

THE ‘AARHUS ACTION FOR ANNULMENT’ OR ‘CLIMATE CHANGE LITIGATION BEYOND *PLAUMANN*?’

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This article focuses on the so-called ‘Aarhus Action for Annulment’, which was introduced by the Aarhus Regulation in 2006 and revised in 2021. It raises the question of whether this mechanism truly offers a ‘Plaumann-free alternative’ to the traditional annulment route provided for under Art. 263(4) TFEU. In exploring this possibility, the article focuses on the relevance of the ‘Aarhus Action for Annulment’ in the context of climate policy. More precisely, it aims to assess whether it can be a meaningful avenue for climate litigants. A brief overview over the revised request for internal review procedure will set the stage, followed by an examination of key findings of recent requests submitted to the European Commission and cases brought before the CJEU under the amended framework. The article highlights how the different actors that can bring such an action, the types of EU acts encompassing climate policy and the CJEU’s scope of judicial review collectively shape the possibilities and limitations of this legal pathway.

1 INTRODUCTION

It has been more than four years since the amendment of the Aarhus Regulation,¹ and it’s time to take stock. The revised regulation promised to expand avenues for access to justice in environmental matters, which is seen as an ‘important support measure to help deliver the European Green Deal transition’.² But has it lived up to that promise?

This contribution sheds light on the revised system’s practical scope, assessing whether the ‘Aarhus Action for Annulment’ can be a meaningful avenue for climate litigants and, essentially, one where claimants do not need to rely on the *Plaumann* test³ applied by the Court of Justice of the European Union (CJEU) under the traditional annulment route (‘Standard Action for Annulment’).⁴ The article aims to find answers to three questions. First, what types of climate acts can be challenged with the Aarhus Action for Annulment? Second, who can be the claimant in these actions? And lastly, what does the judicial review by

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¹ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13 amended by Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 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 (Aarhus Regulation) [2021] OJ L356/1.

² Reg 2021/1767 recital 3.

³ Case 25/62 *Plaumann & Co. v Commission of the European Economic Community* EU:C:1963:17.

⁴ This term refers to the procedure in Treaty on the Functioning of the European Union (TFEU), Art 263(4).

the CJEU look like?⁵

The term ‘Aarhus Action for Annulment’ (AAFA) refers to the procedure that was established by the Aarhus Regulation in 2006. The Regulation was adopted to allow the review of certain administrative acts by EU organs in line with the obligations of the Aarhus Convention.⁶ This regulation was amended in 2021. Contrary to the Standard Action for Annulment, the AAFA does not begin with the filing of an action directly with the CJEU. First, the plaintiff needs to go through an administrative procedure. More precisely, they must make a ‘request for internal review of administrative acts’ (RIR)⁷ with the organ that adopted the administrative act in the first place, on the grounds that such an act contravenes environmental law. For the purposes of this paper, the analysis is limited to acts adopted by the European Commission, arguably the most significant body adopting administrative acts in the field of climate policy. Once the European Commission has responded to the RIR, the applicants may, under certain conditions, challenge that reply before the CJEU.⁸

This article is divided into three parts. First, an introduction to the revised request for internal review procedure will set the stage, including an examination of key findings of recent requests submitted to the European Commission and its replies (Section 2). Second, the characteristics of the proceedings before the CJEU will be analysed while also taking into account recent judgements by the General Court (GC) (Section 3). Finally, the conclusion will summarise the answers to the three initial questions of who can bring an AAFA, what types of EU climate acts can be challenged and what the judicial review looks like (Section 4). This last point refers to the scope of judicial control of the CJEU regarding the European Commission’s reply whereas the other two look at the procedural requirements of such an action.

Methodologically, this article relies on doctrinal analysis. The RIRs and replies mentioned in this contribution can be found in the European Commission’s Repository of requests for internal review.⁹ The numbers of RIRs mentioned below refer to the numbers attributed by the European Commission in its repository. There has been a significant rise in RIRs addressed to the European Commission since the amendment of the regulation.¹⁰ According to its repository, of 18 February 2026, a total of 127 RIRs have been filed with the European Commission since the entry into force of the Aarhus Regulation in 2006. 79 of those were filed after the 2021 amendment. 34 RIRs concern the European Commission’s acts (or omissions) in regard to pesticides (which is the highest number of

⁵ The findings and recommendations of the Aarhus Compliance Committee that motivated the revision of the Aarhus Regulation, see Reg 2021/1767 recital 5, as well as any consideration to the compliance of the amended regulation with the Aarhus Convention are not subject to this paper.

⁶ Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) 1998.

⁷ Aarhus Regulation Art 10.

⁸ *ibid* Art 12.

⁹ European Commission, ‘Repository of requests for internal review lodged with the European Commission pursuant to Article 10 of Regulation (EC) No 1367/2006 (“Aarhus Regulation”)
<https://environment.ec.europa.eu/law-and-governance/aarhus/requests-internal-review_en#repository-of-requests-for-internal-review-logged-with-the-european-commission-pursuant-to-article-10-of-regulation-ec-no-13672006-aarhus-regulation> accessed 18 February 2026.

¹⁰ European Commission, ‘Aarhus Convention Implementation Report’ C(2025) 4316 final, 37; Mario Pagano, ‘Climate Legal Mobilization Under the New Aarhus Regulation’ (2024) 25(6) *German Law Journal* 919, 924.

RIRs in one policy area).¹¹

2 THE ‘ADMINISTRATIVE PART’ OF THE AARHUS ACTION FOR ANNULMENT – THE REQUEST FOR INTERNAL REVIEW OF ADMINISTRATIVE ACTS

The following section will look at the requirements of the RIR and their application by the European Commission. Notably who can make a RIR (Section 2.1), which acts can be contested (Section 2.2), and how the European Commission has responded to some of those RIRs concerning climate policy (Section 2.3).

2.1 APPLICANTS

Art. 10 of the Aarhus Regulation lays down the criteria of the RIR. The applicants eligible for a RIR include non-governmental organisations (NGOs)¹² and, since the latest amendment, ‘other members of the public’. However, members of the public must meet specific criteria under one of the two alternatives. They must either demonstrate that they are directly affected by an impairment of their rights caused by the alleged contravention of environmental law compared to the public at large,¹³ or alternatively they must show that there is a sufficient public interest and that the request is supported by a certain number of members of the public.¹⁴ Additionally, members of the public need to be represented either by an NGO or a lawyer.¹⁵

Especially when it comes to the demonstration of being ‘directly affected’, it is not entirely clear which situations are covered. Recital 19 of the amending regulation clarifies that this does not amount to demonstrating direct and individual concern in the sense of Art. 263(4) TFEU. However, in order to avoid an *actio popularis*, applicants still have to be directly affected in comparison with the general public, which would be fulfilled in the event of an ‘imminent threat to their own health and safety, or of prejudice caused to a right to which they are entitled pursuant to Union legislation, resulting from the alleged contravention of environmental law, in accordance with the case law of the CJEU’.¹⁶ All of this would suggest that being directly affected requires a higher impairment of the claimant’s rights compared to the public at large. In this regard the European Commission could have taken two RIRs, in which the indigenous communities Gabna sameby¹⁷ and Talma sameby¹⁸ figured as co-applicants next to an NGO, as an opportunity to clarify this criterion. In their RIRs the

¹¹ See RIRs n 59–61, 67, 73–75, 77–79, 81–85, 87–93, 97–100, 103–106, 121–123 and 127.

¹² Aarhus Regulation Art 11(1) outlines the criteria determining NGOs’ entitlement to make a RIR, including the ‘primary stated objective of promoting environmental protection in the context of environmental law’, their existence for over two years and the subject matter of the RIR being covered by their objectives and activities.

¹³ Aarhus Regulation Art 11(1a) point (a).

¹⁴ Aarhus Regulation Art 11(1a) point (b): ‘[...] 4 000 members of the public residing or established in at least five Member States, with at least 250 members of the public coming from each of those Member States’.

¹⁵ Aarhus Regulation Art 11(1a) point (b). Note that Art 11(1a) has been applied from 29 April 2023, see Reg 2021/1767 Art 2.

¹⁶ Reg 2021/1767 recital 19, referring to Cases C-237/07 *Janeček* EU:C:2008:447, C-529/15 *Folke* EU:C:2017:419 and C-197/18 *Wasserleitungsverband Nördliches Burgenland and Others* EU:C:2019:824.

¹⁷ See RIRs n 114 and 115.

¹⁸ See RIR n 115.

applicants challenge a European Commission decision which grants the status of a Strategic Project to two Swedish raw materials projects.¹⁹ They claim that Gabna community is directly affected by this decision as the project concessions would ‘physically divide [respectively, impact] their ancestral reindeer grazing lands and thus prevent the practice of traditional reindeer herding, a vital part of Sami culture and identity’.²⁰ Furthermore they see the higher impairment accounted for in the fact that, compared to the general public’s concern about environmental impacts, ‘the existence and survival of the Gabna community is [...] directly threatened by the project’.²¹ This case seems like a textbook example of the fulfilment of the criteria laid down in Art. 11(1a) point (a) Aarhus Regulation. Unfortunately, in its recently adopted reply in which the European Commission combined the two RIRs,²² it only assessed the eligibility of the lead NGO, and standing of both indigenous communities was not considered.

2.2 SUBJECT MATTER

The subject matter of the RIR can be an administrative act or an administrative omission.²³ The definition of an administrative act significantly changed with the amending regulation and now covers ‘[...] 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 within the meaning of point (f) of Art. 2(1)’.²⁴ While legislative acts are not covered by this definition, other acts of general scope are not generally excluded.²⁵ In recent replies, the European Commission has clarified the extent to which acts can be considered to have ‘legal

¹⁹ Based on Regulation (EU) 2024/1252 of the European Parliament and of the Council of 11 April 2024 establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1724 and (EU) 2019/1020 [2024] OJ L2024/1252.

²⁰ RIR n 114 para 76 and RIR n 115 para 69.

²¹ RIR n 114 para 80 and RIR n 115 para 72. Similarly in RIR n 115 in regard to the Talma community, paras 77–79.

²² Together with RIRs n 107–113 and 116, 117, see European Commission, ‘Annex – Detailed assessment of the admissibility and the grounds for the requests of internal review concerning Commission Decision 2025/840 of 25 March 2025 recognising certain critical raw material projects as Strategic Projects under Regulation (EU) 2024/1252 of the European Parliament and of the Council with reference to a number of different projects.’ Ares(2025)10337715.

²³ Aarhus Regulation Art 10(1). This paper will focus on administrative acts.

²⁴ Aarhus Regulation Art 2(1) point (g). Prior to the amendment, only measures ‘of individual scope under environmental law’ with ‘legally binding and external effects’ have been covered by the definition, see Reg (EC) No 1367/2006 Art 2(1) point (g).

²⁵ However, see in this regard the recent judgments by the GC (Ninth Chamber, in Extended Composition), Case T-534/23 *Föreningen Svenskt Landskapsskydd and Others v Council* EU:T:2025:1020 and Case T-535/23 *CEE Bankwatch Network and Ökobüro v Council* EU:T:2025:1021 concerning the replies to RIRs that were addressed to the Council, challenging Council Regulation (EU) 2022/2577 of 22 December 2022 laying down a framework to accelerate the deployment of renewable energy [2022] OJ L335/36, that was adopted on the basis of Art 122(1) TFEU. In its judgments, the GC concludes that the Council acted in a legislative capacity when adopting Regulation 2022/2577 (even though its legal basis does not provide for a legislative procedure). See for a first analysis of the judgement Janek Tomasz Nowak, ‘EU non-legislative acts can still be legislative acts for the purpose of the Aarhus Regulation’ (*LinkedIn*, 20 November 2025) <<https://www.linkedin.com/pulse/eu-non-legislative-acts-can-still-legislative-purposes-nowak-sshce>> accessed 27 November 2025. See also Clara Sersale, ‘The General Court’s Judgment in the Case T-535/23 Bankwatch Network: An Additional Obstacle for the Aarhus Regulation?’ (*Review of European Litigation*, 10 February 2026) <<https://europeanlitigation.eu/2026/02/10/the-general-courts-judgment-in-the-case-t-535-23-bankwatch-network-an-additional-obstacle-for-the-aarhus-regulation/>> accessed 18 February 2026.

and external effects'. Accordingly, these criteria are assessed in the same manner as for acts under the judicial review according to Art. 263 TFEU. As a consequence, preparatory acts, recommendations, opinions and other non-binding acts cannot be considered to have external effect if they do not produce legal effects vis-à-vis third parties,²⁶ whereas the criterion of legal effect is judged on the effects, objective and content of an act, regardless of its form.²⁷ Thus, the European Commission has determined that a tender,²⁸ recommendation or Commission Staff working document²⁹ does not give rise to legal and external effects given their content, context, and wording.³⁰

With regard to the aspect of provisions possibly contravening environmental law, any Union legislation may qualify as 'environmental law' provided it contributes to the pursuit of the objectives of Union environmental policy as set out in the TFEU, regardless of its legal basis.³¹ This broad interpretation of environmental law is probably also why neither the European Commission, nor the CJEU have so far called into question whether climate related RIR and actions before the Court could fall under the scope of the Aarhus Regulation. In contrast, the European Court of Human Rights (ECtHR) suggested on a side note in its *KlimaSeniorinnen* judgement that 'the standing of associations in the context of climate-change litigation [...] is not covered by the Aarhus Convention',³² though simultaneously acknowledging that in most States party to the Aarhus Convention it would be possible for an environmental association to bring a climate-change case.³³

Art. 2(2) of the Aarhus Regulation excludes administrative acts from its scope that concern measures taken by EU organs in their capacity as an administrative review body. This exception also covers acts adopted by the European Commission under Art. 107 TFEU. For this reason, a RIR challenging Guidelines on State aid for climate, environmental

²⁶ Reg 2021/1767 recital 11.

²⁷ Reg 2021/1767 recital 12.

²⁸ RIRs n 94 and 95.

²⁹ RIR n 68.

³⁰ See European Commission, 'European Commission reply Internal Review Request No. 94 "ref. IR/2024/873987 by NGO Global legal Action Network concerning Aggregate EU first term mid-tender to ensure stability and predictability of energy supplies"' Ares(2024)5674211, point 2.2; European Commission, 'Internal Review Request No. 95, "Request for internal review under Title IV of the Aarhus Regulation of the short-term tender published on 12 March 2024 by the European Commission (the Contested Act)'" Ares(2024)7035188, point 2.2; European Commission, 'SUBJECT: Internal Review Request – speeding up permit-granting procedures for renewable energy projects and facilitating Power Purchase Agreements' Ares(2022)8575980, point 2.

³¹ Aarhus Regulation Art 2(1) point (f). Furthermore, the CJEU clarified in its judgement in Joined Cases C-212/21 P and C-223/21 P *EIB v ClientEarth* EU:C:2023:546 para 87 that due to the broad scope of the term 'environmental law' it is not relevant either, if the act in question was adopted under the legislative procedure according to Art 289 TFEU. See also Sebastian Bechtel, 'ClientEarth wins first-ever NGO challenge against the European Investment Bank' (31 July 2023) <<https://www.clientearth.org/latest/news/clientearth-wins-first-ever-ngo-challenge-against-the-european-investment-bank/>> accessed 12 August 2025.

³² *KlimaSeniorinnen v Switzerland* App no 53600/20 (ECtHR, 9 April 2024) para 494. See also para 501: 'The Court must, however, be mindful of the difference between the basic nature and purpose of the Aarhus Convention, which is designed to enhance public participation in environmental matters, and that of the Convention, which is designed to protect individuals' human rights. It must also bear in mind the specific features of climate-change litigation [...] and the difference between climate change and the more linear and localised (traditional) environmental issues which the Aarhus Convention is designed to address'.

³³ See also in this regard, Christina Eckes and Tessa Trapp, 'The Aarhus Convention's Relevance for Climate Litigation Through the Lens of KlimaSeniorinnen' (*European Law Blog*, 11 September 2024) <<https://www.europeanlawblog.eu/pub/xx9vrteu/release/1>> accessed 15 October 2025.

protection and energy 2022³⁴ was deemed inadmissible by the European Commission.³⁵ In the meantime, the European Commission has amended its Best Practice Code for State aid and included an internal review mechanism equivalent to the one in the Aarhus Regulation for certain final state aid decisions closing the formal investigation procedure initiated under Article 108(2) TFEU.³⁶ However, since only final state aid decisions are covered by its scope, Guidelines are most definitely not covered. Another notable point lies in the fact that the Best Practice Code does not include ‘other members of the public’ as possible applicants, therefore only NGOs are eligible to make a RIR under this mechanism.³⁷

2.3 REPLY OF THE EUROPEAN COMMISSION

If the European Commission finds the RIR to be well-founded, it is obliged to take necessary steps, which can possibly result in amending or annulling the administrative act in question. However, it does enjoy a wide margin of discretion.³⁸

Yet, if the RIR is rejected as inadmissible or unfounded, the requesting party can file for an action for annulment according to Art. 12 of the Aarhus Regulation.³⁹ It is not possible to make a second RIR regarding the negative reply of the European Commission.⁴⁰

Before the amending regulation, the vast majority of RIR were rejected as only acts of individual scope were covered.⁴¹ There have been in total 22 RIRs related to climate policy⁴²

³⁴ European Commission, ‘Guidelines on State aid for climate, environmental protection and energy 2022’ (Communication) [2022] OJ C80/1.

³⁵ See reply to RIR n 65, European Commission, ‘Subject: Request for internal review of the Guidelines on State aid for climate, environmental protection and energy 2022’ Ares(2022)3224564.

³⁶ European Commission, ‘Code of Best Practices for the conduct of State aid control procedures’ (Best Practice Code) OJ C/2025/2810 point 11. See in detail Clara H L Labus, ‘The New Internal Review Mechanism Concerning the Compatibility of State Aid Decisions with EU Environmental Law’ (*Unione europea e Diritti*, 20 June 2025) <<https://uediritti.it/the-new-internal-review-mechanism-concerning-the-compatibility-of-state-aid-decisions-with-eu-environmental-law/>> accessed 15 October 2025.

³⁷ *ibid* 2; Best Practice Code, point 11.1. A first RIR under this new mechanism was filed by the Organisation *Laka* on September 25 2025, see European Commission, ‘Aarhus – Requests for internal review of certain State aid decisions’ <https://competition-policy.ec.europa.eu/state-aid/aarhus-review-requests_en> accessed 18 February 2026. The RIR was rejected as inadmissible since the state aid decision was not adopted on the basis of a formal investigation procedure under Art. 108(2) TFEU, see European Commission ‘Subject: SA.103925.AR and SA.103926.AR – Your Aarhus review request concerning decision “State Aid SA.103925 (former SA.103925 (2022/PN) and SA.103926 (2022/PN)) – The Netherlands – PALLAS project: Aid for the construction of a research reactor and of an isotope processing facility in Petten”’ C(2026) 9 final.

³⁸ C(2025) 4316 final, 36–37; Opinion of AG Szpunar in Case C-82/17 P *TestBioTech and Others v Commission* EU:C:2018:837 para 53; Luca Prete, ‘EU Environmental Law: A Complete and Effective System of Remedies before the Courts of the European Union?’ in Mariolina Eliantonio and Emma Lees (eds), *The Legitimacy of EU Environmental Governance and the Role of the European Courts* (Oxford University 2025) 220–221; Giulia C Leonelli, ‘GMO Authorisations and the Aarhus Regulation: Paving the Way for Precautionary GMO Governance?’ (2019) 26(4) *Maastricht Journal of European and Comparative Law* 505, 507; Giulia C 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) 40 *Yearbook of European Law* 230, 262.

³⁹ See below Section 3.

⁴⁰ See reply to RIR n 84, European Commission, ‘Votre demande de reexamen interne au titre du reglement Aarhus concernant la reponse de la Commission europeenne du 3 octobre 2023 [ref. Ares (2023) 6685241] a votre demande de reexamen interne du 8 mai 2023 [ref. Ares(2023) 3273454] concernant le reglement d’execution (UE) 2023/574 etablissant des regles detaillees pour l’identification des coformulants inacceptables dans les produits phytophannaceutiques’ Ares(2024)1987507.

⁴¹ See n 10.

⁴² This figure includes only those RIRs that challenged contraventions of EU climate or energy policy. The author is aware of the fact that no sharp line between climate and environmental policy can be drawn.

under the amended regulation. While all of them have been rejected by the European Commission, the reasons for rejection are not limited to formalities.⁴³ Eight of the requests have been deemed admissible by the European Commission, meaning it went on to assess the pleas of the applicants.⁴⁴

The scope of review by the European Commission is limited in so far as only the claims brought forward by the applicants must be considered and only in so far as the conformity of the act in question with environmental law is contested.⁴⁵ Moreover, the European Commission is not required to engage with pleas that are not sufficiently substantiated. In fact, applicants '[...] are required to put forward, when stating the grounds for their request for review, facts or legal arguments of sufficient substance to give rise to serious doubts'.⁴⁶ This requirement can be qualified as a 'burden of raising and presenting the issues'⁴⁷ and is not to be confused with the burden of proof. Accordingly, the European Commission assesses the fulfilment of this requirement for each of the claims,⁴⁸ while considering inadmissible those claims that are insufficiently substantiated.⁴⁹ Hence, the European Commission only engages with pleas that raise serious doubts regarding the legality of the contested act.⁵⁰ However, neither the Aarhus Regulation itself, the Commission's replies nor the case law of the CJEU specify what burden of proof applicants must meet in order for the European Commission to consider the RIR well-founded.

RIRs concerning pesticide regulation (which account for most of the RIRs, see above Section 1) as well as RIR related to fishery and agriculture have not been considered in this section. See Pagano (n 10) who has also adopted this approach in his analysis.

⁴³ Some of which have been mentioned above, see Section 2.2.

⁴⁴ See for an analysis of some of those RIR, Pagano (n 10) 924–934. He concluded that the RIR has become 'a true "scientific" dispute settlement forum'.

⁴⁵ Aarhus Regulation Arts 10(1) and (2); see also Anaïs Berthier, Anne Friel, and Sebastian Bechtel, 'Access to Justice in European Union Law: A Legal guide on Access to Justice in environmental matters' (2021) 71 <<https://www.clientearth.org/latest/documents/access-to-justice-in-european-union-law-a-legal-guide-on-access-to-justice-in-environmental-matters-edition-2021/>> accessed 15 October 2025; Eckard Rehbinder, 'Die neue Aarhus-Verordnung der Europäischen Union – ein Schritt zu mehr Rechtsschutz gegen Entscheidungen der Organe und Einrichtungen der Union' (2022) 44(5) *Natur und Recht* 293, 296.

⁴⁶ Reg 2021/1767 recital 14, referring to Case C-82/17 P *TestBioTech v Commission* EU:C:2019:719 para 69.

⁴⁷ Opinion of AG Szpunar in Case C-82/17 P *TestBioTech and Others v Commission* EU:C:2018:837 para 50. Similarly Giacomo Gattinara, 'Administrative Review as an Instrument to Enforce Article 9 of the Aarhus Convention' in Bojana Todorović and Roberto Caranta (eds), *Europeanisation of Access to Justice in Environmental Matters: The Aarhus Convention in the Balkans* (Hart Publishing 2025) 227; Nicolas Grundhewer, *Torbüher zur Verwaltungsgerichtsbarkeit: Rechtsschutz im Eigenverwaltungsrecht der Europäischen Union unter dem Einfluss der Aarhus-Konvention* (Schriften zum Europäischen Recht vol 191, Duncker & Humblot 2020) 260.

⁴⁸ See for example reply to RIR n 80, European Commission, 'Annex: Assessment of the request for internal review of Commission Implementing Decision (EU) 2023/1319 of 28 June 2023 amending Implementing Decision (EU) 2020/2126 to revise Member States' annual emission allocations for the period from 2023 to 2030' Ares(2023)8595289, 2.

⁴⁹ See for example reply to RIR n 64, European Commission, 'Annex II – Assessment of the grounds for Internal Review of Commission Delegated Regulation (EU) 2021/2139 included in the Request of ClientEarth' fisma.b.2(2022)5339092.

⁵⁰ Aarhus Regulation Art 10(2) allows for EU organs to not consider a request that is 'manifestly unfounded or clearly unsubstantiated'. In the author's view this means that whenever the RIR does not include (substantiated) claims at all, the European Commission can reject such a request as a whole without even considering its admissibility. Whereas in the beforementioned case, the assessment of whether a plea is sufficiently substantiated is made for each of the pleas, once the admissibility criteria for the criteria are deemed fulfilled. Furthermore, the GC has clarified in Case T-177/13 *TestBioTech and Others v Commission* EU:T:2016:736 para 85 that where the applicants have managed to raise serious doubts, the European Commission needs to 'examine all relevant information of its own motion'.

3 THE AARHUS ACTION FOR ANNULMENT BEFORE THE CJEU – LIMITS AND POTENTIAL

Once applicants have, unsuccessfully, run through the administrative proceedings according to Art. 10 Aarhus Regulation, Art. 12(1) Aarhus Regulation allows for an action for annulment before the CJEU under certain criteria.⁵¹ The following section will analyse who can bring such an action for annulment (Section 3.1), what the subject matter of it is and what the judicial review by the CJEU looks like (Section 3.2). At the same time, its potential and limits compared to the Standard Action for Annulment under Art. 263(4) TFEU are discussed.

3.1 PLAINTIFFS – WHO?

According to Art. 12(1) Aarhus Regulation, ‘the non-governmental organisation which made the request for internal review pursuant to Art. 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of TFEU’. Interestingly, this provision only refers to NGOs as possible applicants and does not grant a right to access to the CJEU for ‘other members of the public’.⁵² However, paragraph two grants a right for NGOs and other members of the public to institute proceeding before the CJEU ‘where the Union institution or body fails to act in accordance with Art. 10(2) or (3)’.⁵³ Furthermore, since the reply of an organ to the RIR can be qualified as a decision in the sense of Art. 288(4) TFEU,⁵⁴ NGOs, just like other members of the public, should be able to challenge it under the first limb of Art. 263(4) TFEU as addressees of the reply.⁵⁵ While to date no AAFA has been brought before the CJEU by members of the public, the Court should interpret this provision in conformity with primary law, thus granting addressed members of the public standing. In cases initiated by NGOs, the CJEU has so far not examined standing but has gone straight to the pleas of the action, which could imply that the applicants were considered as addressees of the contested reply.⁵⁶

As addressees of the reply, plaintiffs do not need to demonstrate individual or direct concern according to the second alternative of Art. 263(4) TFEU. In the past, the individual concern criterion, i.e. the *Plaumann* test, was the biggest hurdle for climate litigants, as seen

⁵¹ This corresponds to the second part of the AAFA that involves the proceedings in front of the CJEU.

⁵² While the latter can file for a RIR, see Section 2.1 and Aarhus Regulation Art. 10(1).

⁵³ Aarhus Regulation Art 12(2).

⁵⁴ This was already suggested by the GC before the amending regulation, see Case T-177/13 *TestBioTech and Others v Commission* EU:T:2016:736 para 53. See also Angelika Krężel, ‘Aarhus Regulation Administrative (self-) Review Mechanism: The Inevitable Failure to Contribute to Access to Justice in the EU?’ (2023) 32(3) EELR 136, 139; Grundhewer (n 47) 263. Lorenzo Grossio, ‘Access to Justice in Environmental Matters Beyond the Aarhus Regulation: Towards an Alternative Adjudicatory Model at the EU Level’ (*Review of European Litigation*, 24 June 2025), 12 < <https://europeanlitigation.eu/2025/06/24/access-to-justice-in-environmental-matters-beyond-the-aarhus-regulation-towards-an-alternative-adjudicatory-model-at-the-eu-level/> > accessed 15 October 2025.

⁵⁵ Similarly Reh binder (n 45) 297.

⁵⁶ See the judgements rendered by the GC under the amended regulation, Case T-331/22 *NLVOW v Commission* EU:T:2024:243; Case T-344/22 *Stichting Nationaal Kritisch Platform Windenergie v Commission* EU:T:2024:244; Case T-345/22 *Stöttingjällets Miljöskydds-förening v Commission* EU:T:2024:245; Case T-346/22 *Föreningen Svenskt Landskapskydd v Commission* EU:T:2024:246; Case T-536/22 *PAN Europe v Commission* EU:T:2024:98, T-583/22 *Fédération environnement durable and Others v Commission* EU:T:2025:863; Case T-579/22 *ClientEarth v Commission* EU:T:2025:862; Case T-1049/23 *Bloom v Commission* EU:T:2025:754.

in cases such as the *People's Climate Case*.⁵⁷ As for now, the direct concern criterion has never been assessed by the Court in Standard Actions for Annulment challenging climate acts. However, meeting this criterion might be difficult, especially for NGOs.⁵⁸ As plaintiffs of an AAFA don't rely on either individual or direct concern, this is also an advantage for underlying regulatory acts that don't require implementing measures and thus could also be challenged through the third limb of Art. 263(4) TFEU, since under this alternative, plaintiffs would still need to demonstrate direct concern.

3.2 SUBJECT MATTER AND JUDICIAL REVIEW – WHAT AND HOW?

The subject matter of an AAFA is not the act subject to the RIR but the reply of the European Commission, therefore if successful only the reply can be annulled.⁵⁹ Consequently, the scope of review of the CJEU is limited. Only contraventions against environmental law can be challenged, and new arguments or facts, that have not been presented in the RIR already, cannot be included.⁶⁰

This is a limitation compared to the Standard Action for Annulment, in which the Court has full jurisdiction to review the act, and has been identified as a shortcoming of the AAFA in the past.⁶¹ In order to assess whether the AAFA can still serve as a valuable avenue for climate litigants, the following paragraphs consider the CJEU's earlier jurisprudence as well as recent judgements by the GC deciding on actions against climate related RIRs. At the heart of this analysis lies the question to what extent plaintiffs can challenge the initially contested administrative act ('underlying act'). The possibility of indirectly challenging higher-ranking law ('underlying legislative act') will be considered at the end of this Section.

As stated above, the subject matter of an AAFA is always the reply and not the underlying act itself. However, this does not mean that the Court cannot engage with material arguments at all. The judicial review can consider the underlying act to the extent that the grounds of the administrative review address it, which means that the Court will look in detail at how the European Commission addressed those arguments.⁶² Consequently,

⁵⁷ Case C-565/19 P *Carvalho and Others v Parliament and Council* EU:C:2021:252.

⁵⁸ Ioanna Hadjiyianni, 'Judicial protection and the environment in the EU legal order: Missing pieces for a complete puzzle of legal remedies' (2021) 58(3) *Common Market Law Review* 777, 789; Tessa 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 Paper*, 8 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5194742> accessed 15 October 2025; Catherine Warin, *Individual rights under European Union law: A study on the relation between rights, obligations and interests in the case law of the Court of justice* (Dissertation. Luxemburger juristische Studien volume 17, 1st edition, Nomos Verlagsgesellschaft mbH & Co. KG 2019) 462–463.

⁵⁹ Case T-177/13 *TestBioTech and Others v Commission* EU:T:2016:736 para 56; European Commission, 'Report on European Union implementation of the Aarhus Convention in the area of access to justice in environmental matters' SWD(2019) 378 final, 24. See also Hadjiyianni (n 58) 797.

⁶⁰ Case C-82/17 P *TestBioTech and Others v Commission* EU:C:2019:719 para 39. Even if pleas raised in the RIR can be amplified, when demonstrating a sufficiently close connection with those pleas, see Case T-536/22 *PAN Europe v Commission* EU:T:2024:98 para 46. See also Gattinara (n 47) 227–228.

⁶¹ Leonelli, 'Access' (n 38); Hadjiyianni (n 58); Trapp (n 58).

⁶² SWD(2019) 378 final, 24 citing Case T-108/17 *ClientEarth v Commission* EU:T:2019:215. See also Bechtel (n 31). The GC (Fourth Chamber, in Extended Composition) suggested this in two recent decisions concerning plant protection, see Case T-412/22 *PAN Europe v Commission* EU:T:2025:1034 paras 30, 36 and Case T-94/23 *Pollinis France v Commission* EU:T:2025:1036 paras 32, 37. See in this regard Matthias Hasler and Marta Morvillo, 'The General Court's Judgment in the Case T-535/23 Bankwatch Network: An Additional

if the arguments concerning the contested administrative act are presented in a substantiated manner in the RIR, plaintiffs can build on these grounds in their action before the CJEU and make them subject to the judicial review.⁶³

However, close attention should be paid to the Court's standard of review, as it determines the burden of proof placed on the plaintiffs in such cases. Where the European Commission must make complex assessments when adopting an act, it enjoys broad discretion and the Court's standard of review under Art. 263 TFEU is usually⁶⁴ limited: 'judicial review [is] restricted to verifying that the measure in question is not vitiated by a manifest error or a misuse of powers and that the competent authority did not clearly exceed the bounds of its discretion'.⁶⁵ In order to fulfil the 'manifest error test' this means that 'the evidence adduced by the applicant must be sufficient to make the factual assessments used in the act implausible'.⁶⁶ The GC has recently applied this standard of review in a Standard Action for Annulment brought by Austria⁶⁷ against a European Commission's delegated regulation⁶⁸ to the Taxonomy Regulation⁶⁹ and dismissed the action.

In the past, the CJEU has applied this standard of review to AAFA's. With regard to the AAFA, this means that plaintiffs have to demonstrate that the European Commission's assessments in its response are implausible.⁷⁰ For the first time in climate related rulings, this has been confirmed by two recent judgements of the GC⁷¹ in AAFA's concerning the preceding delegated regulation⁷² of the delegated regulation that was challenged in the Standard Action for Annulment by Austria. While the GC did engage with the plaintiffs' arguments contesting the underlying delegated regulation in both actions, it examined, for each of the admissible pleas, whether the 'manifest error' threshold was met.⁷³ Consequently, none of the pleas were upheld.

When compared to the Standard Action for Annulment by Austria, the GC referred to the material grounds relating to the delegated regulation in a similar manner. As a result, plaintiffs of the AAFA managed to make the underlying act (the delegated regulation) subject

Obstacle for the Aarhus Regulation?' (*Review of European Litigation*, 10 February 2026)

<<https://europeanlitigation.eu/2026/02/10/the-general-courts-judgment-in-the-case-t-535-23-bankwatch-network-an-additional-obstacle-for-the-aarhus-regulation/>> accessed 18 February 2026.

⁶³ See also Rehlinger (n 45) 297.

⁶⁴ See however the case law cited by Trapp (n 58) 16–17 where the Court applied a 'quasi-substantive review'.

⁶⁵ Case T-177/13 *TestBioTech and Others v Commission* EU:T:2016:736 para 77.

⁶⁶ *ibid* para 78.

⁶⁷ Case T-625/22 *Austria v Commission* EU:T:2025:869 paras 32–37.

⁶⁸ Commission Delegated Regulation (EU) 2022/1214 of 9 March 2022 amending Delegated Regulation (EU) 2021/2139 as regards economic activities in certain energy sectors and Delegated Regulation (EU) 2021/2178 as regards specific public disclosures for those economic activities [2022] OJ L188/1.

⁶⁹ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088 [2020] OJ L198/13.

⁷⁰ T-536/22 *PAN Europe v Commission* EU:T:2024:98 para 54. See also Grossio (n 54) 21.

⁷¹ Case T-579/22 *ClientEarth v Commission* EU:T:2025:862 and Case T-583/22 *Fédération environnement durable and Others v Commission* EU:T:2025:863.

⁷² Commission Delegated Regulation (EU) 2021/2139 of 4 June 2021 supplementing Regulation (EU) 2020/852 of the European Parliament and of the Council by establishing the technical screening criteria for determining the conditions under which an economic activity qualifies as contributing substantially to climate change mitigation or climate change adaptation and for determining whether that economic activity causes no significant harm to any of the other environmental objectives [2021] OJ L442/1.

⁷³ Case T-579/22 *ClientEarth v Commission* EU:T:2025:862 paras 31–33; Case T-583/22 *Fédération environnement durable and Others v Commission* EU:T:2025:863 paras 32–34.

to the judicial review. In other words, the scope of review of the AAFA was not a problem in those cases. This observation aligns with the argument developed above according to which the CJEU can engage with material arguments related to the underlying act, as long as the plaintiffs included them in their initial RIR.⁷⁴

Hence, the ‘review problem’ seems not so much to be a problem of the limited scope of review by the Court (which does not, as explained, necessarily limit the plaintiff in its possibility to *de facto* challenge the underlying act). Rather, it is a consequence of the limited standard of review, or, in other words, of the high burden of proof placed on the plaintiffs. This is however not something that is specific to the AAFA but is equally problematic for the Standard Action for Annulment procedure.

What remains to be considered is whether Art. 277 TFEU – which permits the indirect challenge of an act of general application, including legislative acts – may be invoked in an AAFA. By invoking Art. 277 TFEU, secondary law may be challenged incidentally in an action for annulment under Art. 263 TFEU (‘plea of illegality’). This applies in so far as the individual decision being challenged constitutes an implementing measure of the legislative act. For the AAFA, the GC recently held that the reply of the European Commission that is subject to the court proceedings cannot be regarded as a measure implementing the underlying legislative act. According to the Court, the reply can only be considered as a measure implementing the provisions of the Aarhus Regulation. Hence, the plea of illegality cannot be invoked to challenge the validity of an underlying legislative act.⁷⁵

4 CONCLUSION

Coming back to the initial three questions of who, what and how, the following conclusions can be drawn.

Firstly, unanswered questions regarding individuals’ access to the AAFA route remain. This concerns both the criteria for members of the public to make a RIR,⁷⁶ as well as their right to challenge the European Commission’s reply before the CJEU.⁷⁷ It can, however, be said, given the state aid exception in the Aarhus Regulation and the exclusion of members of the public from the review mechanism under the Best Practice Code of the European Commission, that the AAFA route in the state aid context remains in any way blocked for individuals.

The aspects of ‘what’ and ‘how’ appear to be intertwined. Administrative acts can be challenged through a RIR and can indirectly also be brought to the Court (by challenging the reply), but – due to the high burden of proof in front of the CJEU, the fact that arguments and facts must already be included in the RIR and the fact that only contraventions of environmental law will be reviewed – there are some material limits that

⁷⁴ All of this does not, of course, alter the fact, that the CJEU can only annul the reply and not the underlying act itself, as explained above. It remains up to the European Commission to take the necessary steps. However, if the plaintiff’s concerns are upheld by the CJEU, this will most likely have a spill-over effect on the regulatory act itself. See in this regard Hasler/Morvillo (n 62) who came to this conclusion with respect to cases related to pesticide regulation.

⁷⁵ Case T-331/22 *NLVOW v Commission* EU:T:2024:243 paras 55–59.

⁷⁶ See above Section 2.1.

⁷⁷ See above Section 3.1.

come along with the AAFA. However, with respect to the burden of proof, the Court applies the traditional ‘manifest error test’ in the same manner to both the AAFA and the Standard Action for Annulment. This means, in practice, that in both review regimes the burden of proof remains high due to the usually technical nature of these administrative acts in the field of climate policy.⁷⁸

When it comes to underlying legislative acts of such administrative acts, they remain out of reach for the AAFA. This contrasts with the Standard Action for Annulment, where invoking Art. 277 TFEU would be possible.⁷⁹ Lastly, acts that cannot be challenged through the Standard Action for Annulment cannot be challenged through the AAFA either, which applies especially to acts that do not have legal or external effects.⁸⁰

To conclude, the AAFA has created an alternative, *Plaumann*-free route for climate litigants to access the CJEU, which appears especially valuable for NGOs contesting regulatory acts, and may well carry greater importance than the Standard Action for Annulment in such cases. However, it remains to be seen whether this avenue can have a genuine impact on the implementation of EU climate policy: ‘[t]his is of course one of the limits of procedural environmental rights – that even when they apply they do not guarantee a certain outcome on the substance. When their application is severely restricted, the chances of obtaining a result on the substance are all the more limited’.⁸¹

⁷⁸ See above Section 3.2.

⁷⁹ *ibid.*

⁸⁰ See above Section 2.2.

⁸¹ Warin (n 58) 467.

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