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ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS BEYOND THE AARHUS REGULATION: TOWARDS AN ALTERNATIVE ADJUDICATORY MODEL AT THE EU LEVEL

L'accesso alla giustizia in materia ambientale oltre il regolamento Aarhus: verso un modello di rimedio alternativo a livello sovranazionale

Accès à la justice en matière environnementale au-delà du règlement Aarhus : vers un modèle de recours alternatif au niveau UE

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– 4.3. Why 'Environmental Boards of Appeals' Would Be Compatible with the Union Courts' Competences Under the Treaties. – 5. Conclusion and Way Forward.

1. Introduction: Scope and Aim of the Research

The European Union legal order encompasses a comprehensive regulatory framework for environmental protection[1]. However, its effectiveness largely depends on the operation of public and private enforcement mechanisms[2]. In this respect, the Commission has emphasised the need to guarantee NGOs' access to justice in environmental matters – defined as «the right of natural and legal persons to bring an action before a court of law or other impartial body in order to permit the review of acts or omissions of public or private bodies»[3] – to «strengthen the role that civil society can play as guardian of the democratic space»[4]. However, it is precisely with regard to private enforcement mechanisms at the EU level that the most complex hurdles have emerged for actors pursuing collective interests.

Ensuring access to justice for NGOs and other members of the public in EU environmental law is not merely a policy choice, but a legal

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[1] For an overview, among many, see: G. VAN CALSTER, L. REINS, *EU Environmental Law*, Cheltenham, 2017; F. MUNARI, L. SCHIANO DI PEPE, *Tutela transnazionale dell'ambiente. Principi, regole e problemi*, Bologna, 2012; P. THIEFFRY, *Droit de l'environnement de l'Union Européenne*, Bruxelles, 2th ed., 2011; C. COURNIL, A.-S. TABAU, *Politiques climatiques de l'Union européenne et droits de l'homme*, Bruxelles, 2013.

[2] On the distinction, among many, see: F. MUNARI, *Public e Private enforcement del diritto ambientale dell'Unione*, in *QUADERNI AISDUE – serie speciale – n. 3 – Atti del Convegno di Bari, 3-4 novembre 2022 – "Ambiente, digitale, economia: l'Unione europea verso il 2030"*, Napoli, 2023, p. 59 ff. On public enforcement in EU law, see F. MUNARI, *Protecting the Environment through Union Sanctions. The Many Facets of the Enforcement of EU Environmental Law*, in S. MONTALDO, F. COSTAMAGNA, A. MIGLIO (eds.), *EU Law Enforcement: The Evolution of EU Sanctioning Powers*, Torino-Oxon, 2021, p. 267 ff.

[3] Commission Notice on access to justice in environmental matters, in *OJ* C 275, 18.08.2017, p. 1 ff., point 4. On the role of courts in tackling the climate and environmental crises, among many, see C. ECKES, *Tackling the Climate Crisis with Counter-Majoritarian Instruments: Judges between Political Paralysis, Science, and International Law*, (2021) *European Papers*, p. 1307 ff.

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Improving access to justice in environmental matters in the EU and its Member States, COM(2020) 643 final, 14.10.2020, point 2. On the role of NGOs in the enforcement of EU law, among many, see K. REINERS, E. VERSLUIS, *NGOs as New Guardians of the Treaties? Analysing the Effectiveness of NGOs as Decentralised Enforcers of EU Law*, (2023) *Journal of European Public Policy*, p. 1518 ff.

obligation. Indeed, the Union is a Contracting Party to the UNECE Convention on access to information, public participation in decision-making and access to justice in environmental matters – known as the «Aarhus Convention»[5] – which provides for a general obligation in this respect[6]. However, the peculiar features of the EU judicial system create significant obstacles for NGOs and other members of the public in bringing proceedings before the Court of Justice of the European Union (CJEU). Indeed, the conditions for legal standing in actions for annulment of EU acts and actions against failures to act by EU institutions, bodies, and agencies are specifically designed to align with the protection of individual interests. Therefore, NGOs and other entities advocating for collective interests, like environmental protection, are frequently restricted from directly accessing the Court of Justice[7].

Against this backdrop, the EU legislature implemented the obligations stemming from the Aarhus Convention through an act of secondary law: Regulation (EC) n. 1367/2006[8], commonly referred to as the «Aarhus Regulation», which was amended in 2021. As will be shown in Section 2, this piece of legislation enables NGOs and other members of the public to request an internal review of administrative actions or omissions by EU institutions, bodies, or agencies that breach environmental law. The decision on the review can then be contested before Union Courts under Article 263 TFEU, thereby establishing a double-layered administrative and judicial remedial architecture.

Internal review under the Aarhus Regulation has been a key topic in the scholarly and institutional debate on access to justice in environmental matters within the EU legal order[9]. However, this rich debate has primarily

[5] Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus, 25 June 1998), UNTS n. 2161, p. 447 ff.

[6] For a comprehensive assessment of the implementation of the Aarhus Convention in the EU legal order, see A. LANG, *La Convenzione di Aarhus del 1998 e l'attuazione nell'Unione europea*, (2025) *Rivista Quaderni AISDUE*, p. 1 ff.

[7] See *infra*, Section 2.1.

[8] Regulation (EC) n. 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to community institutions and bodies, in *OJ* L 264, 25.09.2006, p. 13 ff.

[9] Among many, see I. ANRÒ, *Il difficile accesso alla giustizia ambientale per le ONG e la riforma del Regolamento di Aarhus*, (2022) *Federalismi*, p. 1 ff.; L. DE LUCIA, *The New Aarhus Regulation and the Defensive Behaviour of the European Legislator*, (2022) 15 *Review of European Administrative Law* , p. 7 ff.; M. ELIANTONIO, *Collective Redress in Environmental Matters in the EU: A Role Model or a 'Problem Child'?*, in *Legal Issues of European Integration*, 2014, p. 257 ss.; I. HADJIYIANNI, *Judicial Protection and the Environment in the EU Legal Order: Missing Pieces*

focused on the legal standing of NGOs and other members of the public in internal review proceedings, particularly regarding the restrictive conditions established prior to the 2021 reform and, most recently, the new avenues for litigation opened by the revised legal framework[10]. After retracing the main challenges that emerged from the evolution of the system, Section 3 goes beyond the prevailing approach in the literature by critically assessing the administrative remedial model underlying the Aarhus Regulation as such. The internal review mechanism is established as a preliminary step, enabling NGOs to present their claims to the CJEU. Should the latter uphold the action, the EU institution, body, or agency in question must conduct a new internal review. The article reveals that judicial scrutiny in such situations fails to effectively limit administrative discretion, thereby undermining the effective attainment of access to justice as required by the Aarhus Convention. To address this issue, Section 4 advocates for a paradigm shift in the remedial architecture underlying the Aarhus Regulation. Drawing inspiration from the model of adjudication embodied by the EU agencies' Boards of Appeal, this contribution highlights the added value of amending the Regulation to replace the internal review mechanism with administrative scrutiny conducted by independent panels. To this end, the article outlines the potential contours of the proposed solution and discusses its legal feasibility in light of the current EU primary law framework.

For a Complete Puzzle of Legal Remedies, (2021) *Common Market Law Review*, p. 777 ff.; M. HEDEMANN-ROBINSON, *Access to Environmental Justice and European Union Institutional Compliance With the Aarhus Convention: A Rather Longer and More Winding Road than Anticipated*, (2022) *European Energy and Environmental Law Review*, p. 175 ff.; A. HOUGH, *Access to Environmental Justice in the EU: Interpretation, Harmonisation and the Search for Consistency*, in B. VANHEUSDEN, T. ILIOPOULOS, A. VANHELLEMONT (eds.), *Harmonisation in EU Environmental and Energy Law*, Cambridge, 2022, p. 101 ff.; G. LEONELLI, *Access to the EU Courts in Environmental and Public Health Cases and the Reform of the Aarhus Regulation: Systemic Vision, Pragmatism, and a Happy Ending*, (2021) *Yearbook of European Law*, p. 230 ss; K. RATH, *The EU Aarhus Regulation and EU Administrative Acts Based on the Aarhus Regulation: the Withdrawal of the CJEU from the Aarhus Convention*, in C. VOIGT (eds.), *International Judicial Practice on the Environment: Questions of Legitimacy*, Cambridge, 2019, p. 52 ff.; M. VAN WOLFEREN, M. ELIANTONIO, *Access to Justice in Environmental Matters in the EU: The EU's Difficult Road towards Non-compliance with the Aarhus Convention*, in M. PEETERS, M. ELIANTONIO (eds.), *Research Handbook on EU Environmental Law*, Cheltenham, 2020, p 148 ff..

[10] On this point, see M. PAGANO, *Climate Legal Mobilization Under the New Aarhus Regulation*, (2024) *German Law Journal*, p. 919 ff.

2. The UNECE Convention and its EU Implementation: Framing the EU Legal Framework on NGOs' Access to Justice in Environmental Matters

The Aarhus Convention is the key international instrument for public monitoring in environmental matters. The Convention builds upon three pillars, each corresponding to a procedural right afforded to members of the public. These rights include access to environmental information[11], the right to participate in decision-making processes on environmental matters[12] and, finally, the right to access justice. Article 9(3) constitutes the primary provision for the third pillar. It requires Contracting Parties to ensure that «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». Pursuant to the Convention, «members of the public» is defined rather broadly. According to Article 2(4), this category includes «one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups». Article 9(3) thus appears to grant some flexibility to national legislation in defining the requirements of *locus standi* in environmental adjudicatory proceedings[13].

As the Union is a Contracting Party, the Aarhus Convention falls within the scope of EU law and binds Member States as well as the Union's institutions, bodies, and agencies[14]. However, the particularly strict rules on legal standing outlined in Article 263 TFEU for actions for annulment and Article 265 TFEU for actions for failure to act fail to provide an adequate scope for members of the public to access justice in environmental matters (2.1). Therefore, Regulation (EC) 1367/2006

[11] Article 4 of the Aarhus Convention.

[12] Article 6 of the Aarhus Convention.

[13] For a deeper analysis on this point, see M. ELIANTONIO, J. RICHELLE, *Article 9 of the Aarhus Convention, its Transposition in the EU and its Interpretation by the Aarhus Convention Compliance Committee and the Court of Justice of the European Union*, in B. TODOROVIĆ, R. CARANTA (eds.), *Europeanisation of Access to Justice in Environmental Matters: The Aarhus Convention in the Balkans*, Oxford, 2025, p. 17 ff.

[14] To ensure Member States' compliance with the obligations stemming from the Convention at the domestic level, the EU legislature adopted separate instruments for the first and second pillars (Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, in *OJ* L 41, 14.02.2003, p. 26 ff.; Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, in *OJ* L 156, 25.06.2003, p. 17 ff.).

establishes an administrative remedy that NGOs and other members of the public can trigger to seek an internal review of acts and omissions by EU institutions, bodies, and agencies that violate environmental law. This mechanism includes the possibility of subsequent judicial review, as Regulation (EC) n. 1367/2006 allows applicants to challenge negative decisions on their requests before the Union Courts (2.2).

2.1. Environmental Litigation before Union Courts: The Difficult Access to Justice by Environmental NGOs Pursuant to Article 263 TFEU

According to Article 263(4) TFEU, natural and legal persons may challenge acts of Union institutions, bodies, and agencies that are addressed to them or are of «direct and individual concern» to them. A partially different regime is provided for regulatory acts – a category including all acts of general application except for legislative acts[15] – which can be challenged by individuals insofar as they affect them directly and do not require implementing measures.

In environmental litigation, NGOs often struggle to meet the requirements for contesting regulatory acts. Indeed, most Union acts in the field of environmental law necessitate implementing measures[16]. In such circumstances, private applicants may encounter significant obstacles even in demonstrating that the EU act in question concerns them directly. According to the Court's settled case-law, acts of Union law satisfy that requirement only if there is «no discretion left to the addressees of that act who are responsible for its implementation, that implementation being purely automatic and resulting from European Union rules alone without the application of other intermediate rules»[17]. Still, acts of EU

[15] Court of Justice, 3 October 2013, Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council*, ECLI:EU:C:2013:625, points 58–61. In literature, among many, see D. P. DOMENICUCCI, *Il ricorso di annullamento*, in R. MASTROIANNI (a cura di), *Il diritto processuale dell'Unione europea*, Torino, 2025, p. 157, ff, in particular p. 178.

[16] M. ELIANTONIO, *Towards an Ever Dirtier Europe? The Restrictive Standing of Environmental NGOs before the European Courts and the Aarhus Convention*, (2011) *Croatian Yearbook of European Law and Policy,* p. 69ff., p. 82.

[17] *Ex multis*, see Court of Justice, 3 October 2013, Case C-583/11 P *Inuit Tapiriit Kanatami and Others v. Commission*, ECLI:EU:C:2013:625, point 16; 6 November 2018, Joined Cases C-622/16 P to C-624/16 P, *Scuola Elementare Maria Montessori v Commission*, ECLI:EU:C:2018:873, point 42; 12 July 2022, Case C-348/20 P, *Nord Stream 2 v Parliament and Council*, ECLI:EU:C:2022:548, point 43.

environmental law typically provide considerable margins of discretion in their implementation, which is not merely automatic[18].

Should the contested acts differ from regulatory ones – such as acts of individual concern directed at individuals other than the applicant or legislative acts – legal persons must also demonstrate that the act in question is of individual concern to them. In the well-known *Plaumann* ruling[19], the Court of Justice provided a very restrictive interpretation of that requirement. Private applicants satisfy this condition only if the measure affects their legal sphere «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»[20].

The *Plaumann* formula has been designed with reference to litigation involving applicants safeguarding their individual interests, while claims brought by NGOs are intended to pursue the collective interest in environmental protection[21]. Still, this circumstance has not driven the Court to depart from a strict interpretation of the «individual concern» and design different conditions for NGOs' legal standing[22]. Since *Greenpeace International*[23], Union Courts have clarified on several occasions that the *Plaumann* formula applies even to actions brought by environmental NGOs[24]. As a result, collective entities may have legal standing pursuant to Article 263(4) TFEU only in three circumstances: first, insofar as they

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18 I. HADJIYIANNI, *Judicial Protection and the Environment in the EU Legal Order*, *cit.*, p. 788.

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

20 *Ibid*, p. 220.

21 On the distinction between individual and collective interests in EU law, see G. CONTALDI, *La tutela degli interessi collettivi nel diritto dell'Unione europea*, (2020) *Ordine internazionale e diritti umani*, p. 10 ff.

22 I. ANRÒ, *Il difficile accesso alla giustizia ambientale per le ONG e la riforma del Regolamento di Aarhus*, *cit.*, p. 6. However, several arguments for a different reading of Article 263 TFEU in the context of actions aimed at securing collective interests have been advanced in the literature: among many, see O. KELLEHER, *Systemic Climate Change Litigation, Standing Rules and the Aarhus Convention: A Purposive Approach*, (2022) *Journal of Environmental Law*, p. 107 ff.; L. KRÄMER, *Climate Change, Human Rights and Access to Justice*, (2019) *Journal of European Environmental and Planning Law*, p. 21 ff.; I. HADJIYIANNI, *Judicial Protection and the Environment in the EU Legal Order*, *cit.*, p. 783 ff.

23 General Court, 9 August 1995, Case T-585/93 *Stichting Greenpeace Council (Greenpeace International) and Others v. Commission*, ECLI:EU:T:1995:147, point 48.

24 Court of Justice, 5 May 2009, Case C-355/08 P *WWF-UK v. Council*, ECLI:EU:C:2009:286, point 41; General Court, 22 December 1995, Case T-219/95 R *Danielsson and Others v. Commission*, ECLI:EU:T:1995:219, point 72-74.

invoke a breach of their procedural rights recognised by EU law; second, when the action is meant to defend the interests of their members directly and individually affected by the contested act; finally, where «the association is differentiated because its own interests as an association are affected»[25]. Notably, none of these circumstances result in an avenue for ensuring access to justice in environmental matters. Indeed, while the first category entails procedural claims exclusively, the second and third ones presuppose once again a prejudice for individual interests, whether those of NGOs themselves or their members. Therefore, the collective nature of the interest in protecting the environment prevents NGOs from relying on such conditions for legal standing.

Similar considerations apply to actions against the failure of EU institutions, bodies, and agencies to act pursuant to Article 265 TFEU. Despite its limited use in environmental litigation[26], members of the public are also prevented from directly accessing the CJEU under Article 265 TFEU to challenge omissions in adhering to environmental obligations. Union Courts have consistently recalled that the actions for annulment and failure to act «merely prescribe one and the same method of recourse»[27]. Therefore, the same restrictive conditions for individuals' legal standing as prescribed by Article 263(4) TFEU apply *mutatis mutandis* for contesting omissions[28].

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[25] In literature, see I. ANRÒ, *Il difficile accesso alla giustizia ambientale per le ONG e la riforma del Regolamento di Aarhus*, *cit.*, p. 5; in case-law, see: Court of Justice, 4 October 1983, Case 191/82, *Fediol v Commission*, ECLI:EU:C:1983:259, point 28; General Court, 30 September 1997, Case T-122/96 *Federolio v. Commission*, ECLI:EU:T:1997:142, point 61.

[26] E. BROSSET, E. TRUILHE-MARENGO, *L'accès au juge dans le domaine de l'environnement : le hiatus du droit de l'Union européenne*, (2018) *Revue des droits et libertés fondamentaux*, p. 1 ff., p. 13. Still, some some authors have invoked the possibility of initiating proceedings for failure to act against the institution, body or agency that does not comply with the request for administrative review pursuant to the Regulation (EC) n. 1367/2006 (A. FAVI, *Riflessioni sull'effettività dell'accesso della società civile alla giustizia in materia ambientale dopo la riforma del regolamento di Aarhus*, in *QUADERNI AISDUE – serie speciale – n. 2 – II ed. Incontro fra i giovani studiosi del diritto dell'Unione europea 'La Conferenza sul futuro dell'Europa, contributo al dibattito sui valori dell'Unione e sulla protezione della salute e dell'ambiente'*, Napoli, 2022, p. 349 ff.).

[27] Court of Justice, 18 November 1970, Case 15/70, *Chevalley v Commission*, ECLI:EU:C:1970:95, point 6; General Court, 26 November 1996, Case C-68/95, *T. Port v Bundesanstalt für Landwirtschaft und Ernährung*, ECLI:EU:C:1996:452, point 59. On this point, in literature, see R. ADAM, A. TIZZANO, *Manuale di Diritto dell'Unione europea*, Torino, 3rd ed., 2020, p. 325; K. LENAERTS, K. GUTMAN, J. T. NOWAK, *EU Procedural Law*, Oxford, 2nd ed., 2023, p. 416.

[28] General Court, 10 May 2006, Case T-395/04, *Air One v Commission*, ECLI:EU:T:2006:123, point 25; 25 June 2008, Case T-185/08, *VDH Projektentwicklung v Commission*, ECLI:EU:T:2008:225, point 9; 22 June 2015, Case T-690/13, *In vivo v Commission*, ECLI:EU:T:2015:519, point 21. In literature, see K. LENAERTS, K. GUTMAN, J.

It thus appears that the *Plaumann* formula is structurally unfit to ensure access to justice before Union courts for environmental NGOs. As societal watchdogs, these actors pursue collective interests of a public nature. Conversely, the *Plaumann* formula envisages legal standing under Article 263(4) TFEU for the protection of individual rights exclusively.[29]

In recent years, environmental NGOs have presented innovative arguments before the Union courts to seek exceptions to the stringent requirements for *locus standi*[30]. In particular, it has been argued that the interpretation of Article 263(4) TFEU in the field of environmental litigation should be complemented by Articles 47 of the Charter and 9 of the Aarhus Convention, thus justifying a departure from the *Plaumann* formula. However, both arguments have been rejected. On the one hand, the Court clarified that Article 9(3) of the Aarhus Convention cannot be invoked to circumvent the requirements of the Treaty[31]. Insofar as the Aarhus Convention was concluded by the Union and falls within the scope of EU law, its provisions cannot take precedence over primary law[32]. Nor can such a result be achieved by reading Article 263(4) TFEU in light of the Aarhus Convention, as it would constitute a *contra legem* interpretation of primary law[33]. Finally, the Court affirmed that the right to effective judicial protection under Article 47 of the Charter does not allow for derogating from the requirements for standing in the context of actions for annulment[34].

T. NOWAK, *op. cit.*, p. 419; A. MAFFEO, *Il ricorso in carenza*, in R. MASTROIANNI (a cura di), *Il diritto processuale dell'Unione europea*, *cit.*, p. 211 ff., in particular, pp. 211-212.

[29] Court of Justice, 12 May 2011, Case C-115/09 *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen*, ECLI:EU:C:2011:289, point 46. On this point, in literature, see A. FAVI, *Riflessioni sull'effettività dell'accesso della società civile alla giustizia in materia ambientale dopo la riforma del regolamento di Aarhus*, *cit.*, p. 354.

[30] For a comprehensive assessment, see M. PAGANO, *Overcoming Plaumann in EU Environmental Litigation – An Analysis of ENGOs Legal arguments in Actions for Annulment*, (2019) *Diritto e Processo*, p. 311 ff.

[31] Court of Justice, 13 January 2015, Joined Cases C-401/12 to C-403/12 P *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, ECLI:EU:C:2015:4, point 61; 13 January 2015, Joined Cases C-404/12 P and C-405/12 P *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, ECLI:EU:C:2015:5, point 47.

[32] Court of Justice, 3 December 2020, Case C-352/19 P *Région de Bruxelles-Capital v. Commission*, ECLI:EU:C:2020:978, points 25-26.

[33] Court of Justice, 3 September 2020, Case C-784/18 P *Mellifera v. Commission*, ECLI:EU:C:2020:630, point 78. In literature, see G. LEONELLI, *Access to the EU Courts in Environmental and Public Health Cases and the Reform of the Aarhus Regulation*, *cit.*, p. 240.

[34] General Court, 8 May 2019, Case T-330/18, *Carvalho and Others v. Parliament and Council*, ECLI:EU:T:2019:324, points 50, 52; Court of Justice, 25 March 2021, Case C-565/19 P, *Carvalho and Others v. Parliament and Council*, ECLI:EU:C:2021:252, points 69, 76-78.

2.2. Environmental Litigation before Union Institutions, Bodies and Agencies: Key Features of the Internal Review Mechanism Established by the Aarhus Regulation

The barrier to access to justice in the environmental field materialised by the *Plaumann* formula elicits the need to frame alternative remedies to ensure compliance with Article 9(3) of the Aarhus Convention. To that end, the EU legislature has established a specific administrative mechanism. Indeed, Regulation (EC) n. 1367/2006 provides for an internal review procedure by which NGOs and other members of the public collectively organised and reaching certain quantitative thresholds[35] may seek the review of «administrative acts» or omissions of relevance to environmental matters.

According to Article 2(1)(g), as resulting from the 2021 amendment of Regulation (EC) n. 1367/2006,[36] the category of «administrative acts» amenable to review comprises «any non-legislative act adopted by a Union institution or body, which has legal and external effects and contains provisions that may contravene environmental law». In the same vein, omissions are defined as «any failure of a Union institution or body to adopt a non-legislative act which has legal and external effects, where such failure may contravene environmental law»[37]. The material scope of application of the mechanism is framed in broad terms by Article 2(1)(f) therein, as it defines «environmental law» as any «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 TFEU: 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». Still, the Regulation also provides for the exclusion from internal review of acts and omissions falling under the scope of certain fields of law, namely, competition law, infringement proceedings, Ombudsman proceedings and OLAF procedures[38].

The evolution, interpretation, and implications of these provisions for the legal standing of NGOs and other members of the public in internal

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[35] See Article 11 of Regulation (EC) n. 1367/2006, *cit.*

[36] Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) n. 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, in *OJ* L 356, 8.10.2021, p. 1 ff.

[37] Article 2(1)(h) of Regulation (EC) n. 1367/2006, *cit.*

[38] Article 2(2) of Regulation (EC) n. 1367/2006, *cit.*

review mechanisms will be assessed in more detail in Section 3.1. As a preliminary point, it is necessary to focus on the machinery of internal review proceedings to frame the resulting remedial architecture. According to Article 10 of Regulation (EC) n. 1367/2006, review requests must be addressed to the same institution, body, or agency that adopted the act or gave rise to the omission under review within six weeks. The requested institution, body or agency shall thus reply within twelve weeks – a deadline that can be extended to eighteen weeks[39] – either by declaring the request inadmissible or stating reasons for its choices against the points raised. Should the seised institution, body or agency uphold the claim, the review ultimately leads to revising the contested act.

The procedural layout of the internal review mechanism entails no separation between the body that adopts the act and the one carrying out the review. To provide an example, Article 3 of the Commission's Rules of Procedure, laid down by Commission Decision 2008/401/EC[40], states that the request for internal review must be addressed to the Directorate-General or the department responsible for applying the legal basis of the contested act. The power to declare the inadmissibility of a request is vested in the Director-General or the Head of the relevant Department[41]. Conversely, decisions on the merits must be adopted, respectively, by the Member of the Commission responsible for that Department in case of rejecting the request[42] or by the Commission collegially in case of upholding the claims. In any of these cases, the claims lodged by NGOs or members of the public are addressed and adjudicated neither by an independent body within the same EU institution, nor by a unit different from those previously involved in the adoption of the act challenged[43]. Given these peculiar features, the internal review mechanism qualifies as administrative proceedings in functional continuity with the process of adoption of the contested act.[44]

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[39] Article 10(2), last period, and Article 10(3), last period, of Regulation (EC) n. 1367/2006, *cit.*

[40] Annex to the Commission Decision 2008/401/EC of 30 April 2008 amending its rules of procedure as regards detailed rules for the application of regulation (EC) n. 1367/2006 of the European Parliament and of the Council on the application of the provisions of the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters to community institution and bodies, in *OJ* L 140, 30.05.2008, p. 22 ff.

[41] Article 4(3) of the Annex to the Commission Decision 2008/401/EC, *cit.*

[42] Article 5(2) of the Annex to the Commission Decision 2008/401/EC, *cit.*

[43] In particular, while the Directorate-general Environment is informed of the request, it is not involved in its assessment.

[44] On the conceptualisation of functional continuity, see J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO,

At the same time, Regulation (EC) n. 1367/2006 gives rise to a double-layered administrative and judicial system of review. Pursuant to Article 12 therein, NGOs and other members of the public may bring an action for annulment before the CJEU against negative decisions on the merits or inadmissibility decisions adopted by Union institutions, bodies and agencies upon their requests for internal review.[45] The judicial procedure envisaged by the Regulation consists of an action for annulment lodged under the conditions of Article 263(4) TFEU. Since negative decisions qualify as an act of individual scope addressed to the applicants, NGOs do have legal standing before the Union courts in this case.

The peculiar design of the remedy established by Regulation (EC) n. 1367/2006 entails a clear separation between the object of the request for internal review and that of the judicial scrutiny. While the two reviews are functionally linked – so that no new grounds can be raised in the application before the General Court than those included in the request for internal review[46] – the case-law has clarified that judicial scrutiny is limited to the legality of the negative decision, thus not extending to the merits of the act whose review was requested[47]. The distinction between the legality of the negative decision and the merits of the act originally challenged ensures that the remedy under analysis does not circumvent the conditions for legal standing before Union courts, as provided by the Treaties.

Notably, in *EIB v ClientEarth*, the Court was seised with an action for annulment pursuant to Article 12 of Regulation (EC) n. 1367/2006 against the European Investment Bank (EIB) negative decision on the review of an act adopted by its Board of Directors. In that respect, the EIB contested the applicant's legal standing on the grounds of Article 271(c) TFEU[48]. This provision states that only the Member States and the Commission may challenge acts adopted by the EIB Board of Directors

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M. ELIANTONIO (eds.), *Boards of Appeals of EU Agencies: Towards Judicialization of Administrative Review?*, Oxford, 2022, p. 245 ff.; M. CHAMON, *EU Agencies: Legal and Political Limits to the Transformation of EU Administration*, Oxford, 2016, p. 338 ff.; C. TOVO, *Le agenzie decentrate dell'Unione europea*, Napoli, 2015, p. 335 ff.;

45 See Article 11 of Regulation (EC) n. 1367/2006, *cit.*

46 On this point, see A. FAVI, *Riflessioni sull'effettività dell'accesso della società civile alla giustizia in materia ambientale*, *cit.*, pp. 366-367.

47 Court of Justice, 12 September 2019, Case C-82/17 P, *TestBioTech and Others v. Commission*, ECLI:EU:C:2019:719, point 38. 6 July 2023, Joined Cases C-212/21 and C-223/21, *BEI v. ClientEarth*, ECLI:EU:C:2023:546, point 54.

48 Court of Justice, 6 July 2023, Joined Cases C-212/21 and C-223/21, *EIB v ClientEarth*, ECLI:EU:C:2023:546, point 54. In literature, see I. HADJIYIANNI, *Review of European Investment Bank Resolutions on Environmental Grounds through the Aarhus Regulation*, (2023) EU Law Live - Weekend Edition, p. 1 ff.

on the grounds of procedural issues exclusively. Still, the Court stressed that judicial scrutiny under Article 12 of Regulation (EC) n. 1367/2006 is limited to the legality of the negative decision on review addressed to the applicant and does not extend to the merits of the contested EIB resolution[49]. Therefore, the jurisdiction of Union Courts in such circumstances is not subject to the limits dictated by Article 271 TFEU: should the CJEU uphold the action, «the only consequence would be to lead the EIB to review itself that resolution internally»[50].

3. The Internal Review Mechanism in the Light of Recent Practice: Potentialities and Pitfalls of a Double-layered Administrative and Judicial Adjudicatory Model

These findings reveal that the double-layered administrative and judicial remedy established by Regulation (EC) n. 1367/2006 ultimately results in a three-step process. Indeed, following the internal review of the original action or omission and judicial scrutiny of the legality of the review decision, its annulment by Union courts compels the EU institution, body, or agency concerned to re-examine the act in question. The third phase differs from the previous administrative scrutiny, as the EU institution, body, or agency is now bound by the guidance provided by the CJEU when scrutinising its initial decision.

Is this remedial architecture feasible for ensuring NGOs' access to justice at the EU level against the impossibility of directly seising the CJEU? To answer this question, the issues emerging from each phase of the proceedings shall be considered separately. Therefore, the following sections will delve into the recent practice of the remedy to clarify the conditions for the legal standing under Regulation (EC) n. 1367/2006 (3.1), the Union courts' standard for scrutinising negative decisions on review (3.2), and the constraints resulting from the CJEU's review on the discretion of EU institutions, bodies, and agencies in performing the successive internal review (3.3).

3.1. The First Administrative Layer: The Locus Standi of Environmental NGOs and the Scope of Internal Review Proceedings After the 2021 Reform of the Aarhus Regulation

The conditions for legal standing in internal review proceedings under Regulation (EC) n. 1367/2006 have been profoundly revised by

[49] Court of Justice, 6 July 2023, Joined Cases C-212/21 and C-223/21, *EIB v ClientEarth*, ECLI:EU:C:2023:546, point 54

[50] *Ibidem.*

Regulation (EU) 2021/1767. Article 11 of Regulation (EC) n. 1367/2006 originally stipulated that only NGOs can lodge requests for internal review. More specifically, an NGO could seek the review of actions or omissions provided that «(a) it is an independent non-profit-making legal person in accordance with a Member State's national law or practice; (b) it has the primary stated objective of promoting environmental protection in the context of environmental law; (c) it has existed for more than two years and is actively pursuing the objective referred to under (b); (d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities»[51].

These requirements had not been modified by the 2021 reform and, thus, remain in effect. Nevertheless, the EU legislature's option to envisage NGOs' applications exclusively was contested by the Aarhus Convention Compliance Committee (ACCC) – the monitoring body on the application of the Aarhus Convention – as an undue restriction of access to justice[52]. While Article 9(3) of the Convention does not entail an *actio popularis*, it still envisages that members of the public – a wider category of subjects compared to NGOs – must enjoy access to justice.[53] To address the ACCC's criticisms, the EU legislature amended Article 11 of Regulation (EC) n. 1367/2006 to extend the scope of internal review to «other members of the public». This category comprises individuals either directly affected by an impairment of their individual rights as a result of the alleged violation of EU environmental law or collectively representing a public interest by lodging a request supported by at least 4000 persons established in at least 5 Member States, provided that at least 250 members of the public concerned are located in each of those States.

Limitations to legal standing in internal review proceedings stemmed not only from the categories of applicants but also from those of actions and omissions amenable to review. Indeed, the 2006 Regulation defined «administrative acts» as «any measure *of individual scope under environmental law*, taken by a Community institution or body, and *having legally binding and external effects* (emphasis added)»[54]. This definition provided three noteworthy barriers to access to justice. First, NGOs were prevented from

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[51] Article 11 of Regulation (EC) n. 1367/2006, *cit.*

[52] ACCC, 24 August 2011, *Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part I) concerning compliance by the European Union*; 17 March 2017, *Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union*.

[53] ACCC, *Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union,* point 94; *Advice by the Aarhus Convention Compliance Committee to the European Union concerning the implementation of request ACCC/M/2017/3*, paras 36 – 42.

[54] Article 2(1)(g) of Regulation (EC) n. 1367/2006, *cit.*

seeking review of acts (or omissions in adopting acts) of general application, thereby carving out a significant share of environmental claims[55]. Secondly, only acts having «legally binding and external effects» could be challenged. Finally, the internal review mechanism could only address acts falling within the scope of environmental law, thereby excluding actions or omissions adopted under other EU policy areas that breach environmental obligations.

The ACCC censured these three profiles as part of its assessment of the EU's compliance with the Aarhus Convention. First, the Committee stressed that there could be no sound reason to construe «acts» pursuant to Article 9(3) of the Aarhus Convention as meaning those «of individual scope» exclusively. Therefore, the definition provided by Article 2(1)(g) of Regulation (EC) n. 1367/2006 amounted to an unduly restrictive measure on access to justice[56]. Second, the scope of actions and omissions subject to review cannot be limited to those adopted within the realm of EU environmental policy. Indeed, Article 9(3) of the Aarhus Convention requires any act or omission, regardless of the policy area it falls under, to be subject to review if it contravenes environmental law[57]. Third, the ACCC contended that the scope of access to justice under Article 9 of the Aarhus Convention extends beyond merely those acts having «legally binding and external effects», as the Convention does not provide for such a limitation.[58]

Against the backdrop of these critical remarks, Regulation (EU) n. 2021/1767 revised the definition of «administrative act» enshrined in Article 2(1)(g) of Regulation (EC) n. 1367/2006[59]. In its new wording, the review mechanism now extends to «any non-legislative act adopted by a Union institution or body, which has legal [thus no longer «legally binding»] and external effects and contains provisions that may contravene environmental law»[60]. As a result of the reform, the individual

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55 On this point, among many, see J. JANS, G. HARRYVAN, *Internal Review of EU Environmental Measures. It's True: Baron Van Munchausen Doesn't Exist! Some Remarks on the Application of the So-Called Aarhus Regulation*, (2010) *Review of European Administrative Law*, p. 53 ff.; H. SCHOUKENS, *Access to Justice before EU Courts in Environmental Cases against the Backdrop of the Aarhus Convention: Balancing Pathological Stubbornness and Cognitive Dissonance?*, in C. VOIGT (ed.), *International Judicial Practice on the Environment: Questions of Legitimacy*, Cambridge, 2019, p. 74 ff., p. 86; P. WENNERÅS, *The Enforcement of EC Environmental Law*, Oxford, 2007, p. 234.

56 ACCC, *Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union*, point 53.

57 *Ibidem*, point 100.

58 *Ibidem*, point 104.

59 Regulation (EU) 2021/1767, *cit.*

60 Article 2(1)(g) of Regulation (EC) n. 1367/2006, *cit.*

or general scope of the act and its legal basis are no longer relevant to defining access to internal review. Moreover, excluding the binding nature as a precondition for legal standing paves the way for potentially challenging recommendations and soft law instruments, which are often used in environmental matters[61].

While the 2021 reform of Regulation (EC) n. 1367/2006 constitutes a remarkable improvement in NGOs' access to justice at the EU level[62], the regulatory framework currently in force falls short of addressing all the issues raised by the ACCC. Indeed, the Committee also noted that excluding acts and omissions falling under the scope of specific subject matters – such as competition law, infringement proceedings, Ombudsman proceedings, and OLAF procedures – from review is incompatible with Article 9(3) of the Aarhus Convention. The rationale for such a restriction lies in the fact that the powers of EU institutions, bodies, and agencies in these domains amount to a form of administrative review. Therefore, «[g]iven 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»[63]. The ACCC contested this assumption on two grounds: first, equating legislative activity with administrative review is hardly conceivable;[64] second, the Convention does not provide for excluding acts and omissions in the context of administrative review from access to justice, as only judicial acts are excluded from scrutiny pursuant to Article 9(3) therein.[65]

Notwithstanding these critical remarks, Regulation (EU) n. 2021/1767 did not amend the aforementioned provisions. As emphasised by some NGOs[66], the impact of these limitations is particularly sensitive in the context of state aid decisions, which often involve issues concerning

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[61] I. ANRÒ, *Il difficile accesso alla giustizia ambientale per le ONG e la riforma del Regolamento di Aarhus*, cit., p. 18. On the effects of soft law acts and avenues for their potential review, among many, see J. ALBERTI, *The justiciability of ECB 'soft' measures against the financial crisis*, (2018) *Federalismi*, p. 1ss.

[62] From this perspective, see G. LEONELLI, *Access to the EU Courts in Environmental and Public Health Cases and the Reform of the Aarhus Regulation*, *cit.*

[63] Recital 11 of Regulation (EC) n. 1367/2006, *cit.*

[64] ACCC, *Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2008/32 (part II) concerning compliance by the European Union*, point 109.

[65] *Ibid*, points 110-111.

[66] To provide just one example, see ClientEarth, *Position Paper – Amending the Aarhus Regulation: an internal review mechanism that complies with international law*, 12 novembre 2020, available at https://www.clientearth.org/latest/documents/position-paper-amending-the-aarhus-regulation-an-internal-review-mechanism-that-delivers-the-eu-green-deal/, p. 3.

environmental protection. This fact stimulated further allegations from NGOs[67], leading the ACCC to reiterate in 2021 that the exclusion of state aid decisions from internal review contravenes Article 9(3) of the Aarhus Convention[68]. This issue has been debated within the Commission's Expert Group on Aarhus Implementation[69]. Still, Member States' positions appeared opposed to the potential lifting of the state aid carve-out enshrined in Article 2(2) of Regulation (EC) n. 1367/2006[70]. Therefore, rather than amending Regulation (EC) n. 1367/2006, the majority of national delegations expressed their preference for enshrining in the Best Practices Code a review mechanism similar to the one provided by the Aarhus Regulation. This solution has been implemented by the latest amendment of the Best Practices Code adopted on 12 May 2025[71]. While this development has been praised as a step forward in ensuring members of the public's access to justice in environmental matters[72], it remains to be seen whether the non-binding nature of the Code of Best Practices regulating the mechanism may potentially hamper the

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[67] ACCC, Case ACCC/C/2015/128 European Union, whose case file is available at https://unece.org/env/pp/cc/accc.c.2015.128_european-union.

[68] ACCC, *Findings and recommendations with regard to communication ACCC/C/2015/128 concerning compliance by the European Union*.

[69] Commission, Register of Commission expert groups and other similar entities, Commission's expert group on Aarhus Implementation (E00390), available at https://ec.europa.eu/transparency/expert-groups-register/screen/expert-groups/consult?lang=en&groupID=390.

[70] Indeed, just one national delegation to the Expert Group expressed the view that the mechanism established by the Aarhus Regulation should be extended to state aid acts. That position was, conversely, shared by nearly all NGOs which took part in the public consultation launched by the Commission on this issue (Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the findings adopted by the Aarhus Convention Compliance Committee in case ACCC/C/2015/128 as regards state aid: Analysing the implications of the findings and assessing the options available, SWD(2023) 307 final, p. 10). Conversely, multiple Member States expressed «concern that requests for review of Commission State aid decisions will prolong procedures and aggravate legal uncertainty» (Commission, Register of Commission expert groups and other similar entities, Commission's expert group on Aarhus Implementation (E00390), Meeting minutes – Ad Hoc Joint Meeting with Member States' experts, 12 September 2022, available at https://ec.europa.eu/transparency/expert-groups-register/screen/meetings/consult?lang=en&meetingId=43982&fromExpertGroups=390, p. 2).

[71] Communication from the Commission, *Code of Best Practices for the Conduct of State Aid Control Procedures*, SWD(2025) 118 final - SWD(2025) 119 final, points 11.4-11.10.

[72] ClientEarth, *Commission's Access to Justice Reform Bridges the Gap Between State Aid Decisions and Environmental Justice*, 12 May 2025, available at https://www.clientearth.org/latest/press-office/commissions-access-to-justice-reform-bridges-the-gap-between-state-aid-decisions-and-environmental-justice/

effectiveness of the review, as well as of the subsequent judicial scrutiny of the Commission's negative decisions[73]. For the moment being, only future practice will tell.

3.2. The Judicial Layer: Framing the CJEU Standard for Reviewing Administrative Decisions on Requests for Internal Review

Before the 2021 amendment of Regulation (EC) n. 1367/2006, most requests for internal review resulted in decisions of inadmissibility, as the acts or omissions challenged fell outside the scope of the mechanism. This fact influenced the development of case-law on internal review. When ruling on the legality of an inadmissibility decision, Union courts are not confronted with arguments that challenge the merits of the EU institutions, bodies, and agencies' considerations. Conversely, the CJEU is merely called to assess whether the interpretation and application of the rules for legal standing provided by Regulation (EC) n. 1367/2006 by the relevant institution, body, or agency were legitimate.

In this stream of case-law, Union courts have been confronted with pleas of illegality pursuant to Article 277 TFEU against limitations to administrative scrutiny provided by Regulation (EC) n. 1367/2006. Most notably, in *Stichting Natuur en Milieu*[74] and *Vereniging Milieudefensie*[75], the General Court ruled that the exclusion of individual acts from internal review previously provided is inconsistent with Article 9(3) of the Aarhus Convention, which was invoked as a parameter for assessing the legality of such a restriction[76]. The General Court upheld the plea of illegality raised by the applicants and annulled the Commission's decision declaring the request for review inadmissible[77]. However, the Court reversed the General Court's ruling on appeal by holding that Article 9(3) of the Aarhus

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[73] Among the first scholarly analyses, see J. DELARUE, *Op-Ed: New State Aid Rules: will the Public finally have Access to Justice?*, (2025) *EU Law Live*, available at https://eulawlive.com/op-ed-new-state-aid-rules-will-the-public-finally-have-access-to-justice/; C. H. L. LABUS, *The New Internal Review Mechanism Concerning the Compatibility of State Aid Decisions with EU Environmental Law*, (2025) *Unione europea e diritti* (forthcoming).

[74] General Court, 14 June 2012, Case T-396/09, *Stichting Natuur en Milieu*, ECLI:EU:T:2012:301.

[75] General Court, 14 June 2012, Case T-338/08, *Vereniging Milieudefensie*, ECLI:EU:T:2012:300.

[76] General Court, 14 June 2012, Case T-396/09, *Stichting Natuur en Milieu*, ECLI:EU:T:2012:301, points 58-59, 68; General Court, 14 June 2012, Case T-338/08, *Vereniging Milieudefensie*, ECLI:EU:T:2012:300, points 51, 58-59.

[77] General Court, 14 June 2012, Case T-396/09, *Stichting Natuur en Milieu*, ECLI:EU:T:2012:301, point 77; General Court, 14 June 2012, Case T-338/08, *Vereniging Milieudefensie*, ECLI:EU:T:2012:300, point 66.

Convention lacks the essential conditions to serve as a parameter for the legality of secondary law. Indeed, international law sources may be relied upon to challenge secondary law «only where, first, the nature and the broad logic of that agreement do not preclude it and, secondly, those provisions appear, as regards their content, to be unconditional and sufficiently precise»[78]. According to the CJEU in *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*[79] and *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*[80], Article 9(3) of the Aarhus Convention lacks the preciseness and unconditionality requirements for that purpose, thus preventing NGOs from relying on that provision to challenge the restrictive conditions for legal standing once provided by Regulation (EC) n. 1367/2006[81].

Soon after the 2021 reform of the Regulation, several NGOs took advantage of the wider avenues for litigation now available in the context of the internal review mechanism. As Pagano reported in 2024 with respect to the Commission's practice, while «[i]n fifteen years under the old [Regulation], the Commission received forty-eight requests for internal review […] in less than three years under the new Regulation, the Commission has already received forty-three requests»[82]. The new legal framework entailed a significant shift in practice, as it affected not only the number of cases but also their outcomes and the content of the decisions adopted. Indeed, the spectrum of negative decisions on requests for review now encompasses a considerable share of acts addressing the merits of claims lodged by NGOs and other members of the public. Reviewing their legality provides Union courts with different issues than those emerging from inadmissibility decisions. Indeed, the internal review mechanism has now emerged as a «scientific dispute settlement forum»[83], entailing NGOs and EU institutions, bodies, and agencies litigating

[78] On this point, see: Court of Justice, 13 January 2015, Case C-401/12 P, *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, ECLI:EU:C:2015:4, point 54; 3 June 2008, Case C-308/06, *Intertanko and Others*, ECLI:EU:C:2008:312, point 45; 9 September 2008, Case C-120/06 P, *FIAMM and Others* v *Council and Commission*, ECLI:EU:C:2008:476, points 110, 120; 21 December 2011, Case C-366/10, *Air Transport Association of America and Others*, ECLI:EU:C:2011:864, point 54.

[79] Court of Justice, 13 January 2015, Case C-401/12 P, *Council and Others v Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, ECLI:EU:C:2015:4.

[80] Court of Justice, 13 January 2015, Case C-404/12 P, *Council and Commission v Stichting Natuur en Milieu and Pesticide Action Network Europe*, ECLI:EU:C:2015:5.

[81] For an analysis, see H. SCHOUKENS, *Access to Justice before EU Courts in Environmental Cases against the Backdrop of the Aarhus Convention: Balancing Pathological Stubbornness and Cognitive Dissonance?*, in C. VOIGT (ed.), *cit.*, pp. 87-92.

[82] M. PAGANO, *Climate Legal Mobilization Under the New Aarhus Regulation*, *cit.*, p. 924.

[83] *Ibidem*, p. 932.

technical data and evidence. Thus, where the technical discretion enjoyed by Union bodies is at stake, what should be the standard for the Union court's review of decisions adjudicating on the merits of requests for internal review?

In response to this issue, the General Court in *PAN Europe v Commission* provided detailed insights into the scope of judicial review of decisions adopted under Regulation No. 1367/2006. Given the technical nature of assessments carried out in the context of internal review, EU institutions, bodies, and agencies «must be recognised as enjoying a broad discretion»[84]. In line with the well-established case-law on judicial scrutiny of EU acts[85], the General Court took a rather loose standard. In addition to assessing procedural issues – such as «whether the relevant procedural rules have been complied with» and «the facts admitted by the Commission have been accurately stated»[86] – only two grounds may trigger the annulment on the merits: «a manifest error of appraisal or a misuse of powers».[87]

The latter ground, which involves EU institutions, bodies, and agencies applying the review for purposes other than those for which it is intended[88], appears quite rare in practice. Conversely, defining the boundaries of a «manifest error of assessment» poses far more challenges.

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[84] General Court, 21 February 2024, Case T-536/22, *PAN Europe v Commission*, ECLI:EU:T:2024:98, point 52.

[85] Among many, see Court of Justice, Opinion of AG Sharpston in Case C-482/17, *Czech Republic v Parliament and Council*, ECLI:EU:C:2019:321, point 84; 21 June 2018, Case C-5/16, *Poland v Parliament and Council*, ECLI:EU:C:2018:483, point 150; 22 November 2018, Case C-151/17, *Swedish Match*, ECLI:EU:C:2018:938, point 36; 12 December 2006, Case C-380/03, *Germany v Parliament and Council*, ECLI:EU:C:2006:772, point 145; 12 November 1996, Case C-84/94, *United Kingdom v Council* ECLI:EU:C:1996:431, point 58; 13 May 1997, Case C-233/94, *Germany v Parliament and Council*, ECLI:EU:C:1997:231, point 56; 5 May 1998, Case C-157/96, *The Queen v Ministry of Agriculture, Fisheries and Food and Commissioners of Customs & Excise, ex parte National Farmers' Union and Others*, ECLI:EU:C:1998:191, point 61. In literature, among many, see G. TESAURO, *Manuale di Diritto dell'Unione europea*, Napoli, 4th ed. (P. DE PASQUALE, F. FERRARO eds.), 2023, p. 75; T. TRIDIMAS, *Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny*, in E. ELLIS (ed.), *The Principle of Proportionality in the Laws of Europe*, Oxford, 1999, p. 65 ff., in particular p. 66.

[86] General Court, 21 February 2024, Case T-536/22, *PAN Europe v Commission*, ECLI:EU:T:2024:98, point 53.

[87] *Ibidem*.

[88] On the concept of misuse of powers, among many, see Court of Justice, 10 May 2005, Case C-400/99, *Italy v Commission*, ECLI:EU:C:2005:275, point 38; 8 December 2020, Case C-620/18, *Hungary v Parliament and Council*, ECLI:EU:C:2020:1001, point 82; 9 December 2020, Case C-132/19 P, *Groupe Canal + v Commission*, ECLI:EU:C:2020:100, point 31.

In *PAN Europe v Commission*, the General Court adhered to the classical approach to scrutinising the acts of EU institutions, bodies, and agencies, which entails a high threshold for meeting the «manifest» standard. First, it is not for Union Courts to make new factual assessments, as the scope of judicial review does not permit them to replace those carried out by EU institutions, bodies, and agencies in the context of internal review. Secondly, the Union's judiciary may annul the decision on the merits only insofar as the evidence produced «is sufficient to make the factual assessments used in that measure implausible»[89].

In this respect, a point must be stressed: plausibility is measured and tested by reference not to the applicants' claims, but to those of the administrative authorities. This element is pivotal, as it considerably elevates the standard for judicial review and restricts the scope of Union courts' powers of assessment. In adjudicating the applicants' pleas, Union Courts are naturally obliged to assess the appropriateness of scientific evidence and considerations underpinning the decision under review[90]. However, for the General Court to annul the decision, it is insufficient that the applicants' pleas merely affect the solidity of EU institutions, bodies, or agencies' reasoning with plausible arguments. To meet the «manifest» threshold and overturn such technical assessments, the provided evidence must reveal the decision's inherent implausibility.

3.3. The Second Administrative Layer: To What Extent do the CJEU Findings Limit Administrative Discretion?

Let us assume that the Union Courts upheld pleas against the merits of the decision on internal review. As anticipated, this circumstance would entail the annulment of that decision, but not of the act originally contested. Indeed, the latter falls outside the object of judicial review. The only consequence of the annulment of the decision is the duty of the EU institution, body, or agency in question to conduct a new review of the act, thereby initiating the third phase of proceedings under Regulation (EC) n. 1367/2006.

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[89] General Court, 21 February 2024, Case T-536/22, *PAN Europe v Commission*, ECLI:EU:T:2024:98, point 54.

[90] On the CJEU approach towards the scrutiny of EU acts involving technical or scientific assessments, among many, see E. VOS, *The European Court of Justice in the Face of Scientific Uncertainty and Complexity*, in M. DAWSON, B. DE WITTE, E. MUIR (eds.), *Judicial Activism at the European Court of Justice*, Cheltenham, 2013, p. 142 ff.; M. MORVILLO, M. WEIMER, *Who Shapes the CJEU Regulatory Jurisprudence? On the Epistemic Power of Economic Actors and Ways to Counter It*, (2022) *European Law Open*, p. 510 ff.

In this respect, the dividing line between the act originally contested and the decision on its review raises issues that have not been fully explored in the literature. On the one hand, the decision on internal review acts as a shield, protecting the original act from direct judicial consideration and from legal consequences resulting from such a review[91]. On the other hand, it is possible that the considerations made by the General Court and the Court of Justice in their judgments may at least indirectly bind the administration by providing guidance for the new review. This aspect is key to assessing the capability of the system established by Regulation n. 1367/2006 to ensure effective access to justice in environmental matters. Should the judicial review leave the administrative discretion unfettered in the third phase of the proceedings, the overall effectiveness of internal review in addressing the limitations on NGOs' access to justice before Union Courts and coping with the standards of access to justice dictated by Article 9 of the Aarhus Convention would be put into question. Therefore, this section will assess the extent to which Union Courts' rulings pursuant to Article 12 of Regulation (EC) n. 1367/2006 may reduce the discretion of EU institutions, bodies, and agencies in the administrative reassessment of the contested act.

In this regard, the judicial practice does not seem to offer a clear answer. At the time of writing, cases under Regulation (EC) n. 1367/2006 entailing a decision on the merits are yet to return to administrative review after completing the judicial phase[92]. However, an analysis of the first and second phases of the proceedings allows us to provide some considerations from a *de iure condendo* perspective. First, the review of administrative actions and omissions shall be addressed separately. An omission does not give rise to issues in terms of effectiveness. Indeed, adjudicating on the negative decision regarding the review of omissions allows the Union courts to address the key issue of the claim: whether the EU institution, body, or agency failed to act in accordance with an obligation in this respect. In such a scenario, the object of the claim

[91] Against this issue, it has been recently argued in literature that interpreting Regulation n. 1367/2006 consistently with Art. 9 of the Aarhus Convention should entail the CJEU revising its standard of scrutiny of the decision on review so as to indirectly assess the substantive legality of the act originally contested (T. TRAPP, *The Failure of the Aarhus Regulation? The Impossible Possibility of Substantive Judicial Review Under the Internal Review Mechanism of the Aarhus Regulation*, (2025) *Amsterdam Law School Legal Studies Research Papers*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5194742, in particular p. 16).

[92] This consideration applies also to the *PAN Europe v Commission* case previously mentioned, as the General Court's ruling is currently under appeal before the Court of Justice.

revolves around a binary option: whether the EU institution, body, or agency had an obligation to act under environmental law. If Union courts upheld the claim, the applicant NGO would have reached its objective: the EU institution, body, or agency concerned would be compelled to act. Of course, there may be contestations regarding how the administrative authority acts, but the content of the action can then be challenged through a new request for internal review.

Conversely, when the negative decision concerned the review of an act, the objective of NGOs' claims cannot arguably be achieved solely through annulment by the judiciary. As previously noted, judicial scrutiny concerns the administrative authority's reasoning for rejecting the request for review, rather than the act originally contested. In the event of annulment, the ruling merely entails that a manifest error of assessment renders the administrative reasoning invalid. Then, to what extent may such a ruling limit discretion in the subsequent internal review?

To address this question, two elements shall be considered. First, it is impossible for the EU judiciary to precisely dictate how the EU administration should decide in a subsequent internal review. While censuring the reasoning followed in the challenged decision, the Court of Justice cannot prescribe positive actions. Indeed, according to the well-established case-law, the powers of Union Courts do not include issuing injunctions against EU institutions, bodies, and agencies in the context of actions for annulment[93]. Second, the low standard for judicial review impacts the breadth of considerations featured in the ruling. Indeed, to provide the administrative power with guidance, the Court's judgment should extend beyond considerations on the content of the attacked decision. In that way, the judgment could advance broader findings capable of touching upon the content of the original act. However, the frame represented by the decision on review – which constitutes the exclusive object of the action for annulment – and the limited standard for scrutinising that decision considerably limits this possibility. As a result, the constraint on administrative discretion resulting from the ruling may potentially be limited to the mere non-replicability of the reasoning that led to the attacked negative decision.

It follows that the peculiar feature of the remedy established by Regulation (EC) n. 1367/2006 adversely impacts the effective attainment

[93] Court of Justice, 5 March 1998, Joined Cases C-199/94 P and C-200/94 P, *Pevasa and Impesca v Commission*, ECLI:EU:C:1995:360, point 24; 1 October 2019, Case C-284/19 P, *Clarke v Commission*, ECLI:EU:C:2019:799, point 41; General Court, 4 February 2021, Case T-352/18, *Germann Avocats v Commission*, ECLI:EU:T:2021:64, point 50; 2 March 2022, Case T-134/20, *Huhtamaki v Commission*, ECLI:EU:T:2022:100, point 18. In literature, see: K. LENAERTS, K. GUTMAN, J. T. NOWAK, *op. cit.*, p. 406.

of access to justice in environmental matters at the EU level. While NGOs and other members of the public have legal standing in internal review proceedings and can access EU Courts to contest decisions on the review, the limited scope of judicial assessment ultimately leads to the applicants' objectives not being fulfilled.

4. Beyond the Aarhus Regulation: Framing an Alternative Adjudicatory Model for Challenges against EU Actions or Omissions in Environmental Matters

The previous sections unveiled that the current remedial architecture underlying Regulation (EC) n. 1367/2006 potentially entails a systemic shortcoming in the effectiveness of access to justice in environmental matters, characterised by the particularly reduced influence of judicial scrutiny over successive administrative reviews. Building on this issue, this section proposes an amendment to the remedial architecture under analysis that is arguably capable of addressing the identified issues.

4.1. A Double-layered Administrative and Judicial Model Is Unavoidable: But Are Internal Review Mechanisms Fit for Ensuring Access to Justice?

Based on the conclusion reached in the previous section, one may argue that the issue to be tackled lies in the double-layered administrative and judicial configuration of the remedy established by Regulation (EC) n. 1367/2006. This point is certainly well-founded: the shortcomings previously identified lie in the diversification between the object of administrative review (the contested act) and that of judicial scrutiny (the decision on internal review). However, a double-layered remedial architecture, such as the one at issue, may hardly be overcome as EU primary law currently stands.

First, transitioning to a fully judicial remedy would be inconsistent with the CJEU's interpretation of Article 263 TFEU, as defined in *Plaumann* and subsequent case-law[94]. As previously underlined, many criticisms towards the application of the *Plaumann* formula in environmental litigation have been raised in the literature[95]. Still, without revising this line of case-law, no potential reform of Regulation (EC) n. 1367/2006 can allow NGOs and other members of the public to challenge administrative acts in environmental matters directly before the Union

[94] See *supra*, Section 2.1.

[95] *Ibidem*. See, in particular, *supra* fn. 22.

courts. Indeed, such an arrangement would give rise to a conflict with the conditions of legal standing before Union Courts[96].

Second, even enabling Union Courts to adjudicate on the act originally contested, thus realigning the object of administrative and judicial review under Regulation (EC) n. 1367/2006, may not be a viable solution. There are indeed some areas of EU law where administrative review constitutes the precondition for instituting proceedings before the Court of Justice challenging the very same act. Civil service litigation is a prominent example: Article 90 of the Staff Regulations[97] provides for an administrative pre-litigation phase, requiring applicants to bring their claims to the competent administration before filing an action before the Union Courts. In this peculiar legal framework, the decision on administrative review does not exempt the original act from judicial scrutiny[98]. However, it must be noted that this procedural arrangement addresses legal actions that already fall under the scope of the CJEU's

[96] Against this finding, one may observe that the Court of Justice itself has recognised that some sources of EU law hierarchically subordinated to the Treaties – notably, international agreements concluded by the Union – «may confer new powers on the Court, provided that in so doing [they do] not change the nature of the function of the Court as conceived in the [Treaty]» (Court of Justice, 14 December 1991, Opinon 1/91, *Accord EEE – I*, ECLI:EU:C:1991:490, points 59 and 61-65; 10 April 1992, Opinion 1/92, *Accord EEE – II*, ECLI:EU:C:1992:189, point 32; 18 April 2002, Opinion 1/00, *Accord sur la création d'un espace aérien européen commun*, ECLI:EU:C:2002:231, point 33; 8 March 2011, Opinion 1/09, *Accord sur la création d'un système unifié de règlement des litiges en matière de brevets*, ECLI:EU:C:2011:123, point 75). That is the case of the procedures for prior involvement and referral to the Court of Justice envisaged, for instance, by the 2009 Draft Agreement on the European and Community Patents Court and Draft Statute (in this regard, see C. CONTARTESE, *The procedures of prior involvement and referral to the CJEU as means for judicial dialogue between the CJEU and international jurisdictions*, (2016) *Geneva Jean Monnet Working Papers*, available at https://ceje.ch/files/3914/8094/2575/contartese-27-final.pdf). However, such hypotheses concern the establishment of new and distinct judicial procedures under the general scope of the Court's jurisdiction pursuant to Article 19(1) TUE (as recognised by the View of Advocate General Kokott, 13 June 2014, Opinion 2/13, *Adhésion de l'Union à la CEDH*, ECLI:EU:C:2014:2475, points 68-71), without altering the discipline of those already provided for by the Treaties. In such a scenario, no conflict between EU law sources emerges. Conversely, amending the Aarhus Regulation to grant NGOs direct access to Union courts in environmental matters would amount to modifying the conditions for legal standing provided by Art. 263 TFEU as interpreted by the CJEU, thus giving rise to a conflict between primary and secondary law sources.

[97] Regulation No 31 (EEC), 11 (EAEC), laying down the Staff Regulations of officials and the conditions of employment of other servants of the European Economic Community and the European Atomic Energy Community, in *OJ* P 045 14.6.1962, p. 1385 ff.

[98] On this point, see J. PILORGE-VRANCKEN, *Le droit de la fonction publique de l'Union européenne*, Bruxelles, 2017, p. 284 ff.

jurisdiction pursuant to Article 270 TFEU[99]. Without such a duty to initiate administrative proceedings before accessing Union courts, the applicants would still have legal standing before the CJEU to directly challenge civil service acts to which they are addressees or that are of direct and individual concern to them.

This consideration illustrates why, *a contrario*, a similar remedial architecture cannot be replicated under Regulation (EC) n. 1367/2006. Unlike civil service litigation, the Aarhus Regulation provides individuals who are not entitled to *directly* challenge EU acts with an avenue for *indirect* litigation before Union courts, specifically by contesting a decision on internal review that is addressed to them. The frame materialised by that decision, which shields the original act from NGOs' judicial pleas, is essential to ensure that the overall system does not amount to overcoming the conditions for legal standing established by Articles 263 and 265 TFEU. That would be the case if NGOs and other members of the public could challenge the original act in the judicial phase of the procedure. Such an interpretation would amount to expanding the scope of judicial review as established by Article 263 TFEU and interpreted by the CJEU, which is not possible through a mere amendment of secondary law. It follows that there is arguably no alternative solution to a double-layered administrative and judicial remedy for NGOs' environmental claims at the EU level, and administrative proceedings cannot enable applicants to challenge the original act before Union courts.

Therefore, it is contended here that the issue of NGOs' access to justice in environmental matters should be addressed the other way round: by exploring avenues to strengthen the guarantees of effectiveness and independence in administrative proceedings.

In the absence of direct judicial scrutiny of the act, redress for NGOs' claims should be guaranteed in the first instance at the administrative level of proceedings. As previously highlighted, Regulation (EC) n. 1367/2006 establishes an internal review mechanism determined by the same entity responsible for adopting the challenged act[100]. This is not the only model of remedy contemplated in the EU administrative law landscape[101].

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[99] Which provides that «The Court of Justice of the European Union shall have jurisdiction in any dispute between the Union and its servants within the limits and under the conditions laid down in the Staff Regulations of Officials and the Conditions of Employment of other servants of the Union».

[100] See *supra*, sections 2.2 and 3.1.

[101] On this profile, see L. DE LUCIA, *I ricorsi amministrativi nell'Unione europea dopo il Trattato di Lisbona*, (2013) *Rivista trimestrale di diritto pubblico*, p. 323 ff.; J. DAVID, *Les recours administratifs contre les actes des agences européennes*, (2016) *Revue trimestrielle de droit européen*, p.

Therefore, the question arises: is the internal review model suitable for ensuring effective access to justice for NGOs and other members of the public in environmental matters, in compliance with Article 9(3) of the Aarhus Convention and Article 47 of the Charter?

Given the overlap between the body adopting the act and the one performing the scrutiny, whose administrative discretion does not find a meaningful limit in subsequent judicial review, the answer should arguably be negative. The reason for this shortcoming lies in the inherent characteristics of the internal review model[102]. As discussed in the literature, administrative remedies in EU law have a dual nature[103]. On the one hand, as part of the administrative procedure, they ensure that the authority addresses the interests and claims of affected parties in the implementation of the relevant legal provisions. This feature characterises remedial models, which, like internal review mechanisms, do not require separation between the body adopting the act and the one adjudicating the pleas, the latter being entitled to confirm, modify, replace, or withdraw that act[104]. On the other hand, they also aim to serve adjudicatory purposes, thereby securing the position of individuals *vis-à-vis* public authorities[105]. This feature entails a certain degree of independence and impartiality on the part of the adjudicatory body, whose powers are usually limited to striking down the contested act without the possibility of amending or replacing it. Remedies falling under the scope of this category – such as the boards of appeal of EU agencies – contribute to ensuring the right to an effective remedy[106].

From this perspective, while aimed at providing NGOs and other members of the public with indirect access to Union courts, the internal

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275 ff.; as well as the wide-ranging contributions published in B. MARCHETTI (ed.), *Administrative Remedies in the European Union: The Emergence of a Quasi-judicial administration*, Torino, 2017.

102 Further on this point, see A. KRĘŻEL, *Aarhus Regulation Administrative (self-) Review Mechanism: The Inevitable Failure to Contribute to Access to Justice in the EU?*, (2023) *European Energy and Environmental Law Review*, p. 136 ff.

103 L. DE LUCIA, *I ricorsi amministrativi nell'Unione europea dopo il Trattato di Lisbona*, *cit.*; S. PUGLIESE, *I meccanismi di revisione degli atti delle agenzie come veicoli di partecipazione: verso un'amministrazione europea aperta, effiace e trasparente*, (2018) *Il Diritto dell'.Unione europea*, p. 715 ff.

104 L. DE LUCIA, *I ricorsi amministrativi nell'Unione europea dopo il Trattato di Lisbona*, *cit.*, p. 331.

105 *Ibidem*.

106 On this point, see D. RITLENG, *Boards of Appeals of EU Agencies and Article 47 of the Charter: Uneasy Bedfellows?*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeals of EU Agencies: Towards Judicialization of Administrative Review?*, *cit.*, p. 299 ff., in particular pp. 315-317.

review mechanism appears more closely aligned with serving participation goals rather than adjudicatory ones[107]. As such, it falls short of affording a remedy capable of securing effective access to justice at the administrative level.

Against this backdrop, a paradigm shift is warranted. The inability of judicial review to effectively limit administrative discretion without ruling on the act originally contested suggests that enhancing administrative scrutiny could strengthen effective access to justice in environmental matters. To that aim, alternative forms of administrative review aimed at achieving adjudicatory rather than merely participatory goals should be explored. The following sections offer some foundational suggestions in this regard.

4.2. Towards an Alternative Model: from Internal Review to Adjudication by Independent Boards

There is not much legal imagination required to identify a way out of the aforementioned issue. Indeed, the framework of EU administrative remedies offers suitable alternative models to draw inspiration from for enhancing adjudication in environmental matters. The boards of appeals of EU agencies are a prime example in this regard. They consist of panels established within several EU agencies and entrusted under Article 263(5) TFEU with reviewing their acts upon requests from interested individuals[108]. Should a board be established within a given agency, litigation before it is a precondition for judicial scrutiny by the General Court, as the latter adjudicates on appeal against the board's decision. Administrative scrutiny is in functional continuity with the proceedings leading to the adoption of the contested act[109]. In line with this framework,

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[107] On this point, see: S. PUGLIESE, *I meccanismi di revisione degli atti delle agenzie come veicoli di partecipazione*, *cit*, pp. 721, 736; A. KRĘŻEL, *Aarhus Regulation Administrative (self-) Review Mechanism*, *cit.*, p. 144.

[108] Among the scholarly analysis of boards of appeals of EU agencies, see the wide-ranging contributions published in J. ALBERTI (ed.), *Quo vadis, Boards of Appeal? The Evolution of EU Agencies' Boards of Appeal and the Future of the EU System of Judicial Protection*, (2024) *Rivista del contenzioso europeo*; M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *Boards of Appeals of EU Agencies: Towards Judicialization of Administrative Review?*, Oxford, 2022; as well as G. GRECO, *Le commissioni di ricorso nel sistema di giustizia dell'Unione europea*, Milano, 2020; P. CHIRULLI, L. DE LUCIA, *Tutela dei diritti e specializzazione nel diritto amministrativo europeo: le commissioni di ricorso delle agenzie europee*, (2015) *Rivista italiana di diritti pubblico comunitario*, p. 1305 ff.; M. NAVIN-JONES, *A Legal Review of EU Boards of Appeal in Particular the European Chemicals Agency Board of Appeal*, (2015) *European Public Law*, p. 143 ff.

[109] On the concept of functional continuity, see *supra*, fn. 44.

some boards of appeal have traditionally been empowered to replace the original act. However, the law and practice of boards of appeals have evolved in recent decades to enhance their adjudicatory features by strengthening the guarantees of independence and impartiality[110]. As a result of this evolution, boards of appeals have emerged as fully fledged fora for litigation on administrative actions, thus contributing to safeguarding the protection of individuals against the administrative power[111]. In particular, recent legislative amendments in this domain have demonstrated a tendency to exclude the boards' power to replace the contested act[112], thereby further enhancing the separation between administrative decision-making and its review.

The boards' guarantees of independence and impartiality, as well as their crucial role in reviewing the legality of administrative actions, have been formally recognised by the Court of Justice on two occasions. First, appeals before the Court of Justice against judgments of the General Court which reviewed decisions adopted by independent boards of appeals of EU agencies are subject to a prior admission filter. Indeed, an appeal may proceed only if it raises «an issue that is significant with respect to the unity, consistency or development of Union law»[113]. This requirement was originally introduced in 2019 and subsequently expanded in its scope of application by the 2024 reform of the Statute of the Court of Justice[114].

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110 There is still no common regulatory framework for Boards of Appeals, and particularly for the appointment of their members. Therefore, each of them afford different guarantees of independence and impartiality (G. AGRATI, *Procedural Guarantees in the Litigation Before the Boards of Appeal*, in J. ALBERTI (ed.), *Quo vadis, Boards of Appeal?*, *cit.,* p. 65 ff.; J. ALBERTI, *The Position of Boards of Appeal: Between Functional Continuity and Independence*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*, p. 247; K. BRADLEY, *The Court of Justice Appeal Filter Mechanism and Effective Judicial Protection: Throwing out the Baby with the Bathwater?*, in *The 2024 Reform of the Statute of the Court of Justice of the EU*, (2024) *EU Law Live 2024*, p. 9 ff., p. 11).

111 G. AGRATI, *Procedural Guarantees in the Litigation Before the Boards of Appeal*, in J. ALBERTI (ed.), *Quo vadis, Boards of Appeal?*, *cit.,* p. 81; C. BURELLI, *Private Applicants' Locus Standi Before the Boards of Appeals*, in J. ALBERTI (ed.), *Quo vadis, Boards of Appeal?*, *cit.,* p. 17 ff, p. 20.; D. RITLENG, *Boards of Appeals of EU Agencies and Article 47 of the Charter: Uneasy Bedfellows?*, in M. CHAMON, A. VOLPATO, M. ELIANTONIO (eds.), *cit.*

112 J ALBERTI, *Introduction*, in J. ALBERTI (ed.), *Quo vadis, Boards of Appeal?*, *cit.,* p. 1 ff., in particular pp. 3-4.

113 Article 58a(3) of Protocol (n. 3) on the Statute of the Court of Justice of the European Union, in *OJ* C 202, 7.06.2016, p. 210 ff.

114 Regulation (EU, Euratom) n. 2024/2019 of the European Parliament and of the Council of 11 April 2024 amending Protocol n. 3 on the Statute of the Court of Justice of the European Union, in OJ L 2024/2019, 12.08.2024. Among extensive literature, see P. STANCANELLI, A. MENÉNDEZ FERNÁNDEZ, *Role and Perspectives of the Boards of Appeals of EU Agencies in Light of the Reform of the Statute of the Court of Justice*, in J. ALBERTI (ed.), *Quo vadis, Boards of Appeal?*, *cit.,* p. 305 ff.; K. BRADLEY, *The Court of Justice Appeal Filter*

The aim of this mechanism is straightforward: it limits access to the Court of Justice on the grounds that the General Court already exercises appellate jurisdiction in this field of litigation[115]. However, this finding has a corollary: litigation before an independent board *de facto* amounts to a first-instance review contributing to the administration of justice in the EU legal order. Against this premise, an enhanced proximity between judicial and administrative review emerges: together with Union courts, boards of appeals contribute to providing individuals with effective protection against the actions of EU agencies.

Second, this link is further strengthened by the case-law of Union Courts, which has emphasised the crucial adjudicatory functions carried out by boards of appeal. Indeed, the General Court[116] and Court of Justice[117] rulings in *Aquind* affirmed that those boards of appeal are called upon to exercise an in-depth review of the contested act, thus not confining their standard of review to manifest errors of assessment committed by the administration[118]. The panels of the boards of appeal consist of experts in the relevant technical and scientific fields, whose skills enable them to «examine whether the arguments put forward by the appellant are capable of demonstrating that the considerations on which [the act] is based are vitiated by error»[119]. In the General Court's reasoning, this assertion is further supported by the fact that – similar to decisions

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Mechanism and Effective Judicial Protection, *cit.*; M. F. ORZAN, *L'estensione del meccanismo preventivo di ammissione delle impugnazioni a cinque anni dalla sua entrata in vigore nella recente riforma dello statuto della Corte di giustizia dell'Unione europea: bilanci e prospettive*, in B. NASCIMBENE, G. GRECO (eds.), *La riforma dello Statuto della Corte di giustizia*, (2024) *Eurojus*, p. 94 ff.; M. COLI, *La Corte di giustizia si pronuncia sul primo pourvoi ammesso ai sensi dell'articolo 58 bis dello Statuto e conferma il carattere restrittivo del "filtro" sulle impugnazioni*, (2024) *Rivista del contenzioso europeo*, p. 205 ff.; R. TORRESAN, *Filtering Appeals Over Decisions Originally Taken by the Boards of Appeal: Rationale, Impact and Potential Evolution of Article 58a of the CJEU Statute*, in J. ALBERTI (ed.), *Quo vadis, Boards of Appeal?*, *cit.,* p.129 ff.

[115] M. F. ORZAN, *L'estensione del meccanismo preventivo di ammissione delle impugnazioni a cinque anni dalla sua entrata in vigore nella recente riforma dello statuto della Corte di giustizia dell'Unione europea: bilanci e prospettive*, in B. NASCIMBENE, G. GRECO (eds.), *cit.*, pp. 107-108.

[116] General Court, 18 November 2020, Case T-735/18, *Aquind v ACER*, ECLI:EU:T:2020:542, point 50.

[117] Court of Justice, 9 March 2023, Case C-46/21 P, *ACER v Aquind*, ECLI:EU:C:2023:182, points 59, 63-65.

[118] On the implications of *Aquind* for the standard of review employed by the boards of appeal, see S. OOSTERHUIS, *More than EU Courts, Less than EU Agencies: Intensifying the Boards of Appeal's Standard of Review After* Aquind, in J. ALBERTI (ed.), *Quo vadis, Boards of Appeal?*, *cit.,* p.105 ff.

[119] General Court, 18 November 2020, Case T-735/18, *Aquind v ACER*, ECLI:EU:T:2020:542, point 69.

on the review under Regulation (EC) n. 1367/2006 – «the decision of the board of appeal is the only one amenable to review by the EU judicature»[120]. Therefore, while the General Court is not entitled to review «complex technical and economic assessments» underlying the original act, such scrutiny must be conducted by independent boards of appeals upon request from the applicants.

From this perspective, administrative review effectively complements the Union Courts' tasks in the administration of justice. On one hand, the peculiar features of judicial scrutiny *vis-à-vis* technical discretion necessarily imply a loose standard of review by the General Court, which is called upon to determine whether a manifest error of assessment vitiates the decision. On the other hand, judicial review has already been preceded by an in-depth review performed by an independent board of appeal. In such a double-layered remedial framework, judicial review amounts to a *de facto* appellate jurisdiction over a model of administrative adjudication that combines full review of the contested act with guarantees of independence and impartiality.

The model of Boards of Appeal demonstrates that a paradigm shift in environmental administrative adjudication – from a preliminary step to judicial review to a forum for effective litigation by NGOs – is possible. Such a change in perspective would have beneficial effects regarding the effective attainment of access to justice in environmental matters. Against the limits of Union Courts' capacity to constrain administrative discretion under the current architecture of Regulation (EC) n. 1367/2006, an independent form of administrative review would provide NGOs and other members of the public with an appropriate avenue to have their claims fully adjudicated by a panel with sufficient guarantees of independence and impartiality, rather than by the same body that adopted the original act.

To perform such a paradigm shift, an amendment of Regulation (EC) n. 1367/2006 should be envisaged. Clearly enough, there is no room to lay out fully-fledged legislative proposals in this contribution, as further analysis and stakeholder assessment would be required in this regard. However, some preliminary considerations may be put forward to better frame this article's contention.

First, it is essential to clarify that expanding the competences of existing boards of appeal to include environmental matters would not be a suitable solution. Indeed, not all agencies currently have an independent board. Moreover, such a possibility is not envisaged for EU institutions, while the scope of application of Regulation (EC) n. 1367/2006 extends

[120] *Ibid*, point 70.

to all EU institutions, bodies, and agencies. What is more, the technical and scientific competences of members of boards of appeal are profoundly different from those relevant to the environmental fields, thus making them incapable of ensuring a «scientific dispute settlement forum»[121].

Second, the creation of a single «Environmental Board of Appeal» common to the whole spectrum of EU institutions, bodies, and agencies could not be envisaged either. Such a solution is hardly viable from a political viewpoint, as it would entail externalising administrative scrutiny from the concerned institution, body, or agency. Moreover, a similar arrangement would also be less preferable from a legal perspective, as such externalisation could result in breaking the functional continuity link between the adoption of the contested act and its administrative review.

Against these two 'maximalist' alternatives, a 'minimalist' approach to amending Regulation (EC) n. 1367/2006 may provide a suitable solution. To achieve the desired result, it should be sufficient to state in Article 10 of the Regulation that all EU institutions, bodies, and agencies are obliged to appoint an independent board tasked with hearing and determining the requests for review filed by NGOs and members of the public through a quasi-judicial procedure. Such a solution inevitably entails additional costs stemming from the establishment and maintenance of each board's administrative and logistical apparatus. However, these expenditures could be rationalised and minimised by setting up a common administrative hub at the European Commission, which would carry out the secretariat and administrative tasks supporting the board's activities[122]. In this way, while each Board would form an integral part of the relevant EU institution, body, or agency and maintain functional continuity with administrative activity, centralised technical support would ensure the cost-effectiveness of the proposed solution.

Looking at the relationship between administrative decision-making and review, the enhancement of independent and impartial adjudication may be compensated by excluding the board's power to substitute the contested acts. This feature would establish a clear distinction between the realm of the administrative discretion exercised by institutions, bodies, and agencies and that of adjudication carried out by independent panels. Therefore, after conducting a thorough review of the technical and

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[121] M. PAGANO, *Climate Legal Mobilization Under the New Aarhus Regulation*, *cit.*, p. 932.

[122] A similar arrangement has been recently proposed in literature to improve the organisational structure of existing boards of appeal, and particularly of those deprived of a permanent structure. On this point, see M. NAVIN-JONES, *Ramifications of the Aquind Judgements for 'non-permanent' Boards of Appeal*, in J. ALBERTI (ed.), *Quo vadis, Boards of Appeal?*, *cit.,* p. 197 ff., in particular p. 205.

scientific assessments underpinning the act challenged, in accordance with the *Aquind* case-law, the 'Environmental Boards of Appeal' would have the authority to annul the latter or dismiss the claim. In the first scenario, it would be the responsibility of the EU institution, body, or agency involved to adopt a new act. However, its discretion is significantly constrained by findings dictated by the board's decision following an in-depth examination. In the second scenario, the applicant could still challenge the decision before the Union courts, which, however, would only be able to address «a manifest error of appraisal or a misuse of powers» in the board's decision[123].

4.3. Why 'Environmental Boards of Appeals' Would Be Compatible with the Union Courts' Competences under the Treaties

Before concluding the analysis, a crucial point of potential criticism of this proposal shall be addressed. Against the double-layered administrative and judicial remedial system proposed here, one may contend that Article 263(5) TFEU constitutes an obstacle to its legal feasibility. Indeed, that provision expressly recognises the possibility of instituting administrative proceedings such as those carried out by the boards of appeals only for the legality of acts by EU agencies. Both administrative omissions in general and acts of EU institutions fall outside the scope of Article 263(5) TFEU. However, said provision is relevant only insofar as administrative proceedings entail a partial derogation from the jurisdiction of the Court of Justice, which, pursuant to Article 263(1) TFEU, should be directly adhered to contest the validity of EU acts. Boards of appeal of EU agencies exhibit a similar derogation: their scrutiny is of a preliminary nature compared to that of Union Courts, and it encompasses claims by applicants who would be entitled to directly file an action for annulment in the absence of these boards. Article 263(5) thus provides the necessary legal basis for the EU agencies' boards of appeal, since they entail a derogation from the remedial architecture provided by the Treaties.

Conversely, Article 263(5) TFEU is not an obstacle to the solution proposed in this article, as 'Environmental Boards of Appeals' would not manifest a similar derogation. Their competence, as defined by Regulation (EC) n. 1367/2006, would encompass actions that fall outside the scope of the CJEU's jurisdiction, as they are brought by collective entities that do not meet the requirements for *locus standi* provided by Article 263(4)

[123] General Court, 21 February 2024, Case T-536/22, *PAN Europe v Commission*, ECLI:EU:T:2024:98, point 53.

TFEU. From this viewpoint, the shift from internal review to independent boards' scrutiny would not entail any consequence for the compatibility of the resulting remedial architecture with the Treaties. Therefore, the same rationale underpinning the Court's ruling in *EIB v ClientEarth* may apply by analogy[124]. In particular, the competence of 'Environmental Boards of Appeal' would be limited to actions on which the CJEU has no jurisdiction pursuant to Article 263(4) TFEU; however, Union Courts would retain exclusive jurisdiction on actions filed by applicants meeting the requirements for *locus standi* under Article 263 TFEU. Moreover, judicial review pursuant to Regulation (EC) n. 1367/2006 would be limited to the board's negative decisions, which are addressed to the applicant. It follows that reforming the Aarhus Regulation to establish 'Environmental Boards of Appeals' would neither extend nor reduce the CJEU jurisdiction according to the Treaties: this is why such an arrangement would be compatible with the current primary law framework.

5. Conclusion and Way Forward

The quest for ensuring access to justice in environmental matters for NGOs and other members of the public at the EU level, in line with Article 9(3) of the Aarhus Convention, has sparked a lively and ever-growing debate in the EU academic and institutional discourse. Against the restrictive conditions for legal standing before the CJEU, Regulation (EC) n. 1367/2006 provides for a specific administrative remedy: the internal review of administrative acts breaching environmental law, performed by the same EU institution, body, or agency that adopted them. This arrangement is designed to provide the public with indirect access to Union courts, as it enables them to judicially contest unfavourable decisions on review. Still, inherent flaws characterise the remedial architecture envisaged by Regulation (EC) n. 1367/2006. Most scholarly analyses on the topic have focused on the scope of the internal review mechanism and the conditions for the legal standing of NGOs and other members of the public in internal review proceedings. However, key issues undermining the effective attainment of access to justice stem from the limited capacity of judicial scrutiny of decisions on review to constrain administrative discretion.

These deficiencies in securing effective access to justice in environmental matters are systemic, as they stem from the interaction between the administrative remedy envisioned by the Aarhus Regulation

[124] Court of Justice, 6 July 2023, Joined Cases C-212/21 and C-223/21, *EIB v ClientEarth*, ECLI:EU:C:2023:546, point 54

– specifically, internal review proceedings – and the scrutiny by the CJEU. In response to these issues, this contribution advocates for a change in perspective. Against the prevailing approach in the literature and institutional debate, this article argues that access to justice at the EU level should be strengthened at the administrative, rather than the judicial, level. Indeed, the CJEU's approach in this context is inevitably driven by the peculiar features of the Treaties, which have been crystallised in well-established case-law. As the primary law stands, there is no room for imagining NGOs and other members of the public to directly access Union Courts in actions for the annulment or failure to act. Neither could the CJEU extend its scrutiny to the act initially contested when adjudicating under the terms of Regulation (EC) n. 1367/2006.

Therefore, the issue should be assessed the other way round: by exploring avenues to strengthen the guarantees of effectiveness and independence in administrative proceedings. Providing for internal review proceedings rather than resorting to a different kind of administrative remedy amounts to a mere policy choice by the EU legislature when drafting the Aarhus Regulation. Therefore, the article advocated for a reform of that piece of legislation to shift from internal review to scrutiny by independent boards appointed within all EU institutions, bodies, and agencies. By drawing inspiration from the law and practice of EU agencies' boards of appeal, the proposed remedial architecture would ensure that the limited scope of judicial scrutiny under Regulation (EC) n. 1367/2006 is complemented by an in-depth review previously carried out by an independent panel of experts. This solution would not impair the CJEU's competencies as defined by the Treaties. Similarly to the internal review mechanism currently in force, the competence of 'Environmental Boards of Appeal' would only cover actions brought by collective applicants which could not directly bring their actions before the Union courts pursuant to Articles 263 or 265 TFEU.

To better frame the proposal, the article also outlined the potential contours of 'Environmental Boards of Appeals' by arguing, in particular, that a common hub providing administrative and supporting services for all boards would be beneficial for rationalising the inevitable costs that the reform would entail. However, this consideration is far from conclusive. Imagining a new adjudicatory model calls for further analysis to address the various procedural and substantive issues it presents. While the law and practice of EU agencies' boards of appeal are an important source of inspiration, merely transplanting their common key features to Regulation (EC) n. 1367/2006 would fall short of adequately addressing the peculiar characteristics of environmental litigation.

Therefore, there is still a long way to go to develop this proposal into a fully-fledged remedial tool that could potentially be enacted in secondary law. Nonetheless, this article has already demonstrated a key point: a way out of the current ineffectiveness of access to justice under Regulation (EC) n. 1367/2006 is possible. Its concretisation just requires political will and, perhaps, a hint of legal imagination.

ABSTRACT

The European Union is a contracting party to the Aarhus Convention, which guarantees access to justice in environmental matters. However, the Treaties present significant barriers to the legal standing of NGOs and other members of the public before the Court of Justice. To comply with the Convention, the EU adopted Regulation (EC) n. 1367/2006 (the 'Aarhus Regulation'). The latter allows NGOs and other members of the public to request an internal review of EU administrative acts or omissions for violations of environmental law. Still, the limited scope of judicial scrutiny of decisions on the review fails to effectively constrain administrative discretion. While judicial review of those decisions has sparked considerable academic debate, this article shifts the focus to a broader critique of the internal review model itself. Drawing inspiration from the law and practice of EU agencies' Boards of Appeal, the paper argues for a reform of the Aarhus Regulation replacing internal review with scrutiny by independent administrative panels. This alternative would ensure that the limited scope of judicial scrutiny under Regulation (EC) n. 1367/2006 is complemented by an in-depth review previously carried out by an independent panel of experts. The article concludes by demonstrating the legal feasibility of such a reform within the current EU primary law framework.

L'Unione europea è parte contraente della Convenzione di Aarhus, la quale garantisce l'accesso alla giustizia in materia ambientale. Tuttavia, i Trattati presentano ostacoli significativi alla legittimazione attiva delle ONG e di altri membri del pubblico dinanzi alla Corte di giustizia. Per dare attuazione alla Convenzione, l'Unione ha adottato il regolamento (CE) n. 1367/2006 (il «regolamento di Aarhus»). Quest'ultimo consente alle ONG e ad altri membri del pubblico di ottenere un riesame interno degli atti amministrativi o delle omissioni di istituzioni, organi, e organismi dell'Unione per violazioni del diritto ambientale. Tuttavia, la portata limitata del controllo giurisdizionale delle decisioni sul riesame non materializza un limite effettivo alla discrezionalità amministrativa. A fronte dell'ampio dibattito accademico relativo al controllo giurisdizionale di tali decisioni, il presente articolo sposta l'attenzione su un'analisi critica del modello rimediale del riesame interno. Ispirandosi al diritto e alla prassi delle commissioni di ricorso delle agenzie dell'UE, l'articolo sostiene l'opportunità di una riforma del regolamento di Aarhus che sostituisca il riesame interno con un controllo da parte di collegi amministrativi indipendenti. Questa alternativa garantirebbe che la portata limitata del controllo giurisdizionale ai sensi del regolamento (CE) n. 1367/2006 sia

integrata da un previo scrutinio approfondito in sede amministrativa da parte di un collegio indipendente di esperti. L'articolo conclude dimostrando la fattibilità giuridica di tale riforma nell'ambito dell'attuale quadro di diritto primario dell'Unione.

L'Union européenne est partie à la convention d'Aarhus, qui garantit l'accès à la justice en matière d'environnement. Cependant, les traités font obstacle à la qualité pour agir devant la Cour de justice des Communautés européennes des ONG et des autres membres du public. Afin de se conformer à la convention, l'UE a adopté le règlement (CE) n° 1367/2006 (le « règlement Aarhus »). Ce dernier permet aux ONG et aux autres membres du public de demander un réexamen interne des actes administratifs ou des omissions de l'UE pour violation du droit de l'environnement. Toutefois, la portée limitée du contrôle juridictionnel des décisions de réexamen ne permet pas de limiter efficacement le pouvoir discrétionnaire de l'administration. Si le contrôle juridictionnel sur ces décisions a suscité un débat académique considérable, le présent article se concentre davantage sur une critique plus large du modèle de réexamen interne lui-même. S'inspirant du droit et de la pratique des commissions de recours des agences de l'UE, il plaide en faveur d'une réforme du règlement Aarhus visant à remplacer le réexamen interne par un contrôle exercé par des panels administratifs indépendants. Cette alternative permettrait de compléter le contrôle juridictionnel par un examen approfondi préalablement effectué par un panel d'experts indépendants. L'article conclut en démontrant la faisabilité juridique d'une telle réforme dans le cadre actuel du droit primaire de l'UE.