



# EU implementation of the Aarhus Convention in the area of access to justice

**Jennifer McGuinn**

**Director, Milieu Consulting, Brussels**

**December 2019**

# Context

- ▶ EU - *signed and ratified* the Aarhus Convention (Decision 2005/370)
- ▶ *NGO complaint* led the Convention Committee (ACCC) to examine the EU-level compliance with access to justice provisions - led to *finding of non-compliance*
- ▶ EU commissioned a study to explore '*ways and means to comply with the Aarhus Convention*'

# ‘EU-level’ implementation of Aarhus?

- ▶ Non-legislative acts adopted by the EU institutions, including:

Implementing decisions, strategies, funding decisions, procedural rules, reports, reporting methods and formats, monitoring guidelines, etc.

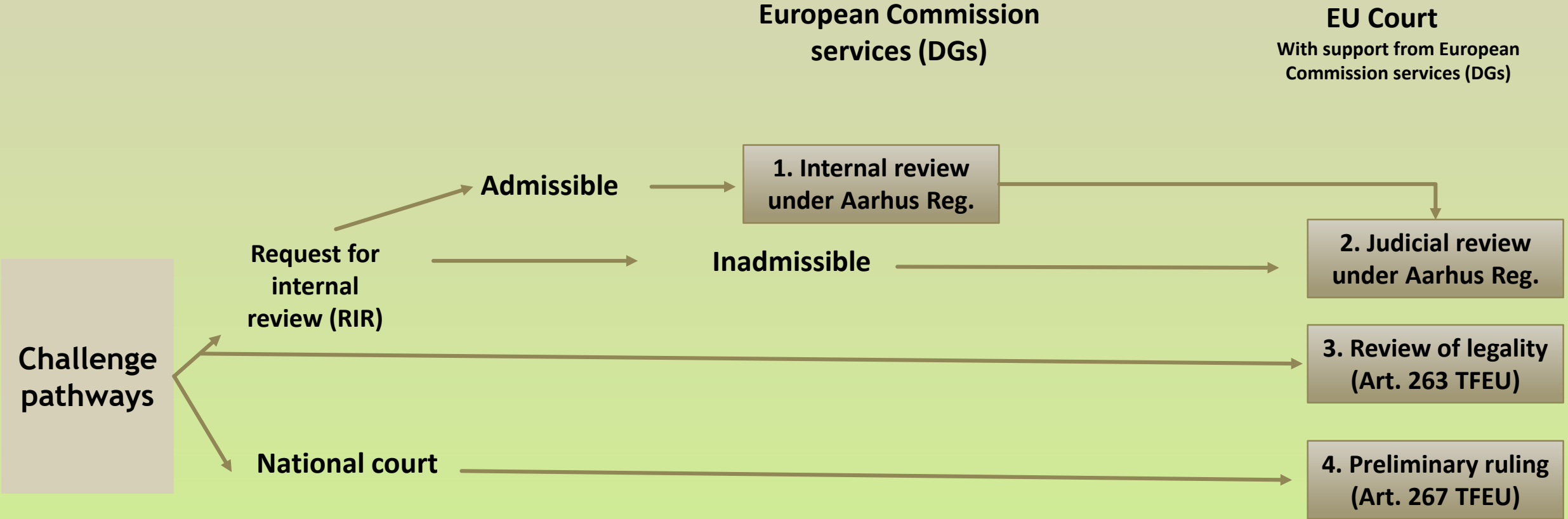
# Types of EU acts challenged

- ▶ **Authorisation of substances for use**
  - ▶ *Plant protection products (pesticides)*
  - ▶ *Chemicals under REACH*
  - ▶ *Biocides*
- ▶ **Authorisation for placing products on the market**
  - ▶ *GMOs: maize, soybeans, feed for animals*
- ▶ **Approval/authorisation of plans/programmes**
  - ▶ *Industrial emissions plans*
  - ▶ *Air quality plans*
  - ▶ *EU-level e.g. TEN-E list*

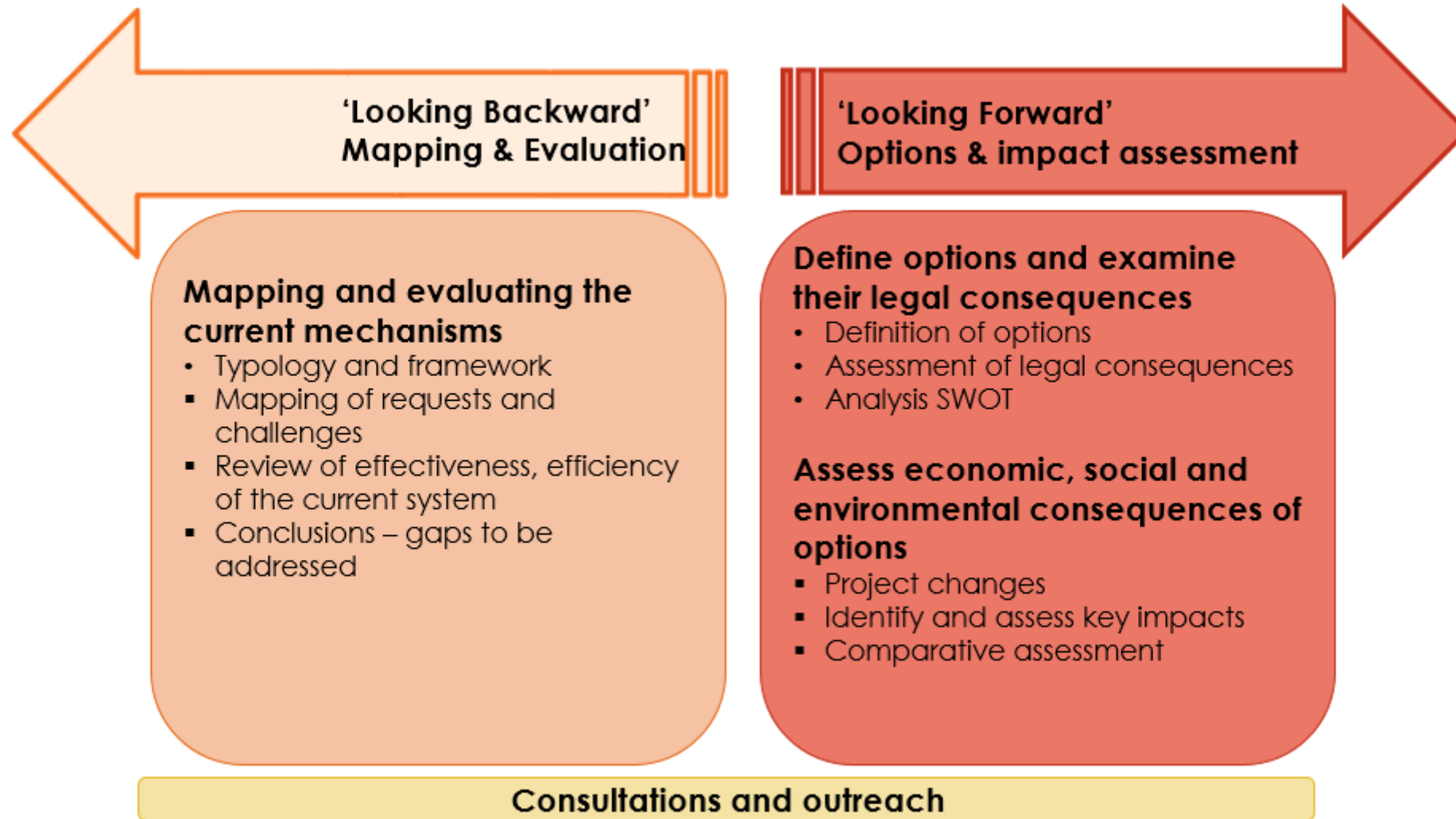
# ‘Mechanisms’ for challenging EU acts

1. **Internal or administrative review under the Aarhus Regulation**
2. **Judicial review under the Aarhus Regulation**
3. **Review of legality under Article 263 TFEU (direct to the EU Court)**
4. **Preliminary ruling or validity reference under Article 267 TFEU (via national courts)**

# Pathways for challenging EU acts



# Study objectives and purpose



# Study methods

- ▶ **Reports, studies, databases** (stakeholder position papers, national justice systems, case documentation, etc)
- ▶ **Focus groups** with NGOs and industry representatives
- ▶ **Questionnaires** to Commission services, CJEU
- ▶ **Open public consultation** (20 Dec 2018 - 14 March 2019, 176 replies)
- ▶ Followed EU's '**Better Regulation**' guidelines on evaluation and impact assessment

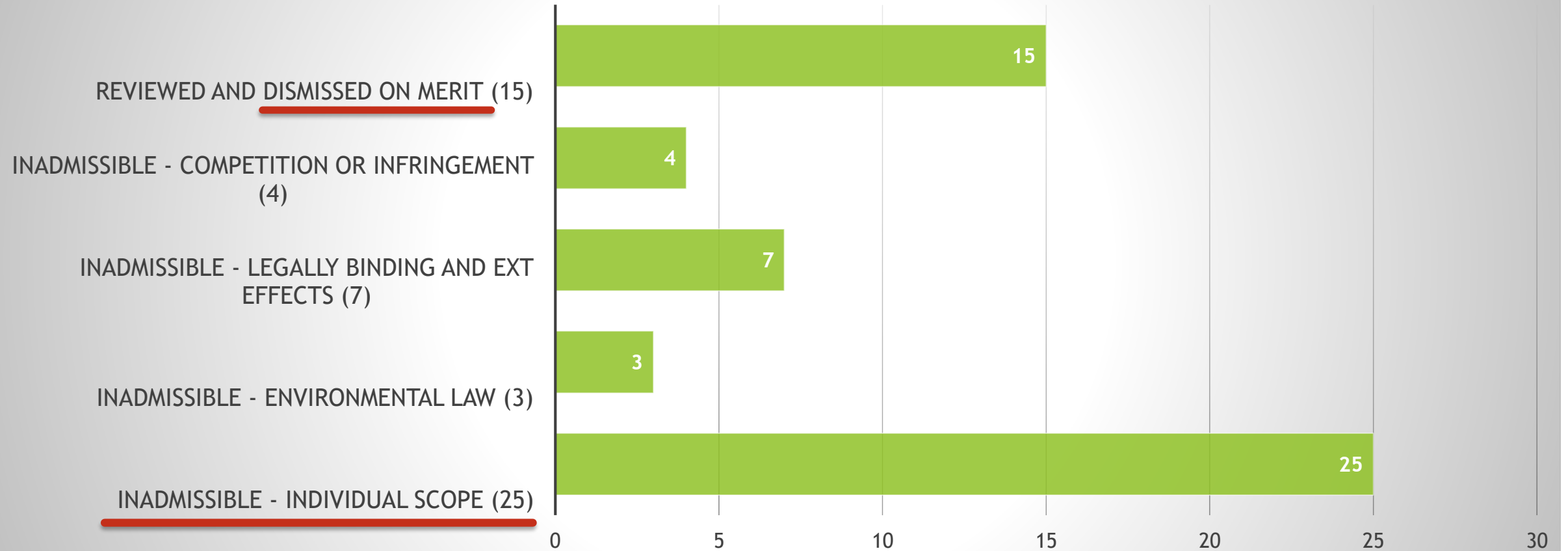


# Mapping requests and challenges to EU acts, 2006-18

- ▶ **491 legal provisions** stemming from existing EU legislation that require the Commission to adopt an act or decision potentially related to the environment
- ▶ **At least 1,715 acts** adopted by the EU institutions since 2006

Type of request/challenge	Total since 2006
Internal (administrative) review under Aarhus Regulation	43
Judicial review under Aarhus Regulation	23
Review of legality under Art. 263 of TFEU	35
Preliminary ruling under Art. 267 of TFEU	4
<b>Total since 2006</b>	<b>105</b>

# Outcomes of internal (administrative) review requests under the Aarhus Regulation, 2006-2018

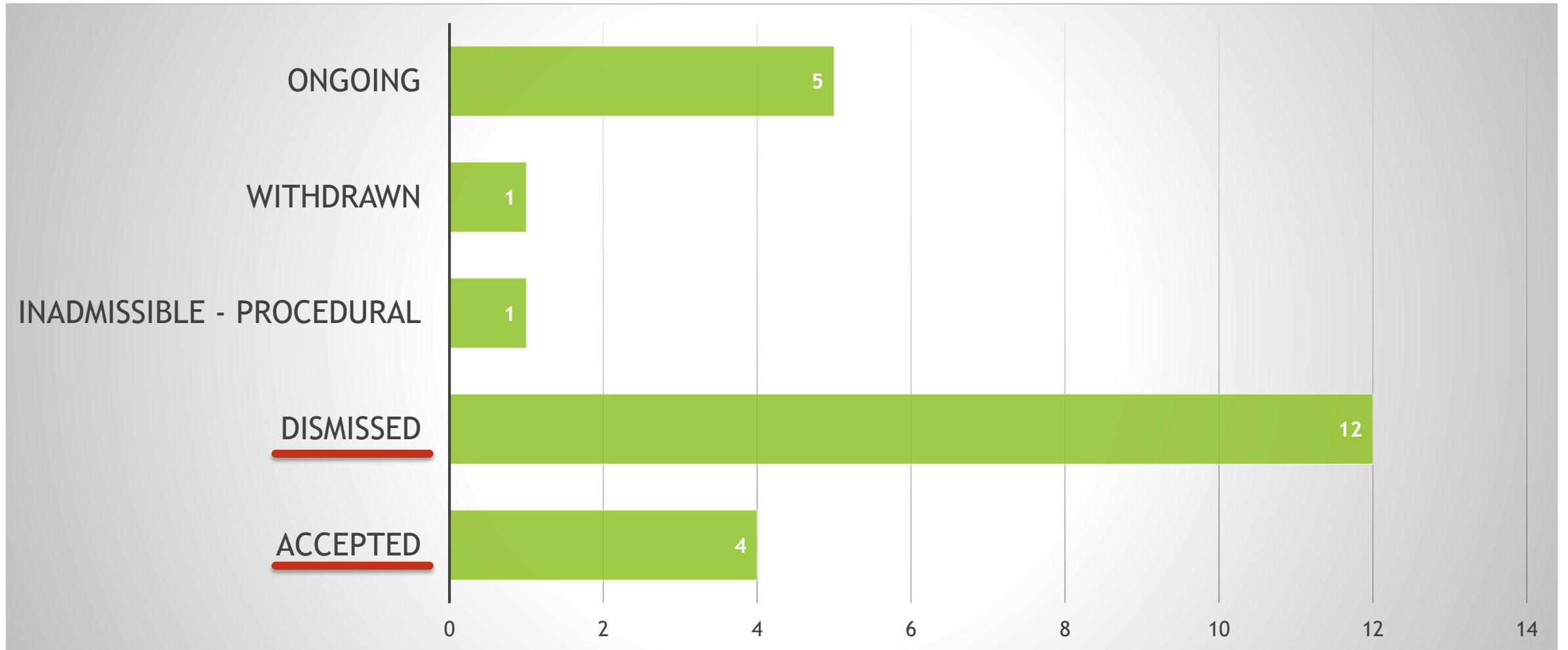


**Total requests - 43**

**Total admissible - 15**

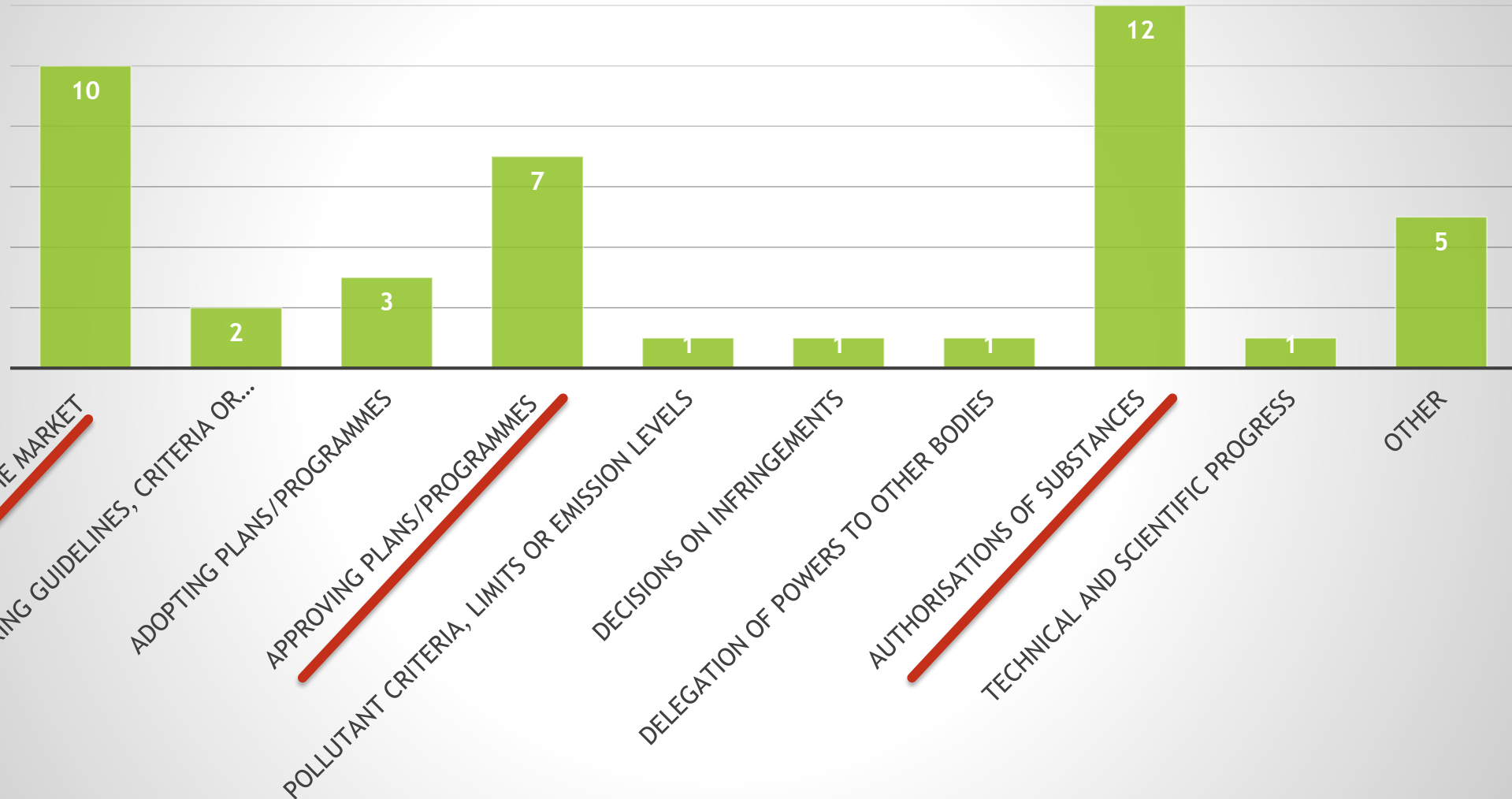
**Total inadmissible - 28**

# Outcomes of judicial challenges under the Aarhus Regulation, 2006-2018



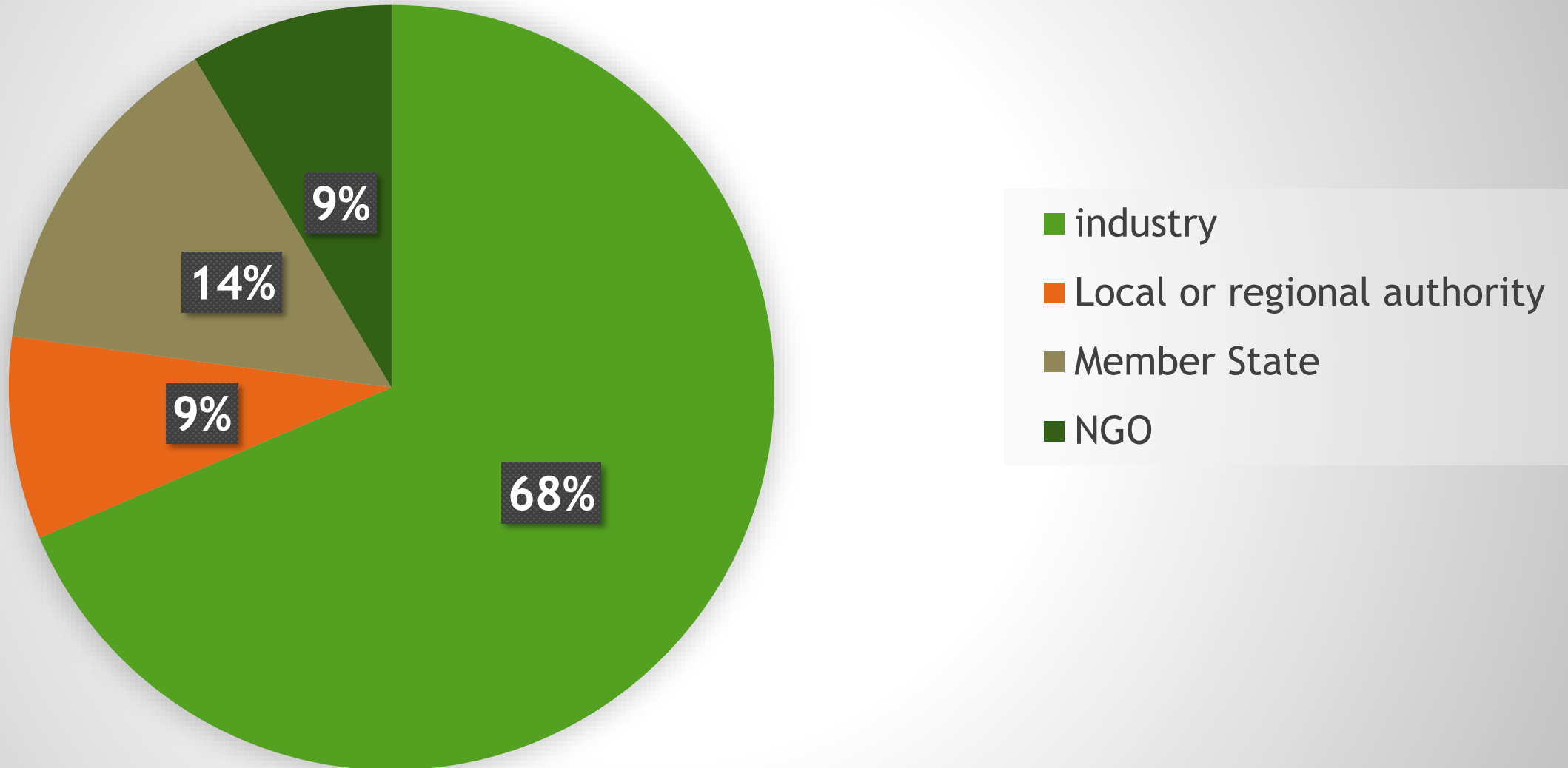
**Total challenges - 23**

# Types of EU acts subjected to administrative review requests, 2006-2018



# Challenges directly to EU court, by type of litigant, 2006-2018

Review of legality under Article 263 TFEU, 2006-18 (35 cases)

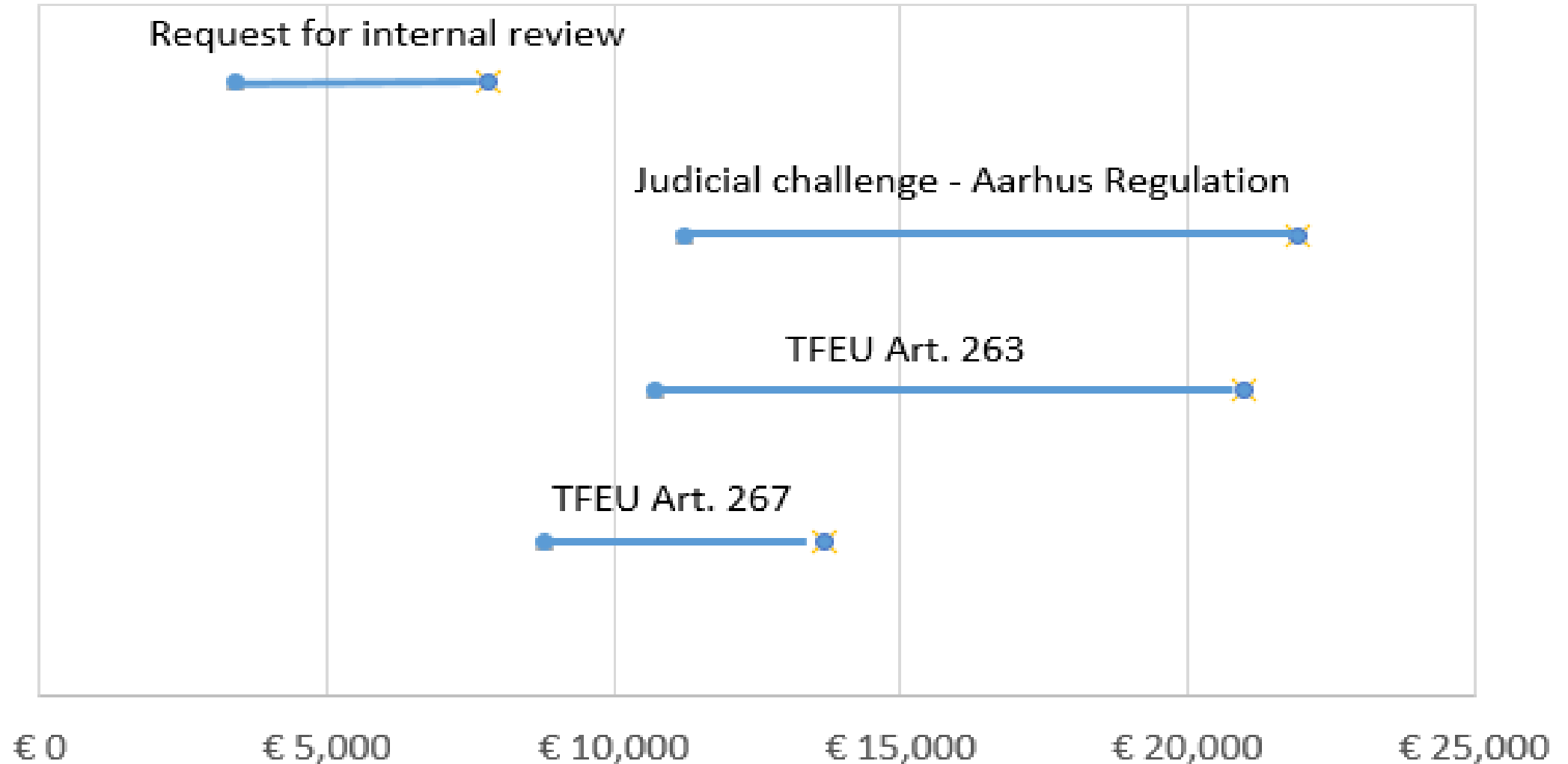


# ‘Article 267’ - validity reference

- ▶ Presence of a national implementing measure usually necessary to have a case
- ▶ **Legality of EU act** must be pertinent to the case
- ▶ Uncertainty about the use of the **referral mechanism**
- ▶ National procedural rules apply - **standing for NGOs**
- ▶ **Costs** can be prohibitive for NGOs in some Member States

# Unit costs of handling requests and challenges

## ► Costs for European Commission DGs (days x salary)



# Evaluation main conclusions

- ▶ There are situations where it is **not possible or excessively difficult for NGOs to challenge EU acts** related to the environment
- ▶ Few environmental acts are of **individual scope** - main barrier to request administrative review
- ▶ At the same time, **direct access to EU Court is limited by Treaty rules**
- ▶ Option to challenge via **national courts** also has obstacles
- ▶ Scope to improve the way requests are handled, to **reduce costs and maximise efficiency**
- ▶ Other elements - **impacts on stakeholders, environment, fundamental rights**



# Five possible options proposed

## 0 Status quo

- No action is taken.

## A Non-legislative measures

- A1 Administrative review Guidance
- A2 Judicial review Guidance

## B Legislative measures

- B1 - B3 Amendments to Aarhus Regulation
- B4 Proposed access to justice Directive

## AB1 Combo no AtoJ Directive

- Non-legislative measures A1 and A2
- Legislative measures B1 - B3

## AB2 Combo AtoJ Directive

- Non-legislative measures A1
- Legislative measures B1 - B3 + B4

# Impact assessment

Key impacts		0	A	B	AB1	AB2
<b>Effectiveness and feasibility</b>		<b>Effectiveness and feasibility</b>				
NGOs' access to justice		Moderately negative	Neutral to slightly positive	Positive to very positive	Moderately positive	Positive to very positive
Effective functioning of administrative review		No change	Positive	Moderately negative	Positive	Positive
Feasibility of implementation		Easy	Moderately easy	Challenging	Moderately challenging	Challenging
<b>Economic impacts</b>		<b>Economic impacts</b>				
Cost to Commission		No change	Medium decrease	High increase	Low to medium increase	Low to medium increase
Cost to CJEU		No change	Low decrease	High increase	Medium increase	Medium increase
Broader impact on business		No change	Slightly negative	Moderate to very negative	Moderate to very negative	Moderate to very negative
<b>Social impacts</b>		<b>Social impacts</b>				
Impact on stakeholders	Industry	Positive	Mixed	Moderate to very negative	Moderate to very negative	Moderate to very negative
	NGOs	Negative	Neutral to positive	Positive to very positive	Positive	Positive to very positive
<b>Environmental impacts</b>		<b>Environmental impacts</b>				
Deterrent factor - environment		No change	Neutral	Positive to very positive	Positive	Positive to very positive
Likely reduction in harm - environment		No change	Neutral to positive	Positive to very positive	Positive	Positive to very positive

Positive impact

Negative impact

# Next steps - final thoughts

- ▶ **NGO community** has welcomed the study for the most part
- ▶ **Council of EU (Member States)** to discuss findings and way forward
- ▶ **New Commission** to propose concrete next steps
- ▶ **Timing** - next Meeting of Parties in September 2021