

Note: Access to Justice in the Energy Performance of Buildings Directive

Legal basis

Whether the Aarhus Convention obligations apply to a particular EU legislation or not depends upon whether the law **relates to the environment**. See Access to Justice Article 9(3), (4) of the Aarhus Convention. While there is no stand-alone definition of **relating to the environment** in the Aarhus Convention nor in EU law, there is a lot of [interpretational guidance](#) and case law confirming that that term is to be understood widely¹. Furthermore, there is a generally accepted practice of interpreting “**relating to the environment**” similarly to “**environmental information**” which is in fact defined in article 2(3) of the Aarhus Convention and also in the EU Aarhus Regulation art 2(1)(f).

A lot of the EU’s environmental law acquis is based on article 192 TFEU but the legal basis is not the determining factor on whether legislation relates to the environment. The EPBD is based upon article 194 TFEU but its environmental objectives and specific environmental requirements clearly classify it as a law relating to the environment. See e.g. article 1 objectives on greenhouse gas emissions.

Article 194 in and of itself provides the necessary legal base for implementing Article 9(3) and (4) of the Aarhus Convention, not least because of:

- Article 37 of the Charter of fundamental rights, which states that ‘a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development’,
- Article 11 TFEU, according to which environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development, and
- Article 194 (1) TFEU itself, according to which Union policy on energy must have regard for the need to preserve and improve the environment.

The Aarhus Convention unmistakably applies to the EPBD and so do the access to justice requirements of the Convention. The remaining question is whether there is a need to **explicitly** mention access to justice in the directive itself or whether to leave the application in the hands of national courts.

¹ See Case C-594/18 P Austria v Commission.

Why is a provision for access to justice in EU environmental laws essential?

1. Access to justice is required by the Aarhus Convention, which binds the EU and its Member States. Article 9(3) and (4) of the Convention requires access to justice to challenge acts and omissions which contravene provisions of law relating to the environment.

2. But all the available research² shows that access to environmental justice is uneven across all EU Member States. So, without express provisions in individual EU environmental laws, such as the EPBD, the public will often be unable to hold Member State governments to account in national courts for commitments made at EU level. Simply put, national courts regularly ignore internationally guaranteed environmental rights if not explicitly repeated in EU and national legislation.

3. The EU Commission has recognised that there is a problem with respect to access to justice and called for the introduction of explicit access to justice provisions in sectoral legislation.³ But the Commission has failed to introduce such provisions itself which is why the Parliament must pick up the slack.

4. Public access to justice would add resources to the enforcement, and strengthen the effective application, of the EPBD.

5. Effective access to justice would contribute to national ownership of the Union's target of achieving a zero-emission building stock by 2050 and the 2030 and 2050 decarbonisation objectives, by empowering citizens to hold their national authorities to account rather than having to rely on the courage of the European Commission to start infringement proceedings.

² See, for example -

1. A study commissioned by the EU Commission and conducted by Jan Darpö (Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union;
2. Environmental Implementation Review 2019:A Europe that protects its citizens and enhances their quality of life; COM(2019) 149 final; and
3. The Commission's 2020 Communication on improving access to justice in environmental matters in the EU and its Member States
4. 'Development of an assessment framework on environmental governance in EU Member States' prepared by IEEP and Ecologic Berlin for the European Commission, DG ENV, May 2019, ISBN 978-92-76- 08005-3.
5. Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters: Final report September 2019 07.0203/2018/786407/SER/ENV.E.4

³ The Commission's 2020 Communication on improving access to justice in environmental matters in the EU and its Member States

The wording of the proposed amendment

The wording is based very closely on two successful amendments in the Effort Sharing Regulation and the Land use and forestry regulation which were endorsed by Parliament.

All EPBD provisions with major obligations for Member States are listed to ensure their proper application can be enforced by the public in national courts.

What rights would a provision of justice create?

In theory a provision on access to justice would not create any rights that do not already exist under the Aarhus Convention to which all EU member states are a party to. But it would make those rights more exercisable in reality. An ambitious EPBD should not scare away from empowering citizens to take national governments to court if they fail to fulfil their EPBD obligations

For example citizens could take governments to court for:

- Article 3: faulty national building plans that don't fulfil the requirements of paragraph 1 a – d.
- Article 5: failure to set minimum energy performance requirements and failure to adhere to them.
- Article 7: missing new building zero-emission targets.
- Article 8: failure to ensure upgraded renovations.
- Article 9: missing energy performance targets.
- Article 11: failure to set adequate system requirements for technical building systems.
- Article 15: misapplication of support financing, including but not limited to the recovery and resilience facility, and the social climate fund.
- Article 16 and 19: failure to establish and make visible of energy performance certificates.
- Article 20: failure to organise regular inspections.

Relation to the Aarhus Regulation:

While access to justice for decisions of the EU institutions is enshrined in the **Aarhus Regulation**, that regulation does not apply to Member States and is legally separate. There is no horizontal directive on environmental access to justice (as opposed to one on e.g. access to environmental information). Therefore, individual provisions are crucial.

