Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber, Extended Composition)

27 January 2021*

(Environment – Financing of a biomass power generation plant in Galicia – Resolution of the Board of Directors of the EIB approving the financing – Access to justice in environmental matters – Articles 9 and 10 of the Aarhus Convention – Articles 10 to 12 of Regulation (EC) No 1367/2006 – Request for an internal review – Refusal of the request as inadmissible – Action for annulment – Admissibility of a ground of defence – Obligation to state reasons – Concept of an act adopted under environmental law – Concept of an act having a legally binding and external effect)

In Case T-9/19,

ClientEarth, established in London (United Kingdom), represented by J. Flynn QC, H. Leith and S. Abram, Barristers,

applicant,

v

European Investment Bank (EIB), represented by G. Faedo and K. Carr, acting as Agents, and by B. Wägenbaur, lawyer,

defendant,

supported by

European Commission, represented by F. Blanc and G. Gattinara, acting as Agents,

intervener,

APPLICATION under Article 263 TFEU for annulment of the decision of the European Investment Bank (EIB), communicated to the applicant by letter of 30 October 2018, rejecting as inadmissible the request for an internal review of the resolution of the EIB's Board of Directors of 12 April 2018 approving the financing of a biomass power generation plant in Galicia (Spain) which the applicant had submitted on 9 August 2018, in application of Article 10 of Council Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ 2006 L 264, p. 13) and of Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation No 1367/2006 as regards requests for the internal review of administrative acts (OJ 2008 L 13, p. 24),

* Language of the case: English.

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of M. Van der Woude, President, V. Tomljenović, F. Schalin, P. Škvařilová-Pelzl (Rapporteur) and I. Nõmm, Judges,

Registrar: S. Spyropoulos, Administrator,

having regard to the written part of the procedure and further to the hearing on 24 June 2020,

gives the following

Judgment

Background to the dispute

The Aarhus Convention

1 On 25 June 1998, the European Community, which subsequently became the European Union, signed, in Aarhus, the Convention on access to information, public participation in decision-making and access to justice in environmental matters ('the Aarhus Convention'). The Aarhus Convention entered into force on 30 October 2001. It was subsequently approved, on behalf of the Community, by Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Aarhus Convention (OJ 2005 L 124, p. 1). As from that date the European Union is also a Party to that convention.

2 Article 1 of the Aarhus Convention, which is entitled 'Objective', provides that '[i]n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party [to the convention] shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention'.

3 According to the Aarhus Convention Implementation Guide, the right of access to justice in environmental matters, as provided for in Article 9(1) and (2) of the Aarhus Convention, is specifically intended to ensure the rights of access to information in environmental matters and public participation in decision-making in environmental matters, as guaranteed by that convention. Article 9(3) of the Aarhus Convention provides, more generally, that each party is to ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

4 The Aarhus Convention Implementation Guide also states the following. The parties to the Aarhus Convention retain considerable discretion in designating which forums (court or administrative body) and forms of procedure (e.g., civil law, administrative law or criminal law) should be available to challenge the acts and omissions referred to in Article 9(3) of the Aarhus Convention. While bearing in mind the general obligation in Article 3(1) of that convention to establish and maintain a clear, transparent and consistent framework, the parties to the convention are not prevented from providing different review procedures for different kinds of acts and omissions. The objective of any administrative or judicial review process is to have erroneous decisions, acts and omissions corrected and, ultimately, to obtain a remedy for transgressions of law Under Article 9(4) of the Aarhus Convention, the parties to the Aarhus Convention must ensure that the review bodies provide 'adequate and effective' remedies, including injunctive relief as appropriate. In addition to specifying

kinds of remedies, Article 9(4) of the Aarhus Convention requires the parties to the Aarhus Convention to ensure that review procedures under paragraphs 1 to 3 are 'fair, equitable, timely and not prohibitively expensive' and that the public be duly informed.

EU policy on the environment and the implementation of Article 9(3) and (4) of the Aarhus Convention by the Aarhus Regulation

5 EU policy on the environment is based on Articles 191 to 193 TFEU and Article 11 TFEU, which promotes transversal sustainable development.

6 Article 191 TFEU defines the scope of EU policy on the environment and sets out a series of objectives (paragraph 1), principles (paragraph 2) and criteria (paragraph 3) which the EU legislature must respect in implementing that policy.

7 Under Article 191(1) TFEU, the objectives pursued by EU policy on the environment are as follows:

'– preserving, protecting and improving the quality of the environment,

– protecting human health,

– prudent and rational utilisation of natural resources,

– promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.'

8 At the material time, concrete EU action was based mainly on the Environmental Action Programme for the period 2014-2020. It pursued three objectives, namely, first, conservation of natural capital (soil fertility, air and water quality, biodiversity, etc.), secondly, transition of the European Union into a low-carbon economy which is resource-efficient (waste treatment, waste prevention, recycling, etc.) and, thirdly, protection of human health and welfare (tackling pollution, restricting chemicals, etc.). In addition to those objectives, EU policy on the environment was increasingly integrated into the other areas of EU activity. For example, the 2020, and subsequently the 2030, climate and energy package included binding national targets in order to increase the proportion of renewable energy in national consumption.

9 Article 191(4) TFEU clarifies the scope of the European Union's external competence in the field of the environment. It establishes the principle of concurrent competence on the part of the Member States and the European Union to enter into international environmental agreements with third countries and relevant international bodies.

10 In order to achieve the objectives of the EU policy on the environment, the Community, which subsequently became the European Union, signed the Aarhus Convention.

11 For the purpose of implementing that convention in the EU legal order, the European Parliament and the Council of the European Union adopted Regulation (EC) No 1367/2006 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 [European Union] institutions and bodies (OJ 2006 L 264, p. 13) ('the Aarhus Regulation'), which, according to Article 1(1)(d) thereof, lays down, inter alia, 'rules to apply the provisions of the Convention to [Union] institutions and bodies, in particular by […] granting access to justice in environmental matters at [EU] level under the conditions laid down by [that] Regulation'. In accordance with Article 14, the Aarhus Regulation entered into force on 28 June 2007.

12 Under Article 10(1) of the Aarhus Regulation, any non-governmental organisation (NGO) which meets the criteria set out in Article 11 thereof may submit a reasoned request and trigger an internal review of an administrative act by the EU institution or body that adopted it under environmental law.

13 Recital 11 of the Aarhus Regulation states that administrative acts of individual scope are to be open to possible internal review where they have legally binding and external effects. In that regard, Article 2(1)(g) of the Aarhus Regulation defines 'administrative act' for the purpose of that regulation as meaning any measure of individual scope under environmental law, taken by an EU institution or body, and having legally binding and external effects.

14 Recital 10 of the Aarhus Regulation states that, 'in view of the fact that environmental law is constantly evolving, the definition of environmental law should refer to the objectives of [EU] policy on the environment as set out in the [FEU] Treaty'. In that regard, Article 2(1)(f) of the Aarhus Regulation provides that, for the purpose of that regulation, 'environmental law' means EU legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of EU policy on the environment as set out in the TFEU: namely preserving, protecting and improving the quality of the environment, protecting human health, the prudent and rational utilisation of natural resources, and promoting measures at international level to deal with regional or worldwide environmental problems.

15 In addition, in accordance with Article 12(1) of the Aarhus Regulation, the NGO that made the request for internal review pursuant to Article 10 thereof may institute proceedings before the Court of Justice in accordance with the relevant provisions of the TFEU.

16 In recital 18 of the Aarhus Regulation, the legislature stated in that regard that, in accordance with Article 9(3) of the Aarhus Convention and the TFEU, that regulation sought to provides access to judicial or other review procedures for challenging acts and omissions by public authorities which contravene provisions of law relating to the environment. In addition, it stated that provisions on access to justice should be consistent with the TFEU. Lastly, in recitals 19 and 21 of the Aarhus Regulation, the legislature stated that, in order to ensure adequate and effective remedies, including those available before the Court of Justice of the European Union under the relevant provisions of the TFEU, it was appropriate that the EU institution or body which was the source of the contested act or omission should be given the opportunity to reconsider its former decision or to act, and that where previous requests for internal review had been unsuccessful, the ONG concerned should be able to institute proceedings before the Court of Justice in accordance with the relevant provisions of the TFEU.

17 It follows from the recitals of the Aarhus Regulation cited in paragraph 16 above that, in the system of access to justice in environmental matters established by Articles 10 to 12 of that regulation, the internal review is designed to be an administrative procedure preceding a possible action being brought before the Courts of the European Union, which should be brought in accordance with the relevant provisions of the TFEU.

18 Furthermore, it follows from those same recitals that the purpose of the system of access to justice established by Articles 10 to 12 of the Aarhus Regulation is solely to enforce the application of EU environmental law.

19 In that regard, Article 1(1) of Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of [the Aarhus] Regulation as regards requests for the internal review of administrative acts (OJ 2008 L 13, p. 24) requires any NGO which submits a request for internal review of an administrative act or omission, as referred to in Article 10 of the Aarhus Regulation, to specify the administrative act or alleged administrative omission whose review is sought and the provisions of EU environmental law which it considers not to have been complied with.

EIB

20 The European Investment Bank (EIB) is a body of the European Union whose task is to contribute to achieving the latter's objectives.

21 The EIB, pursuant to Article 308 TFEU, has separate legal personality from that of the European Union. It is administered and managed by its own bodies. It has its own resources and its own budget.

22 Under Article 309 TFEU, the task of the EIB is to contribute, by having recourse to capital markets and utilising its own resources, to the balanced and steady development of the internal market in the interest of the European Union. For this purpose, it is, operating on a non-profit-making basis, to finance various projects, in all sectors of the economy, in particular projects of common interest to several Member States which are of such a size or nature that they cannot be entirely financed by the various means available in the individual Member States.

23 Article 7(2) of the Statute of the EIB laid down in Protocol No 5 annexed to the TEU and to the TFEU provides, inter alia, that the Board of Governors lays down general directives for the credit policy of the EIB, in accordance with the Union's objectives. Pursuant to Article 7(3)(b) of that statute, for the purposes of Article 9(1), the Board of Governors is to determine the principles applicable to financing operations undertaken within the framework of the EIB's task.

24 Under Article 9(1) of the Statute of the EIB, the EIB's Board of Directors is to ensure that the bank is properly run and is managed in accordance with the provisions of the Treaties and of the Statute and with the general directives laid down by the Board of Governors. It is to take decisions in respect of granting finance and is to fix the interest rates on loans.

25 The Rules of Procedure of the EIB, in the version applicable to the present case, namely the version resulting from the amendments of 20 January 2016 (OJ 2016 L 127, p. 55), states, in Article 18 thereof, that, in accordance with Article 9(1) of the Statute of the EIB, the Board of Directors is to define, on a proposal from the Management Committee, the terms and conditions constituting the general framework of financing, in particular by approving the criteria for the fixing of interest rates. It is to adopt, on a proposal from the Management Committee, the policy decisions concerning the management of the EIB. It is to approve the financing operations proposed by the Management Committee. In general, the Board of Directors is to ensure that the EIB is properly run in accordance with the TFEU, the Statute of the EIB, the directives laid down by the Board of Governors and the other texts governing the EIB's activity in the performance of its task under the TFEU.

26 Article 16(1) of the Statute of the EIB provides that the EIB is to grant financing within the framework of the task set out in Article 309 TFEU.

27 Under Article 19(3) of the Statute of the EIB, the Board of Directors is to rule on financing operations submitted to it by the Management Committee, which, in accordance with Article 11(3) of that statute, has a preparatory and executive role in relation to the raising of loans and the granting of finance, in particular in the form of loans and guarantees.

28 The Statement of Environmental and Social Principles and Standards, approved by the Board of Directors on 3 February 2009 ('the Statement of 2009'), and the climate strategy aimed at mobilising finance for the transition to a low-carbon and climate-resilient economy, adopted by the EIB on 22 September 2015 ('the climate strategy'), define the objectives of lending activity and the eligibility criteria for projects relating to the environment.

29 In paragraph 22 of the climate strategy, the EIB states as follows:

‘As the EU bank, our mandate consists in supporting EU policy objectives, which include promoting innovation and skills, access to finance for small and medium-sized businesses, strategic infrastructure and climate action. We foster these interlinked objectives by lending, blending (combining EIB finance with other funding sources) and advising. Policy alignment, portfolio quality and the soundness of credit decisions are underpinned by an extensive due diligence process applying to each operation supported by the EIB … In the area of climate action, EU climate policies and instruments such as the Emissions Trading System … Adaptation Strategy or the 2030 Climate and Energy package are integrated into operationally relevant practices and procedures which guide financing decisions, alongside long-term visions such as the EU Energy Union or the IPCC decarbonisation path by which global greenhouse gas emissions need to peak by 2020 at the latest, be reduced by at least 50% by 2050 compared to 1990 and be near zero or below by 2100 in order to contain global warming below 2 °C.’

30 Point 36 of the climate strategy states that the EIB will continue to dedicate a minimum of 25% of its financing to specific climate action projects. In addition to the traditional sector-based eligibility approach to climate action, Point 39 of the climate strategy provides for a more refined focus on impact to enhance the EIB’s overall contribution.

31 Point 24 of the climate strategy notes that not all sectors have the same impacts on climate and that the most relevant sectors, due to their share in EIB financing and the underlying project typology, are energy and transport. It states that an important feature of the screening and assessment criteria for energy projects is the application of an emissions performance standard to electricity generation projects. That standard makes it possible to rule out projects whose expected emissions are not in line with EU targets, on a technology-neutral basis. Energy efficiency investments are prioritised across the board.

32 Point 47 of the climate strategy states that a high-impact projects typology per sector will be developed, by looking at available sectoral decarbonisation roadmaps or carbon intensities. Inside the EU, EU and Member State policies, including for example the EU long-term vision of a low-carbon and climate-resilient society, or National Renewable Energy Action Plans and Adaptation Programmes are likely to be crucial references as roadmaps.

33 Furthermore, Point 72 of the climate strategy states that the assessment of greenhouse gas emissions is also used to screen projects for emissions performance in power generation, and to verify the climate impact of hydropower and bio-energy projects. The accuracy, consistency and comparability of these assessments are thus important features of the due diligence process.

34 The Statement of 2009 requires that environmental and social sustainability considerations be respected for all funding granted by the EIB. It states that, in order to obtain funding, a project should contribute to the achievement of one or more of the objectives of EU policy, such as the provision of an appropriate response to the threat of climate change, through either climate change mitigation or adaptation-related investments, including support for projects in the fields of energy efficiency, renewable energy, cleaner energy and carbon sequestration or contributing to sustainable natural resource management (paragraph 10). According to the Statement of 2009, the EIB promotes the renewable energy sector, optimizes the scope for energy efficiency in all the projects it is financing, and aligns its operations with other EU climate policy investment priorities (paragraph 77). In addition, the EIB aims to promote sustainable land-use practices, including sustainable forestry, and recognises the importance of forests and their contribution to both climate change mitigation and adaptation and the protection of biological diversity (paragraph 77).

35 Moreover, the Statement of 2009 requires that projects financed by the EIB comply with the general environmental standards established by the EIB, which derive from EU law and where necessary are supplemented by other good international practices or standards that are more stringent than those

imposed by the EIB (paragraphs 31 and 32). It also requires compliance with procedural standards, such as the provisions of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (OJ 2012 L 26, p. 1), as amended (although paragraph 35 makes reference to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ 1985 L 175, p. 40) which was subsequently repealed by Directive 2011/92).

36 Lastly, according to paragraphs 78 and 82 of the Statement of 2009, the EIB actively seeks to identify and promote projects that result in a significant reduction in greenhouse gas emissions, by methods that it studies and develops in cooperation with other international financial institutions, and also takes those benefits into account in its financial and economic analyses.

The Curtis project and its financing by the EIB

37 The project for the construction, in the municipality of Curtis (Teixeiro), in the province of La Corunna, in Galicia (Spain), of a biomass power generation plant with a capacity of approximately 50 megawatts electrical fuelled by forest waste collected within a radius of 100 km ('the Curtis project') was among the successful projects in a tender procedure for renewable energy projects organised by the Kingdom of Spain in 2016.

38 At the end of 2016, the promotor of the Curtis project contacted the EIB's services to present the technical features of the project and to engage in discussions about the possibility of obtaining EIB financing.

39 On the basis of the information available and the outcome of the discussions with the promoter, the EIB's services agreed on a preliminary information note for the Curtis project.

40 On 4 December 2017, the EIB's Management Committee approved the preliminary information note, authorising the services to formally commence the process for the appraisal of the Curtis project.

41 On 13 December 2017, the description of the Curtis project was published on the EIB's website, in accordance with the requirements of the transparency policy of the EIB Group, which includes the EIB and the European Investment Fund. It was stated on the website that the production of electricity from renewable sources was consistent with the EU objective of mitigating the effects of climate change. By ensuring a demand for woodland residues, the project should make it possible to reduce the occurrence of forest fires in Galicia and to contribute to the sustainability of forestry activities in that region and its economic activity in general.

42 On 15 December 2017, the EIB requested the European Commission to give its opinion on the Curtis project, as provided for in Article 19 of the Statute of the EIB. On 12 February 2018, the Commission communicated to the EIB a favourable opinion on the Curtis project.

43 On 18 December 2017, the EIB requested the opinion of the Kingdom of Spain, in accordance with Article 19 of the Statute of the EIB. The latter communicated a non-objection opinion on 20 December 2017.

44 At a meeting held on 20 March 2018, the Management Committee approved the submission to the Board of Directors of a proposal for the financing of the Curtis project, bearing the reference 'Doc 18/291' ('the financing proposal'), from the EIB's own resources, and the submission to the Investment Committee of the European Fund for Strategic Investments (EFSI) of a request for an EU guarantee for that project, since it presented a specific risk profile and on that basis was considered to be a special activity within the meaning of the second subparagraph of Article 16(3) of the Statute of the EIB.

45 During a meeting held on 9 April 2018, the EFSI Investment Committee approved the use of the EU guarantee for the Curtis project.

46 By a resolution adopted at a meeting held in Luxembourg (Luxembourg) on 12 April 2018 ('the resolution at issue'), the Board of Directors approved the financing proposal, in the form of a loan to be granted to a Special Purpose Vehicle, of a maximum amount of EUR 60 million. The resolution at issue was recorded in the minutes of the meeting.

47 By letter of 13 April 2018, the EIB informed the promoter about the resolution at issue, pointing out that the preliminary approval of the financing of the Curtis project did not create any legal obligation for the EIB to grant the loan, but allowed the promoter to take the steps needed to formalise the loan.

48 On 28 June 2018, the resolution at issue was published on the EIB's website.

49 The detailed terms and conditions of the financing of the Curtis project were negotiated between the promoter and the different lenders, which included, in addition to the EIB, a commercial bank, an export credit agency, a national promotional bank and a mezzanine lender. Once the final terms had been agreed among all the parties and the different due diligence reports had been finalised, the outcome of the negotiations and of the due diligence process was presented to the Management Committee in a final note, which was approved by that committee on 16 July 2018.

50 On 23 July 2018, the EIB's services signed an internal agreement on the terms of the finance contract for the Curtis project. The associated contract documentation was signed on 25 July 2018.

51 The first disbursement of the EIB financing took place on 29 August 2018. It was envisaged that the construction of the Curtis project would be completed before the end of 2019. As the EIB stated at the hearing, in response to an oral question from the Court, the implementation of the Curtis project has been proceeding normally since then.

The applicant and its challenge to the financing of the Curtis project

52 The applicant, ClientEarth, is an NGO working for the protection of the environment.

53 On 9 August 2018, the applicant submitted to the EIB a request for internal review of the resolution at issue, in accordance with Article 10 of the Aarhus Regulation and Decision 2008/50.

54 The request for an internal review was based on various grounds, substantive or procedural. On the substance, and in so far as the resolution at issue might be based on the reasoning set out in the financing proposal, the applicant took issue, in particular, with the Board of Directors for having made a manifest error of assessment in the resolution at issue in considering that the Curtis project would make a high contribution to EU policy by meeting three of the policy objectives.

55 First of all, the applicant disputed the conclusion that the Curtis project would contribute to Spanish and European renewable energy production, energy security and environmental objectives. As regards the contribution to the achievement of Spanish and European renewable energy production objectives, it observed that that conclusion was not supported, since the financing proposal stated that there was a significant risk that not all the wood used as fuel in the biomass generator would meet the sustainability standards laid down in Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (OJ 2009 L 140, p. 16), in the version applicable at the time when the resolution at issue was adopted, or that the Curtis project would not be implemented within the prescribed period. As regards the contribution to achieving an energy security objective, the applicant observed that that was contradicted by the

assertion, in the financing proposal, that, since the Spanish electricity market was characterised by significant oversupply, the project would be of little economic value to the general electricity system. As regards the contribution to achieving environmental objectives, the applicant claimed that that was not supported, since the electrical performance of the project was too low to make a real contribution to the renewal energy production objectives.

56 Next, the applicant disputed the conclusion that the Curtis project would contribute to the prevention of forest fires and to the sustainability of the forest activity in Galicia. It maintained that that conclusion was based on an incorrect interpretation of Ley 7/2012 de montes de Galicia (Law 7/2012 of the Galician Region) of 28 June 2012 (BOE No 217, 8 September 2012, p. 63275) and a misunderstanding of the true impact of the biomass generator on the forest activity in Galicia, which could, in practice, lead to an increase in the risk of fires by favouring monoculture forestry.

57 Lastly, the applicant disputed the conclusion that the Curtis project would be in line with the EIB's priority for renewable energy loans and combating climate change. It observed that that conclusion was based on an incorrect analysis which overestimated the electrical performance of the Curtis project or the environmental advantages associated with the project, while underestimating certain significant risks capable of affecting the viability of that project or the time necessary for its implementation, and its impact on the environment, such as the increase in logging in Galicia, which gave rise, in particular, to doubt that the Curtis project would have a positive impact in terms of greenhouse gas.

58 By letter of 30 October 2018 signed by its Secretary General and its Deputy General Counsel, the EIB informed the applicant that it was refusing the request for an internal review of the resolution at issue as inadmissible, on the ground that the request did not relate to an act amenable to in internal review, namely an 'administrative act' within the meaning of Article 2(1)(g) of the Aarhus Regulation ('the contested act').

59 In the contested act, the EIB claimed, first, that the resolution at issue did not have any legally binding external effects and could not create any rights for a third party. That resolution was merely an internal act, within the meaning of Articles 9 and 19 of the Statute of the EIB, that was required for signature of the corresponding finance contract, but did not necessarily lead to such signature, nor did it create any right for the counterparty to demand such signature. Such a decision was not equivalent to a decision awarding a contract in the context of public procurement, since it did not form part of a procedure governed by public procurement law nor was it comparable to a public call for tenders. Rather, it resulted from the EIB's commercial and policy discretion accorded to it under the Treaties and the EIB's Statute.

60 Second, the EIB maintained that the resolution at issue had not been taken 'under environmental law' within the meaning of Article 2(1)(f) of the Aarhus Regulation, which defines 'environmental law' as ' legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of [EU] policy on the environment as set out in the Treaty …'

61 As regards the argument whereby the applicant alleged that the Curtis project was covered by the EU guarantee provided by the EFSI under Regulation (EU) 2015/1017 of the European Parliament and of the Council of 25 June 2015 on the [EFSI], the European Investment Advisory Hub and the European Investment Project Portal and amending Regulations (EU) No 1291/2013 and (EU) No 1316/2013 – the [EFSI] (OJ 2015 L 169, p. 1), which, in its view, required that environmental constraints related to the project be taken into account, the EIB claimed that, irrespective of whether the granting of the EU guarantee of a project financed by the EIB was sufficient to bring that financing within the scope of 'environmental law', the decision to provide such a guarantee was taken not by its Board of Directors but by the EFSI Investment Committee.

62 As regards the argument that the EIB had committed to the furthering of environmental objectives in the deployment of its own resources, the EIB maintained that such commitment was not sufficient to support the conclusion that the financing of the Curtis project or any other project financing approved in accordance with the Statute of the EIB were ipso facto approved on the basis of EU environmental legislation. Such an argument would artificially stretch the limits of 'EU legislation' beyond the scope of the Aarhus Regulation, in a way that would be incompatible with the EIB's institutional role and its mission as defined in the Statute.

Procedure and forms of order sought

63 By application lodged at the Court Registry on 8 January 2019, the applicant brought the present action.

64 On 22 March 2019, the EIB lodged its defence at the Court Registry.

65 By a document lodged at the Court Registry on 6 April 2019, the Commission applied for leave to intervene in the present proceedings in support of the form of order sought by the EIB. The applicant waived its right to comment on that application on 11 April 2019, while the EIB stated on 29 April 2019 that it had no comments to make on that application. By decision of 2 May 2019, the President of the First Chamber of the Court granted it leave to intervene.

66 On 7 May 2019, the applicant lodged the reply at the Court Registry.

67 The Commission lodged a statement in intervention on 17 June 2019.

68 On 3 July 2019, the EIB lodged the rejoinder at the Court Registry.

69 On 3 July and 8 July 2019 respectively, the EIB and the applicant lodged their observations on the statement in intervention.

70 In application of Article 106(2) of the Rules of Procedure of the General Court, the applicant submitted, on 4 August 2019, a reasoned request for a hearing.

71 Owing to the partial renewal of the Court, the present case was assigned to a new Judge-Rapporteur sitting in the Second Chamber.

72 On a proposal from the Second Chamber, the Court decided, in application of Article 28 of the Rules of Procedure of the General Court, to refer the case to a formation of the Court with an extended composition. Furthermore, as a member of the Chamber was unable to sit, the President of the General Court designated himself to complete the Chamber pursuant to Article 17(2) of the Rules of Procedure of the Court. In accordance with Article 10(5) of the Rules of Procedure, he also took the responsibility of presiding over the Chamber as regards the present case.

73 Acting on a report of the Judge-Rapporteur, the Court (Second Chamber) decided to open the oral part of the procedure.

74 The parties presented oral argument and replied to the Court's oral questions at the hearing on 24 June 2020.

75 The applicant claims that the Court should:

– annul the contested act;

– order the EIB to pay the costs.

76 The EIB, supported by the Commission, contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

77 The applicant relies on two pleas in law in support of its action. The first, a substantive plea, is divided into two parts and alleges errors of assessment in the application of the Aarhus Regulation. By that first plea, the applicant takes issue, in essence, with the EIB for having, when adopting the contested act, misapplied, with regard to the resolution at issue, certain conditions necessary for an act to be capable of being characterised as an 'administrative act' within the meaning of Article 2(1)(g) of the Aarhus Regulation. The second, a procedural plea, alleges breach of the obligation to state reasons.

78 The EIB, supported by the Commission, requests the Court, even before it addresses the two pleas put forward by the applicant, to rule that the application is unfounded, since the request for an internal review of the resolution at issue was inadmissible on the basis that it was incompatible with the EIB's independence in the sphere of its financial operations. Furthermore, the EIB claims that the application should be dismissed on the ground that the two pleas raised in support of the application are unfounded. The Commission supports, inter alia, the arguments which the EIB raises against the first plea for annulment.

79 Before examining the two pleas for annulment raised by the applicant in support of its action, it is necessary to examine the defence put forward by the EIB.

The defence put forward by the EIB

80 The EIB, supported by the Commission, requests the Court, even before it examines the two pleas put forward by the applicant, to rule that the application is unfounded, since the request for an internal review of the resolution at issue was inadmissible on the basis that it was incompatible with the EIB's independence in the sphere of its financial operations.

81 The applicant claims that, in the contested decision, the EIB did not rely, with regard to the request for an internal review of the resolution at issue, on any plea of inadmissibility alleging that that request was incompatible with the EIB's independence in the sphere of its financial operations and that it cannot therefore rely on such a plea of inadmissibility as a ground of defence in the context of the present action.

82 In the alternative, the applicant maintains that, in not mentioning that aspect in the contested act, the EIB breached its obligation to state reasons, as observed in the context of the second plea.

83 In so far as the EIB relies on its autonomy and its independence for the purpose of responding to the applicant's grounds of annulment, the applicant maintains that the EIB's arguments are excessive and unfounded and that they have already been rejected on numerous occasions by the Courts of the European Union.

84 In response to the applicant's arguments, the EIB maintains that it is thus entitled to introduce a new plea of inadmissibility of the request for an internal review of the resolution at issue before the Court, since that plea merely reinforces the position which the EIB already set out in the contested act,

namely that the request was inadmissible, and seeks to respond to the arguments put forward in the application, in accordance with the principle of respect for the rights of the defence, the principle of equality of arms and the right to an adversarial hearing.

85 Furthermore, the EIB denies having breached its obligation to state reasons, on the ground that it was not required to define in advance, in the contested act, all the arguments that it might develop in the context of an action brought against that act. For the first time, in response to an oral question put by the Court at the hearing, the EIB maintains that it raised in essence, in the contested act, a ground of inadmissibility based on the incompatibility of the request for internal review with the independence it claims to enjoy in the field of its financial operations, arguing, first, in the sixth paragraph of that act, that 'any decision by the EIB whether to support a potential eligible project or not, and if so in which form, is subject to the [EIB]'s commercial and policy discretion accorded to it under the Treaties and the Statute' and, secondly, in the eighth paragraph of that act, that the position defended by the applicant would lead to a situation that 'would no longer be compatible with either the EIB's institutional role or its Statute-based mission'.

86 In the present case, in the light of the applicant's objections to the defence put forward by the EIB, it is necessary to begin by ruling on the admissibility of that defence.

87 First of all, it should be recalled that the right to good administration laid down in Article 41 of the Charter of Fundamental Rights of the European Union, by virtue of paragraph 2(c) of that provision, includes, inter alia, the obligation of the administration to give reasons for its decisions. In accordance with Article 296 TFEU, acts adopted by the institutions, bodies, offices and agencies of the European Union must state reasons. Article 10(2) of the Aarhus Regulation also provides that the written position taken by the EU institution or body to which a request for internal review of one of its acts has been submitted is to state the reasons on which it is based. The reasons given should enable the applicant to understand the reasoning of the competent institution or body (Opinion of Advocate General Szpunar in *TestBioTech and Others* v *Commission*, C-82/17 P, EU:C:2018:837, point 49).

88 In the context of the review of legality provided for in Article 263 TFEU, the General Court cannot substitute its own reasoning for that of the author of the contested act and cannot fill, by means of its own reasoning, a gap in the reasoning in that act in such a way that its examination does not relate to any assessment carried out in that act (see judgment of 18 July 2013, *UEFA* v *Commission*, C-201/11 P, EU:C:2013:519, paragraph 65 and the case-law cited).

89 In the present case, as is clear from its fourth paragraph, the contested act was based solely on one ground of inadmissibility that the contested resolution was not an 'administrative act' within the meaning of Article 2(1)(g) of the Aarhus Regulation. Furthermore, it is clear from the fifth and seventh paragraphs of that act that that ground was itself based on two sub-grounds, namely, first, that the resolution at issue produced no legally binding and external effects and, secondly, that that resolution had not been adopted 'under environmental law' within the meaning of Article 2(1)(f) of the Aarhus Regulation.

90 It is only in the context of examining those two sub-grounds, and not an independent ground, that, for the purposes of rejecting the contrary interpretation of the concept of 'administrative act', within the meaning of Article 2(1)(g) of the Aarhus Regulation, put forward by the applicant, the EIB referred, in a vague and general manner, to the commercial and policy discretion accorded to it by the Treaties and its Statutes, its institutional role and the mission incumbent on it by virtue of those statutes.

91 The examination of the substance of the defence would place the Court in the situation of substituting its own reasoning for that adopted by the EIB in the contested act, which it is not entitled to do. In the present case, if the EIB had wanted to lawfully base its decision on an additional independent ground, it should have withdrawn the contested act and adopted a new act based, inter alia, on that ground.

92 In the light of the foregoing considerations, the defence put forward by the EIB that the request for internal review of the resolution at issue was inadmissible on the ground that it was incompatible with the EIB's independence in the field of its financial operations, must therefore be rejected as inadmissible.

Substance of the action

93 As regards the two pleas for annulment put forward in support of the action, the second concerns the infringement of an essential procedural requirement applicable to the contested act, namely the obligation to state reasons for that act, while the first, alleging errors of assessment in the application of the Aarhus Regulation which vitiate the contested act, concerns the substantive legality of that act.

94 Since the Courts of the European Union are not able to carry out a substantive review of an act if the statement of reasons in that act is insufficient as regards an essential point of the reasoning which led to the author's choice, those Courts must ascertain whether the statement of reasons in that act is sufficient before addressing the pleas in law put forward by the parties in order to challenge its merits (see, to that effect, judgment of 4 March 2009, *Tirrenia di Navigazione and Others* v *Commission*, T-265/04, T-292/04 and T-504/04, not published, EU:T:2009:48, paragraphs 98 and 99).

95 For those reasons, it is necessary, in the present case, to examine the second plea in law before the first plea.

The second plea in law, alleging infringement of the duty to state reasons

96 The applicant takes issue with the EIB for having failed, when adopting the contested act, to comply with its obligation to state reasons. It maintains that that act constitutes a 'legal act' subject to the obligation to state reasons pursuant to Article 296 TFEU and the rights recognised in Article 41(2)(c) of the Charter of Fundamental Rights. That was recognised by Advocate General Szpunar, in point 49 of his Opinion in *TestBioTech and Others* v *Commission* (C-82/17 P, EU:C:2018:837). In the applicant's submission, the statement of reasons for the contested act is insufficient to permit an understanding of the reasons that led the EIB to conclude that the resolution at issue, an internal review of which was requested, did not meet some of the conditions that must be satisfied in order for an act to be classified as an 'administrative act' within the meaning of Article 2(1)(g) of the Aarhus Regulation, namely, first, the condition that it was adopted 'under environmental law' and, secondly, the condition that the act has a 'legally binding and external effect'. In particular, the applicant takes issue with the EIB for not having responded, in the contested act, to all the arguments of fact or of law which it had put forward in the request for an internal review of the resolution at issue.

97 The EIB disputes the applicant's arguments and submits that the second plea should be rejected as unfounded.

98 It follows from the case-law cited in paragraph 87 above that the contested act was subject to the obligation to state reasons laid down in Article 296 TFEU and referred to in Article 10(2) of the Aarhus Regulation.

99 It is settled case-law that the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution, body or office which adopted the measures in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to

all the legal rules governing the matter in question (see judgment of 5 March 2009, *France* v *Council*, C-479/07, not published, EU:C:2009:131, paragraph 49 and the case-law cited). In particular, the reasons given for a measure adversely affecting persons are sufficient if that measure was adopted in a context which was known to them (see judgment of 14 April 2015, *Council* v *Commission*, C-409/13, EU:C:2015:217, paragraph 79 and the case-law cited).

100 It also follows from the case-law that the obligation to state reasons laid down in Article 296 TFEU is an essential procedural requirement, as distinct from the question whether the reasons given are correct, which goes to the substantive legality of the measure at issue (see judgment of 5 March 2009, *France* v *Council*, C-479/07, not published, EU:C:2009:131, paragraph 50 and the case-law cited).

101 In the contested act, the EIB rejected the request for internal review of the resolution at issue as inadmissible on the ground that it did not relate to an act amenable to internal review, namely an 'administrative act' within the meaning of Article 2(1)(g) of the Aarhus Regulation. That position was based, in essence, on the reasons set out in paragraphs 59 to 62 above, namely, and more specifically, that the resolution at issue did not satisfy some of the conditions laid down in Article 2(1)(g) of the Aarhus Regulation to be classified as an 'administrative act' in so far as, first, it did not produce legally binding and external effects and, secondly, it had not been adopted under environmental law.

102 In that regard, the reasons set out in the contested act were sufficient to enable the applicant to know the reasons why the EIB had rejected as inadmissible the request for internal review of the resolution at issue which it had sent to the EIB and to enable it to challenge the merits of those reasons in the context of the first plea. Furthermore, those reasons are sufficient to enable the General Court to review the merits of that act by examining the first plea in law (see paragraphs 105 to 173 below).

103 Accordingly, the applicant is not justified in claiming that the EIB infringed its obligation to state reasons for the contested act, in the light of the statement of reasons actually contained therein.

104 Thus, the second plea in law, alleging infringement of the obligation to state reasons, must be rejected as unfounded.

The first plea in law, alleging errors of assessment in the application of the Aarhus Regulation

105 The applicant takes issue, in essence, with the EIB for having, when adopting the contested act, misapplied, with regard to the resolution at issue, certain conditions necessary for an act to be capable of being characterised as an 'administrative act' within the meaning of Article 2(1)(g) of the Aarhus Regulation.

106 That plea consists of two parts relating, first, to the incorrect application of the condition that the act must have 'legally binding and external effects' and, second, to the incorrect application of the condition that the act in question must have been adopted 'under environmental law'.

107 As a preliminary point, it should be recalled that, according to settled case-law, EU legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the European Union (judgment of 14 July 1998, *Safety Hi-Tech*, C-284/95, EU:C:1998:352, paragraph 22; see also judgment of 19 December 2019, *Nederlands Uitgeversverbond and Groep Algemene Uitgevers*, C-263/18, EU:C:2019:1111, paragraph 38 and the case-law cited). When called upon to interpret the provisions of directives implementing, as regards the Member States, the requirements of Article 9(4) of the Aarhus Convention, the Courts of the European Union noted that the objective pursued by the European legislature was to give the public concerned 'wide access to justice' and that that objective pertained, more broadly, to the desire of the EU legislature to preserve, protect and improve the quality of the environment and to ensure that, to that end, the public plays an active role (judgment of

11 April 2013, *Edwards and Pallikaropoulos*, C-260/11, EU:C:2013:221, paragraphs 31 and 32). Accordingly, it considered that, although the parties to the Aarhus Convention had a certain margin of appreciation in the application of Article 9(3) of that convention, a highly protective approach to the effectiveness and objectives of that convention in the context of the implementation obligations incumbent on the Member States should nevertheless be adopted (see, to that effect, Opinion of Advocate General Jääskinen in *Council and Others* v *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, C-401/12 P to C-403/12 P, EU:C:2014:310, paragraph 132 and the case-law cited). For similar reasons, it is necessary, so far as possible, to interpret the two conditions referred to in paragraph 106 above in the light of Articles 9(3) and (4) of the Aarhus Convention (see, by analogy, judgment of 18 July 2013, *Deutsche Umwelthilfe*, C-515/11, EU:C:2013:523, paragraph 32 and the case-law cited) and, therefore, in the light of the requirement to ensure effective access to justice.

108 Furthermore, and for reasons of expediency, it is necessary to examine the second part of the first plea in law before the first part.

– The second part of the first plea in law, alleging incorrect application of the condition that the act be adopted 'under environmental law', set out in Article 2(1)(g) of the Aarhus Regulation

109 The applicant takes issue with the EIB for having, when adopting the contested act, incorrectly applied, with regard to the resolution at issue, the condition that the act must be adopted 'under environmental law', laid down in Article 2(1)(g) of the Aarhus Regulation.

110 The applicant maintains that, according to the case-law, 'environmental law', as defined in Article 2(1)(f) of the Aarhus Regulation, has a broad meaning, which is not limited to environmental protection issues in the strict sense. It covers any legislative provision of the European Union that contributes to the pursuit of the objectives of EU policy on the environment, independently of its legal basis or its nature. The applicant claims to have identified, in the request for an internal review of the resolution at issue, the provisions of environmental law that were not complied with by the EIB in the resolution at issue.

111 In the applicant's submission, the circumstances in which the Board of Directors adopted the resolution at issue show that it did so under 'environmental law', as defined in Article 2(1)(f) of the Aarhus Regulation.

112 The EIB, supported by the Commission, disputes the applicant's arguments and submits that the second part of the first plea should be rejected as unfounded.

113 The EIB asserts that the resolution at issue was adopted pursuant to Article 19(3) of the Statute of the EIB, namely a provision of EU primary law which does not refer to the environment. It is apparent from Article 2(1)(f) of the Aarhus Regulation that the concept of 'environmental law' in that regulation should be understood as referring to legislative provisions of EU secondary legislation that contribute to the pursuit of EU environmental policy. The fact that the EIB pursues environmental objectives in the context of financial operations involving its own resources is not sufficient to support the conclusion that the resolution at issue or any other resolution of the same kind is adopted on the basis of EU environmental legislation and, in particular, that it runs counter to specific provisions of environmental law, as set out in recital 18 and Article 19(3) of the Aarhus Regulation. The grounds of the resolution at issue are irrelevant in that regard, as is the reference to a directive which, by nature, is addressed only to the Member States. Too broad an interpretation of the concept of 'environmental law' would be artificial, would run counter to the scope of the Aarhus Regulation and would undermine the EIB's independence in the sphere of its financial operations and its task as defined in its Statute. In the context of the mandate defined in Article 309 TFEU, the EIB is, among other things, to contribute to the balanced and steady development of the internal market in

the interest of the European Union, by facilitating, by granting loans and giving guarantees, the financing of projects that meet certain criteria. Its decisions are investment decisions that do not directly implement environmental law. Compliance with environmental law is the responsibility of the promotors when they implement the projects, subject to the control of the national competent authorities. Likewise, the fact that the Curtis project has an impact on the environment is a factual circumstance that does not permit the conclusion, in legal terms, that the resolution at issue was adopted under environmental law.

114 The EIB rejects any reference to the legal regime applicable to the EU guarantee granted by the EFSI, in particular in Regulation 2015/1017, as irrelevant, since the resolution at issue was not adopted in application of that regime. The decision of the Board of Directors is independent of that taken by the EFSI Investment Committee. In any event, the legal regime applicable to the EU guarantee and the grant of that guarantee to the Curtis project pursue numerous general objectives other than environmental protection and protection of the environment and of resources. Article 3 of Regulation 2015/1017 clearly states that the purpose of the EU guarantee is to support investments and small and medium-sized enterprises rather than the environmental objectives set out in Article 191(1) and Article 192(2) TFEU.

115 In addition, the EIB disputes the arguments relating to the legal framework in which the resolution at issue was adopted and the factors on which it is based. The Statement of 2009 was intended only to guide project appraisal prior to financing decisions. It is an internal act that does not alter the Bank's mission as defined in the TFEU, which does not mention the promotion of environmental protection among the EIB's key functions. Furthermore, the fact that the financing proposal for the Curtis project refers to, inter alia, environmental advantages linked with the project is not sufficient to substantiate the conclusion that the resolution at issue, adopted on the basis of that proposal, was adopted under environmental law.

116 The second part of the first plea raises the question whether the EIB erred in finding, in the contested act, that the resolution at issue was not a measure of individual scope adopted 'under environmental law' within the meaning of Article 2(1)(g) of the Aarhus Regulation.

117 'Environmental law' is defined in Article 2(1)(f) of the Aarhus Regulation as EU legislation which, irrespective of its legal basis, contributes to the pursuit of the objectives of EU 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.

118 It follows from the wording of Article 2(1)(f) of the Aarhus Regulation that, by referring to the objectives listed in Article 191(1) TFEU, the EU legislature intended to give the concept of 'environmental law' referred to in that regulation a broad meaning, not limited to matters relating to the protection of the natural environment in the strict sense (judgment of 14 March 2018, *TestBioTech* v *Commission*, T-33/16, EU:T:2018:135, paragraphs 43 and 44; see also, to that effect, Opinion of Advocate General Jääskinen in *Council and Others* v *Vereniging Milieudefensie and Stichting Stop Luchtverontreiniging Utrecht*, C-401/12 P to C-403/12 P, EU:C:2014:310, paragraph 128).

119 Moreover, that finding is confirmed by Article 192(2) TFEU, according to which environmental law, in so far as it is the subject of Title XX of the TFEU, may also include provisions that are primarily of a fiscal nature, measures that affect town and country planning, quantitative management of water resources (or affecting directly or indirectly the availability of those resources) and land use, and also measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply. The effect of a restricted interpretation of the concept

'environmental law' would be that such provisions and measures would, to a great extent, fall outside its scope (judgment of 14 March 2018, *TestBioTech* v *Commission*, T-33/16, EU:T:2018:135, paragraph 45).

120 Further, it must be observed that Article 2(2) of the Aarhus Regulation provides that administrative acts and administrative omissions are not to include measures taken or omissions by an EU institution or body in its capacity as an administrative review body, under, for example, Articles 101, 102, 106, 107, 228, 258, 260 and 325 TFEU relating to the competition rules, infringement proceedings, European Ombudsman proceedings and anti-fraud proceedings. The fact that the legislature considered it necessary to include such exceptions again indicates that the concept of 'environmental law', covered by the Aarhus Regulation, must be interpreted, in principle, very broadly (judgment of 14 March 2018, *TestBioTech* v *Commission*, T-33/16, EU:T:2018:135, paragraph 46).

121 Moreover, the reference to '[EU] legislation' in Article 2(1)(f) of the Aarhus Regulation must be understood as referring to any provision of secondary EU legislation of general application, as opposed to 'administrative act', which is defined in Article 2(1)(g) of the Aarhus Regulation as 'any measure of individual scope'. At the time when that regulation was adopted, on 6 September 2006, the Treaty of Lisbon, signed on 13 December 2007, had not yet introduced into EU law the distinction, within acts of general application, between legislative acts adopted pursuant to the legislative procedure and regulatory acts adopted under another procedure. Thus, it cannot be held that the reference to that concept precludes taking into account, as 'environmental law', the provisions of a 'regulatory act' within the meaning of the Treaty of Lisbon, namely an act of general application that was not adopted either under the ordinary legislative procedure or under a special legislative procedure within the meaning of Article 289(1) to (3) TFEU.

122 Moreover, such a restrictive definition would prevent account being taken of any measure of general application adopted by the EIB, such as declarations of principles and standards or the strategies adopted by the EIB in the exercise of its institutional autonomy (see paragraphs 28 to 36 above).

123 It should be recalled that, for the purposes of achieving the objectives of the TFEU, the bodies of the EIB adopt, in particular in the form of policies, strategies, appraisals, principles or standards, internal policies of general scope, duly published and implemented, which, irrespective of their binding nature or not in the strict sense, limit the exercise of the EIB's discretion in the exercise of its activities (see, to that effect and by analogy, judgments of 27 April 2012, *De Nicola* v *EIB*, T-37/10 P, EU:T:2012:205, paragraph 40 and the case-law cited; of 16 September 2013, *De Nicola* v *EIB*, T-618/11 P, EU:T:2013:479, paragraph 36: and of 19 July 2017, *Dessi* v *EIB*, T-510/16, not published, EU:T:2017:525, paragraph 43). When the Courts of the European Union examine the legality of an act adopted by the EIB, they take into account the internal rules adopted by the EIB (see, to that effect and by analogy, judgment of 16 September 2013, *De Nicola* v *EIB*, T-618/11 P, EU:T:2013:479, paragraph 42).

124 In the present case, and contrary to the EIB's submissions at the hearing, the rules of general application governing its activity in relation to the granting of loans for the purpose of attaining the objectives of the TFEU as regards environmental matters, in particular the environmental criteria for the eligibility of projects for EIB funding, must therefore be regarded in the same way as EU legislation in the field of environmental law, within the meaning of Article 2(1)(f) of the Aarhus Regulation.

125 Lastly, it is clear from the wording and scheme of Articles 9(3) and (4) of the Aarhus Convention, in the light of which the Aarhus Regulation must, so far as possible, be interpreted (see paragraph 107 above), that all acts of public authorities which run counter to the provisions of environmental law should be open to challenge. Thus, access to justice in environmental matters should not be limited solely to acts of public authorities that have as their formal legal basis a provision of environmental law.

126 For all those reasons and in the interests of a general interpretation of Article 9(3) of the Aarhus Convention that is consistent and in conformity with the requirement to provide sufficient and effective remedies (see paragraph 4 above), the concept of a measure of individual scope adopted 'under environmental law', included in Article 2(1)(g) of the Aarhus Regulation, must be interpreted broadly, as meaning that it is not limited, as the EIB maintains with the support of the Commission, to solely measures of individual scope adopted on the basis of a provision of secondary legislation that contribute to the pursuit of the objectives of the European Union in the field of the environment, which are laid down in Article 191(1) TFEU, but rather covers any measure of individual scope subject to requirements under secondary EU law which, regardless of their legal basis, are directly aimed at achieving the objectives of EU policy on the environment.

127 It therefore remains to be examined whether the resolution at issue may be regarded as being such a measure of individual scope.

128 In that regard, it is clear from paragraph 11 of the minutes of the meeting of 12 April 2018, as included within the documents before the Court, that, by the resolution at issue, the Board of Directors approved, at that meeting, the financing proposal.

129 It is apparent from paragraphs 21 to 23 of the financing proposal that the contribution of the Curtis project to EU policy was significant, in so far as that project supported the Spanish and European objectives concerning the production of renewable energy and contributed to the security of energy supply and the achievement of environmental objectives. The project also contributed to the prevention of forest fires and to the sustainability of forestry in the Galicia region, by fostering regional demand for forest wood residues. The financing of the project was in line with and contributed to the priority given by the EIB, as part of its lending policy, to renewable energy and climate action.

130 Paragraph 24 of the financing proposal stated that that project was eligible for EIB financing under Article 309(c) TFEU, in so far as it corresponded to a common interest in the field of energy.

131 In paragraph 25 of the financing proposal, it was stated that the Curtis project would correct a market failure given that projects for the production of electricity and low-carbon heat reduced external costs related to carbon and air pollution.

132 In addition, paragraph 30 of the financing proposal stated that the Curtis project contributed to the renewable energy targets for 2020 laid down in the Spanish renewable energy action plan, adopted in accordance with Article 4(1) of Directive 2009/28, in the version applicable at the time when the resolution at issue was adopted.

133 Lastly, paragraph 34 of the financing proposal stated that, from the point of view of its 'sustainability', provided 'the appropriate conditions [were] in place (please see Environmental and Social Data Sheet), the [Curtis] project [was] acceptable for financing [by the EIB] in environmental and social terms'.

134 The Environmental and Social Data Sheet for the Curtis project of 12 April 2018 ('the data sheet'), mentioned in paragraph 34 of the financing proposal, referred to the results of an environmental impact assessment of that project which the competent national authority had decided to carry out, in accordance with Article 4(2) of Directive 2011/92, in the version applicable at the time when the resolution at issue was adopted.

135 Next, the data sheet referred to the commitments made by the promoter of the project in order to guarantee the sustainability of the biomass consumed in the context of the project, on the basis of certain criteria set out in that data sheet. In particular, the promoter had given an assurance that the biomass consumed in connection with the Curtis project complied with the sustainability criteria set out in Directive 2009/28, in the version applicable at the time when the resolution at issue was

adopted, and in Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (OJ 2010 L 295, p. 23), which was intended to combat illegal logging and related trade.

136 Lastly, the data sheet reproduced the results of the carbon footprint of the project that had been calculated by the EIB in accordance with its own assessment methods, noting that, in so far as it was to replace electricity generation from a combination of existing and new power plants, the total relative effect of the project would be a net reduction in CO2 equivalent emissions by 151 kilotonnes per year.

137 In the data sheet, the EIB's services concluded, in the light of the abovementioned results and commitments, that the Curtis project was acceptable from an environmental and social point of view for funding by the EIB.

138 It follows from the foregoing that, in accordance with EU law and the internal rules of general application governing EIB lending activities referred to in paragraphs 28 to 36 above, the resolution at issue found that certain eligibility criteria of an environmental nature, adopted by the EIB in the exercise of its institutional autonomy and aimed directly at achieving the objectives of EU policy relating to the environment, were complied with in the present case.

139 In particular, it is apparent from the documents before the Court that the resolution at issue was adopted on the ground that the Curtis project met the objectives of the EIB's lending activity and the eligibility criteria for projects relating to the environment resulting from the Statement of 2009 and from the climate strategy, in particular because it supported the European and Spanish targets for the production of renewable energy, complied with the sustainability criteria and the provisions intended to combat illegal logging laid down in EU secondary legislation, and would lead to a net reduction in CO2 equivalent emissions at both Spanish and European level.

140 In so far as it found that the Curtis project satisfied those eligibility criteria of an environmental nature, the resolution at issue was indeed a measure of individual scope adopted 'under environmental law' within the meaning of Article 2(1)(g) of the Aarhus Regulation.

141 In contrast, in so far as the resolution at issue was adopted by the Board of Directors, it is not relevant to examine whether, as the applicant submits, another decision concerning the Curtis project adopted by the EFSI investment committee, regarding granting the EU guarantee for that project (see paragraph 45 above) was also adopted in compliance with requirements contributing to the pursuit of the objectives of the EU's environmental policy.

142 In the light of the findings set out in paragraphs 138 and 140 above, the applicant rightly submits, in the present case, that the EIB made an error of assessment in stating that the resolution at issue could not be regarded as a measure of individual scope adopted 'under environmental law' within the meaning of Article 2(1)(g) of the Aarhus Regulation and, therefore, as an act amenable to internal review in accordance with Article 10(1) of that regulation.

143 Accordingly, the second part of the first plea in law must be upheld. However, in view of the cumulative nature of the conditions required for an act to be regarded as an 'administrative act' within the meaning of Article 2(1)(g) of the Aarhus Regulation, which are contested in the context of each part of that plea, it is necessary to continue by examining the first part of that plea.

– The first part of the first plea in law, alleging incorrect application of the condition that the act must have a 'legally binding and external effect' laid down in Article 2(1)(g) of the Aarhus Regulation

144 The applicant takes issue with the EIB for having, when adopting the contested act, incorrectly applied, with regard to the resolution at issue, the condition that the act must produce 'legally binding and external effects', laid down in Article 2(1)(g) of the Aarhus Regulation.

145 The EIB, supported by the Commission, disputes the applicant's arguments and submits that the first part of the first plea should be rejected as unfounded.

146 It takes the view that, in accordance with the case-law, the EIB is entitled to refuse, as inadmissible, any request for an internal review that, as in the present case, does not meet certain conditions laid down in the Aarhus Regulation for the submission of such a request. As is clear from the letter of 13 April 2018 to the promoter, the resolution at issue did not create any obligation for the EIB to grant the loan to the special purpose vehicle for the Curtis project, nor did it confer any right on the promoter of that project or alter its legal position. The only act that had a legally binding and external effect in that regard was the contractual documentation relating to the financing of the Curtis project by the EIB, signed on 25 July 2018, which did not constitute an 'administrative act' within the meaning of Article 2(1)(g) and Article 10(1) of the Aarhus Regulation. The resolution at issue was merely a mandatory stage in the EIB's internal decision-making process. As it concerned a project finance transaction, that process took place in two stages. First, the Board of Directors gave in-principle approval of the financing of the Curtis project by the EIB, without selecting the beneficiary of the loan. Secondly, the Management Committee definitively approved that financing, after, in accordance with the resolution at issue and in application of Article 11(3) of the Statute of the EIB, defining the final terms and conditions of the financing within the limits of the in-principle approval given by the Board of Directors. The negotiation of the contract by the EIB's services was a very important step, the success of which was not guaranteed, as may be seen from past experience in the case of other projects.

147 The EIB, supported by the Commission, claims that neither the acts of its internal decision-making process nor the loan contract are 'administrative acts' within the meaning of Article 2(1)(g) and Article 10(1) of the Aarhus Regulation. That is in keeping with the EIB's independence in the sphere of its financial operations and with the fact that its banking activity cannot be compared with an administrative activity. The situation in the present case cannot therefore be compared with the situation in the cases that gave rise to the judgment of 31 January 2019, *International Management Group* v *Commission* (C-183/17 P and C-184/17 P, EU:C:2019:78), in which an administrative act was clearly at issue. As regards Article 271(c) TFEU, on which the applicant relies, that provision is intended only to preserve the specific procedural rights attributed to the Member States and the Commission, by Article 19 of the Statute of the EIB, in the context of its internal decision-making process concerning the grant of loans and does not confer any right to challenge the substance of decisions granting loans. As for the internal review procedure, provided for in Article 10 of the Aarhus Regulation, its purpose is not to improve the quality of the decision-making process, but to extend access by certain applicants to the legal remedies existing before the Courts of the European Union, in accordance with Article 12 of that regulation. It is not possible to request an internal review of an act that is not challengeable within the meaning of Article 263 TFEU, because it does not have a legal effect contrary to environmental law vis-à-vis a third party.

148 The first part of the first plea raises the question whether the EIB erred in finding, in the contested act, that the resolution at issue was not a measure having 'legally binding and external effects' within the meaning of Article 2(1)(g) of the Aarhus Regulation.

149 As a preliminary point, it should be recalled that the internal administrative review procedure provided for in Article 10 of the Aarhus Regulation provides for the possibility of review proceedings before the Court of Justice of the European Union which, pursuant to Article 12 of that regulation, must be

brought 'in accordance with the relevant provisions of the [FEU] Treaty' and therefore, in principle, in compliance with the conditions laid down in Article 263 TFEU. In view of the link that thus exists between the concept of an act having 'legally binding and external effects', within the meaning of Article 2(1)(g) of the Aarhus Regulation, and that of an act producing legal effects vis-à-vis third parties, within the meaning of Article 263 TFEU, it is reasonable, in the interests of general consistency, to interpret the former in accordance with the latter.

150 The Commission and the EIB propose, in essence, that it should be stated from the outset that the resolution at issue is not an administrative act, since it relates to the EIB's financial activities, in the context of which the EIB must be able to act with complete independence.

151 However, as stated in paragraph 92 above, the EIB is not entitled, in the circumstances of the present case, to rely on a defence to the effect that the request for internal review made by the applicant, on the basis of Article 10 of the Aarhus Regulation and Decision 2008/50, was incompatible with the 'special status' conferred on it by the TFEU.

152 It is therefore appropriate to confine the examination to whether the resolution at issue has 'legally binding and external effects' within the meaning of Article 2(1)(g) of the Aarhus Regulation and, consequently, whether it was 'intended to produce legal effects vis-à-vis third parties' within the meaning of Article 263 TFEU.

153 According to settled case-law, in order to determine whether acts or decisions are 'intended to produce legal effects vis-à-vis third parties' within the meaning of Article 263 TFEU, it is necessary to look to the substance of those acts rather than their form and to examine whether they produce binding legal effects such as to affect the interests of a third party by bringing about a distinct change in his or her legal position (see, to that effect, orders of 21 June 2007, *Finland* v *Commission*, C-163/06 P, EU:C:2007:371, paragraph 40 and the case-law cited, and of 2 September 2009, *E.ON Ruhrgas and E.ON Földgáz Trade* v *Commission*, T-57/07, not published, EU:T:2009:297, paragraph 30 and the case-law cited). That does not apply to internal measures that do not produce any binding legal effect outside of the EU institution, body, office or agency which adopted them (see, to that effect, judgment of 17 July 1959, *Phoenix-Rheinrohr* v *High Authority*, 20/58, EU:C:1959:14, p. 181). In the case of acts or decisions adopted by a procedure involving several stages, in particular where they are the culmination of an internal procedure, neither does that apply to acts or decisions that are purely preparatory, in so far as they do not definitively establish the position of the EU institution, body, office or agency on any aspect of that procedure (see, to that effect, judgment of 7 March 2002, *Satellimages TV5* v *Commission*, T-95/99, EU:T:2002:62, paragraphs 32 to 41). Lastly, nor does that apply to acts or decisions that are purely implementing measures (see, to that effect, judgment of 25 February 1988, *Les Verts* v *Parliament*, 190/84, EU:C:1988:94, paragraphs 7 and 8; see also, to that effect, Opinion of Advocate General Ruiz-Jarabo Colomer in *Ismeri Europa* v *Court of Auditors*, C-315/99 P, EU:C:2001:243, paragraph 47).

154 In the present case, in order to carry out the examination set out in paragraph 152 above, in the light of the principles referred to in paragraph 153 above, it is necessary to examine both the content of the resolution at issue and the context in which it was adopted.

155 In accordance with Article 9(1) of the EIB Statute, it is for the Board of Directors to decide on the granting of financing and to fix the interest rates on loans. It may, on the basis of a decision taken by qualified majority, delegate some of its functions to the Management Committee. In the event of delegation, it is to determine the terms and conditions for such delegation and supervise its execution. Article 11(3) of the EIB Statute provides that the Management Committee is to be responsible for the current business of the EIB, under the authority of the President and the supervision of the Board of Directors, to prepare the decisions of that board, in particular in the form of loans and grants, and to ensure the implementation of those decisions.

156 Article 17 of the Rules of Procedure of the EIB, in the version applicable at the time the resolution at issue was adopted, namely that resulting from the amendments of 20 January 2016 (OJ 2016 L 127, p. 55), states that 'minutes shall be kept of the meetings of the Board of Directors. They shall be signed by the Chairman of the meeting and the Chairman presiding over the meeting during which they are approved as well as by the Secretary of the meeting'.

157 Article 18(1) of the Rules of Procedure further provides:

'In accordance with Article 9(1) of the [EIB] Statute, the Board of Directors shall exercise the following powers:

…

it shall approve the financing and guarantee operations proposed by the Management Committee …'

158 Under Article 18(2) of the Rules of Procedure of the EIB, 'In general, [the Board of Directors] is to ensure that the [EIB] is properly run in accordance with the [FEU] Treaty, the [EIB] Statute, the directives laid down by the Board of Governors and the other texts governing the [EIB]'s activity in the performance of its task under the [FEU] Treaty'.

159 Article 18(3) of the EIB's Rules of Procedure recalls the possibility of delegation to the Management Committee provided for in Article 9(1) of the EIB Statute, stating that such a decision is to be taken by a qualified majority.

160 Under Article 18(4) of the Rules of Procedure of the EIB, the Board of Directors 'shall exercise all other powers provided for in the [EIB] Statute and shall confer upon the Management Committee, in the rules and decisions that it adopts, the corresponding implementing powers, it being understood that the Management Committee shall, in accordance with Article 11(3) of the Statute, be responsible for the current business of the [EIB], under the authority of the President and the supervision of the Board of Directors'.

161 As has already been stated, it is apparent from paragraph 11 of the minutes of the meeting of 12 April 2018, as included within the documents before the Court, that the Board of Directors approved the financing proposal at that meeting.

162 It is apparent from paragraph 5 of the financing proposal that in order to be eligible for the support scheme established by Real Decreto 413/2014 por el que se regula la actividad de producción de energía eléctrica a partir de fuentes de energía renovables, cogeneración y residuos (Royal Decree 413/2014 laying down rules on electricity generation from renewable energy sources, cogeneration and waste) of 6 June 2014 (BOE No 140 of 10 June 2014, p. 43876), the Curtis project had to be finalised, tested and operational by 28 March 2020, which was a very tight schedule for completion and, ultimately, financing approval. For that reason, the EIB's services stated that they had decided to advance the financing approval process in parallel with the Lenders' Technical Advisor due diligence and Stage II appraisal, whilst being cognisant of the fact that, in view of the significant risks identified with regard to the Curtis project, it was possible that the EIB might ultimately be prevented from participating in the financing of the project.

163 Paragraph 15 of the financing proposal explained more precisely the proposed structure for the approval of the project. According to that paragraph, 'this transaction [was to] follow the customary two-stage approval for project financing transactions. Following stage one Board approval, the outcome of final due diligence and the detailed loan and project documentation [was to] be presented to the Management Committee for final agreement. This procedure [would allow] the [EIB] to adhere to the strict operational and commercial timelines required for Project Finance transactions, and

specifically for [the Curtis] project. In the event that the final terms deviated from the conditions specified in this approval, a further approval from the Board would be sought, according to the [EIB]'s procedures'.

164 In addition, it is apparent from the finding in paragraph 139 above that the resolution at issue was adopted on the ground that the Curtis project met the objectives of the EIB's lending activity and the eligibility criteria for projects relating to the environment resulting from the Statement of 2009 and from the climate strategy, in particular because it supported the European and Spanish targets for the production of renewable energies, complied with the sustainability criteria and the provisions intended to combat the illegal logging laid down in EU secondary legislation and would lead to a net reduction in CO2 equivalent emissions at both Spanish and European level.

165 By letter of 13 April 2018, the EIB communicated to the promoter of the Curtis project that the Board of Directors had approved the loan to finance the project and the main conditions of the financing contract, while stating that that 'communication [did] not constitute a legal undertaking to grant the aforementioned loan, but rather [had] been issued to enable [that promoter] to take the steps needed to formalise said loan'.

166 By an email that the 'Civil Society' division of the EIB sent to the applicant on 16 August 2018, which the latter placed in the file of documents before the Court in order to be able to rely on it in support of its arguments, the EIB informed the applicant that 'all relevant environmental information related to the appraisal of [the] particular financing operation [of the Curtis project] [had been] presented to the Board of Directors at Stage I [of the appraisal of that project] and [had been] made public as part of the Environmental and Social Data Sheet [relating to that project]. The Stage II appraisal of [the] financing operation only concerned the technical, economic and financial aspects of the financing operation. The Stage II Appraisal documents [did] not contain any environmental information and therefore [fell] outside of the scope of [the] request [for access to environmental information relating to the Curtis project which the applicant had sent]'.

167 It is clear from the content and context in which the resolution at issue was adopted that it reflected a definitive position adopted by the EIB, following the vote of its Board of Directors, on the eligibility of the Curtis project for the grant of financing by the EIB in the light of its environmental and social aspects, which met the objectives of the EIB's lending activity and the eligibility criteria for projects relating to the environment resulting from the Statement of 2009 and from the climate strategy.

168 Even though, following the resolution at issue, the appraisal of the Curtis project was to continue and certain technical, economic and financial aspects of the financing operation, on which the grant of the loan depended, were still to be examined by the Management Committee, the fact remains that that appraisal would no longer relate to the environmental and social aspects of that project, in relation to which the board of directors had adopted a definitive position, in the resolution at issue, in the light of all the information relating to it in the technical proposal and in the financing proposal.

169 In response to an oral question put by the Court at the hearing, the EIB acknowledged that the resolution at issue had definitively fixed the position of the Board of Directors, which was the competent authority in that regard, concerning the eligibility of the Curtis project for EIB financing in the light of its environmental and social aspects. To that extent, it was therefore neither a provisional opinion of the Board of Directors nor an intermediate decision intended to pave the way for a final decision of that board.

170 It follows that, even if the resolution at issue was not, as the EIB maintains in the context of the present proceedings and as it stated in its letter to the promoter of the Curtis project of 13 April 2018, a legal commitment to grant the loan to the special purpose vehicle, in so far as other technical, economic and financial aspects of the project were still to be appraised, it nevertheless produced certain definitive legally binding effects vis-à-vis third parties, in particular as regards the promoter of

that project, in that it stated the eligibility of that project for EIB financing with regard to its environmental and social aspects, thus enabling the promoter to take the next steps needed to formalise the loan, as noted in the EIB's letter of 13 April 2018 to the promoter. In the light of those environmental and social aspects, the subsequent decision of the Management Committee to grant the loan, having carried out the appraisal of the Curtis project as regards the other aspects that remained to be examined, can at most be regarded as a purely implementing measure, within the meaning of the case-law cited in paragraph 153 above.

171 The internal review procedure laid down by the Aarhus Regulation should have related specifically to environmental aspects (see, in that regard, paragraphs 16, 18 and 19 above) and the request for internal review submitted by the applicant questioned, inter alia, the EIB's assessment of the sustainability of the Curtis project and of its contribution to achieving the objectives of EU policy in the field of the environment (see, in that regard, paragraphs 54 to 57 above and paragraphs 80 to 123 of the request for internal review). Thus, that request related, at least in part, to the definitive legally binding effects vis-à-vis third parties produced by the resolution at issue.

172 For those reasons, the first part of the first plea in law must also be upheld.

173 In the light of the foregoing, the first plea in law must be upheld in its entirety and, on that basis, the contested measure must be annulled.

Costs

174 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings.

175 In the present case, the EIB has been unsuccessful. In addition, the applicant expressly applied for the EIB to pay the costs.

176 The EIB must therefore be ordered to bear its own costs and pay those incurred by the applicant.

177 In accordance with Article 138(1) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs.

178 The Commission must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. **Annuls the decision of the European Investment Bank (EIB), communicated to ClientEarth by letter of 30 October 2018, rejecting as inadmissible the request for an internal review of the resolution of the EIB's Board of Directors of 12 April 2018 approving the financing of a biomass power generation plant in Galicia (Spain) which ClientEarth had submitted on 9 August 2018, in application of Article 10 of Council 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 and Commission Decision 2008/50/EC of 13 December 2007 laying down detailed rules for the application of Regulation No 1367/2006 as regards requests for the internal review of administrative acts;**

2. Orders the EIB to bear its own costs and to pay those incurred by ClientEarth;

3. Orders the European Commission to bear its own costs.

Van der Woude Tomljenović Schalin

Škvařilová-Pelzl Nõmm

Delivered in open court in Luxembourg on 27 January 2021.

E. Coulon
Registrar

M. Van der Woude,
President