The EEB's Provisional Analysis of the Performance of the EU on Access to Justice

Contents

Executive Summary

The European Green Deal has been an ambitious environmental and climate policy package in both substantive and procedural aspects. It provided an unprecedented opportunity to implement access to justice in environmental matters and established by the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) in sectoral legislation, since a horizontal Directive implementing this right in the EU is missing and the right to access national courts in environmental matters is poorly implemented and highly fragmented across the EU. This provisional assessment compares and evaluates the legal wording of the different access to justice provisions proposed by the European Commission in all European Green Deal files which contained such provisions, in the legislature of 2019 to 2024.

Introduction

Access to justice is the right for individuals and organisations to go to court when there is a violation of the law. This document is a preliminary assessment of the performance of the EU's 9th legislature's (2019 – 2024) in implementing the right of access to justice in environmental matters stemming from article 9 of the Aarhus Convention. The ideal scenario for guaranteeing an environmental right at the EU level is a two-pronged approach. Firstly, there should be a horizontal guarantee laying out minimum standards as there exists for environmental transparency and public participation in environmental decision-making. Secondly, there need to be specific provisions in sectoral legislation where general minimum standards are not sufficient or sufficiently clear, or where unique features of a law need to be accounted for. As a horizontal instrument guaranteeing access to justice is missing from the EU environmental acquis, the European Commission attempted to provide both minimum standards and file specific requirements by introducing access to justice provisions in selected sectoral legislation. This provisional analysis aims to examine the Commission's effort in promoting access to justice in different files of the European Green Deal. It assesses the merit of each provision in terms of guaranteeing broad access to justice and highlights the missing pieces and needs for the future. This provisional analysis will be updated to include efforts on the side of the European Parliament and the Council once the legislative process in all the files analysed is concluded.

The EU needs to guarantee access to justice to comply with its international law obligations, foster environmental democracy, and to improve environmental legislation and its enforcement. Some of the obstacles to the implementation of access to justice in different EU Member States can be consulted in this EEB report highlighting challenges to access to justice.

This document will not focus on the Aarhus Regulation, the law through which the Aarhus Convention is implemented for the EU institutions, as it relates to EU acts affecting the environment (although it still fails to guarantee access to justice for all EU decisions relevant to environmental policy, namely those concerning state aid), but rather on the national level, where rules on access to justice are fragmented and no harmonising EU directive exists to address this problem.

History

In 2003, there was a legislative Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, that failed to ever be approved. This Commission initiative was blocked by the Member States and remained dormant in the Council for years, until it was eventually abandoned officially in 2014. The case-law of the Court of Justice of the EU (CJEU) has also confirmed the requirement of access to justice in environmental matters under the Aarhus Convention, but CJEU judgements do not lead to uniform or harmonised implementation of this right across the Member States.

In 2020, the European Commission issued a communication on the topic of improving access to justice in environmental matters in the EU and its Member States. After recognising the crucial role of individuals and NGOs in identifying potential breaches of EU law by submitting complaints to administrations or taking cases to court and the importance of access to justice in the European Green Deal, the Commission stated that clear access to justice provisions in sectoral legislation should be included in new proposals. In addition, five legislative files including access to justice provisions had already been adopted before 2019 (EIA Directive, IED, ELD, Access to information Directive, Seveso III Directive).

The failure to include access to justice in the Commission proposal on the 2021 EU Climate Law (Regulation (EU) 2021/1119), which provides the framework for the EU's climate action in the coming decades, should be highlighted. Whilst the European Parliament proposed to add a provision that would allow affected persons as well as environmental NGOs to go to national court when a Member State violates EU law when preparing and adopting an National Energy and Climate Plan (NECP) or a Long-Term Strategy (LTS), this was not adopted in the final law, in a loss for accountability. The non-binding statement issued by the European Commission upon adoption of the law and reiterating the need for Member States to ensure access to justice in case of breach of the Governance Regulation's obligations does not compensate for this lack of access to justice provision.

In the below tables, we analyse the efforts of the European Commission (2019 – 2024) in proposing qualitative access to justice in environmental matters. When analysing these efforts, it becomes immediately apparent that very few files (only seven) include an access to justice provision at the stage of the Commission's legislative proposal.
The access to justice provisions we have seen across the different environmental files are of a varying level of quality when it comes to guaranteeing wide access to justice to the public (notably environmental NGOs), a broad scope of decisions, acts, or omissions that can be legally challenged, and other aspects. In Annex I, we provide a list of indicators that have guided the quality-assessment of the wording of the different provisions. Ideally an access to justice provision is closely modelled on the obligations in article 9 of the Aarhus Convention.

Mapping of legislative files

In Force prior to European Green Deal/2019

File name	Adopted date	Quality of ACCESS TO JUSTICE provision (Commission)
Access to information Directive	28/01/2003	Art- 6 ★★★★
Environmental Impact Assessment Directive (EIA Directive)	13/12/2011; entered into force 17/02/2012	Art 11 ★★★★
Industrial Emissions Directive (IED)	Latest version: 19/06/2012	Art 25 ★★★
Seveso III	Latest version: 04/07/2012	Art 23 ★★
Environmental Liability Directive (ELD)	Latest version: 25/06/2019	Art 13 ★★★

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Files of the European Green Deal (2019-2024)

File name	Proposal date	Adopted date	Reach/Impact	Quality of ACCESS TO JUSTICE provision of the Commission proposal
Deforestation Regulation	17/11/2021	31/05/2023	★★★	★★★
Industrial Emissions Directive revision (IED)	05/04/2022	ongoing	★★★	★★★
Nature Restoration Regulation (NRL)	22/06/2022	ongoing	★★★★★	★★★★★
Ambient Air Quality Directive recast (AAQD)	26/10/2022	ongoing	★★★	★★★★
Urban Wastewater Treatment Directive recast (UWWTD)	26/10/2022	ongoing	★★	★★
Green Claims Directive	22/03/2023	ongoing	★	★★
Soil Monitoring Law	05/07/2023	ongoing	★★★	★★★★

Files in which the Commission did not propose an access to justice provision, but the European Parliament discussed the inclusion of one:

- EU Climate Law
- Effort Sharing Regulation
- Land Use, Land Use Change, and Forestry Regulation
- Social Climate Fund
- Energy Performance of Building Directive
- Water Framework Directive
- Critical Raw Materials Act

Trends

The European Green Deal includes over 148 planned initiatives. Not all of them are relevant for access to justice. For example, many of them concern acts which are of direct and individual concern to potential applicants and already have, therefore, an acceptable margin of access to justice at least on paper (interest-based approach or rights-based approach to standing)[1]. Out of the over almost 150 announced Commission initiatives and the over 100 legislative proposals submitted, only seven contained an access to justice provision, and this document analyses the seven proposals which did.

The Commission's Communication on Access to Justice in environmental matters from 2020 gives no indication regarding which areas of environmental law should include access to justice provisions specifically. The seven proposed access to justice provisions cover a wide range of policy areas and a variety of types of legal acts. There are a multitude of legal and political arguments that can be made on why those seven laws were singled out. But most importantly, it seems that the political will was not present in the first years of the European Green Deal to push for access to justice provisions consistently, and clearly, the Commission had a preference for obliging reviewability of plans and programmes and mandated acts by public authorities, staying clear of opening Pandora's box on permitting decisions and remaining cautious with regard to acts of companies. The reasons which have led the European Commission to prioritise those seven files are interesting intellectually but more important are the gaps that remain towards the end of the legislature. Where are we now as opposed to half a decade ago?

Analysis of the legislative framework:

Looking at the European Green Deal through an access to justice lens, files can be categorised in two different ways. Firstly, via the policy area of the European Green Deal and, secondly, via the type of legal act that would be or should be reviewable.

[1] Aarhus Convention Compliance Committee decisions should be kept I mind, however, namely ACCC/C2008/31 (Germany), para. 92: "Unlike Article 9, paragraphs 1 and 2, Article 9, paragraph 3, of the Convention applies to a broad range of acts or omissions and also confers greater discretion on Parties when implementing it. Yet, the criteria for standing, if any, laid down in national law according to this provision should always be consistent with the objective of the Convention to ensure wide access to justice. The Parties are not obliged to establish a system of popular action (actio popularis) in their national laws to the effect that anyone can challenge any decision, act or omission relating to the environment. On the other hand, the Parties may not take the clause "where they meet the criteria, if any, laid down in its national law" as an excuse for introducing or maintaining such strict criteria that they effectively bar all or almost all members of the public, including environmental NGOs, from challenging acts or omissions that contravene national law relating to the environment. Access to such procedures should be the presumption, not the exception, as Article 9, paragraph 3, should be read in conjunction with Articles 1 and 3 of the Convention and in the light of the purpose reflected in the preamble, that "effective judicial mechanisms should be accessible to the public, including organisations, so that its legitimate interests are protected and the law is enforced"

By policy area:

Policy area	Files with ACCESS TO JUSTICE	Comment and missing files
All	Already existing: EIA Directive Missing: SEA Directive	Article 11(1) of the EIA Directive specifies that Member States shall ensure members of the public have access to review procedures to challenge "the substantive or procedural legality of decisions, acts or omissions" subject to the public participation provisions of the Directive, in line with article 9(2) AC. The SEA Directive contains no rules on access to justice, but directly concerned claimants should be able to invoke provisions with direct effect.
Climate	ESR and LULUCF marginal access to justice success	In this area the Commission did not propose any access to justice provisions. Big pieces missing are the failure to provide for access to justice in the Climate Law, the Fit for 55 package and the Governance Regulation (review potentially upcoming during next mandate). Attempts were made in Parliament to introduce access to justice wording with ultimately obtaining a Commission non-binding statement by which it will assess access to justice in member states in 2024, in the framework of the review report of the Governance Regulation, with the possibility of being accompanied by legislative proposals where appropriate.
Energy		This policy area did not only see no access to justice provision added, it even witnessed an attack on access to justice rights which were available in the Environmental Impact Assessment Directive, by fast-tracking permitting procedures in the RED III. Unsuccessful attempts were made in the Parliament

		to introduce access to justice wording, as in the EPBD.
Nature	Deforestation Regulation Soil Monitoring Directive (still ongoing at time of writing) <u>Failed:</u> NRL	Limited access to justice obligations linked to planning decisions were proposed by the Commission but failed in the Nature Restoration Law, where this right was completely swallowed by larger political and existential questions on the file. Success was had, however, in the Deforestation Regulation which marked the first file of the European Green Deal where an access to justice provision made it into the final text.
Agriculture		No access to justice rights were proposed in the files of the Farm to Fork strategy. However, the revision of Regulation 1169/2011 on Information to Consumers is ongoing with no legislative proposal out yet, but this file is one to watch with regard to access to justice rights.
Air and Noise Pollution	Ambient Air Quality Directive	The proposal for a recast AAQD saw an improvement in the enforceability mechanisms of the Directives through new provisions on access to justice and compensation and an enhanced provision on penalties.
Justice	Environmental Crime Directive (ECD) <u>Possibly upcoming:</u> ELD	So far there has not been an Environmental Liability Directive review and the co-legislators failed to provide for stronger rights for the public concerned in criminal proceedings during the revision of the ECD. A file to watch for access to justice is the review of the INSPIRE directive under the umbrella of the Green Data 4 All initiative.
Industrial Pollution	Industrial Emissions Directive UWWTD <u>Prior to EGD:</u>	The Industrial Emissions Directive included a reference to the right to access to justice already prior to the revision.

	Seveso III	The UWWTD saw an access to justice provision alongside an article on compensation rights introduced by the Commission.
Circular Economy	Green Claims Directive	The proposal for a Green Claims Directive included an access to justice provision in addition to a complaint-handling mechanism.
Chemicals		REACH must have an access to justice provision in the future but for now the review is on hold.

By reviewable act:

Decisions directly concerning an individual	<u>Prior to EGD:</u> Access to Information Directive, Seveso III	Challengeable acts are restricted to prior access to information decisions and public participation decisions.
Permits i.e. decisions concerning legal persons	EIA Directive IED (art 25)	RED III undermines part of the EIA Directive. Missing is a review possibility for permits not requiring an EIA but nevertheless concerning environmental matters.
Plans and programmes	AAQD, NRL	The NRL access to justice provision failed. The big missing pieces here are National Energy and Climate Plans under the Governance Regulation.
Failure to fulfil an obligation by a public authority	UWWTD Soil Monitoring Law Deforestation Regulation IED (art 70h)	This is where the bulk of climate litigation cases would fall in. However, no access to justice provision formally made it into any of the EGD or previous files.
Breach of EU environmental law by an individual or a company	Green Claims Directive, Deforestation Regulation <u>Prior to EGD:</u> ELD, IED	Members of the public can submit a "substantiated complaint" or "concern" to national authorities alleging that a private operator is in breach of its obligation under EU law and challenge the resulting actions or omissions from the authorities.

		The missing elements concerning these types of acts are all to be found in the ELD. In order to properly apply the polluter pays principle, the ELD's scope of review needs to be significantly increased.
Acts of environmental damage	ECD <u>Prior to EGD:</u> ELD	The ECD establishes minimum rules on criminal liability for environmental damage. The revised Directive recognises the role of civil society in reporting crimes and providing evidence but does not ensure adequate changes to Member States' enforcement chains or treatment of individual or NGO informants. The ELD establishes a liability regime for environmental damage based on prevention an remediation.

Missing Pieces:

Article 9 of the Aarhus Convention demands access to justice for all acts and omissions by private persons or public authorities which contravene environmental law. While the right to access to justice is guaranteed at EU level only sporadically throughout environmental laws, the big missing pieces are the policy areas of climate, biodiversity, and energy. On climate, the EU legislative framework is missing clear ways to hold public authorities (and governments and companies) to account for failure to meet climate targets under EU law. This lack of access to justice makes landmark climate cases such as the *Urgenda* judgment more difficult to obtain. On biodiversity, the failure of the Nature Restoration Law's proposed access to justice provision and the lack of avenues mandated by EU law to challenge national decisions on farming issues clearly maintains the balance of power in favour of big agricultural businesses. Additionally, while there has been promising case law on the Habitats Directive, there is no statutory obligation in EU law to allow for private enforcement of Natura 2000 sites. In the EU's energy and climate policy, all files of the Fit for 55 package neglected to include access to justice provisions. The 2019 – 2024 legislature missed one opportunity after the other to empower energy and transportation consumers and tenants with any viable means of enforcing the minimum requirements set under EU law.

When looking at the spread of reviewable acts, several trends become apparent. Firstly, EU law remains weak on demanding reviewability of acts and omissions of individuals and companies. Some attempts have been made to get a foot in the door through demanding reviewability with limited scope or by proposing the development of

complaints mechanisms at national level. An interesting case in point is the revision proposal of the Industrial Emissions Directive. In the proposal, a new chapter on animal rearing activities is created with a specific access to justice provision. The access to justice provision in the new chapter on animal rearing applies to all acts, decisions, or omissions taken by a public authority. Whereas the access to justice provisions applicable to all other activities only applies to permitting decisions. Complaints systems have been proposed for the Deforestation Regulation and Green Claims Directive. And while not part of the European Green Deal, the Corporate Sustainability Due Diligence Directive deserves an honourable mention here, which due to the scope of the directive could be relevant for numerous policy areas. The Commission's proposal provided the possibility to submit a complaint about acts of private persons, i.e. companies, and challenge the response of the national supervisory authority before the courts. Ultimately, however, complaints systems (substantiated concerns) do not make up for lacking access to justice vis a vis private parties. A review of the Environmental Liability Directive could potentially address many of these gaps in the future.

Conclusion

Despite commitments to include access to justice provisions in sectoral legislation, namely in the Commission's own 2020 Communication on Access to Justice, this has not happened consistently. After the failure of the legislators to include access to justice provisions in the Effort Sharing Regulation and on the Land Use, Land Use Change and Forestry Regulation in trilogue negotiations, the Commission made a non-binding declaration, by which it committed to assess access to justice in Member States in its report pursuant to Article 45 of the Governance Regulation.

The onus to heed access to justice promises is of course not solely on the European Commission. Both Parliament and Council had ample opportunity to introduce access to justice provisions in numerous files. And in fact, the European Parliament did try to do so in many files and was partially successful in the LULUCF and ESR files. Analysing the success of access to justice provisions throughout the 2019 – 2024 legislature, it becomes, however, abundantly clear that where the right to go to court is already proposed in the Commission's proposal, the chances of it finding it into the final law are much higher than when the Parliament tries to introduce a reference to the third Aarhus Convention pillar later on in the legislative procedure.

While different environmental legislative files vary in their impact and importance for the environmental rule of law, the EU Climate Law and the Governance Regulation must be singled out as the two pieces of legislation with the largest multiplier effect in environmental and climate policy. As discussed above, the EU Climate Law, which provides the framework for the EU's climate action, failed to include an access to justice

provision. The Governance Regulation 2018/1999, which establishes energy and climate action in the EU and creates the framework within which the proposals in the Fit for 55 Package operate, also includes provisions implementing aspects of the Aarhus Convention (e.g. public participation rights, although they have been found to be inadequate). However, the Governance Regulation should also be amended to include access to justice, since EU climate rules should formally require Member States to provide citizens and NGOs with Aarhus Convention compliant standards of access to justice at national level to ensure compliance with national duties under EU rules relating to climate objectives.

This provisional analysis makes clear that, with the European Green Deal, the Commission has successfully tested the political waters on sectoral access to justice provisions. Several will hopefully make it into the final pieces of legislation and Parliament and Council are getting accustomed to negotiating around them. An updated analysis will be published once all relevant European Green Deal files have been concluded and the Council's and the Parliament's positions can be analysed as well. Two major issues remain.

Firstly, the analysis makes it clear that there is no uniform approach in EU law for access to justice provisions. Both material and personal scope varied greatly in the Commission's proposals and will vary even more in the final texts after negotiations. Redress for acts of private persons infringing environmental law remains mostly untouched, ironically, creating a reliance on horizontal legislation (Environmental Liability Directive and potentially the Corporate Sustainability Due Diligence Directive) in an otherwise sectoral approach. Courts will have their interpretative work cut out in the future and environmentalists can only hope that they will refer to the Aarhus Convention in their rulings.

Secondly, the assessment concludes that specific access to justice provisions are successful for some policy areas or a specific category of reviewable act. But sectoral provisions alone cannot guarantee access to justice throughout. Without a horizontal directive on access to justice in environmental matters, the legislative framework stays fragmented. In theory, the text of the Aarhus Convention itself could be enough to oblige all EU Member States to grant adequate access to justice, with the caveat that litigants cannot invoke article 9 paragraph 3 of the Aarhus Convention before national courts, since it has been denied direct effect by the Court of Justice, but between dualist legal systems and the inconsistent application of international legal agreements in national law and courts, reliance on the Convention itself will never be enough. EU law, which has a harmonising effect, is, therefore, the next best option. A recast of the Access to Justice Directive's proposal should be explored. Alongside, the horizontal approach, sectoral provisions need to be pursued continuously to facilitate private enforcement and, ultimately, implementation of specific files. While most sectoral laws are limited, some

have a wider scope which can provide access to justice guarantees for whole subsections of EU environmental law. The EU Climate Law (Regulation 2021/1119) and the Governance Regulation (Regulation 2018/1999) are examples of such overarching EU law covering wide spectrums of decision-making related to the environment. However, neither include, until now, any access to justice obligations.

After the 2014 failure to adopt a horizontal Directive on access to justice, this Aarhus Convention pillar continues to be the least implemented of the three. The other two pillars of environmental democracy have been transposed into horizontal directives, in the form of the Access to Environmental Information Directive (2003/4/EC) and the Directive on Public participation (2003/35/EC). Just as there are specific transparency obligations in selected files and detailed obligations for specific public participation formats in other files, a comprehensive guarantee of access to justice rights should include one horizontal EU directive plus several individual sectoral provisions where needed.

Additional sources

EEB META article (2022), An introduction to access to justice
EEB META article (2023), Enforcement Struggles to Take Root In Deforestation Regulation
EEB Report (2018), Challenge accepted? How to improve access to justice for EU environmental laws
ClientEarth (2020), Short Note: Access to justice under the EU Climate Law
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ELNI (2023), Jerzy Jendrośka and Alina Anapyanova: Towards a Green Energy Transition: REPowerEU Directive vs Environmental Acquis?
EJNI (2021), Proposals for EU governance to foster more consistent national ownership of the EU's climate neutrality objective
Romain Didi, Frederik Hafen, Social Europe Op-ed (2022), Legal challenges by NGOs, citizens key to climate battle

Annex I – Methodology

List of indicators:

While it is not possible or, indeed, recommended to adopt a 'one-size fits all' approach to the evaluation of all the different access to justice provisions that have arisen in EU

legislation (or legislative process), there are a few overarching criteria that can be deployed when examining each provision. These criteria can be broken down into:

- *Scope (double weighted);*
    - *Who has standing (for example, recognition of NGO status as public concerned)*
        - *Guidance on sufficient interest, consistently with the objective of giving the public concerned wide access to justice.*
    - *Challengeable acts (permits, environmental damage, acts of private bodies contravening environmental law, plans and programmes, other acts of public authorities, …)*
- *Level of national discretion when implementing/absence of obligation qualifiers;*
- *Supplementary obligations:*
    - *Provide practical information;*
    - *Fair, equitable, timely, not prohibitively expensive.*
    - *Adequate and effective remedies including injunctive relief;*
- *Proactive publication/ providing of information to the public about access to review;*
- *Establishment of assistance mechanisms;*
- *Exhaustion of administrative remedies specifically required or not.*

Annex II - Detailed assessment of the quality of the Access to justice provisions

Access to Environmental Information Directive Article 6

Comments:

The Access to Environmental Information Directive is one of two directives implementing the Aarhus Convention for the European Union (the other one being the Public Participation Directive). As the subject matter is solely access to information, the comparable scope is of course limited to review of decisions not granting full access to certain environmental information. However, within the legal context of the Directive itself, the scope of challengeable acts is large as it allows for review of all decisions taken. The provision also provides some detail on the quality of available review by listing three distinct review processes, one of which refers to the courts. No recognition specifically to NGOs in their role of representing the public interest in environmental matters is needed as personal standing is guaranteed by default due to the receiving of a decision on either granting or refusing access by the person seeking review. It is also not a requirement enshrined in article 9(1) AC.

- Art 6(1): Broad scope: acts or omissions of public authorities relating to request of information, exemptions and charges. Establishes supplementary obligation (expeditious and either free of charge or inexpensive).
- Art 6(2): Broad scope (decisions and acts or omissions of public authorities).

- Art 6(3): Establishes supplementary obligation on public authority: reasoning must be stated when access to information is refused under this Article.
- No supplementary obligations with regard to the quality of the available redress mechanism are specified.

Overall rating: ★★★★

Reach of the provision: ★

1. Member States shall ensure that any applicant who considers that his request for information has been ignored, wrongfully refused (whether in full or in part), inadequately answered or otherwise not dealt with in accordance with the provisions of Articles 3, 4 or 5, has access to a procedure in which the acts or omissions of the public authority concerned can be reconsidered by that or another public authority or reviewed administratively by an independent and impartial body established by law. Any such procedure shall be expeditious and either free of charge or inexpensive.

2. In addition to the review procedure referred to in paragraph 1, Member States shall ensure that an applicant has access to a review procedure before a court of law or another independent and impartial body established by law, in which the acts or omissions of the public authority concerned can be reviewed and whose decisions may become final. Member States may furthermore provide that third parties incriminated by the disclosure of information may also have access to legal recourse.

3. Final decisions under paragraph 2 shall be binding on the public authority holding the information. Reasons shall be stated in writing, at least where access to information is refused under this Article.

Environmental Impact Assessment Directive **Article 11**

Comments:

The EIA Directive concerns the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment. The Directive's scope itself is broad which gives the access to justice provision a wide range as well. Within the legal context of the Directive itself, the material scope is also considerably wide as it grants access to review of all acts and omissions subject to public participation requirements, which include in this Directive's case, relevant decisions on development consent for a project. It in theory opens a legal avenue for review of permitting and screening decisions as their decision-making process is subject to the related public participation requirements.

- Art 11(1): Scope restricted to decisions, acts or omissions subject to the public participation provision.
- Art 11(2): High level of national discretion when implementing at what stage decisions, acts or omissions can be challenged.
- Art 11(3): Recognises NGO status of having sufficient interest and having rights capable of being impaired.
- Art 11(3): Includes a reference to the Aarhus Convention wording of giving the public concerned wide access to justice.

- Art 11(4): Requirement of exhaustion of administrative remedies before judicial review; establishes supplementary obligations (fair, equitable, timely and not prohibitively expensive).
- Art 11(5): Establishes some supplementary obligation of public access to practical information on access to administrative and judicial review procedures but is nor prescriptive with regard to the quality of the available redress mechanism are specified (see Art 6(5)).
- Includes a qualifier of the access to justice obligation which grants member states significant leeway in when along the decision-making process to allow for access to justice.

Overall rating: ★★★★

Reach of the provision: ★★★★★

1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned: (a) having a sufficient interest, or alternatively; (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition; have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive.

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.

3. What constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice. To that end, the interest of any nongovernmental organisation meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a) of paragraph 1 of this Article. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of point (b) of paragraph 1 of this Article.

4. The provisions of this Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law. Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

5. In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.

Environmental Liability Directive Article 13

Comments:

The Environmental Liability Directive provides minimum standards for liability of individuals and companies. Its aim is to provide redress mechanisms for private persons to request that the national authorities act against environmental damage perpetrated by private persons. In theory this is a crucial missing piece as almost all access to justice provisions in sectoral legislation only demand redress mechanisms against the acts or omissions of public authorities. The relevant access to justice article provides for a bare minimum level of access to justice requirements. Its material scope is large within the context of this Directive as it encompasses all decisions under the Directive but is small overall as the Directive itself does not cover a wide

scope in practice. The personal scope includes the Aarhus Convention definition of the "public concerned" plus those who allege an impairment of their rights i.e. victims of environmental damage.

- Article 13(1): large scope: all decisions, acts or failure to act of the competent authority under the Directive; applies to both legal and natural persons, but does not expressly recognise status of environmental NGOs.
- Article 13(2): includes a standard requirement clause on the exhaustion of administrative remedies before judicial review but does not expand on the requirements for such an administrative review.
- No supplementary obligation (fair, equitable, timely and not prohibitively expensive).

Overall rating: ★★★

Reach of the provision: ★★★★

1. The persons referred to in Article 12(1) shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Directive.

2. This Directive shall be without prejudice to any provisions of national law which regulate access to justice and those which require that administrative review procedures be exhausted prior to recourse to judicial proceedings.

Seveso III Directive **Article 23**

Comments:

The objective of the Seveso III Directive is the prevention of major accidents involving dangerous substances and limiting their consequences when such accidents occur. The provision on access to justice under this Directive is limited to decisions subject to public consultation under Article 15 or to challenge acts of omissions of public authorities in relation to access to information requests. The provision does not allow for review of the mandatory prevention policies nor emergency plans (arguably both plans and programmes under the Aarhus Convention). It also does not provide access to justice for any acts taken by private persons under this Directive. Interestingly, the provision's personal scope of any "applicant" is in theory wider than the usual "public concerned", but in reality this is largely insignificant because the definition used in the related public participation provision (article 14(2)) mirrors the Aarhus Convention's definition of the "public concerned".

- Limited scope of decisions or omissions that can be challenged: limited to access to information request or public consultation/participation processes.
- Too high a level of national discretion when implementing when decisions, acts or omissions can be challenged.
- Recognises NGO status of having sufficient interest and rights capable of being impaired.
- Exhaustion of administrative remedies before judicial review.
- Establishes supplementary obligation (fair, equitable, timely and not prohibitively expensive)
- Establishes supplementary obligation of public access to practical information on access to administrative and judicial review procedures.

Overall rating: ★

Reach of the provision: ★

Member States shall ensure that:

(a) any applicant requesting information pursuant to points (b) or (c) of Article 14(2) or Article 22(1) of this Directive is able to seek a review in accordance with Article 6 of Directive 2003/4/EC of the acts or omissions of a competent authority in relation to such a request;

(b) in their respective national legal system, members of the public concerned have access to the review procedures set up in Article 11 of Directive 2011/92/EU for cases subject to Article 15(1) of this Directive.

Industrial Emissions Directive Art 25 and Art 70h

Comments:

The below analysis focuses on the Commission's proposal for a revised Industrial Emissions Directive. It does not analyse the pre-existing access to justice provision in the IED (albeit largely unchanged in the Commission's proposal) nor the versions discussed in the ongoing decision-making process (trilogues ongoing as of date of publication). The Industrial Emissions Directive itself has an enormous scope, however, its original access to justice provision (Art 25) is limited to decisions related to a defined set of industrial activities. It is, furthermore, limited in scope only to decisions which are also subject to public participation obligations in article 24. The revision proposal clarifies that prior involvement in a public participation process is not a prerequisite for obtaining standing but the limitation, nevertheless, limits which type of decisions are reviewable. Notably, access to justice seems to be limited to granting or updating permits and does not extend to e.g. monitoring or site closures.

Article 70h stands in stark contrast to article 25 in terms of material scope. While only applicable to the proposed new Chapter on animal rearing, it is not linked to the scope of public participation obligations. In fact, it gives a wide material scope of any decisions, acts or omissions subject to the Chapter itself. The scope of article 70h thus expands beyond permitting decisions and, in theory, includes monitoring and even omissions to enforce operators' obligations.

- Art 25(1): Narrow scope of acts, decision or omissions that can be challenged.
- Art 25(2): Too high a level of national discretion when implementing when decisions, acts or omissions can be challenged.
- Art 25(3): Recognises NGO status of having sufficient interest and rights capable of being impaired.
- Art 25(4): Exhaustion of administrative remedies before judicial review; establishment of supplementary obligations (fair, equitable, timely and not prohibitively expensive).
- Art 25(5): Establishes supplementary obligation of public access to practical information on access to administrative and judicial review procedures.

Overall rating: ★★★

Reach of the provisions: ★★★

Art 25

1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned have access to a review procedure before a court of law or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to Article 24 when one of the following conditions is met:

(a) they have a sufficient interest;

(b) they maintain the impairment of a right, where administrative procedural law of a Member State requires this as a precondition.

Standing in the review procedure may not be conditional on the role that the concerned member of the public played during a participatory phase of the decision-making procedures under this Directive. The review procedure shall be fair, equitable, timely and not prohibitively expensive, and shall provide for adequate and effective redress mechanisms, including injunctive relief as appropriate.

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.

3. What constitutes a sufficient interest and impairment of a right shall be determined by Member States, consistently with the objective of giving the public concerned wide access to justice. To this end, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed sufficient for the purpose of paragraph 1(a). Such organisations shall also be deemed to have rights capable of being impaired for the purpose of paragraph 1(b).

4. Paragraphs 1, 2 and 3 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law. Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

5. Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.

Art 70h

Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned have access to a review procedure before a court of law, or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions, acts or omissions subject to this Chapter when one of the following conditions is met:

(a) they have a sufficient interest;

(b) they maintain the impairment of a right, where administrative procedural law of a Member State requires this as a precondition.

Standing in the review procedure may not be conditional on the role that the concerned member of the public played during a participatory phase of the decision-making procedures under this Directive. The review procedure

shall be fair, equitable, timely and not prohibitively expensive, and shall provide for adequate and effective redress mechanisms, including injunctive relief as appropriate.

2. Member States shall determine at what stage the decisions, acts or omissions may be challenged.

Nature Restoration Regulation Article 16

Comments:

The NRL is a crucial piece of EU environmental legislation, setting legally binding targets to rehabilitate degraded habitats and lost species, with the aim of restoring various ecosystems across the EU. The impact of this Regulation could be very meaningful as these nature restoration measures should cover at least 20 % of the EU's land and sea areas by 2030. The implementation framework of the NRL consists of the preparation and carrying out of national restoration plans to implement the Directive's objectives. The access to justice provision that features in the legislative proposal presented by the Commission has a moderately broad scope, as it establishes that the national restoration plans (act/decision of public authority) or any failure to act by the public authority are challengeable.

- Article 16(1): Large scope: national restoration plans and any failures to act of the competent authorities, regardless of the role members of the public have played during the process for preparing and establishing the national restoration plan.
- Article 16(2): Recognises NGO status of having sufficient interest and having rights capable of being impaired.
- Article 16(2): Includes a reference to the Aarhus Convention wording of giving the public concerned wide access to justice.
- Article 16(3): Establishes supplementary obligations (fair, equitable, timely and free of charge or not prohibitively expensive)
- Article 16(4): Establishes supplementary obligation of public access to practical information on access to administrative and judicial review procedures.

Overall rating: ★★★★★

Reach of the provisions: ★★★★★

1. Member States shall ensure that members of the public, in accordance with national law, that have a sufficient interest or that maintain the impairment of a right, have access to a review procedure before a court of law, or an independent and impartial body established by law, to challenge the substantive or procedural legality of the national restoration plans and any failures to act of the competent authorities, regardless of the role members of the public have played during the process for preparing and establishing the national restoration plan.

2. Member States shall determine what constitutes a sufficient interest and impairment of a right, consistently with the objective of providing the public with wide access to justice. For the purposes of paragraph 1, any nongovernmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed to have rights capable of being impaired and their interest shall be deemed sufficient.

3.Review procedures referred to in paragraph 1 shall be fair, equitable, timely and free of charge or not prohibitively expensive, and shall provide adequate and effective remedies, including injunctive relief where necessary.

4. Member States shall ensure that practical information is made available to the public on access to the administrative and judicial review procedures referred to in this Article.

Deforestation Regulation Article 30

Comments:

The Deforestation Regulation will require companies to actively examine their supply chains to ensure their products are not linked to deforestation or forest degradation (even outside of the EU). It will prohibit specified commodities and products from being imported into, exported from, or made available in the EU, unless they are deforestation-free. In the legal context of the Regulation, the scope of the access to justice provision is as broad as possible spanning all decisions, acts or failure to act by public authorities under this legislation. Limiting, however, is the personal scope which does not refer to the standard Aarhus Convention wording of (public concerned) and the requirements of sufficient interest or impairment of a right. It remains unclear whether filing substantiated concern under article 29 constitutes *de facto* a sufficient interest.. Article 29 allows for the submission of complaints to public authorities against private persons, whereby, the access to justice provision in article 30 only spans review of public authorities. The article is missing any positive obligation detailing the quality of the review, information requirements, or accessibility.

- Article 30(1): Large scope: decisions, acts or failure to act of the competent authority under the Regulation; applies to both legal and natural persons, but does not expressly recognise status of environmental NGOs.
- Article 30(2): Exhaustion of administrative remedies before judicial review.
- Does not specifically recognise NGOs as automatically fulfilling the requirement of sufficient interest.
- No supplementary obligation (fair, equitable, timely and not prohibitively expensive).
- No supplementary obligation of public access to practical information on access to administrative and judicial review procedures.

Overall rating: ★★★

Reach of the provisions: ★★★

1. Any natural or legal person having sufficient interest, including those having submitted substantiated concern in accordance with Article 29, shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Regulation.

2. This Regulation shall be without prejudice to any provisions of national law which require that administrative review procedures be exhausted prior to recourse to judicial proceedings.

Urban Wastewater Treatment Directive (UWWTD) Article 25

Comments:

The UWWTD focuses on the collection, treatment and discharge of wastewater from domestic, industrial and mixed sources. The objective is to protect the environment from adverse effects of wastewater discharges from urban sources and specific industries. In the Directive different levels of treatment are required for wastewater and minimum standards for water quality are set up. The scope of the access to justice provision under this Directive is relatively restricted. While it includes decisions, acts or omissions of public authorities regarding the Directive's provisions on secondary, tertiary and quaternary treatment of urban wastewater, it does not include article 5 which obliges Member States to set up integrated urban wastewater management plans, nor does it include the monitoring and risk assessment duties for public authorities. It also does not provide standing against private persons with regard to the extended producer responsibilities set out in the Directive. Waste-water treatment plants are specifically listed in Annex I of the Aarhus Convention for applicability of article 6 of the Convention on public participation in decisions on specific activities and thereby access to justice obligations under article 9(2) of the Convention. However, the population threshold in the Annex of the Convention is higher than those in all three water treatment obligation articles of the Directive.

Comments:

- Article 25(1): Restricted scope: decisions, acts or failure to act of the competent authority under the Regulation; applies to both legal and natural persons but does not expressly recognise status of environmental NGOs.
- Article 25(2): High level of discretion for MS to decide when legal challenges can be brought.
- Article 25(1): Provides for some supplementary obligation (fair, equitable, timely and not prohibitively expensive).
- Does not specifically recognise NGOs as automatically fulfilling the requirement of sufficient interest.

Overall rating: ★★

Reach of the provisions: ★★

1. Member States shall ensure that, in accordance with the relevant national legal system, members of the public concerned have access to a review procedure before a court of law, or another independent and impartial body established by law to challenge the substantive or procedural legality of decisions or acts or omissions subject to Articles 6, 7 or 8 of this Directive when at least one of the following conditions is met:

(a) they have a sufficient interest;

(b) they maintain the impairment of a right, where administrative procedural law of a Member State requires this as a precondition.

The review procedure shall be fair, equitable, timely and not prohibitively expensive, and shall provide for adequate and effective redress mechanisms, including injunctive relief as appropriate.

2. Member States shall determine at what stage the decisions, acts or omissions referred to in paragraph 1 may be challenge.

Ambient Air Quality Directive Article 27

Comments:

The Ambient Air Quality Directive combines several former Directives into one piece of legislation. It sets concentration limits for certain pollutants and aligns standards more closely with WHO recommendations. Within the legal context of the Directive, the access to justice provision has a limited scope only applicable to the two planning obligations within the law, for example, to challenge the lack of implementation of this Directive, such as when an air quality plan has not been established. No review possibilities are afforded for acts or failures to act by the public authorities with regard to the assessment of air quality (e.g. monitoring, measuring, analysis and sampling of air quality). The provision includes a host of supplementary obligations and does not extend an excessive amount of discretion to the Member States.

- Art 27(1): Limited scope: decisions, acts or omissions concerning air quality plans referred to in Article 19, and short-term action plans referred to in Article 20.
- Art 27(1)(a): Applies to both legal and natural persons, but does not expressly recognise status of environmental NGOs.
- Art 27(1)(b): Supplementary obligations: sets objective of giving public concerned wide access to justice; recognises NGO status of having sufficient interest and having rights capable of being impaired.
- Art 27(2): Access to justice not restricted by previous participation in decision-making.
- Art 27(3): Supplementary obligations (fair, equitable, timely and not prohibitively expensive and adequate and effective redress mechanisms, including injunctive relief).
- Art 27(4): Exhaustion of administrative remedies before judicial review.
- Art 27(5): Establishes supplementary obligation of public access to practical information on access to administrative and judicial review procedures.

Overall rating: ★★★★

Reach of the provisions: ★★★

1. Member States shall ensure that, in accordance with their national legal system, members of the public concerned have access to a review procedure before a court of law, or another independent and impartial body established by law, to challenge the substantive or procedural legality of all decisions, acts or omissions concerning air quality plans referred to in Article 19, and short term action plans referred to in Article 20, of the Member State, provided that any of the following conditions is met:

(a) the members of the public understood as one or more natural or legal persons and, in accordance with national law or practice, their associations, organisations or groups, have a sufficient interest;

(b) where the applicable law of the Member State requires this as a precondition, the members of the public maintain the impairment of a right.

Member States shall determine what constitutes a sufficient interest and impairment of a right consistently with the objective of giving the public concerned wide access to justice.

The interest of any non-governmental organisation which is a member of the public concerned shall be deemed sufficient for the purposes of the first paragraph, point (a). Such organisations shall also be deemed to have rights capable of being impaired for the purposes of the first paragraph, point (b).

2. To have standing to participate in the review procedure shall not be conditional on the role that the member of the public concerned played during a participatory phase of the decision-making procedures related to Article 19 or 20.

3. The review procedure shall be fair, equitable, timely and not prohibitively expensive, and shall provide adequate and effective redress mechanisms, including injunctive relief as appropriate.

4. This Article does not prevent Member States from requiring a preliminary review procedure before an administrative authority and does not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

5. Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures referred to in this Article.

Soil Monitoring Directive **Article 22**

Comments:

The Soil Monitoring Law sets out an EU pathway for healthy soils by 2050, including elements to increase the knowledge and data availability on the health of soils. The directive is to apply to all soil in the EU and sets out measures on monitoring soil health, sustainable management, and the treatment of contaminated sites. It sets out financing and reporting frameworks and besides a proposal for access to justice it also covers penalties for breaches.

The scope of the access to justice provision in the proposed Directive is quite broad, encompassing all failures to act by public authorities or measures taken by public authorities pursuant to the Directive. It specifically highlights the reviewability of the assessment of soil health, which is an obligation upon public authorities of the Member States under article 9. While the Directive establishes minimum standards for penalties for breaches by private persons, it does not go as far as mandating a specific redress mechanism for individuals against private persons (individuals or companies).

- Broad scope of acts, decisions or failure to act that can be challenged.
- Recognises NGO status of having sufficient interest and rights capable of being impaired.
- Establishes supplementary obligation (fair, equitable, timely and free of charge or not prohibitively expensive; provides for injunctive relief).
- Establishes supplementary obligation of public access to practical information on access to administrative and judicial review procedures.

Overall rating: ★★★★

Reach of the provisions: ★★★

Member States shall ensure that members of the public, in accordance with national law, that have a sufficient interest or that maintain the impairment of a right, have access to a review procedure before a court of law, or an independent and impartial body established by law, to challenge the substantive or procedural legality of the assessment of soil health, the measures taken pursuant to this Directive and any failures to act of the competent authorities.

Member States shall determine what constitutes a sufficient interest and impairment of a right, consistently with the objective of providing the public with wide access to justice. For the purposes of paragraph 1, any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed to have rights capable of being impaired and their interest shall be deemed sufficient.

Review procedures referred to in paragraph 1 shall be fair, equitable, timely and free of charge or not prohibitively expensive, and shall provide adequate and effective remedies, including injunctive relief where necessary.

Member States shall ensure that practical information is made available to the public on access to the administrative and judicial review procedures referred to in this Article.

Green Claims Directive Article 16

Comments:

The 'Green Claims' Directive aims at addressing the growing trend of greenwashing practices by requiring companies to substantiate the voluntary green claims they make in business-to-consumer commercial practices, by complying with several requirements regarding their assessment, such as taking a life-cycle perspective, requirements on how to communicate the claims, and new rules on environmental labelling schemes. Compliance with these requirements would have to be verified and certified by a third-party verifier.

The scope of the access to justice provision in the proposed Directive is restricted to decisions, acts or omissions of public authorities following the submission of substantiated complaints by natural or legal persons according to article 16(1).

- Art 16(2): Recognises NGO status of having sufficient interest.
- Art 16(5): Very limited scope of decisions, acts or omissions which can be challenged: access to justice restricted to decisions, acts or omissions of public authorities following the submission of substantiated complaints by natural or legal persons according to article 16(1).
- Art 16(6): Establishes supplementary obligation of public access to practical information on access to administrative and judicial review procedures.

Overall rating: ★★

Reach of the provisions: ★

1. Natural or legal persons or organisations regarded under Union or national law as having a legitimate interest shall be entitled to submit substantiated complaints to competent authorities when they deem, on the basis of objective circumstances, that a trader is failing to comply with the provisions of this Directive.

2. For the purposes of the first subparagraph, non-governmental entities or organisations promoting human health, environmental or consumer protection and meeting any requirements under national law shall be deemed to have sufficient interest.

3. Competent authorities shall assess the substantiated complaint referred to in paragraph 1 and, where necessary, take the necessary steps, including inspections and hearings of the person or organisation, with a view to verify those complaints. If confirmed, the competent authorities shall take the necessary actions in accordance with Article 15.

4. Competent authorities shall, as soon as possible and in any case in accordance with the relevant provisions of national law, inform the person or organisation referred to in paragraph 1 that submitted the complaint of its decision to accede to or refuse the request for action put forward in the complaint and shall provide the reasons for it.

5. Member States shall ensure that a person or organisation referred to in paragraph 1 submitting a substantiated complaint shall have access to a court or other independent and impartial public body competent to review the procedural and substantive legality of the decisions, acts or failure to act of the competent authority under this Directive, without prejudice to any provisions of national law which require that administrative review procedures be exhausted prior to recourse to judicial proceedings. Those judicial review procedures shall be fair, equitable, timely and free of charge or not prohibitively expensive, and shall provide adequate and effective remedies, including injunctive relief where necessary.

6. Member States shall ensure that practical information is made available to the public on access to the administrative and judicial review procedures referred to in this Article.