostile to referring a question to the CJEU. The applicants before the national courts cannot compel them to put a preliminary question to the CJEU. The situation on referral for interpretation illustrates the lack of willingness from national courts to refer questions:

[12] Poland, Supreme Administrative Court judgement (File No. II OSK 3218/17 of 23 January 2018), for Bulgaria: Supreme Administrative Court judgements (No. 13138 of 1 November 2017 and No. 16049 of 20 December 2018).
[13] Administrative Court Schleswig, judgement of 13.12.2017 – no. 3 A 26/17 and Administrative Court of Düsseldorf, judgement of 24.01.2018 – no. 6 K 12341/17
[14] Decision VI/8k on compliance by the United Kingdom with the Convention, ECE/MP.PP/2017/2/Add.1, available online at: <https://www.unece.org/fileadmin/DAM/env/pp/compliance/MoP6decisions/Compliance_by_United_Kingdom_VI-8k.pdf>.
[15] See for details: Communication by Za Zeminiata to the Aarhus Convention Compliance Committee, ACCC/C/2018/161 (Bulgaria), paras. 13-27, 40-41 and 71-95, available at: < https://www.unece.org/env/pp/cc/com.html>.

- Poland: Supreme Administrative Court judgement (File No. II OSK 3218/17 of 23 January 2018);
- Bulgaria: Supreme Administrative Court (No. 13138 of 1 November 2017 and No. 16049 of 20 December 2018).

French Courts systematically refuse to refer questions to the CJEU and have even been recently condemned by the CJEU for not doing so.[16] We can sadly expect judges in other jurisdictions to refuse putting questions to the CJEU as well.

Moreover, the applicants cannot decide what question(s) should be submitted to the CJEU, rather the formulation of the question(s) is at the discretion of the national court.

There is no sanction against a court or a Member State when a question should have been submitted, but was not. The Commission has taken only one action recently against France which has resulted in a ruling from the CJEU condemning France (its Conseil d'Etat) for not referring a question. This decision was adopted in a tax context, not an environmental one, and is therefore not indicative of a new trend in the EC to initiate infringement proceedings against Member States whose courts do not refer questions to the CJEU.

This procedure entails longer delays and more costs

Unavoidably, putting a question to the CJEU will induce more work and longer delays than having direct access to the CJEU. It is an additional procedure, which implies that the applicant has to work on the drafting of the suggested questions and prepare for the oral hearing before the CJEU. In turn, this implies more costs to pay the lawyer representing the applicant. On average, the preliminary rulings take 16 months in environmental matters.[17] Clearly, having to make a referral is not a timely procedure as required under Article 9(4) of the Convention. It is also more costly than if applicants had direct access to the CJEU.

[16] C-416/17, Commission v France.
[17] See Judicial statistics of 2017, available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-03/cp180036en.pdf>.

Part II: The inadequacy of Article 263(4) TFEU

No NGO or individual has been considered as fulfilling the conditions imposed by Article 263(4) TFEU to have legal standing before the CJEU.

Individual concern

The test for "individual concern" was defined in the Plaumann case as requiring that the applicant show she/he is affected "by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed". In practice, this requirement rules out cases brought in the public interest. This is because, by definition, measures affecting the environment will not solely concern one, individual applicant. This was also confirmed by the ACCC.

Therefore, all cases brought by NGOs and individuals in environmental matters have been rejected as inadmissible. Below is a list of unsuccessful attempts by individuals and NGOs to overcome this barrier:

- Cases T-585/93, Stichting Greenpeace Council and Others v Commission, ECLI:EU:T:1995:147 & C-321/95 P, Stichting Greenpeace Council and Others v the Commission, ECLI:EU:C:1998:153;
- T-219/95 R, Marie-Thérèse Danielsson and Others v Commission, ECLI:EU:T:1995:219;
- T-236/04, EEB and Stichting Natuur en Milieu v Commission, ECLI:EU:T:2005:426.

Direct concern

Since the introduction of the Lisbon Treaty, "regulatory acts" which do not require implementing measures may be challenged by persons to whom the act is of "direct concern" only. However, in practice this amendment has not led to any expansion of standing for NGOs or individuals acting in the public interest. In the Microban[18] case, the Court confirmed that the previous interpretation of "direct concern" still applied. This entails a two-step test for the act, which must:

[18] T-262/10, *Microban International and Microban (Europe) v Commission, para. 27.*

1. Affect the legal situation of the applicants, and
2. Leave no discretion to its addressees as to its implementation, "such implementation being purely automatic and resulting from the application of Community rules without the application of other intermediary rules".

The requirement that the measure must affect the legal situation of the applicant makes it in practice impossible for environmental NGOs to obtain standing under Article 263(4) TFEU, as they act in order to defend the public interest in the environment, rather than their subjective rights. The same applies to an individual acting in the public interest.

This was confirmed by the ACCC which found that the CJEU's interpretation of the "direct concern" criterion makes it impossible for organisations acting solely for the purpose of protecting the environment to obtain standing under the third limb of Article 263(4) TFEU, as such organisations would not be able to show an effect on their legal situation. Moreover, the Committee considered that the requirement that the challenged measure "*leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules*" was incompatible with Article 9(3) of the Convention, as it introduced additional requirements as to the kind of acts which are amenable to challenge under that provision.

As a recent example, in the PAN[19] case, three NGOs were denied standing by the General Court for lack of direct concern. The case concerned the approval by the Commission of the sulfoxaflor, an active substance for plant protection products, which the applicant NGOs sought to challenge because of its harmful effect on bees. The applicants argued that they were directly concerned by the approval because it represented a threat to beekeepers' producing activities and would therefore affect their right to property and to conduct a business as well as their campaign activities. The General Court rejected this argument, finding the potential effect on the applicants' economic activity was factual in nature, and did not impact their legal situation. The Court relied on Stichting Natuur to state that "*individuals cannot rely directly on Article 9(3) of the Aarhus Convention before the*" CJEU.[20] Therefore, Article 9(3) cannot be relied on to assess the compatibility of the Aarhus Regulation with the Convention nor to interpret Article 263(4) TFEU in light of the Convention.

[19] T-600/15, *PAN Europe, Bee Life and Unapii v Commission,* ECLI:EU:T:2016:601.
[20] Ibid, para.59

Part III: The inadequacy of the Request for Internal Review mechanism (Aarhus Regulation)

Article 10 to 12 of the Aarhus Regulation implement article 9(3) of the Aarhus Convention. The internal review request procedure was adopted to allow NGOs to contest decisions of EU institutions. However, it does not fulfil its objective and has been found in violation of Article 9(3) and (4) of the Aarhus Convention by the ACCC. The very limited number of requests found to be admissible evidences the misapplication of the provisions of the Convention.

a) Insufficient standing under the Aarhus Regulation, as recognized by the ACCC (Article 9.3 Aarhus Convention)

Since the adoption of the Aarhus Regulation, 31 of 40 requests for internal review were rejected as inadmissible by the Commission.[21]

Statistic of accepted and rejected Requests for Internal Review (as of September 2018)

No. of request	Inadmissible for:	Rejected on merits	Court appeal	Challenged act / omission
4	individual scope	X (due to appeal)[22]	T-338/08 and C-404-405/12 P -> T-574/12[23]	Regulation 149/2008 amending Regulation 396/2005 setting maximum residue levels for products
6	individual scope			Directive 2008/116/EC amending Directive 91/414/EEC to include certain active substances
8	individual scope		T-396/09 and C-401-403/12 P	Decision on notifying the Netherlands of postponement of deadline for attaining NO2 and PM10 limit values

[21] As of latest available data, last updated on Commission website in September 2018.
[22] After the initially successful court challenge in T-338/08, the Commission considered a renewed request by the applicant and rejected it on the merits. The applicants therefore filed a new court challenge (T-574/12). However, in the meantime case T-338/08 was overruled on appeal (Joined Cases C-404/12 and C-405/12). The Court therefore found that there was no longer a cause of action in case T-574/12.
[23] Ibid.

10	individual scope		T-232/11	Directive 2010/77/EU on expiry dates for certain substances
11	individual scope		T-192/12	Impl. Regulation 1143/2011 approving substance prochloraz
12	individual scope		T-458/12	Impl. Regulation 359/2012 approving active substance metam
13	individual scope		T-168/13	Communication "Renewable Energy"
15	individual scope		T-8/13	Impl. Regulation 482/2012 approving bifenthrin
16	individual scope		T-19/13	Decision C(2012) 4576 to give transitional free allocation for the modernisation of electricity generation notified by Czechia
18	individual scope			Impl. Regulation amending Impl. Regulation 540/2011 on approval of glufosinate
19	individual scope		T-671/13	Impl. Regulation amending Impl. Regulation 540/2011 on approval of glufosinate etc and omission to act
22	individual scope		T-462/14	Decision on notification by Greece of Transitional National Plan
24	individual scope		T-565/14	Decision on notification by Poland of Transitional National Plan
25	individual scope		T-685/14	Decision on notification by Bulgaria of Transitional National Plan
26	individual scope			Impl. Regulation approving amorphous silicon dioxide
28	individual scope			Decision determining list of sectors and subsectors deemed to be exposed to significant carbon leakage
29	individual scope			Decision on notification by Czechia of Transitional National Plan
32	individual scope			Decision on notification by Spain of Transitional National Plan
36	individual scope		T-12/17	Impl. Regulation concerning extending the approval period of glyphosate
40	individual scope		T-393/18	Impl. Regulation concerning renewing the approval of glyphosate

21	individual scope & environmental law			Delegated Regulation concerning list of projects of common interest
5	infringement proceedings			Decision concerning infringement procedure for the Baixo Sabor dam project
1	external effects			Decision adopting list of candidates to the Management Board of the European Chemicals Agency
3	legally binding and external effects			Decision approving the Operational Programme Transport 2007-2013 for Czechia
17	legally binding and external effects			Decision to appeal against judgements in T-338/08 and 396/09
7	legally binding and external effects & individual scope			Statement concerning Directive 2003/87/EC on emissions trading
23	legally binding and external effects & individual scope			Omission to submit proposal to implement Fuel Quality Directive
34	request to generally formulated			Decision authorising placing on the market of a GMO
27	Decision taken by review body & individual scope			Guidelines on state aid for environmental protection and energy – 2014 – 2020 (2014/C 200/01).
39	Decision taken by a review body			Decision concerning a French State Aid Measure SA.40454 2015/C (ex 2015/N)
20	Organization did not meet Article 11 criteria			Delegated Regulation concerning list of projects of common interest

2		X		Decisions authorising placing on the market of GMOs
9		X		Decisions authorising placing on the market of GMOs
14		X	T-177/13	Decision authorising the placing on the market of GMOs
30		X	T-33/16	Decision authorising placing on the market of GMOs
31		X		Decision authorising placing on the market of a GMO
33		X		Decision recognising Le Commerce du Bois as a monitoring organisation for timber
35		X	pending	Decision authorising use of a substance (DEHP)
37		X		Decision authorising the placing on the market of GMOs
38		X	pending	Decision authorising use of a substance (lead chromate)

Individual scope

As the table above shows, 20 of the Requests for Internal Review (RIRs) were rejected solely on the basis that they were not considered to be of individual scope and in 4 further cases, individual scope was one of the grounds for rejection. As demonstrated by the replies to the requests, this requirement excludes from the scope of internal review any act that is not addressed specifically to one economic operator or association of operators. Decisions addressed to a Member State or that regulate a specific subject (such as a substance) are also excluded.

The ACCC found in this regard:

> *"[…] the Committee agrees with the General Court's analysis that "there is no reason to construe the concept of 'acts' in article 9, paragraph 3, of the Convention as covering only acts of individual scope" and that "there is no correlation between measures of general application and measures taken by a public authority acting in a judicial or legislative capacity". It follows that article 10, paragraph 1, of the Aarhus Regulation fails to correctly*

implement article 9, paragraph 3, of the Convention insofar as the former covers only acts of individual scope."[24]

Clearly the individual scope criterion is the most important obstacle to access to justice under the Aarhus Regulation. The regulation should be revised accordingly. The fact that the European Commission's proposal for the regulation in 2006 did not contain the criterion demonstrates that it did not find it necessary to impose such a limitation. The proposal defined an "administrative act" as "*any administrative measure taken under environmental law by a Community institution or body having legally binding and external effect*."[25]

Legally binding and external effects

In its findings, the ACCC included the following list of EU decisions based on which it considers the "legally binding and external scope" criterion to be problematic:

1. approving Operational Programme Transport for certain Member States;[26]

2. a Commission proposal to implement a directive and the omission to adopt such a proposal;[27]

3. guidelines on state aid for environmental protection and energy;[28]

[24] Findings of the Aarhus Compliance Committee on communication ACCC/C/2008/32, Part II (European Union), para. 51
[25] Proposal for a Regulation of the European Parliament and of the Council on the application of the provisions of the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies (COM/2003/0622).
[26] Commission's reply of 06/08/2008 on request made by Ekologicky Pravni Service. The Commission argues that these decisions are addressed to Member States and that it is their responsibility and competence to implement them. However, the fact that some discretion is left to the Member States is not that convincing to demonstrate that the decision lacks external effects. Moreover, these programmes set out a development strategy with a coherent set of priorities and that these decisions enable the Commission to make commitments on the Community's budget to complement national actions, integrating into them the priorities of the Community.
[27] Commission's reply of 7/04/2014 to Greenpeace, Transport & Environment, Friends of the Earth Europe. The NGO was challenging the omission to submit the proposal for the implementation measures of a provision of the Fuel Quality Directive, in particular the fuel baseline standard and greenhouse gas emissions calculation methodologies. The adoption of a Commission proposal to implement a directive clearly has external effects in that it starts the procedure to adopt an implementing or delegated act, and can trigger the European Parliament and Council to act in the relevant case, either using their veto or supporting the proposal. It will also trigger interventions from the industrial sectors concerned.
[28] Commission's reply of 13/10/2014 to Friends of the Earth England, Wales and Northern Ireland

4. a Commission statement concerning the implementation of a provision of the EU ETS Directive specifying the way Member States may use revenues generated from auctioning of allowances to support the construction of certain plants.[29]

All of these are examples of requests for internal review that were rejected by the Commission as inadmissible.

This is not to say that there is no need for an act to have legal effects in order to be subject of a challenge, i.e. the act or omission must have the potential to contravene environmental law. The problem arises from the fact that the wording "legally binding and external effects" has in practice been interpreted in a manner that goes substantially beyond that requirement.

Adopted under environmental law

The central problem with the limitation of review to acts "adopted under environmental law" is that it misconstrues the definition of the acts that can be challenged provided by Article 9(3) of the Convention and has therefore led to some misapplication in practice

The Commission considers that to be subject to review an act must be specifically intended to positively contribute to the environmental policy of the European Union.[30] Of course, this is not what Article 9(3) of the Convention envisages. Article 9(3) provides that the Parties to the Convention shall ensure that members of the public may challenge "acts or omission by private persons and public authorities which contravene provisions of its national law relating to the environment". The objective of this provision is instead that acts or omissions that violate environmental law, i.e. that go against the Union policy on the environment, are challengeable. In some cases, these concepts may overlap: An act may be intended to contribute to environmental policy but then fail to do so, or do so only to an insufficient extent. However, other acts that may not be intended to contribute to environmental policy, but for instance to energy policy, may "contravene" the Union policy on the environment. It is crucial that the latter must also fall within the scope of Article 10 of the Aarhus Regulation.

This is required not only by Article 9(3) of the Convention but also follows from the so-called "environmental integration principle" enshrined in Article 11 TFEU:

[29] Commission's reply of 27/4/2009 to ClientEarth internal review request.
[30] Reply of 7 February 2014 by the European Commission to request for internal review by Justice & Environment, available at: <http://ec.europa.eu/environment/aarhus/pdf/requests/21/reply.pdf>.

> *"Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development."*

This provision clearly establishes that environmental policy does not operate independently of other Union policy areas but must be integrated in all Union policy. The requirement that an act must be "adopted under environmental law" therefore contradicts Article 9(3) of the Convention and the nature of the Union policy on the environment.

The correct test is instead, whether the arguments of the applicant relate to a violation of environmental law. This is in turn in line with the objective of Article 9(3) of the Convention and prevents that all Union acts, whether related to the environment or not, would become subject to a challenge.

This test was in fact already applied by the Commission and the Court in the context of case T-33/16 Testbiotech. Here the Court held:

> *49 The Court must therefore interpret the extent of the obligation to carry out an internal review pursuant to Article 10 of Regulation No 1367/2006 in such a way that the Commission is required to examine a request for internal review only in so far as the applicant for review has claimed that the administrative act in question contravened environmental law within the meaning of Regulation No 1367/2006."*

The Court accordingly interpreted the provision in line with Article 9(3) of the Aarhus Convention. Rather than maintaining this uncertainty, the Aarhus Regulation should be clarified accordingly, making clear that there is no need for an act to be "adopted" under environmental law, but only that it "contravenes" environmental law. The Commission's proposal for the regulation in 2006, despite the fact that it also defined administrative acts as being adopted under environmental law, was clearer as it specified in its article 9 the conditions under which any qualified entity could make an internal review request in the following way:

> *"Any qualified entity who has legal standing according to Article 10 and who considers that an administrative act or an omission* ***is in breach of environmental law*** *is entitled to make a request for internal review …" [emphasis added]*

Paragraph 2 of the same article stated that the Community institution had to adopt a decision in reply to the request for internal review "to ensure compliance with environmental law".

This wording was thus much clearer as it prevented any confusion as to the scope of the request.

(b) Further standing limitation under the Aarhus Regulation: The exemption of administrative review

In its findings on communication ACCC/C/2008/32 (European Union), Part II, the Aarhus Convention Compliance Committee stated that the Aarhus Convention does not include an exemption for bodies acting as an "administrative review body" as provided for in Article 2(2) of the Aarhus Regulation.[31] The Committee further held that this exemption is not covered by the exceptions for acts adopted in a judicial or legislative capacity provided by Article 2(2) of the Convention.[32] Nonetheless, the Committee found that there was no non-compliance with the Aarhus Convention because it was lacking concrete examples of breaches.[33]

Since the adoption of the findings of the Aarhus Compliance Committee, the Committee has been presented with clear evidence in the context of communication ACCC/C/2015/128 (European Union) that decisions taken by the Commission under Articles 107 and 108 TFEU can contravene provisions of environmental law.[34] While the findings of the Committee have not been published yet at the time of this public consultation, they will likely be published in the following months. It is important that the amendment of the Aarhus Regulation remedies this issue directly to prevent that a renewed amendment process will be necessary.

(c) No possibility to challenge the underlying decision before the EU Courts

In its findings on communication ACCC/C/2008/32, the Compliance Committee also stated that it seems that:

> *"[..]* ***it is possible for the European Courts to interpret article 12 of the Aarhus Regulation in a way that would allow them both to consider*** *failure to comply with article 10, paragraphs 2 and 3, and* ***also the substance of an act falling within article 10, paragraph 1****. On that basis, unless and until there is a contrary interpretation by the*

[31] ECE/MP.PP/C.1/2017/7, paras. 108-110.
[32] Ibid.
[33] Ibid, para. 111.
[34] All relevant documents are available here: https://www.unece.org/environmental-policy/conventions/public-participation/aarhus-convention/tfwg/envppcc/envppcccom/acccc2015128-european-union.html.

> *European Union courts, the Committee does not conclude that article 12 of the Regulation is inconsistent with the requirements of the Convention*."[35]

In the meantime, the General Court has made a statement on this very point in case T-177/13 *Testbiotech*, holding that:

> *"It is of course inherent in a request for internal review of an administrative act that the party requesting the review is challenging the lawfulness or merits of the measure, in this case the authorisation decision. The purpose of the internal review procedure is therefore to obtain a finding that the authorisation decision is unlawful or unfounded. Pursuant to Article 12 of Regulation No 1367/2006, read in conjunction with Article 10 thereof, the party requesting the review may institute proceedings against the decision rejecting the request for internal review as unfounded before the EU Courts, and may allege lack of powers, infringement of essential procedural requirements, infringement of the Treaties or of any legal rule relating to their application, or misuse of powers.* ***That does not mean that the party making the request is entitled, in the course of those proceedings, to put forward arguments directly challenging the lawfulness or merits of the authorisation decision****. In the present case, therefore, the first applicant may only ask the Court to declare that the first contested decision referred to in the request for internal review is unlawful, even if it based on the authorisation decision being unlawful or unfounded*.
> […]
> *60 It follows that the first applicant's* ***pleas*** *put forward in support of the present action* ***must be rejected in so far as they*** *do not allege any unlawfulness of the first contested decision, but* ***merely affirm directly the unlawfulness of the authorisation decision*** *or of EFSA's opinions, or that they are unfounded."36*

An appeal of this judgement is currently pending (case C-82/17) and the same issue has been raised in two cases lodged by ClientEarth (cases T-108/17 and T-436/17) before the General Court. However, there is currently no indication that the Court attempts to interpret Article 12 in a manner that would allow an applicant to challenge the substance of the act that was the subject of the internal review request.

If such an interpretation is upheld, the Regulation is emptied of its substance. For instance, a reply of the Commission to an internal review request could meet all formal requirements but actually fail to accurately identify a violation of environmental law. Such a request could then still be upheld

[35] ACCCC/C/2008/32, Part II (European Union), ECE/MP.PP/C.1/2017/7, para. 119.
[36] ECLI:EU:T:2016:736.

by the Court. This would prevent the Regulation from fulfilling its objective to provide members of the public with the right to challenge decisions of institutions that contravene national law related to the environment.

The Commission's proposal for the regulation was not entirely satisfactory either but was going further than the present version of the regulation since it stated that the "qualified entity" could institute proceedings before the CJEU "to review the substantive and procedural legality of the decision".

Part IV: How to amend the Aarhus Regulation

Proposed substantive amendments in green, amendments to reflect Lisbon Treaty changes in blue:

Whereas:

[…]

(3) On 25 June 1998 the Community signed the United Economic Commission fro Europe (UNECE) Convention on Access to Information, Public Participation in decision-making and Access to Justice in Environmental Matters (hereinafter the Aarhus Convention). The Community approved the Aarhus Convention on 17 February 2005. Provisions of EU law should be consistent with that Convention and must be interpreted in such a way as to give full effect to its provisions.

(4) The Union has already adopted a body of legislation, which is evolving and contributes to the achievement of the objectives of the Aarhus Convention. Provision should be made to apply the requirements of the Convention to Union institutions and bodies**,** including institutions and bodies under the Euratom Treaty.

Article 2

Definitions

(g) 'administrative act' means any measure ~~of individual scope under environmental law,~~ taken by a Union institution or body, and having legally binding ~~and external~~ effects ;

[…]

2. Administrative acts and administrative omissions shall not include measures taken or omissions ~~by a Community institution or body in its capacity as an administrative review body, such as~~ under:
~~(a) Articles 81, 82, 86 and 87 of the Treaty (competition rules);~~
(a) Article 258, 259 and 260 TFEU (infringement proceedings)
(b) Article 228 TFEU (Ombudsman proceedings);
(c) Article 325 TFEU (OLAF proceedings).

[…]

Article 10

Request for internal review of administrative acts

1. Any non-governmental organisation which meets the criteria set out in Article 11 and who considers that an administrative act or an omission contravenes environmental law is entitled to make a request for internal review to the Union institution or body that has adopted the ~~an~~ act ~~under environmental law~~ or, in case of an alleged omission, should have adopted ~~such~~ an act.

   […]

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 issue ~~state its reasons in a written reply~~ as soon as possible, but no later than 12 weeks after receipt of the request, a decision in writing on the measure to be taken to ensure compliance with the environmental law or state its reasons to reject the request.

[…]

Article 12
Proceedings before the Court of Justice

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~~ to review the substantive and procedural legality of the decision.

   […]

3. The Union institution or body referred to in Article 10(1) shall be required to take the necessary measures to comply with the judgment of the Court of Justice.

Annex 2: Further information on the Specific Questions

Part I: Experience with Requests for Internal review

ClientEarth has filed the following six requests for internal review:

No. of request	Inadmissible for:	Rejected on merits	Court appeal	Challenged act / omission
7	legally binding and external effects & individual scope			Statement concerning Directive 2003/87/EC on emissions trading
15	individual scope		T-8/13	Impl. Regulation 482/2012 approving bifenthrin
17	legally binding and external effects			Decision to appeal against judgements in T-338/08 and 396/09
26	individual scope			Impl. Regulation approving amorphous silicon dioxide
35		X	T-108/17	Decision authorising use of a substance (DEHP)
38		X	T-436/17	Decision authorising use of a substance (lead chromate)

All of these requests related to acts which do not entail implementing measures at national level. Since the first four of the requests were declared inadmissible, there was therefore no available avenue to challenge these acts:

- Request no. 7 related to statement made by the European Commission which effectively permitted state aid for the construction of power plants. This statement was in no way implemented at national level. Downstream it would only be applied by the Commission in decisions on notifications of state aid, which are excluded from the Aarhus

Regulation[37] and for which NGOs generally lack the required direct concern under Article 263 (4) TFEU. It should also be noted that the possibility to challenge such measures by way of Article 267 TFEU is highly questionable.[38]

- Request no. 17 contested the decision by the Commission to appeal against the CJEU's judgements in T-338/08 and 396/09. The decision by the Commission to appeal was not implemented in any way at national level, as the decision was concerned solely with an EU institutional matter.
- Requests 15 and 26 challenged Commission Implementing Regulations approving certain active substances, one being adopted under Regulation 1107/2009 on plant production products and the other under Regulation 528/2012 on biocidal products. Since these Implementing Regulations implement an aspect of a Regulation adopted under article 288 TFEU, they are directly applicable in the Member States without further implementing measures. Since the substances concerned can accordingly be directly utilized in production processes, there is no intervening national act that could be challenged in national courts.

Part II: Experience with the preliminary ruling mechanism (Article 267 TFEU)

a and e) Bulgaria and Poland: Evidence regarding legal standing and willingness of judges to refer a request

Bulgaria:
ClientEarth supported environmental NGO ZaZemiata and groups of local residents to challenge the air quality plans adopted by the municipalities of Sofia and Brno. In both cities, air quality limits are consistently breaching the legal limits set by the Air Quality Directive and the public authorities

[37] For an application of this rule, see the Commission's reply to an internal review request no. 39 filed by the French NGO "Force 5".
[38] Interestingly, in its recent judgment in jointed C-622/16 P to C-624/16 P, *Scuola Montessori* ECLI:EU:C:2018:873, the CJEU looked at the issue of whether a Commission State aid decision entailed implementing measures in the sense of Article 263(4) TFEU. In this case, the applicant was a competitor of the aid beneficiary. The Commission argued that its decision required implementing measures at national level granting the aid. The Court rejected this argument and confirmed the General Court's finding that, "with respect to" the applicant, the Commission's decision did not entail implementing measures. In this respect, it found that "it would be artificial to require that competitor to request the national authorities to grant him that benefit and to contest the refusal of that request before a national court, in order to cause the national court to make a reference to the Court on the validity of the Commission's decision concerning that measure."

were therefore required to adopt an air quality plan that would bring pollution limits below the applicable limits in the shortest period possible. Since the plans were inadequate to reach these levels, both ZaZemiata and local residents of both cities launched parallel cases (i.e. three cases in total). However, all applications were rejected on the basis that the plans were considered an "internal act" that did not affect the legal interests of the applicant.[39] These rulings were confirmed on appeal in two judgements by the Supreme Administrative Court.[40] In their pleadings, the applicants requested the courts to refer a question for a preliminary ruling as to their standing but all judges, including those on final instance, refused to do so. This was despite the clear case law of the CJEU on this very issue, in particular cases C-237/07 *Janecek* and C-404/13 *ClientEarth*.

Poland:

ClientEarth Poland supported a resident of Rybnik, Silesia, to challenge the air quality plan adopted by the Provincial Assembly of Silesia. In the absence of a reply from the responsible public authority, both the resident and ClientEarth Poland launched a case before the administrative court seeking the plan to be quashed and that a new plan be adopted. However, both the local resident and ClientEarth were considered to not have a legal interest that was violated by the adoption of the plan and therefore did not have standing to bring proceedings.[41] This decision was confirmed on appeal by the Supreme Administrative Court.[42] As in the Bulgarian example above, the applicants' request for a preliminary reference was denied despite the clear, pre-existing CJEU jurisprudence.

b) Germany and Greece: Evidence regarding the nature of the act

Germany:

ClientEarth supported DUH in bringing two cases before the Administrative Courts of Schleswig and Düsseldorf to challenge a permit granted to certain vehicles affected by the so-called dieselgate scandal.[43] DUH alleged that the type approval had been granted for the vehicles concerned based on test results that had been falsified due to the use of illegal software and that the permit for operation of these vehicles should therefore be quashed. DUH is a recognized environmental organization for the purposes of Germany's Environmental Appeals Act (UmwRG), which permits environmental organizations to challenge certain environment related acts. However, the court found that the permits concerned were not covered by the Environmental

[39] Sofia Administrative Court judgement, No. 6541 of 25 September 2017 and Plovdiv Administrative Court judgements, No. 1972 of 5 October 2018 and No. 1996 of 10 October 2018.
[40] Supreme Administrative Court judgment, No. 13138 – Sofia, 1 November 2017 and No. 16049 – Sofia, 20 December 2018.
[41] Order of the Voivodship Administrative Court in Gliwice, file no. II SA / Gl 639/17, 15 September 2017.
[42] Supreme Court judgment, file no. II OSK 3218/17, 23 January 2018.
[43] Administrative Court Schleswig, judgement of 13.12.2017 – no. 3 A 26/17 and Administrative Court of Düsseldorf, judgement of 24.01.2018 – no. 6 K 12341/17.

Appeals Act and that DUH had therefore no standing on this basis. Neither could DUH obtain standing based on the regular standing rules because the court found that its subjective rights were not violated by the measure.

Greece:

ClientEarth and WWF Greece have submitted a joint communication to the Aarhus Convention Compliance Committee (ACCC) detailing the barriers faced by both entities in challenging certain permitting decisions in relation to large combustion plants (LCPs) (details of the communication can be found here). In summary, permitting decisions in relation to LPCs are not subject to administrative or judicial review when they are adopted by way of legislative acts. The Public Power Corporation ('***PPC***') is Greece's national incumbent power company and operates the majority of Greece's highly polluting lignite mines and power plants. A large proportion of PPC's LCP permits, including operating and environmental permits, have been granted and extended through legislative acts since 1999. The result is that the public concerned does not have access to a review procedure, administrative or judicial, to challenge the substantive and procedural legality of the legislative acts that granted and extended the operating permits and extended the validity of the environmental permits of PPC's plants as required by the Industrial Emissions Directive and the Environmental Impact Assessment Directive.

c) and d) UK and Belgium: Evidence of additional costs and timeframes involved in preliminary references to the CJEU

UK:

On 28 July 2011, ClientEarth launched a judicial review of the failure by the Secretary of State for the Environment, Food and Rural Affairs (Defra) to comply with legal limits for nitrogen dioxide (NO2) in Directive 2008/50/EC on ambient air quality. After the High Court and the Court of Appeal dismissed the case, the Supreme Court finally referred a number of questions to the CJEU on the interpretation of the Directive on 1 May 2013. Following the CJEU's judgment on 19 December 2014,[44] the Supreme Court found in favour of ClientEarth in a judgment handed down on 16 April 2015.[45] The total cost of hiring a barrister to represent ClientEarth in the entire case (from launching the judicial review in the High Court to the final Supreme Court judgment in April 2015) amounted to more than 100,000 GBP. Approximately one quarter of that cost can be attributed to the cost of hiring counsel to cover the preliminary reference procedure.. It should be noted that these amounts do not include the costs associated with ClientEarth's in-house solicitors working

[44] C-404/13 ClientEarth, ECLI:EU:C:2015:486.
[45] R (on the application of ClientEarth) v Secretary of State for the Environment Food and Rural Affairs [2015] UKSC 28.

on the case. Therefore, the cost for an NGO or member of the public that would need to hire a solicitor as well as a barrister in the UK would be significantly higher.
It should be noted that when the case was launched in 2011, ClientEarth sought an order that UK government must issue air quality plans in relation of certain areas that should have achieved compliance at the latest by 2015 (according to a derogation available in the Directive). The delay in the procedure caused by the preliminary reference procedure meant that the final ruling was issued when the question was not relevant anymore (as it was after January 2015).
Belgium:
On 21 September 2016 ClientEarth launched a case against the Brussels Region's failure to enact an adequate air quality plan and to properly monitor air pollution, as required by Directive 2008/50/EC, before the First Instance Tribunal of Brussels.[46] On 15 December 2017 the Tribunal referred questions to the CJEU on the interpretation of the Directive.[47] A hearing before the CJEU took place on 10 January 2018. The judgment is currently pending. The cost of hiring legal counsel for representation before the CJEU accounted for more than one third of the total cost of counsel in the case. Again, the costs associated with legal representation would be significantly higher for individuals or organisations without in-house legal expertise.
The procedure of the referral therefore entails an additional delay of around 18 months and significant additional costs.

e) Romania: evidence of unwillingness to refer questions to the CJEU under Article 267 TFEU

Part of ClientEarth's work on coal in Central Europe focuses on improving the sanctioning of power plants that operate in violation of the Industrial Emissions Directive (Directive 2010/75/EU. Our partner in this work, Greenpeace Romania, is an intervener in a case involving CET Govora and the National Environment Guard, pending before the Ramnicu Valcea District Court[48] since 2 November 2015. Greenpeace Romania addressed the court with a request for a preliminary ruling, suggesting that the national court refer a number of questions on the interpretation of Article 79 of the Industrial Emissions Directive. The plaintiff, CET GOVORA, also submitted a set of separate questions for the national court to consider when and if addressing the CJEU. Starting on 20 June 2017, the Court systematically postponed discussions regarding Greenpeace Romania and CET Govora's requests, only to finally allow the discussions to take place on 11 December 2018 (thirteen court hearings later). The court finally rejected both the request of Greenpeace Romania and CET GOVORA. The reasoning for rejecting both requests, according to Court's decision of

[46] 2016/3659/A.
[47] Case C-723/17 *Craeynest e.a.*
[48] Case File 6920/288/2015.

11.12.2018 is extremely brief, stating solely that “the requests are not useful to the case”. Although this is not an example of a preliminary reference on validity of an EU acts, it is valid evidence of the difficulties faced in persuading national courts to refer questions to the EU courts.

Part III: Experience with actions for annulment (article 263 TFEU)

Standing

As discussed in detail in Annex 1, part II, NGOs have only very limited standing to challenge EU acts under Article 263 TFEU due to the CJEU's interpretation of direct and individual concern. In practice, this means that we can only challenge the replies of EU institutions to requests for access to documents and requests for internal review. Even in the cases where we do have standing under the Aarhus Regulation to challenge replies to requests for internal review, the question of whether the application for annulment can refer to the unlawfulness of the underlying decision is still outstanding, as referred to in Annex 1. If this question is answered by the Court in the negative, it will represent a major difficultly in challenging EU acts in the CJEU.

Nature of the act challenged

The very limited scope of the acts that be challenged through the internal review procedure in Regulation 1367/2006, particularly the limitation to acts of individual scope, means that we can challenge only very few EU acts that contravene EU law relating to the environment. This represents a major difficulty in the procedure. For more details, see Annex 1, part III.

Length of procedure

According to the CJEU's Annual Report for 2017, the average length of proceedings in the General Court is 16.3 months. However, ClientEarth currently has three cases (not including those related to access to documents) which have already been pending before the General Court for at least 16 months and have not yet been concluded.

- Case T-108/17 ClientEarth v Commission was lodged with the Court on 17 February 2017, approximately two years ago. The written procedure has been completed and a hearing was held in September 2018. The case was brought under Article 12 of Regulation 1367/2006 against the Commission's decision in respect of a request for internal review of its authorisation of DEHP, a substance of very high concern.
- Case T-436/17 ClientEarth and others v Commission was lodged with the Court on 12 July 2017, 19 months ago. Again, the written procedure has been completed and a

hearing was held in January 2019. This case was also brought under Article 12 of Regulation 1367/2006, this time against the Commission's decision in respect of a request of internal review of its authorisation of lead chromates, another substance of very high concern.

- Finally, case T-677/17 ClientEarth v Commission was lodged with the Court on 2 October 2017, 16 months ago. The written procedure has been completed but no hearing has yet been scheduled. This case was brought under Article 263(4) TFEU in respect of a Commission implementing regulation regarding vehicle type approval.

Pending judgment in these cases, irreparable harm continues to be caused to the environment and human health by the contested EU acts. This means that, by the time the judgment is handed down, it may be wholly irrelevant. The timeframes involved in receiving a first instance judgment highlighted by these cases therefore represent a major difficulty in these processes.
The CJEU's Annual Report for 2017 also states that the average length of proceedings before the Court of Justice is 16.4 months. ClientEarth has experience of appealing three General Court judgments to the Court of Justice concerning access to documents.

- Case C-57/16 P ClientEarth v Commission was lodged on 1 February 2016 and was decided two years and 7 months later, on 4 September 2018. Including the procedure in the General Court (case T- 424/14) which commenced on 11 June 2014, this case lasted more than four years.
- Case C-615/13 P ClientEarth and PAN v EFSA was lodged on 27 November 2013 and was decided one year and eight months later, on 16 July 2015. Including the procedure in the General Court (case T-241/11) which commenced on 11 April 2011, the case lasted more than four years.
- Case C-612/13 P ClientEarth v Commission was lodged on 26 November 2013 and was decided one year and eight months later, on 16 July 2015. Including the procedure in the General Court (case T-111/11) which commenced on 21 February 2011, the case lasted more than four years and 5 months.

Costs and related issues

In order to litigate before the CJEU, ClientEarth must be represented by an independent lawyer. Hiring such a lawyer for the written and oral procedures before the General Court only (excluding appeal to the Court of Justice) would usually amount to approximately 20,000 euros, but this varies in relation to the complexity of the case. Unless funding is secured for this purpose, which is very rare, ClientEarth must rely on pro bono counsel. In general, only large commercial law firms or

independent lawyers with a commercial practice offer pro bono work. This can make it very difficult to find counsel that is not conflicted because many environmental cases have the potential to impact their other clients. Our experience is that these lawyers are conflicted in cases involving at least the following matters chemicals, oil, GMOs and cars' emissions.

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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