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COMMISSION STAFF WORKING DOCUMENT

Impact Assessment
on a Commission Initiative on Access to Justice in Environmental Matters

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INTRODUCTION

This impact assessment concerns a Commission initiative on **Access to justice in environmental matters at Member State level** in the field of the EU environmental law. The assessment addresses problems that have arisen concerning who can bring environmental disputes to court and how these disputes should be dealt with.

Effective justice systems play a crucial role in upholding the rule of law and the fundamental values of the European Union, as well as in ensuring effective application of EU law and mutual trust. In order to function effectively, every judicial system needs to set out clear procedural rules, including on access to justice. In national justice systems normally whoever claims the impairment of a right or has an interest (i.e. stake or entitlement) to act may bring a case before a court in order to seek redress for an alleged breach caused by private persons or by public entities (rules on '*standing*'¹). Access to justice in environmental matters in particular, in addition to the issue of who can bring an action (i.e. standing) also includes issues on the scope and conditions of the action, the available remedies and the costs. In other words, it is a package made up of several interlinked parts.

In the case of environmental law, access to justice is complicated because correct implementation may relate to public rather than private interests. As Advocate General Sharpston observed at the hearing in Case C-115/09, '*the fish cannot go to Court*'. The principle that litigation may be started where a subjective right is impaired, or when there exists a direct interest, finds its limits in the case of environmental legislation, which is addressed to society in general, including future generations, and which aims at protecting broader interests than private ones (such as biodiversity, water and soil). Under classic rules on standing, only when a particular interest is at stake (e.g. private property) can environmental law be the subject of court actions. Traditional concepts of standing can be therefore inadequate when it comes to the environment.

Recognizing this, the EU and its Member States concluded the 1998 UN/ECE Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereafter the Aarhus Convention). As far as access to justice is concerned, this Aarhus Convention tackles the lack of standing for the environment by granting the right to a judicial review procedure to members of the public directly interested in a decision or an omission or maintaining the impairment of a right as well as to non-governmental organisations (hereafter NGOs) promoting the environment and meeting any requirements set out in national law (requirements which must, in any case, be consistent with the objective of giving the public the widest possible access). The Aarhus Convention completed the package by stipulating that judicial review procedures should be effective, timely and not prohibitively expensive.

The provision of the Aarhus Convention dedicated to access to justice is Article 9. In its structure, this provision reflects the Convention's three pillars, i.e. access to information, public participation and access to justice. Article 9(1) provides for access to justice standing in respect of access to information disputes, Article 9(2) for access to justice standing in respect of public participation disputes and Article 9(3) for access to justice standing for environmental disputes more generally. Article 9(4) then sets out common conditions to apply to each type of access to justice standing.

¹ A glossary explaining the main legal terms referred to in this report is contained in Annex 12.

More specifically, under Article 9(2), NGOs have to be considered *ex officio* as having an interest in acting to challenge the substantive or procedural legality of acts and omissions **in the field of specific activities subject to public participation.**

Article 9(3) envisages a right of members of the public, including associations, organisations or groups in accordance with national legislation, to challenge acts and omissions by private or public bodies which contravene **environmental law.**

Under Article 9(4), those benefiting from standing under the other provisions have the right to **adequate and effective remedies, including injunctive relief as appropriate, and which are fair, timely and not prohibitively expensive.** This means that, whenever it is required to grant standing to members of the public (individuals or NGOs) based on Article 9(1) to (3), the procedural guarantees laid down in Article 9(4) must be provided. In other words, the Aarhus Convention does not give the parties a legal option of granting standing while withholding the rest of the package.

There are differences in the standing provisions of Article 9(2) and 9(3). In Article 9(2), i.e. in areas subject to public participation relating to activities associated with development consent and permit procedures, the standing of NGOs is explicitly recognised. Similar standing is not, however, explicitly recognised in Article 9(3), this being made dependent on national legislation. In this sense, Article 9(3) is less specific than Article 9(2).

The Aarhus Convention was implemented in the EU by means of several acts of secondary legislation, including legislation to give effect to access to justice under Article 9(1) and 9(2). The Commission, when preparing the accession of the EU to the Aarhus Convention, also tabled in 2003 a proposal on access to justice to implement Article 9(3). However, this proposal was not adopted by the Council (more details are given in Chapter 2.1 below).

In recent years, the Court of Justice of the European Union (hereafter the CJEU), drawing on general principles laid down in the EU Treaties, has interpreted both the Aarhus Convention and secondary legislation, with two main consequences:

1. The rules on standing for individuals and NGOs have been extended to matters other than those covered by Article 9(1) and (2). The CJEU has therefore effectively brought EU law into the domain of Article 9(3).
2. National courts must interpret national provisions pertaining to Article 9(3) to the fullest extent possible in order to secure access of NGOs to challenge decisions liable to be contrary to EU law. In practice this necessarily **leads to a very broad access to justice for NGOs in environmental matters.** Through its interpretations, the CJEU has considerably reduced the space for manoeuvre of Member States under Article 9(3). In particular, by relying on general principles such as the principle of effectiveness, the CJEU has made judicial review a minimum requirement, whereas Article 9(3) refers to access to either administrative or judicial review provisions.

It may be concluded that the objectives of the 2003 Commission proposal in relation to Article 9(3) have been partially addressed through the case-law. In separate decisions concerning Article 9(2) standing, the CJEU has clarified how the conditions set out in Article 9(4) need to be respected. Because Article 9(4) relates to Article 9(3) as well as Article 9(2), the cumulative effect of the case-law is considerable.

The June 2012 Environment Council conclusions called for improvement of access to justice in line with the Aarhus Convention. In resolutions from 2012 and 2013, the European Parliament (hereafter EP) called for a directive on access to justice. The Committee of the Regions has also shown support for this (see Annex 1).

In the negotiations on the European Union Environment Action Programme to 2020 (7th EAP)², the Council and EP agreed on the following text:

'63. *In order to maximise the benefits of EU environment legislation by improving implementation, the programme shall ensure that by 2020:*

(e) The principle of effective legal protection for citizens and their organisations is facilitated. This requires, in particular:

v. Ensuring that national provisions on access to justice reflect the case law of the CJEU and promote non-judicial conflict resolution as a means of finding amicable and effective solutions to conflicts in the environmental field.[...]'

Finally the Communication '*EU: Better results through better application*' stresses the role of national courts as '*the common courts*' for upholding EU law and for contributing effectively to enforcing it in individual cases³.

As noted above, the proposal for a directive on access to justice in environmental matters which the Commission adopted in 2003 did not receive the necessary support from the Council. For this reason, the Commission identified this proposal in its Communication of 2nd October 2013 '*Regulatory Fitness and Performance (REFIT): Results and Next Steps*'⁴ as a proposal which could be withdrawn, while considering alternative ways of meeting its obligations under the Aarhus Convention. The proposal was finally withdrawn in 2014.

The present impact assessment, based on a thorough evaluation of the third pillar of the Aarhus Convention in the light of the experience gained so far as well as on the CJEU case law, aims at identifying such alternatives. The evaluation will ensure respect of fundamental rights under the Charter of Fundamental Rights of the European Union, in particular Article 47 which sets out the right to an effective remedy and to a fair trial before a tribunal, ensuring that all proposed options should be in line with it.

PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

1.1. Procedural issues

DG ENV is the lead DG for this initiative (ref. 2013/ENV/013 in Agenda Planning).

An Impact Assessment Steering Group allowed DG ENV to collect the views of the following DGs: AGRI, CLIMA, CNECT, COMP, ENER, ENTR, JUST, RTD, SANTE, Legal Service and Secretariat General (hereafter SG). Specific meetings have also been held with the Legal Service. Meetings on a draft impact assessment report were held on 22 November 2012, 25 February, 4 July, 9 and 21 October 2013 and 13 July 2016.

² Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'.

³ OJ EU C 18/10 19.01.2017, p. 10, 11.

⁴ COM (2013/685).

1.2. External expertise and consultation of interested parties

Expertise

This assessment and evaluation draws on expertise built up over more than 15 years in connection with the negotiations and the operation of the Aarhus Convention and the corresponding EU implementing legislation. The findings reflect:

1. Consultations with external stakeholders (including two on-line public consultations);
2. *Ad hoc* studies;
3. Inter-Service consultation, via the inter-service Impact Assessment Steering Group.

The Commission also benefited from opinions and positions stemming from other Commission initiatives (e.g. the EU Justice Scoreboard and the Collective Redress Recommendation⁵) as well as from the legislative process which led to the approval of the 7th EAP.

Several studies were commissioned over the course of the work on this impact assessment and numerous reports produced by other organisations (Annex 8) and Member States were used as a source of expertise.

Consultations of stakeholders and interested parties

A dedicated public consultation ran from 28 June to 23 September 2013. The consultation gathered 631 contributions, covering all Member States.

The public consultation *inter alia* collected views in on whether legislative action at EU level would have added value in ensuring effective and non-discriminatory access to justice in environmental matters across EU Member States (subsidiarity test); and at identifying those issues where targeted EU legislative action would be needed to fulfil the objective of ensuring access to national courts in environmental matters (proportionality test).

The main results of the public consultation can be summarized as follows (further details are provided in Annex 1).

- Contributions were received from all Member States. Citizens represented 69% (437 replies) overall. Different organisations contributed 29% (185 replies), with NGOs representing 62%, business and their organisations 9% and public authorities representing 1%. Responses were submitted by 9 different public institutions from 4 Member States, namely BE, DE, PL and SI.
- The majority of respondents (62%) are **not satisfied with the current level of access to justice in their respective Member States**. Access to justice in other Member States is also largely perceived as unsatisfactory.
- 86% of the respondents have confirmed that it is **either important or very important that there is a level playing field across the EU Member States**, meaning that all actors should have broadly equal access to justice, based on a similar minimum conditions. Amongst business representatives, this means a 75% support (overall 2%), among NGOs 100% (overall 23%), and 94% of all citizens (overall

⁵ OJL 201, 26.7.2013, p. 60

63%) gave support to this general aim. All public authorities who filled in the questionnaire agreed with this policy aim.

- As a possible policy response, a **great majority** of the respondents called for the adoption of **specific rules in EU legislation**. These should be clear so that litigation procedures become more predictable, and should cover issues of standing (including of associations), timeliness of proceedings, and costs and availability of effective remedies. Over 80% of respondents see the advantages of having an EU legal instrument so that that **legal certainty would be ensured for stakeholders**, while ensuring the **protection of human health and the environment**.
- The development of an EU instrument ensuring effective access to environmental justice is considered by a large majority (more than 85%) of respondents to be in the **interest of the public administration** (including the courts) and 60 to 70% consider it also important for **business**. Respondents representing business awarded some level of importance to the subject by a large majority (81%).

Some Member States (UK, IE, NL) acknowledged the importance of ensuring an effective system of access to justice in environmental matters but expressed support for a non-binding instrument rather than a legislative act. NGOs are generally not satisfied with the current level of access to justice in their Member States (DE, ES, BE). Industrial groups from different sectors (e.g. chemicals, energy and water, insurance, mining, oil and gas) are generally satisfied with the existing situation and remain sceptical about the added value of a new legislative initiative, compared to the direct application of Article 9(3) of the Aarhus Convention.

The report also took advantage of the public consultations which were run in the context of the 7th EAP (from 12 March 2012 to 1 June 2012) where questions also covered access to justice. The broad response was positive to the idea of strengthening and clarifying the EU framework on environmental access to justice.

On 13 May, 2013 the Commission informed Member States representatives, meeting in a Council Working Party on International Environmental Issues (WPIEI) on the Aarhus Convention, of the main findings of recent studies. Member States participants were broadly supportive of an impact assessment to be carried out on the topic of access to justice.

An *ad hoc* meeting held on 15 October 2013 with Member States experts allowed for a fruitful exchange of views. The German and UK representatives expressed doubts on the added value of a Commission initiative in this field. In particular, Germany took the view that access to justice for NGOs under Article 9(3) of the Aarhus Convention was deliberately not foreseen when the Aarhus Convention was negotiated and the situation should not be altered, as its national case-law already foresees standing for environmental NGOs. DG ENV referred to the case-law of the CJEU on Article 9(3) (Case C-240/09 '*Slovak Bears*' or '*LZ I*'), which declared that national courts must, *de facto*, secure broad access of NGOs so that they may challenge decisions liable to be contrary to EU law. Austria had a different view, seeing this case as having a far-reaching impact on its legal system. The United Kingdom took the view that the provisions of the Aarhus Convention are sufficient and there is no need for further EU legislation. All other Member States did not pronounce themselves on the appropriateness of an EU initiative. Inputs on specific issues were made, however. In particular, the representatives of Bulgaria favoured the inclusion of access to justice provisions in sectoral legislation, such as the Strategic Environmental Assessment, and Latvia asked that reporting obligations in any possible initiative are kept to the very minimum, because of the burden

they may create for collecting information and statistics. This view on reporting obligations was shared by several Member States

Numerous and extensive consultations with national judges⁶ and NGOs show that there is a high level of legal uncertainty to be addressed by any EU legislation. A summary of the recommendations by national judges and academics is contained in Annex 6. A one-day workshop with national judges (11 October 2013) allowed for an in-depth discussion on specific problems relevant to Member States. National judges are strongly in favour of an EU initiative to fill the legal vacuum to further improve the efficiency and coherence of judicial procedures at national level. National judges recognize the benefits of current case-law by the CJEU on access to justice in terms of **clarification of those restrictions which do not conform to legislation and the Aarhus Convention**. However, they lack guidance and standards on **what should be done**. This consultation also confirmed that, where this has happened, providing access to individuals and NGOs in line with the Aarhus Convention and case-law **has not resulted in a significant increase in the number of cases in any of the Member States**.

Business organisations, although concerned about the lack of legal certainty, remain sceptical about a strong and detailed EU intervention. The subsidiarity principle was invoked by several business stakeholders who prefer a direct implementation of the Aarhus Convention by Member States to a new EU instrument. This position, however, seems not to take into account that it is precisely the implementation of Article 9(3) of the Aarhus Convention that has triggered, in the absence of specific common criteria, a growing number of CJEU cases on the interpretation of the existing rules. This points to a lack of legal certainty and investment predictability. Moreover, clarity on access to justice benefits also business, including SMEs (which may also act as plaintiffs) and public bodies which are often called upon to decide on projects of economic importance.

1.3. Consultation of the Impact Assessment Board

A draft of the present Impact Assessment was first submitted to the Impact Assessment Board (IAB) in October 2013 and a second, revised draft, taking into account the negative opinion of the Board issued on 22 November 2013, was presented in February 2014. On 18 March 2014, the Board issued a further set of recommendations which were addressed in a third version of the report. Finally, on 21 May 2014 the IAB adopted a third and positive opinion, but still with remarks, including further recommendations to improve the report. In particular, based on this third opinion, the final report has been amended in order to:

- (1) Improve the problem definition and better explain the EU added value;
- (2) Further clarify how the disparities in access to justice in environmental matters in different Member States lead to internal market and competition distortions;
- (3) Clarify the content of the options and better motivate that setting requirements for standing, scope of review, costs of legal procedures, timeliness of national procedures, possible remedies as well as the role of alternative dispute resolution at the EU level is justified from a subsidiarity point of view;
- (4) Further specify exactly how CJEU rulings have limited the possibility for Member States to interpret the application of Article 9(4) of the Aarhus Convention;
- (5) Clarify which of the main barriers to access to environmental justice in Member State systems listed in the table can be considered as non-implementation of the Aarhus Convention.

⁶

Association of European Administrative Judges (AEAJ), European Judicial Training Network, European Forum of Judges, Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe),

- (6) Clarify how the existing legislation and the case-law of the CJEU limit the choices for these elements;
- (7) Better motivate the conclusions on effectiveness of different options.

POLICY CONTEXT, PROBLEM DEFINITION AND SUBSIDIARITY

2.1. Policy context

The EU is a Party to the Aarhus Convention since 2005.

As mentioned in the Introduction, the substantive provisions of the Aarhus Convention on Access to Justice are to be found in Article 9 (see Annex 7), which hereafter is presented in greater detail:

- Article 9(1) deals with access to justice in relation to access to information.
- Article 9(2) deals with access to justice in relation to public participation in decision-making procedures.
- Article 9(3) deals with access to justice in relation to omissions and breaches of environmental law in general.

A fourth paragraph (9(4)) lays down minimum criteria on effective remedies, timeliness and the cost of court procedures: these aspects are an integral part of access to justice.

Whereas Articles 9(1) and 9(2) are sufficiently precise in their wording, Article 9(3), which has a much broader scope, is less specific. It refers to *'members of the public'* as having access to **administrative or judicial procedures** to challenge acts and omissions by private persons and public authorities which contravene the provisions of national law relating to the environment, without – in contrast to Article 9(2) - explicitly mentioning whether NGOs have standing in environmental justice challenges or not. In accordance with national law, the definition of *'public'* includes associations, organisations and groups. Where the EU has enacted secondary legislation, the proviso *'in accordance with national law'* contained in the Aarhus Convention must be interpreted as referring to EU law. The case-law of the CJEU has filled in some open questions about the scope of Article 9(3) insofar as it requires **Member States to grant standing in areas where public health** is at stake, even if there are no public participation requirements, and to interpret national law as much as possible with the aim of **granting access to courts to NGOs**. In this context, it should be recalled the Article 47 of the Charter of Fundamental Rights of the European Union provides that *"everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article"*.

The table below summarizes the content of Article 9 of the Aarhus Convention (first two columns) and the ways in which this is either transposed in EU secondary legislation or the subject of corresponding CJEU case-law (last column). As will be seen, the secondary legislation consists of several acts. This feature combined with the the CJEU case-law means that the current legal framework is a patchwork (see also Annex 7). This presents a challenge in terms of providing clarification.

AARHUS	RIGHTS	EU LAW
<p>9(1) ACCESS TO JUSTICE IN RELATION TO ACCES TO INFORMATION</p> <p>Breach of Article 4 of the Convention (laying down detailed rules on access to information)</p>	<p>REVIEW BODY: Review procedure before a CoL* or AIIBEBY**</p> <p>ACCESS TO REVIEW BY WHOM: Those whose request was refused or not treated</p> <p>In case the Party provides for review by CoL, the person must also have access to an expeditious procedure established by law, free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a CoL</p>	<p>Article 6(1&2) Directive 2003/4 on access to information</p> <p>Article 25 (2&3) of Directive 2010/75 on industrial emissions (IED)</p> <p>Relevant case-law of the CJEU</p>
<p>9(2) ACCESS TO JUSTICE IN RELATION TO PUBLIC PARTICIPATION</p> <p>Substantial or procedural legality of decisions, acts and omissions falling under the scope of Article 6 of the Convention</p>	<p>REVIEW BODY: access to a review procedure before a CoL or AIIBEBY to challenge the substantive and procedural legality of any decision/omission under Article 6 (and other provisions of the Aarhus Convention if the Member States so decides)</p> <p>ACCESS TO REVIEW BY WHOM: Public having a sufficient interest or maintaining the impairment of a right as well as NGOs promoting environmental protection and meeting any requirement under national law are considered <i>ex officio</i> to comply with the above criteria (sufficient interest/right impaired)</p>	<p>Article 11 of Directive 2011/92 (Environmental Impact Assessment EIA)</p> <p>Article 25 of Directive 2010/75 (IED)</p> <p>Article 23 of Directive 2012/18 (Seveso III)</p> <p>Relevant case-law of the CJEU</p>
<p>9(3) ACCESS TO JUSTICE IN GENERAL</p>	<p>REVIEW BODY: administrative or judicial bodies</p> <p>ACCESS TO REVIEW BY WHOM: Members of the public (including its associations, organisations and groups in accordance with national legislation), have access to administrative or judicial procedures to challenge acts and omissions by privates/public bodies which contravene environmental law</p>	<p>Article 13 of Directive 2004/35 Environmental Liability (ELD)</p> <p>Recital 18 of Regulation 2013/1257 on ship recycling</p> <p>CJEU requires effective legal protection and judicial review for NGOs and individual or legal persons</p>
<p>9(4) REQUIREMENTS</p>	<p>Adequate and effective remedies, including injunctive relief, procedures that are fair, equitable, timely and not prohibitively expensive</p>	<p>Article 11 of Directive 2011/92 (EIA Directive)</p> <p>Art. 25 of Directive 2010/75 (IED)</p> <p>NB no reference to injunctive relief.</p> <p>Relevant case-law of the CJEU e.g. on prohibitive costs of legal procedures and on injunctive relief (see Annex 10)</p>

* CoL= Court of Law **AIIBEBY= Another Independent and Impartial Body Established by Law

Thus, a number of rules based on the secondary legislation already exist in the EU legal order:

The **first set of rules, reflecting Article 9(1) of the Aarhus Convention**, is provided by the **Access to Information Directive**. Only where **requests for access to information** are not treated expeditiously and in an inexpensive manner, or not treated at all, can citizens or legal persons and NGOs make an appeal to an administrative and judicial body under the terms of the directive.

The **second set of rules, reflecting Article 9(2) and 9(4) of the Aarhus Convention**, is provided by the **Environmental Impact Assessment Directive (hereafter EIA Directive)**, the **Industrial Emissions Directive (hereafter IED)**, as amended by **Directive 2003/35/EC** and the **Seveso III Directive**. Under the last-mentioned directive the provisions on access to justice also extend to certain projects relating to plans and policies. Under the regimes of these directives, the public concerned, having sufficient interest or, alternatively, maintaining impairment of a right, has access to a review procedure to challenge the substantive or procedural legality of any decisions or omissions falling under the scope of these directives. **In that context, environmental NGOs are *ex officio* considered to have sufficient interest and rights to access courts.**

The **third set of rules, pertaining to Article 9(3) of the Aarhus Convention**, is applicable in the context of **environmental liability rules under the Environmental Liability Directive (hereafter ELD)**. A reference to judicial review in line with the case-law of the CJEU has also been inserted in the recent Ship Recycling Regulation. Under the ELD, the public concerned (meaning potentially-affected citizens/legal persons and their associations, along with NGOs) can challenge the substantive and procedural legality of decisions and omissions of **environmental law in general**. It should, however, be indicated that this is without prejudice to any national provisions on access to justice, rendering the provisions open to interpretation and to diverging situations across the Member States .

To these legislation-based rules can be added requirements arising from the CJEU case-law. These requirements pertain to Article 9(1),(2),(3) and (4) of the Aarhus Convention. The case-law (see **Annex 10**) has resulted from referrals from national courts and direct actions by the Commission in the framework of infringement procedures. Amongst other things, it **recognizes standing rights for potentially affected individuals as well as NGOs that go beyond those explicitly provided for in the secondary legislation.** The CJEU has, for example, upheld standing rights to uphold EU environmental obligations related to public health and nature conservation. **The case-law thus limits the possibility for Member States to interpret Article 9(3) of the Aarhus Convention too restrictively.**

The main problems are illustrated by the third column of the table. **Different provisions exist in relation to different sectors of environmental law, and only some sectors of environmental law are addressed by secondary legislation. Key areas of environmental legislation such as air, water, waste and nature are not covered by access to justice legislative provisions. For example, permits under the Water Framework Directive or waste management plans are not explicitly made subject to access-to-justice rights.** On the other hand, the CJEU has shown an interest in recognising a broad access to justice in environmental matters. However, the case-law has emerged in a piecemeal way and the links between cases and the broader implications are not always clear. This gives rise to **legal uncertainty and litigation that delays decisions** and may endanger the predictability for investments.

2.2. Problem definition, including drivers

What is the nature of the problem?

The Treaty on the European Union (hereafter TEU) sets an obligation for the EU in Article 19(1) to guarantee a high level of legal protection for rights under EU law. This general obligation is relevant to the field of EU environmental law, as defined by the Treaties and EU secondary law and Article 47 of the Charter of Fundamental Rights of the EU enshrines the right to an effective remedy before a tribunal.

Given this, why does EU environmental law require EU action? The reasons are several-fold.

Non-compliance with EU environmental law constitutes a challenge for the European Union, causing every year significant damage to the health of human beings and animals and the quality of air, soil and water. The public, i.e. individuals and environmental NGOs, play a vital role in identifying infringements of EU environmental law by administrative acts or omissions. Enabling these stakeholders to bring a case to a national court and ask for a review is an essential element in ensuring the correct application of EU environmental law in the Member States and in guaranteeing these stakeholders the rights accorded them by EU law.

Second, the EU ratified the Aarhus Convention in 2005 and this requires contracting parties to guarantee access to courts for the purpose of reviewing decisions and omissions by public administrations related to environmental law.

Third, a common minimum standard on access to justice in environmental matters exists in Member States only in those areas which are harmonised by EU secondary legislation (see Section 2.1). Studies and complaints by the public have revealed that, outside the scope of harmonised EU law, the current legislation in the Member States on access to justice in environmental matters differs considerably.

Fourth, the CJEU has issued important judgments which, while providing clarification, are not always easy to link.

As a result, at this point in time, the enforcement of European environmental policy cannot be followed up by the public in the same way throughout the Union. The objective of ensuring a minimum standard of environmental protection throughout the Union is thus jeopardized.

One such barrier is standing. In many Member States, the right to go to court is traditionally very restricted. Plaintiffs need to show that they have a direct interest or that they have a subjective right that is impaired. These restrictions are problematic in the case of environmental legislation, which addresses society in general, including future generations, and broader values than private interests (such as a health biodiversity, water and soil). Under the classic rules on legal standing, only when a particular interest is at stake (e.g. private property) can environmental law be the subject of court actions. In other words, traditional concepts of legal standing need to have a more comprehensive ambit in the context of environmental rules.

This is not the only barrier to effective access to justice. In some Member States, the costs of going to court – especially if a plaintiff loses – are very high and this acts as a deterrent. Or the national courts look at the legal challenge on rather limited grounds and therefore in a very narrow way (narrow scope of review). In addition, the available remedies provided in some Member States are not adequate e.g. it is difficult or impossible to stop damage occurring (for details see table below). Access to justice in environmental matters requires

addressing several potential barriers specific to the environmental litigation, without prejudice to other aspects relevant to access to justice in general.⁷

is therefore best seen as a package that addresses several potential barriers.

The measures assessed in this context are best understood as a package of inter-related guarantees that make it possible for citizens and NGOs to bring disputes to court. The necessary guarantees identified and subject to an initiative on access to justice are:

- (1) *standing* (i.e. the right to go to court in the first place), which has several subsidiary aspects, notably the entitlement of NGOs to act in the collective interest;
- (2) *an adequate scope of review*, i.e. an obligation on courts to examine a sufficient range of legal aspects and to do so in sufficient depth;
- (3) *effective remedies*, i.e. an obligation on courts to provide adequate remedies where breaches are identified, including interim measures;
- (4) *costs* that are not prohibitive, which can have several subsidiary aspects; and
- (5) *timeliness*, i.e. the duration of judicial procedures should not take unreasonably long.

The initiative could also address two further closely related matters:

- (6) *practical information* to be provided by Member States on the national system of access to justice in environmental matters;
- (7) *alternatives* to litigation such as mediation.

Any initiative considered under this Impact Assessment would cover exclusively access to justice at Member States level. EU level access to justice is covered by the conditions laid down in Article 263 TFEU and by the EC/1367/2006 Regulation (Aarhus Regulation) and is aimed at access to justice before EU institutions.

Overview of specific problems identified

The following table⁸ outlines the main **barriers in Member States' systems** to access to justice in environmental matters, **based on studies conducted for DG ENV** (Annex 8) and other information collected by the Commission services within the frame of compliance control of national legislation. An “X” indicates that there are significant barriers to access to justice in relation to the aspect indicated in the first line (further details are provided in Annex 2).

⁷

The 2017 EU Justice Scoreboard provides an overview of further aspects of accessibility of justice in general in section 3.2.1

⁸

The findings in the table are based on the results of studies carried out in 2012/2013. http://ec.europa.eu/environment/aarhus/access_studies.htm

PROBLEM AREA MS	INSUFFICIENT NGO STANDING	INSUFFICIENT INDIVIDUAL STANDING	PROHIBITIVE COSTS	INSUFFICIENT TIMELINESS	INSUFFICIENT INJUNCTIVE RELIEF	INSUFFICIENT SCOPE OF REVIEW
Austria	X					
Belgium	X	X				
Bulgaria	X	X	X	X		
Croatia	X	X	X	X	X	
Cyprus	X	X	X	X	X	
Czech Republic	X	X			X	
Denmark	X	X	X		X	X
Estonia			X		X	
Finland	X	X				
France			X			
Germany	X		X			
Greece			X	X		
Hungary	X	X				
Ireland			X	X	X	X
Italy	X		X	X		
Latvia				X		
Lithuania			X			
Luxem- bourg	X	X	X			
Malta	X	X	X	X	X	
Nether- lands		X				
Poland	X	X				
Portugal			X	X		X
Romania			X	X		

Slovakia	X	X		X	X	X
Slovenia	X		X			
Spain			X	X	X	
Sweden	X			X		
United Kingdom	X	X	X	X	X	X

The problems can also be illustrated by reference to **concrete problems which have arisen and resulted in judgments of the CJEU**, as described in the examples below (see also Annex 10). **Again, these examples are illustrative of a rather general situation.** In several cases, there have been consequences in terms of **delays of decisions relating to investments (e.g. permits).**

Description of the baseline and how the issue has evolved over time

In order to be able to better assess the different options the following table indicates which of the elements of access to justice are based on obligations established by the Aarhus Convention. It also indicates whether relevant CJEU case law exists on the individual subject matter and how the initiative would address the issue.

	Aarhus Convention	Case law of the CJEU	Comments
1. Legal standing			
a. NGOs	Art. 9.2 and 9.3		
aa. access to the courts	Art. 9.2 and 9.3	C-240/09 – Slovak Bear (LZ I) C-404/13 – Client Earth C-243/15 – LZ II	<u>The case law</u> requires that standing is granted to the public, in particular, to NGOs. <u>The initiative</u> aims at clarifying the standing level for the public in the areas not covered yet by EU secondary law.
bb. conditions for <i>de lege</i> standing	Art. 9.2 and 9.3	C-263/08 - Djurgården	<u>The case law</u> requires that the criteria have to take into account small and local NGOs, as well. <u>The initiative</u> aims at clarifying the requirements when setting the conditions for <i>de lege</i> standing for NGOs
cc. foreign NGOs	n/a	n/a	Non-discrimination is a general principle of EU law.
b. individuals	Art. 9.2 and 9.3	C-237/07 Janecek	<u>The cases law</u> bases standing rights on the general EU principle of an effective judicial protection. <u>The initiative</u> aims at the same

			objective as described for NGOs (see above).
c. Group of individuals	Art. 9.2 and 9.3	n/a	No specific case law on this issue. <u>The initiative</u> will keep a clear distinction to groups which fulfil the criteria for privileged access to justice as foreseen in the Aarhus Convention
2. Scope of review	Art. 9.2 and 9.3		
a. Applicable law	Art. 9.2 and 9.3	C-115/09 – Trianel; C-137/14 – KOM./DE	<u>The case law</u> established for NGOs in an Art. 9.2 context (EIA Directive) the obligation that the courts have to assess the legality of acts on the basis of all provisions of EU environmental law.
b. level of scrutiny	Art. 9.2 and 9.3	C-72/12 – Altrip C-71/14 – East Sussex	<u>The Case law</u> has established in context of Art. 9.1, Art. 9.2 of the Aarhus Convention some general principles concerning the level of scrutiny.
c. prior participation ⁹	Art. 9.2 and 9.3	C-263/08 - Djurgården	<u>The case law</u> indicates that such a criterion could be in conflict with the requirement of a full review of the procedural and substantive legality.
d. Preclusion ¹⁰	Art. 9.2 and 9.3	COM./DE: C-137/14	In the context of Art. 9(2) the CJEU has ruled that preclusion is not in line with EU law.
3. Remedies	Art. 9.4	C-201/02 Delena Wells, C-420/11-Leth C-416/10 – Krizan	<u>The case law</u> establishes remedies which have to be available in the context of Art.9.2 (EIA Directive), such as revocation, suspension, compensation, interim measures. <u>The initiative</u> aims at ensuring that these minimum remedies are available for all environmental cases falling in the scope of the Aarhus Convention.
4. Costs	Art. 9.4		
a. Fees	Art. 9.4	C-530/11 – COM./UK; C-260/11 - Edwards	<u>The case law</u> has established various criteria which have to be considered when taking a cost decision. <u>The initiative</u> aims at clarifying the criteria established by the case law.
b. Cost capping/	Art. 9.5	n/a	No specific case law in this area.

⁹ Prior Participation means the requirement to take part in the administrative procedure as a condition to be entitled to bring a case to a national court.

¹⁰ Preclusion means the restriction of bringing arguments before a court only if they were already raised in the administrative procedure.

cost shifting			The <u>initiative</u> aims at addressing the issue to ensure that such mechanisms are provided for in Member States in order to reduce the cost risk. The details will be left to the Member States.
c. Legal aid	Art. 9.5	n/a	No specific case law on this issue. The <u>initiative</u> will address the issue to ensure that such mechanisms are provided for in Member States in order to reduce the cost risk. The details will be left to the Member States.
6. Timeliness	Art. 9.4	n/a	No specific case law on this issue. The <u>initiative</u> will address the issue to ensure that Member States strive for efficient judicial procedures. The details will be left to the Member States.
7. Practical Information	n/a	C-427/07 – COM v. IE	In the context of Art. 9 of the Aarhus Convention the CJEU has laid down requirements for the information of the public of the possibilities to access to the courts.
8. Alternative dispute resolution mechanism (ADR)	n/a	n/a	No specific case law on this issue and no reference in the AC. The <u>initiative</u> could address ADR as it is introduced in other areas of EU law to offer a cheap and fast alternative to court procedures. The modalities of ADR would be left to the Member States.

I. INSUFFICIENT NGO AND INDIVIDUAL STANDING: individuals and NGOs are not given a sufficient entitlement to bring cases to national courts, i.e. standing

Standing for individuals: the *Janecek* case on EU air quality rules, Case C-237/07

A Munich resident living only 900 meters away from an air control station showing that air quality limit-values were exceeded more than 35 times in 2005-2006, sought a court order requiring an air quality plan to be drawn up by the competent authorities so as to determine the short-term measures to be taken in order to ensure compliance with air quality standards. His claim was dismissed for lack of standing by the court of first instance. The second instance court found that he could file an action, but was not entitled to request a specific action. At third instance at the federal level, the court had doubts as to whether refusing standing conformed with EU law, so it stayed the proceedings and issued a preliminary reference to the CJEU. The CJEU found that a natural or legal person **affected by health concerns should be given the possibility to file a claim before national courts to ask for a specific action by the competent authorities**. This judgment, without mentioning it, brings Article 9(3) of the Aarhus Convention into play in areas where there is a public health concern. Similar cases have

arisen after this judgment (for example in Germany, UK and Italy).

Standing for NGOs: the *Slovak Brown Bear* or *LZ I* case on Article 9(3) of the Aarhus Convention, Case C-240/09

A Slovak NGO claimed standing in a case concerning the granting of derogations to the system of protection for species such as the brown bear. Not having been awarded the status of party to the proceedings, it appealed before a Slovak court. The court, in doubt about the interpretation of the applicable rules, stayed the proceedings and referred a number of questions to the CJEU. The latter ruled that Article 9(3) of the Aarhus Convention has no direct effect, but **national courts, in light of the principle of effective judicial protection, must interpret requirements pertaining to Article 9(3) of the Aarhus Convention to the fullest extent possible in order to provide standing to NGOs. In practice the judgment implies that Member States no longer have full discretion in deciding whether to grant standing to NGOs under Article 9(3). This case has since then been invoked in several other cases in the Member States (see Annex 4).**

With these two judgments, the CJEU partially filled a vacuum, **requiring that standing must be granted when health is at stake and that, with regard to Article 9(3) of the Aarhus Convention, national courts must interpret national provisions to the fullest extent possible in order to secure access of NGOs to challenge before courts decisions and omissions liable to be contrary to EU law also in sectors which are not covered by the current legislation implementing Article 9(2) of the Aarhus Convention**, notably when biodiversity protection is at stake. The underlying logic suggests that access should also be granted in relation to other environmental law sectors and situations. Regardless of the CJEU case-law, 7 Member States still apply very strictly the principle that only those whose rights are impaired can access courts, which limits NGO access; many limit NGO and individual standing to certain acts or sectoral legislation¹¹.

Standing for NGOs in cases related to projects in NATURA 2000 sites pursuant to the the Habitats Directive, 92/43/EEC: *LZ II*, Case C_243/15

A Slovak NGO claimed that it should have been admitted as a party in the administrative procedure to approve a fence in a Natura 2000 site. After questions were referred to the CJEU, the latter court held that the NGO was entitled to participate in an administrative procedure based on Article 6(1)(b) of the Aarhus Convention read in conjunction with Article 6(3) of the Habitats Directive, 92/43/EEC. By extension, it also enjoyed standing in line with Article 9(2) of the Aarhus Convention.

With its judgment in Case C-243/15, the CJEU extended the scope of Article 9(2) of the Aarhus Convention to cases which are assessed solely on the basis of the Habitats Directive, 92/43/EEC.

Impact on business: the *Trianel* Case on the EIA Directive, Case C-115/09

Trianel – the intervener in the main proceedings – intended to construct and operate a coal-fired power station in Lünen, Germany. Within eight kilometers of the project site,

¹¹ See studies on access to justice in environmental matters, carried out for 28 Member States in 2012/2013. http://ec.europa.eu/environment/aarhus/access_studies.htm

there are five areas designated as special areas of conservation within the meaning of the Habitats Directive, 92/43/EEC. An NGO challenged a preliminary decision and a partial permit for the project, invoking impacts under the Habitats Directive.

At first instance, the national court accorded no standing to the NGO, as the national law provides standing only if individual rights are being infringed, which was not considered to be the case. The Higher Administrative Court of Nordrhein-Westfalen, however, doubted that this interpretation would be in line with the EIA Directive, which transposed Article 9(2) of the Aarhus Convention, and referred the case to the CJEU. The CJEU stated that **NGOs promoting environmental protection are deemed to have an interest in challenging a decision or an omission in such a case, without having to prove a specific interest or impairment of a right.**

The preliminary reference was introduced by the national court on 5 March 2009, and the final ruling was delivered on 12 May 2011. During this time, the national decision on the permit was suspended. **This illustrates how litigation aimed at clarifying access to justice – sometimes called 'satellite litigation' – can result in delays in court decisions on investments which could otherwise be made sooner.**

In summary, the overall situation in relation to standing has developed significantly thanks to decisions of the CJEU, but this still needs to be fully reflected at Member States level:

=> The case-law already addresses several situations in which NGOs or individuals/legal persons must be granted standing.

=> As an outcome of the rulings of the CJEU, standing must be provided to natural and legal persons in relation to air quality. This should apply to other sectors as well (water, waste, chemicals etc. but some Member States refrain from following the CJEU line (in particular if the rulings concerns cases arising in other Member States).

=> In relation to nature conservation, standing now has to be provided to environmental associations. This may apply to other sectors as well.

=> Not only decisions on specific activities, but also plans and omissions, can be challenged,

=> The *Trianel* case is illustrative of the fact that decisions on investments can be affected by 'satellite litigation' on procedural issues related to access to justice. The emergence of several cases at national level, whereby courts make direct use of the case-law of the CJEU, shows that this **is not a one-off case but an illustration of a systemic trend** (see Annex 8).

A number of cases developed on the basis of the *Slovak Brown Bears* ruling are relied upon all over Europe. Cases where NGOs are given standing based on the line provided by the CJEU in this case have been reported by BE, SE, FIN and DE courts (Annex 4).

The above examples refer directly to rules on standing. However, the important aspects of access to justice in environmental matters are broader than rules on standing. The examples below concern other aspects of access to justice and illustrate the current challenges.

II. APPROPRIATE SCOPE OF REVIEW: The CJEU case-law highlights the need for clarity on how deeply and widely national courts should scrutinize the legality of contested decisions, acts and omissions.

A succession of cases referred to the CJEU highlight the demand for certainty by national courts on how they should review legal challenges related to EU environmental law. The CJEU has provided important clarity in relation to the EIA and IED Directives, as well as a number of other instruments. For example, a 2004 judgment in the *Waddenzee* case, C-

127/02, indicates how national courts should scrutinize the legality of decisions concerning Natura 2000 sites under the Habitats Directive. Further clarifying the scope of review would contribute to a more transparent and effective implementation of the Aarhus Convention.

Unclear scope of review under the EIA Directive: the *Altrip* case, C-72/12

German owners/tenants of land located where works were authorised for public purposes challenged the decision to approve the works on the ground that the environmental impact assessment (EIA) carried out was inadequate. The Administrative Court dismissed the action stating that only a failure to carry out an EIA could be challenged and not an irregular EIA. The Federal Administrative Court referred the case to the CJEU. The CJEU clarified that an irregular EIA can also be the subject of a legal challenge before a national court.

The planned works in *Altrip* were delayed for about 2 years owing to the 'satellite litigation' needed to clarify the scope of review. Clarifying this aspect of access to justice would enhance the legal certainty and efficiency of judicial procedures (and consequent costs) and can have considerable added value.

III. PROHIBITIVE COSTS: The CJEU case-law highlights the importance of ensuring that costs are not prohibitive and of clarifying how national courts should ensure this, while information about Member States points to cost barriers

The costs of legal procedures include in particular court application fees, lawyers' fees and, where it is so provided, costs derived from applying the '*loser pays principle*'.

Expensive procedures: the *Edwards* case, C-260/11

A UK national brought an action for judicial review of a permit which had been granted to a large cement works. She lost the case and was ordered to pay the respondent's litigation costs at the appeal stage, in total £90,000 based on the '*loser pays principle*'. When the cost order was appealed, the Supreme Court decided to stay the proceedings and to refer a number of questions to the CJEU, such as how a national court should approach the requirement that procedures should not be prohibitively expensive. The CJEU ruled that the requirement that litigation should not be prohibitively expensive concerns all the costs arising from participation in the judicial proceedings and that the assessment of what must be regarded as prohibitively expensive is not a matter for national law alone. Therefore the CJEU considerably limited the discretion of national authorities and courts in setting the costs related to litigation.

The *Edwards* case relates to the EIA Directive, which explicitly requires that procedures should not be prohibitively expensive. However, no similar explicit requirement on costs of legal procedures is to be found in other relevant legislation, despite the fact that Article 9(4) of the Aarhus Convention states that all procedures relating to environmental law should not be prohibitively expensive. It is therefore necessary to secure that the non prohibitively expensive clause deriving from the Aarhus Convention and the CJEU case-law is applied in a comprehensive way at national level. Member States sometimes apply fees, schemes or obligations applicable at the court proceedings. These can include administrative or court fees, mandatory lawyers in court, application of the loser pays principle, schemes for lawyers'

fees or protective cost orders¹². The evaluation of those measures indicates that they could result in costs being prohibitive in several Member States, either because living standards are low relative to other Member States (BG), or because procedural costs are onerous in absolute terms (DK, FR, IE, UK) or because there is no upper limit to costs (PT). Court fees can vary from €2 in Hungary to €10.000 in DK. The majority of Member States requires a lawyer in court, only 5 foresee protective cost orders, 8 apply limited responsibility for the costs. The lack of mitigating measures and high court costs makes access to justice difficult.

IV. EXCESSIVE DURATION (inefficient timeliness): There is a need to ensure the timeliness of procedures in a context where evidence points to significant variations across the EU

Access to justice in environmental matters is not limited to rules on standing and financial costs, but also includes the time needed to obtain a judgment. Efficiency relates, *inter alia*, to the timeliness of judicial procedures, a criterion expressly mentioned in Article 9(4) of the Aarhus Convention.

Statistics for 2009¹³ (Annex 2) provided by The Supreme Court Judges Association show that the average duration of cases before Supreme Administrative Courts¹⁴ was 17.1 months for preliminary reference proceedings and direct applications proceedings, and 15.4 months for proceedings on appeal. 7 Member States out of 18 where data were collected are above the average (see Annex 2 for details). Duration of proceedings from first-instance stage to final ruling by Supreme Administrative Courts ranges from 5 months in Poland to 48 months in Italy.

According to the findings of a recent report by the Council of Europe and the Commission for the Evaluation of the Efficiency of Justice (CEPEJ), certain Member States combine unfavourable factors such as lengthy proceedings and low clearance rates, which implies that a high number of cases remain pending (Annex 2). This number ranges from less than 1 per 50 inhabitants in LT, MT, PL, LU and a few others to more than 7 per 50 inhabitants in EL, CY, ES and DE¹⁵. The reduction of the excessive length of proceedings in certain Member States should be a priority in order to improve the business environment and attractiveness for investments (EU Justice Scoreboard).

EU secondary legislation expressly provides for timeliness in relation to matters coming within the scope of Article 9(1) and (2) of the Aarhus Convention (i.e. access to information and public participation) but not in relation to other matters. There is a close relationship between the efficiency (timeliness) of procedures and their cost, with inefficient procedures pushing up costs for all parties, business included.

V. INSUFFICIENT EFFECTIVE REMEDIES, INCLUDING INJUNCTIVE RELIEF: The CJEU case-law highlights the need for clarity on the effective remedies which should be available in environmental litigation.

Examples: the *Krizan*, *Wells Leth* and *Client Earth* cases

In the *Krizan* case, C-416/2010, the question of injunctive relief was raised in the context of challenge of a permit for waste landfill in Slovakia. The CJEU established that, where a permit which is non compliant with applicable rules is challenged by an applicant and where there is a serious possibility of damage to the environment, it should

¹² See Annex 2, for more details.

¹³ Currently no more recent data are available.

¹⁴ BG, EL, EE, LU, MT, SE did not submit data, IE not covered

¹⁵ No data for BE, CZ, DK, IE, UK, AT, PT, IT.

be possible for the national court to suspend the permit in question. Thus, in the context of environmental access to justice, the CJEU confirmed the role of injunctive relief.

In the *Wells* case, C-201/2002, in the context of a dispute related to the appropriateness of an EIA for an old quarry, the CJEU ruled that it is for the national court to determine whether it is possible under national law for a consent already granted to be revoked or suspended, or alternatively, to grant compensation for the harm suffered.

In the *Leth* case, C-420/11, an Austrian citizen was allegedly affected by noise pollution during the construction of an airport in her vicinity. The case also concerned the lack of EIA carried out by the authorities. The applicant in the national proceeding sought compensation due to the loss of value for her house caused by the construction of the airport and the related noise nuisance.

The CJEU indicated that it is ultimately for the national court, which alone has jurisdiction, to assess the facts of the dispute before it, and to determine whether the requirements of EU law applicable to the right to compensation, in particular, the existence of a direct causal link between the alleged breach and the damage sustained, had been satisfied and if there was scope to establish pecuniary damage in the case at hand.

In the *Client Earth* case, C-404/13, the CJEU clarified what remedies a national court must provide in case that a Member States is found in breach of legislation on air quality.

The *Krizan*, *Wells* and *Leth* cases concern the EIA Directive. This reflects Articles 9(2) and 9(4) of the Aarhus Convention, although not all the requirements set out in Article 9(4) of the Aarhus Convention have been transposed by the directive (which is silent on injunctive relief, for instance). The clarifications provided by the CJEU in the above and other cases are also relevant to litigation falling within the scope of Article 9(3) of the Aarhus Convention. Taken together, the cases illustrate the keen interest of national courts in knowing the CJEU position on the effective remedies to be provided.

VI. ALTERNATIVE DISPUTE RESOLUTION: There is no clear legal framework as regards problems of defining a possible role of non-judicial conflict resolution (mediation)

Alternative dispute resolution can contribute to the overall efficiency of the judicial system. It relieves the burden of courts (as the studies from CEPEJ¹⁶ show, the number of cases is on the rise due to a higher awareness of citizens that increasingly become actors in the decision-making process). Based on the findings of a recent study and analysis of national practices, it can be safely assumed that non-judicial dispute resolution to some extent is present in almost all Member States legal systems¹⁷. There are either national rules specifically for environmental non-judicial dispute resolution or rules on alternative dispute resolution (ADR) applied to the environmental sector. However, the situation is not consistent across Member States .

¹⁶ Annex 2.

¹⁷ As shown by a recent study, in all Member States there is some kind of ADR mechanism in place, although not leading to a full coverage of all relevant areas. See in particular "Study on the use of Alternative Dispute Resolution in the European Union, Final Report, 2009, Civic Consulting of the Consumer Policy Evaluation Consortium (CPEC)" page 12. The divergence of the situations was identified in the environmental sector as well (Commission's 2012 study covering 10 Member States "Study on environmental complaint-handling and mediation mechanisms at national level Final report 2012, EcoLogic"). The study shows that Member States who have national rules and institutions covering environmental mediation are AT, DE, EL, IE, PL, SI, while Member States (out of the ones considered) which do not have environmental coverage of ADR are DK, FR, LT, ES.

Mediation: national examples

The Commission has also undertaken a study which explores the use of mediation in the environmental field in a number of Member States¹⁸ It shows a quite uneven situation across the Member States Hereafter some examples are recalled.

On 26 July 2012 a law on the promotion of mediation became effective in **Germany**. This act is applicable in all sectors (not only civil law) though not specifically tailored to administrative matters.

In the year 2000, a **mediation process** was launched in relation to the impact of **Vienna Airport**. In a process involving some 50 stakeholders (citizens' initiatives, local communities, the provinces of Lower Austria and Vienna, Austrian Airlines Group, air traffic control, Flughafen Wien AG, etc.) solutions were agreed to keep the nuisance caused by air traffic to an acceptable level for the population concerned. The results were set forth in 2005 in a binding **mediation agreement**.

Following conclusion of the mediation process, the dialogue is continuing between the stakeholders and monitoring of the implementation of the mediation agreement is taking place.

In **Scotland** there is a specific dedicated website¹⁹ to mediation, where all information is compiled on environmental mediators' activities, competences and availability.

What are the consequences and extent of the above problems?

The above-mentioned problems give rise to at least two broad categories of consequences.

First, a lack of clarity means that it is not possible to **maximise the benefits of legal certainty**. This leads to costs for society owing to **a sub-optimal implementation of environmental legislation** due to the **shift of resources towards procedural issues instead of their being used to deal more immediately with the substance** and - at times – to a non efficient use of resources, with a significant number of complaints being addressed to the Commission.

Second, the risk of prolonged procedural disputes may result in discouragement of investments in certain Member States owing to the **delays on decisions and unpredictability of the outcome of administrative decisions, as well as in lack of confidence in the public administration**.

As the EU Justice Scoreboard recalls, effective justice systems "*support economic growth and defend fundamental rights*". In general, timeliness, independence, affordability and user-friendly access are some of the essential parameters of an effective justice system, whatever the model of the national justice system or the legal tradition in which it is anchored.²⁰ Access to justice is therefore an important component of the overall effectiveness of justice.

¹⁸ "Environmental complaint-handling and mediation mechanisms at national level (2013) available at: http://ec.europa.eu/environment/aarhus/pdf/mediation_and_complaint-handling.pdf;

¹⁹ <http://www.scotland.gov.uk/Topics/Built-Environment/planning/National-Planning-Policy/themes/Med11>

²⁰ The 2017 EU Justice Scoreboard, Introduction. The Scoreboard contains figures on all three main elements of an effective justice system: quality, independence and efficiency.

As regards the environmental field more specifically, the considerable differences in terms of access to courts, length of proceedings, capacity to resolve particular categories of cases, availability of mediation and other alternative dispute resolution methods within the EU may have a negative impact on the internal and external competitiveness of the EU single market. Evidence shows that conflicts on access to justice rules inevitably create additional litigation and judicial proceedings and delay decisions on permits and plans. **The reduction of such delays should be a priority in order to improve the business environment and attractiveness for investments . Obviously, not all issues of ineffectiveness of justice are directly related to access to justice conditions. Still, access to justice is one of the tools that contributes to an effective environmental justice.**

The lack of or incoherent rules on access to justice is also likely to cause cross-border problems. Studies on access to justice carried out between 2002 and 2013 conclude that disparities in access to justice tend to lead not only to a different standard of environmental protection but also to unequal conditions of economic competition²¹. There are arguments that jurisdictions are supposed to compete against each other with lenient environmental legislation to attract industry. The result would be an overall reduction of environmental quality below satisfactory levels²². These findings also showed great differences in the number of court cases brought by environmental NGOs. This does not necessarily reflect differences in the degree of implementation of environmental law, but certainly does reflect differences in national rules on access to justice. Moreover, there is evidence that business considers the effectiveness of justice as a key element in planning investments. By way of example, in September 2013 the multinational company General Electric declared it was no longer willing to sign contracts open to a possible judicial review in Italy, as the length of the procedure and related uncertainty would endanger the profitability of its investments. The President of ENI (the largest Italian energy company) named taxes and justice as the 'big shocking topics' which influence corporate investment. Without a clear legal framework, such examples may become even more frequent, with investors searching for countries, including outside the EU, where the predictability of decisions of the public sector affecting investments is more certain. Diverging access to justice rules complicate the regulatory framework of the market. Investing companies should not be confronted with different sets of rules depending on the countries in which they plan to invest. Although the investment decisions depend on a high number of factors and on the interaction among these factors **and it is not possible to quantify the correlation between investment decisions and access to justice rules, the more economic integration progresses, the more the issue of a clear and coherent regulatory framework becomes crucial.**

In addition, in the event of decisions affecting more than one Member States it is important that effective means of judicial redress in all concerned states are available. This is typically the case of decisions on transport and energy infrastructure which cross several Member States. Further examples relate to biodiversity and air pollution. Decisions on hunting or infrastructure may interfere with the transboundary migratory patterns of fauna (typically, birds or large predators). And air pollution, too, has an important cross-boundary dimension. All of this points to the importance of a level playing field.

Finally, but equally important, is the possibility to take action in the case of cross-border pollution so that all citizens affected and NGOs promoting environmental objectives have possibilities to take action to safeguard their rights granted by EU law adopted in the field of

²¹ Study coordinated by Professor Michael Faure from Maastricht University on the possible economic implications of access to justice in environmental matters, January 2013, p. 84-86.

²² Ibid.

environmental protection. Such transboundary pollution occurred, for instance, in 2000, in the event of the Baia Mare spill caused by a massive leak of cyanide in Romania. The polluted waters flowing from Romania eventually reached rivers, killing large numbers of fish in Hungary, Ukraine, Serbia and Bulgaria. The spill has been called the worst environmental disaster in Europe since the Chernobyl disaster.

Failure to systematically implement environmental legislation results in considerable costs to society. The costs of not implementing current EU environmental legislation has been estimated by a study (Annex 3) at around €50 billion/year. 20 to 50% of the EU population live in areas where air quality breaches European limit values and the estimated annual costs in terms of health expenditure for days of work lost run into billions of Euros²³ (Annex 3). **Of course these implementation failures do not all relate to access to justice.** It is not possible to quantify how much of this overall cost is directly related to inefficiencies in the access to justice, since access to justice is not the sole factor which influences the degree of implementation of EU environmental legislation. However, the review opportunities can be seen as a kind of safety-net addressing shortcomings closest to citizens and leading to greater efficiency of the public administration. Empirical evidence shows that in most Member States actions brought before the courts by environmental associations are more successful than the average law-suit. The high success rate of actions brought by environmental associations in the public interest indicates that they fulfil an important function in the enforcement of environmental law and that they are generally brought for legally sound reasons²⁴. As recognised by the CJEU, citizens and NGOs act as guardians of environmental rules, contributing to environmental protection.

The divergence in national policies on non-judicial conflict resolution schemes (or lack thereof) shows that unilateral action by Member States does not lead to a satisfactory solution²⁵.

As shown by studies carried out and also demonstrated by findings on consumer alternative dispute resolution systems (ADRs), litigants (business, citizens and NGOs) benefit from the possibility to have a solution without having to go to court. Drawing from the consumer ADR studies, when ADR is successful, disputes are resolved in 90 days. Furthermore, taking a very conservative range of data, the costs are reduced on average to €850 for each case. As shown by a number of studies, litigation can be very costly.

In addition, as a consequence of regulatory and procedural obstacles in accessing courts at national level or in obtaining effective remedies to the breaches of environmental legislation, citizens, legal persons and NGOs tend to turn to the Commission by using the complaint procedure. This results in the Commission being continuously put under pressure to investigate what are claimed to be failures in environmental compliance by Member States. Environment accounts for a large share of the Commission's overall complaint load and the large volume of EP petitions. The extent to which the Commission is called upon to intervene can be considered as an indicator of a lack of effectiveness of access to justice mechanisms in Member States. In some cases, the Commission is bound to intervene in cases of high political sensitivity in the Member States.

Complaints on breaches of EU environment legislation received during 2016

The Commission received 351 complaints on environmental matters during 2016. The

²³ COM (2012) 95 Commission Communication "improving the delivery of benefits from EU environmental measures: building confidence through better knowledge and responsiveness".

²⁴ De Sadeleer, Roller and Dross (2002), Access to Justice in Environmental Matters, study for the European Commission, p. 8.

²⁵ See footnote n. 10.

sector receiving the most complaints was nature protection (87), followed by the sectors waste management (39), water (39) and air (22). Not all complaints necessarily raise issues of access to justice, but it is clear that the existence of effective and timely redress systems at national level would decrease the number of cases being brought to the attention of the Commission.

2.3. What are the underlying causes of the problem?

Member States have had different interpretations of the articles of the Aarhus Convention. The result is that there are varying applications in Member States giving a non-harmonised approach. In particular, as regards standing for NGOs, different approaches are followed in respect of Articles 9(2) and 9(3) of the Aarhus Convention. As already mentioned, under Article 9(2), NGOs are deemed to have sufficient interest with the result of having standing rights. In Article 9(3) no specific provisions on standing of NGOs are stipulated, but standing to NGOs is granted according to national legislation or practice of the Parties to the Convention. As the EU is a Party to the Aarhus Convention, it has to set out the meaning of "national legislation" – in this context meaning EU legislation – in order to fulfil the objective of implementing Article 9(3). This is what the EU did by granting the NGOs standing under the ELD Directive in relation to requests to the competent authorities to take action under this Directive. Moreover, around a third of Member States have also granted standing to NGOs in their national legislation (see Annex 2).

The CJEU has already interpreted in several judgements the provisions of the Aarhus Convention and the provisions on access to justice in EU secondary legislation, and considerably extended their scope and the rights of standing. However, the judgments usually only address a very specific problem in a particular case. The legal information provided in these findings has to be brought together and made use of in a structured way in order to provide a clear and coherent picture of access to justice requirements in environmental matters.

2.4. How will the situation evolve?

Baseline scenario

In the absence of an initiative by the EU, the situations highlighted in section 2.2 will not improve. Legal uncertainty will remain and procedural litigation will not decrease with consequent delays in decision-making, leading to further **unpredictability for investments and associated opportunity costs**. In particular, rules on standing will continue to differ across sectors and Member States, and so will the conditions for judicial review and its costs. The pattern of recent years shows both an increase in litigation on access to justice at national level and national courts increasingly staying procedures and putting interpretative questions to the CJEU on access to justice. (see Annex 10). Although it may be expected that Member States will react to individual case-law, there is no reason to expect that the pattern of uncertainty will end by itself.

Moreover, different situations exist in Member States as regards the existence (or even non-existence) of potentially cheaper solutions such as alternative dispute resolution methods. These situations will not be made coherent without an initiative at EU level. The baseline

scenario would therefore continue with different application of environmental mediation across the EU, contrary to what is being done in other fields of EU law (such as consumer law).

Non-compliance which is insufficiently addressed will continue to have environmental, economic and social impacts. Although it is not possible to quantify the direct correlation between access to justice rules and compliance level, given that access to justice is only one of the tools for better implementation, in light of the significant scale of environmental problems it is likely that any improvement in the implementation of environmental legislation will bring considerable benefits to society. For example, in the air quality area, compliance with limit values is far from being satisfactory and access to justice has proven to play a crucial role for improving the situation (e.g. the Janecek case in Germany or the Client Earth case in the UK mentioned in section 2.2 above). Air pollution is the first environmental cause of death in the EU, responsible for ten times more deaths than road accidents. Health related costs range between 330 and 940 billion € per year. Demands for confidence in the effectiveness of the application of EU environment legislation are unlikely to be met, leading to further distrust by citizens in the public administration.

2.5. Who is affected and how?

Business will increasingly suffer from a high number of complaints/litigations and, as a consequence, a low predictability of the outcome of permit procedures. Prolonged litigation procedures and a suboptimal efficiency of the public administration (as a consequence of limited review possibilities) delay the taking of final decisions and especially disturbs SMEs, for which timing of decisions is crucial and can have heavy economic consequences, such as projects pending for years. Moreover, current obligations which are scattered in different instruments add substantial burdens on enterprises, in particular SMEs and micro-enterprises, even just for being up-to-date with applicable laws across the sectors and Member States. Where standing is limited, SMEs may not be able to defend their interests before the court. The effect on the eco-industries should be mentioned. The EU28 eco-industry is estimated to have an annual turnover in excess of 300 billion EUR so it is clear that if uncertainty about implementation of the environmental legislation affects the industry by just a few percentages, this amounts to significant costs (Annex 3).

The environment - and future generations – improper implementation of environmental legislation (though not quantifiable) due to ineffective access to justice will contribute to further insufficient internalization of social and environmental costs with a negative impact on the society.

Citizens and their associations will continue to complain that they do not enjoy the benefits of EU environment legislation because there are ineffective review mechanisms at Member States level to address problems such as lack of action by authorities resulting in, for example, pollution of water bodies or illegal waste disposal. An inconsistent approach to access to justice will increase uncertainties, further undermining confidence of citizens in all levels of public administration and effective enforcement.

The public administration will face growing burdens and costs due to litigations. It will also not gain in efficiency. It is to be underlined that the main effect of establishing a more open access to the courts will be preventive, since the mere possibility of a lawsuit will induce public authorities to examine more carefully the compatibility of their decisions (including decision not to act) and activities with environmental law, to the benefit of all society.

2.6. Subsidiarity and the EU's right to act and justification

The principle of subsidiarity requires in this context that the Union may only harmonise access to justice in environmental matters where the high level of environmental protection stipulated in Article 191.2 TFEU cannot be sufficiently achieved by the Member States and can therefore be better achieved on Union level.

The current legislation in the Member States on access to justice in environmental matters differs considerably and all Member States more or less do not entirely transpose the requirements of the EU acquis on access to justice in environmental matters, in particular the obligations stemming from the Aarhus Convention (see table in section 2.2). One reason for that is certainly that only parts of EU environmental law contain access to justice requirements as established by the Aarhus Convention. For areas going beyond the harmonised EU law Member States have chosen different approaches. While in some Member States the general applicable law also covers some of the access to justice aspects related to environmental matters, in other Member States the possibilities for the public to access the courts in environmental matters remains either impossible (no standing rights are granted) or other obstacles such as high costs, long procedures and a limited scope of review prevent the public from taking court actions.

But even in the harmonised sectors of EU environmental law which have established access to justice requirements, the interpretation of the provisions differs in the Member States. This in itself does not pose a problem. However, when, as shown by a number of studies Member States do not ensure compliance with the requirements of effective access to justice in environmental matters and fail to give access to courts in accordance with the Aarhus Convention as interpreted by the Court of Justice of the EU, the problem arises.

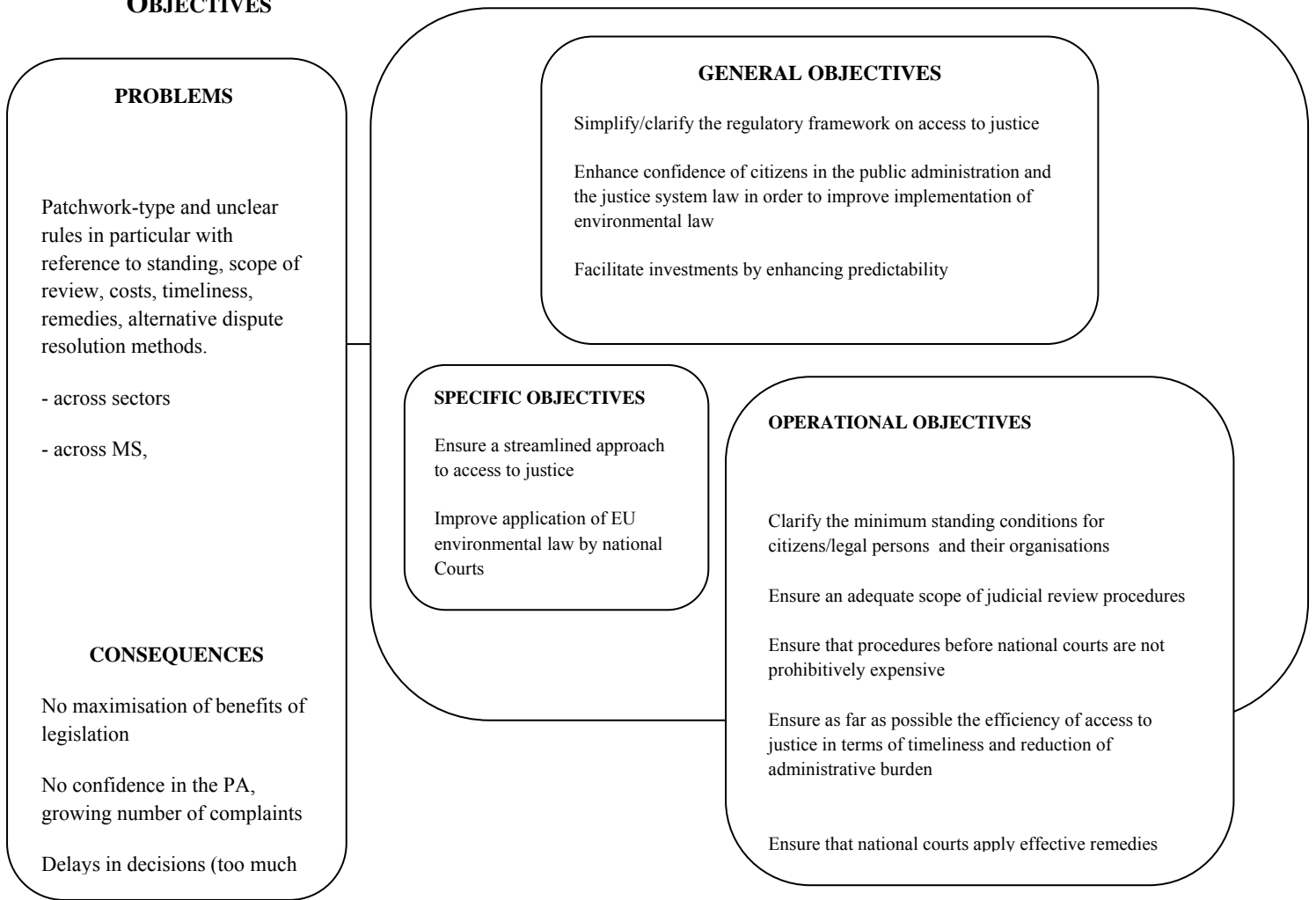
The CJEU has also already provided some important rulings, mainly in the context of preliminary rulings, which in some cases for transparency and legal certainty reasons need to be made explicitly applicable and known by way of an EU initiative. In some other cases the rulings have revealed the need to further clarify certain aspects in order to ensure an effective regime of access to justice in environmental matters in the Member States (e.g. scope of review).

Since the entry into force of the Aarhus Convention in 2005 the Member States which had gaps in their legal system to ensure an appropriate and complete access to justice regime in environmental matters had time to take the necessary actions.

Due to this different level of compliance with provisions of international law which became part of the EU law (Art. 216.2 TFEU), the possibilities of the public to assist in enforcing European environmental policy are not the same throughout the Union. This is not just a policy but a legal problem. Without an EU initiative the existing non-compliant situation in some Member States would remain and the public would continue being deprived of rights granted by EU law. Furthermore, the objective of ensuring a minimum standard of environmental protection throughout the Union continues to be jeopardised.

Therefore, action taken at EU level aiming at clarifying the access to justice rules at Union level is necessary.

OBJECTIVES



3.1. Hierarchy of objectives

The **general objective** is to clarify the regulatory framework on access to justice leading to an improvement in the quality of the environment, efficiency of the judiciary, enhancement of confidence of citizens and business in the public administration and a more certain setting for the predictability of permitting procedures related to investments.

This is reflected in the text of the 7th EAP, which requires that by 2020 the principle of effective legal protection for citizens and their organisations is facilitated. The 7th EAP also calls for "ensuring that national provisions on access to justice reflect the case-law of the CJEU, and promote non-judicial conflict resolution as a means of finding amicable solutions for conflicts in the environmental field."

Within this overarching goal, the **specific objectives** are:

- To ensure a streamlined approach on environmental access to justice across all subject-areas in order to decrease litigation on access to justice and prevent delays on decisions affecting infrastructures or activities.
- To facilitate the direct application of EU law by national courts and therefore also decrease the number of complaints and infringements to be dealt with by the Commission.

The following **operational objectives** have been identified in order to address the problems and causes identified in the previous chapter. They reflect the problems described in chapter 2.

Operational objectives
OO1: Clarify the minimum standing conditions for citizens/legal persons and their organisations
OO2: Ensure an adequate scope of judicial review procedures in national courts
OO3: Ensure that procedures before national courts are not prohibitively expensive
OO4: Ensure as far as possible the efficiency of access to justice in terms of timeliness and reduction of administrative burden
OO5: Ensure that national courts apply effective remedies, including interim measures
OO6: Promote the availability of alternative dispute resolution methods as a complementary solution

Operational objective 1 aims at clarifying regulatory framework for standing as interpreted by the CJEU. There should be only one set of criteria applied in order to decide on standing under different policy areas. Currently Article 9 (2) of the Aarhus Convention already provides for standing for NGOs. The CJEU interpreted Article 9(3) as requiring standing for NGOs in certain cases only. The objective would be to ensure that the public, including NGOs, is granted access to justice in all relevant environmental fields.

Operational objectives 2 to 6 aim at improving the effectiveness of judicial procedures. It should be ensured that the procedural guarantees provided for in EU law as interpreted by the CJEU are complied with. For example, the cost of bringing legal challenges is a potential obstacle to access to justice. Article 9(4) of the Aarhus Convention thus requires procedures not to be prohibitively expensive. This requirement is also found in EU secondary legislation in the existing provisions on access to justice for EIA and IED. Another example relates to further clarifying the scope of judicial review procedures, i.e. the meaning of substantial or procedural legality of decisions relating to environmental law.

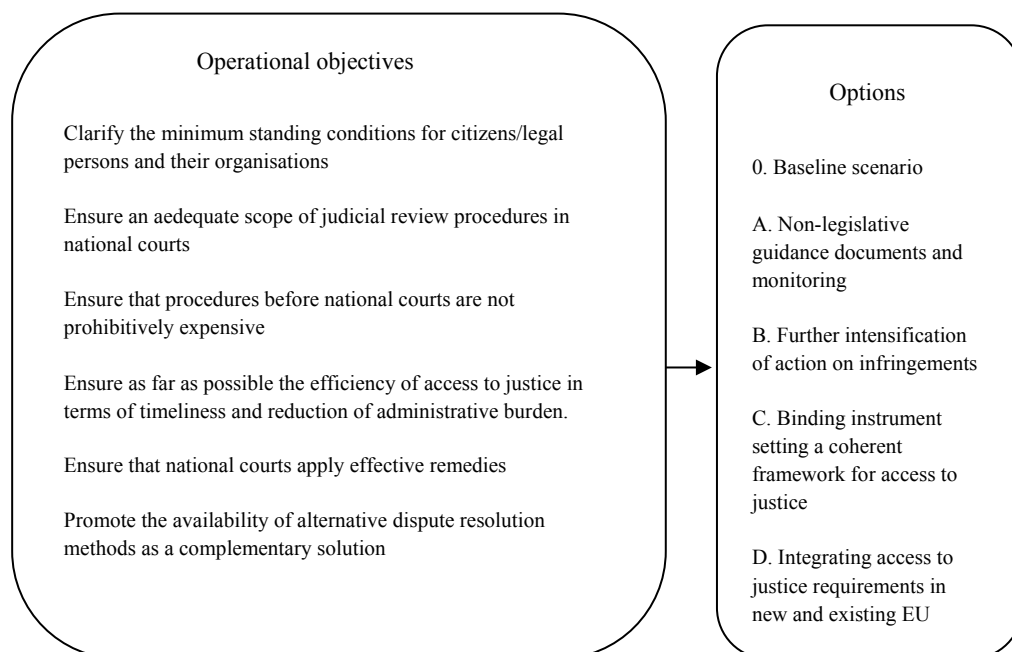
Section 4 below provides details on how the objectives would be achieved.

3.2. Coherence with other horizontal policies

Besides being consistent with the simplification, codification or recasting policy of the Commission (REFIT), the initiative on access to justice in environmental matters is fully consistent with existing instruments in the field of consumer protection, such as Directive 2009/22/EC on injunctions for the protection of consumers' interests, Directive 2013/11/EU on alternative dispute resolution for consumer disputes, Regulation 524/2013 on online dispute resolution for consumer disputes, as well as with other instruments in the civil justice field, notably the Commission recommendation on common principles for collective redress

[C(2013)3539] (see Annex 10) and Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters.

OPTIONS



Presentation of the options considered

The question now arises about the most effective and efficient way to achieve the identified objectives based on the above-mentioned illustrated content of the initiative. Can this better be done by non-legislative, voluntary instruments or is a binding initiative necessary? And in the latter case, should this take the form of legislation or would it be possible to rely on enforcement possibilities of the already-existing *acquis*? Reflecting this question, the on-line public consultation mentioned three options: a non legislative one (A. one comprehensive instrument), an option based on infringements (B) and a legislative option (C). Following specific comments by stakeholders (e.g. CEFIC) and Member States, the Commission assessed one further legislative option (D, adoption and amendment of several pieces of sectoral environmental legislation).

Option 0 – Baseline scenario

If no action is taken, the problems identified will evolve as described in chapter 2.4, reference is therefore made to that section of this Report.

Option A –Guidance documents and monitoring

In light of the extensive case law of the CJEU since 2003 the Commission would under this option prepare an interpretative guidance document based on relevant judgments of the CJEU and make the resulting document available to all interested parties.

A guidance document would not mean new binding rules for the Member States, but would provide clarity and improve the effectiveness of public administration. The light adoption procedure would help the Commission deliver an effective initiative in the short term. In case

of non-compliance with existing requirements under the EU *acquis*, the Commission would continue using infringement procedures to ensure their enforcement.

Guidance documents could also be complemented by:

- Facilitating the improvement of access to justice by promotion of networks to improve cooperation among environmental practitioners, such as inspectors, judges, prosecutors, academics etc. in order to share experience and best practices. This would take the form of support for meetings, projects, training modules and initiatives of such networks.
- Periodic updating in light of relevant information (e.g. new case-law).
- Developing targeted tools for monitoring the implementation of existing access to justice legislative instruments.
- Continuous collection of evidence and performance evaluation by supporting reviews and development of statistical data.

Option B – Role of infringements

Article 258 of the TFEU²⁶ may be used by the Commission in order to address gaps in Member States provisions for ensuring access in line with the latest legislation and Court cases²⁷. The Commission, as Guardian of the Treaty, is bound anyway to ensure the correct implementation of the *acquis*. However, the Commission has discretionary power as to which initiatives to take, when to take them and on which specific cases. The Commission may act on its own initiative or on the basis of complaints from the public or petitions from the EP.

Under this option, the Commission would carry out its activity on infringements of EU provisions related to access to justice with a view to ensure that the rules and principles stemming from the case-law are applied systematically in all the Member States. Each time the CJEU would provide for a given interpretation of the *acquis* on access to justice, in particular in the context of preliminary references, the Commission would perform a conformity check of Member States legislation in order to identify all situations where the CJEU interpretation would require an amendment of national legislation or practice.

Option C –Setting a coherent framework for access to justice

This option would aim at creating a clear and consistent legal framework for environmental access to justice in Member States (streamlined approach, taking account of both existing legislation and case-law but considerably simplifying the current patchwork-type system). It would provide the core requirements on entitlement to access to environmental justice and on the related conditions in line with the established practice for the recognised sectors (such as environmental impact assessment).

This would imply adopting a European Parliament and Council directive or a regulation laying down minimum binding requirements on access to justice on environmental matters.

²⁶ I.e. The provision that allows the Commission to take legal action against Member States .

²⁷ Notably *Janecek and the Slovak Brown Bears case* - see Annex 10

The legislative act would set out requirements for all sectors of environmental law, based on the principles mentioned in the beginning of this chapter. It would leave Member States a sufficient level of discretion to address procedural safeguards (eg. standing requirements, loser pays principle, etc.) as appropriate, so that abusive claims can be filtered by courts. The national differences would of course be consistent with the set of minimum requirements so that overall consistency of the regulatory framework across Member States would be ensured. For example, Member States would be free to decide whether to achieve the objective of non-prohibitive costs of judicial procedures by means of capping on legal costs or of the granting of legal aid. Both instruments would have the same result, that potential plaintiffs would not be discouraged from bringing a legal challenge by reason of the potential prohibitive costs of it.

The legislative act would also repeal all existing sectoral provisions on access to justice (see table at page 9, third column, lines 2 to 4) in order to simplify the regulatory settings and create a streamlined instrument.

As regards the type of instruments, in theory both a directive and a regulation based on Article 192 TFEU would be possible. However, access to justice is a field in which there is a need for flexibility and subsidiarity concerns, in order to take account of the national principles, traditions and practices. In this context, a directive would appear to be better suited to strike a balance between minimum rules at EU level and the continued application of national rules. For this reason, the sub-option "EU regulation" has been discarded.

Option D – Integrating access to justice requirements in new and existing EU secondary environmental legislation

This option would imply that existing environmental secondary legislation (such as Strategic Environmental Assessment, etc.) would be amended in order to include specific provisions on access to justice and also that future environmental regulations or directives would contain the same provisions. This "sectoral" approach has been used in the past in relation to environmental liability and industrial accidents. This option would aim at broadening the scope of the existing acquis over time, in order to cover air, waste, nature, chemicals and so on. In terms of content, the same elements described in relation to option C would form the subject of each revision of existing directives or regulations on the environment.

ANALYSIS OF IMPACTS

5.1. Overall approach to assessing impacts

When starting an economic analysis of better access to justice, it is useful, as a background, to explain why widening access to justice may be effective from an economic perspective. The starting point is that private law remedies to be used by individual plaintiffs, like in classic tort or nuisance cases, may not work in environmental cases. In summary, given that environmental damages concern society as a whole, individuals are not motivated to take on the expenses of litigation. This is why the concept of environmental public interest litigation, based on actions brought by NGOs, comes into play.

Deficiencies in access to justice regimes also contribute to reduced accountability for breaches of environmental obligations. In the present context, access to justice relates to the right to challenge the decisions, acts or omissions of public authorities. In the first instance, it therefore concerns the accountability of public authorities. However, in as much as the decisions, acts or omissions of public authorities often relate to businesses, reduced accountability also involves the latter.

Although public authorities are obliged to apply EU environmental law in their decision-making correctly, experience shows that in practice substantial and procedural mistakes do occur from time to time. Such mistakes can and do take the form of excusing businesses from respecting safeguards required under EU environmental legislation, creating internal market and competition distortions. Those businesses who are less (indirectly) exposed to court actions taken by the public against public authorities who, because of those mistakes, fail to correctly uphold environmental requirements in relation to those businesses potentially benefit from lower compliance costs. The accountability implied by an effective access to justice regime means that such mistakes become less likely – with internal market and competition distortions being thereby reduced. In this context, "effective" means a regime that allows the public, i.e. individuals and NGOs, to play a vital role in upholding common environmental standards through legal challenges to public authorities who fail to do so.

There is another way in which disparities in environmental access to justice can lead to internal market and competition distortions. Deficiencies in access to justice guarantees may adversely affect businesses in the Member States which have not properly implemented the required guarantees. This is because such deficiencies may themselves become the subject of litigation, with questions of the extent of required access to justice guarantees becoming entangled with questions about the legality of decisions relating to businesses. For instance, in case C-243/15 – *LZ II* the CJEU ruled on the interpretation of EU law in conjunction with the Aarhus Convention in a case where, six years after the grant of a permit, the project remains in dispute because the question of whether an environmental NGO was entitled to exercise public participation rights in the administrative procedure is still to be decided. Such lengthy and inefficient procedures in environmental matters are a burden for the public and businesses alike and do not help to foster acceptance of EU environmental law in the Member States.

As a general rule, investment is positively affected by a clear and stable regulatory setting, which allows to predict in advance both the time and costs associated with permitting procedures and the outcome of these procedures. Clear and effective rules on the functioning of legal review of administrative decisions are part of the regulatory setting.

General considerations on environmental, social and economic benefits

The greater availability of environmental review mechanisms - not only related to the initiatives of individuals but also of NGOs - and the greater clarity of rules will improve the level of implementation of environmental legislation and better internalize external costs. From a social perspective, it will allow for a more active participation of citizens in decision making and help to enhance public confidence in environmental governance at national and European level. It will also feed back to the quality and effectiveness of environmental decisions, since the administration will be able to benefit from the interpretation of the legislation by the judiciary, reducing the overall uncertainty and contribute to more predictable conditions for investments in infrastructures and projects, with particular relevance for SMEs. Moreover, it would enhance the effectiveness of implementation at Member States level reducing the need to make use of the Commission's infringement powers and to the CJEU.

To the extent that more effective access to justice allows for a better implementation of environmental legislation, less air, water and soil pollution, reduced impact from waste, chemicals and industrial installations will lead to general improvements of public health. The enhancement of the implementation of the environmental *acquis* will also contribute to the creation of green jobs and foster the green economy. Uncertainty about the environmental policy affects innovation in environmental technologies, which, otherwise, can reduce the costs of compliance and create new markets and job opportunities. The EU eco-industry is estimated to have an annual turnover in excess of 300 billion EUR. A study on the costs of not implementing the waste legislation has estimated that full implementation of all waste legislation would lead to an additional waste (and recycling) industry turnover of 49 billion and an additional job creation of about 600,000 jobs (Annex 3). Obviously, it cannot be expected that improved access to justice alone would lead to full implementation of environmental legislation, but it would certainly contribute towards improving the situation, since access to justice is a tool for better implementation of the legislation.

Environmental legislation suffers from a clear implementation gap²⁸, which depends on a number of factors. In terms of how much the implementation of environmental legislation might benefit from better access to justice rules, quantitative estimations are inherently difficult when they relate to future behaviour. Nevertheless, by way of example, effective access to justice opens the prospect of the number of non-compliant derogations granted by the administrations being reduced to zero. This would be the result not only of effective early intervention in the national courts but also of administrations not wishing to "repeat offend" in the eyes of those courts.

Also the studies carried out and the empirical evidence based on the consequences of court judgments show that an improved and more consistent access to justice contributes to better implementation of environmental legislation. An illustrative example comes from the air sector (e.g. in Germany, UK, Italy), where, as a consequence of judicial actions brought by citizens and NGOs, measures have been adopted by the competent authorities in order to improve compliance with EU air quality directives²⁹. These examples are also illustrative of the scale of the problem: there is a rather systemic situation of non-compliance with air quality standards in several European urban areas. The systematic use of standing rights as in the mentioned examples would lead to significant environmental and public health gains.

²⁸ COM (2012) 95 "improving the delivery of benefits from EU environmental measures: building confidence through better knowledge and responsiveness and COM (2008) 773 "Implementing European Community Environmental Law".

²⁹ In addition to the German case *Janecek* (C-237/07) and the UK case *ClientEarth* (C-404/13) mentioned in section 2.2 above (Annex 10), worth mentioning is also the Italian Council of State ruling 6989/2012 of 19 December 2012 (*Regione Lombardia v Genitori Antismog*). The Association "Antismog Parents" brought an action before the Lombardy Administrative Court to declare that the Lombardy Region had failed to adopt an air quality plan in conformity with national law. On 2 July 2012, the Court ordered the Lombardy Region to draft the plan within 60 days from the judgment.

General considerations on overall costs

As a preliminary remark, it is important to underline that any EU legislative initiative on access to justice would not require the building up of any new legal structure in order to comply with it, since it concerns legal procedures and judicial structures which already exist in all Member States .

Furthermore, when assessing the estimated costs of the initiative, a distinction should be made between:

a) Costs of **negotiating and transposing the initiative**. These costs fall entirely on the public administration, including the EU institutions and relate to the standard decision-making procedures.

b) Costs of **implementing the initiative**. Within this category a further distinction is necessary, between (b1) **costs on the judiciary** in order to make the initiative operational and (b2) **costs related to the consequences of final court decisions** which oblige to make further **environmental investments** (e.g. less polluting plants, decontamination of polluted sites, adoption of air quality, water quality of waste management plans). Of course only some court decisions will have an actual cost: for example, court decisions upholding or implementing hunting requirements will not entail any additional cost nor require any investment. In any event, even if a court decision entails environmental expenditure in order to improve compliance with existing rules, these costs cannot be attributed to the initiative on access to justice. Correcting non-compliance or incorrect application does not lead to additional cost to those costs that has already been factored-in by time of adoption of the specific piece of legislation. If an NGO brings a case to a court because it believes that environmental law has been breached (and the studies/statistics show that environmental cases brought by NGOs have a very high chance of succeeding), the possible costs (which could be very high) of remedying the breach cannot reasonably be associated to the initiative on access to justice.

As a consequence, only the costs under category a) and b1) are relevant in relation to the initiative on access to justice. They only concern the public administrations of the Member States

As regards category a), the costs of producing the initiative are related to the work of the competent administrations. Annex 5 provides a simulation of these costs, which overall are not of a significant order. The assumptions used in calculating these figures are based on an average hourly wage for officials dealing with legislative and policy activity in public administrations in the 28 Member States³⁰ These figures are also based on the assumption that a shorter time-span for reaching an optimal level of implementation requires a smaller allocation of human resources and therefore requires less costs for the Member States and the Commission.

Member States have different approaches regarding the financial and human resources in justice systems, including among the Member States with similar legal culture or lengths of proceedings³¹ and there are no figures available on the costs of individual judicial procedures. Therefore it is very difficult to draw any conclusion as to possible costs relating to clarifying

³⁰ Calculator as provided by SG, Impact Assessment Board website : <https://myintracomm.ec.europa.eu/corp/sg/en/impact/Pages/general.aspx>

³¹ The 2017 EU Justice Scoreboard

standing or rules on the scope of the review, as well as the conditions of court reviews (remedies, injunctive relief). It is nevertheless safe to conclude that by clarifying rules on standing, the courts will face less cases dealing with procedural issues and the resources saved can be used to increase clearing rates³², which in 13 (out of 19 reported) cases remains below 100%.

Costs on the judiciary will also depend on how many of the components of a fully effective review mechanism are taken forward and in what manner. For example, promoting non-judicial conflict resolution, such as mediation, as a complementary solution to court litigation leads to decisions being taken sooner and at a reduced cost.

Also as regards the costs of the consequences of court reviews (b2), data is very difficult to collect and estimations very difficult to carry out. Overall costs will depend on the level of compliance of each Member States with EC environmental legislation: the greater the compliance gap, the higher the costs. As mentioned, **these costs cannot be attributed to the initiative on access to justice. It is important to underline that the envisaged initiative would not set any new or stricter environmental standard which will imply investments on the part of business. The initiative is about clearer procedural rules to follow in case of doubts on the legality of administrative decisions or incorrect application of EU environmental law.** In this context, a further remark is important: contrary to what one might think, clearer rules on access to justice would not necessarily result in more cases being brought to courts. If rules on standing, scope of the review, costs of the procedures and so on were clear, there would be less need to litigate on them. For each of the cases highlighted in section 2 above there have been two to four degrees of procedural litigation (first level of Court review, one or two instances of courts of appeal and possible referral to the CJEU). In all cases the environmental issue at stake could have been solved with a single judgment, if individuals (see Janecek case) or NGOs (see Slovak Bear Case) were granted standing. Secondly, a study carried out for the Commission indicates, based on empirical evidence that widening standing rules does not entail a risk of overload of the courts. The study³³ concludes: *“Compared to the overall number of actions brought before the courts in the Member States studied, the relative figure itself is low, and sometimes even at a level that is insignificant. This study clearly refutes the argument that environmental public interest actions lead to an overload in the courts”*.

Can the identified costs be absorbed by all concerned stakeholders in a similar way?

Given that the only possible costs - if any - which can be attributed to access to justice will affect the public administration, there is no need for private stakeholders to face higher costs of production or investments. On the contrary, the simplification brought about by the initiative and the legal certainty that this will entail, will reduce the cost of investments.

Moreover, the administrative costs related to improving access to justice would be fully recoverable by improving the implementation of secondary legislation, such as the Water Framework Directive and the Waste Framework Directive, which would have a direct impact on the health of the general public and the potential costs on the taxpayer related to reclamation measures (see Annex 2).

Will any Member States be disproportionately affected?

Depending on their specific situation and option chosen, Member States may have to undertake certain reforms of their rules and/or practices on access to justice in environmental matters. The Commission has made an extensive survey of the situation at national level by means of ad hoc studies, consultation of national judges as well as the information it holds in

³² The clearance rate is the ratio of the number of resolved cases over the number of incoming cases. It measures whether a court is keeping up with its incoming caseload. When the clearance rate is low and the length of proceedings is high, backlog develops in the system.

³³ Access to justice in environmental matters, Final report by De Sadeleer, Roller and Dross, 2002.

the framework of complaints and infringement procedures. The table in section 2.2 above gives an insight into problems which have been identified in the Member States. As a general conclusion, it can be stated that no Member States will be "disproportionally affected", meaning that Member States need not significantly re-organise their justice system, although some will have to undertake changes in their legislation and practice in order to adapt them to the requirements for broad standing. As the table in section 2.2. shows, adaptation are required mostly in the area of NGO standing as well as cost/timeliness of judicial procedures³⁴.

More specifically, one problematic area, addressed in the first and the second column in that table, is that there is no sufficiently clear legal framework as regards entitlement of citizens and NGOs to bring cases to national courts. **NGOs are not given standing (1st column)** or are facing restrictive standing conditions in 18 Member States (AT, BE, BG, HR, CY, CZ, DE, DK, FI, HU, IT, LUX, MT, PL, SK, SI, SE, UK). The other aspect of standing is the **possibility for individuals to go to court (2nd column)**, based on an interest or an impairment of a right (i.e. health concern), which is not fully granted or is restricted in 14 Member States (BE, BG, HR, CY, CZ, DK, FI, HU, LUX, MT, NL, PL, SK, UK). In other words, this means that in these countries (under column 1 and 2) implementation of Article 9 (3) of the Aarhus Convention is not in line with the case law. The Member States where the prevailing model of standing is based on the concept of what is technically defined as the "impairment of subjective rights"³⁵, such as AT, CZ, DE and DE will need to adapt their practices. In Germany this change has already occurred as a consequence of the *Trianel* case without any increase in costs or significant changes in the functioning of the judiciary being reported. Whether the legislation and practice offers sufficient access to justice is a question which also arose in Lithuania and Slovakia.

Excessive **costs (3rd column)** produce major problems for litigants³⁶ in 17 Member States according to the studies available³⁷. **Delayed court proceedings (4th column)** are problematic in particular in 14³⁸ Member States. As mentioned before, a clearer framework will certainly influence those delays and backlogs, as the courts will face less burden linked to procedural issues, but some Member States will have to work on the efficiency of their system. In particular, in IT and MT the duration of court proceedings has a clear deterrent effect and might negatively affect investments. In cases, where **injunctive relief (5th column)** is not fully implemented, for instance in HR, CY, CZ, DK, EE, IE, MT, SK, ES, UK, or where the interpretation of the **scope of review (6th column)** is not in line with the case law (DK, IE, PT, SK, UK) some more effort will be needed to comply with new rules.

To summarize, based on problematic areas seen under all columns, Member States **that would have to make more efforts than others** in better ensuring access to justice in environmental matters are BG, HR, CY, DK, IE, MT, SK, UK (**8 Member States**) as they have problems in multiple areas of access to justice (see more details in Annex 2), although there are some problems (in implementing Article 9 (3), (4) of the Aarhus Convention) in all Member States.

What is the estimated impact of the initiative on investments?

As mentioned, this initiative is not about setting new or stricter environmental standards than the existing ones, but on clarifying procedural rules for the sake of legal clarity. Investment decisions depend on a complex number of factors and on the interaction between them. As a general rule, however, investments are positively affected by a clear and stable regulatory setting, which allows to predict in advance both the time and costs associated with permitting procedures and the outcome of these. Clear and efficient rules on the functioning of legal

³⁴ The studies reflect the state of play in the Member States in the year 2013.

³⁵ Only those individuals who can claim that a right directly attributed to them by law has been breached, can access courts

³⁶ Costs are not only problematic because in some cases litigants might even have to sell their houses to cover legal costs, but high costs can also produce a chilling effect for litigation, discouraging litigants from going to court.

³⁷ BG, HR, CY, DK, EE, FR, DE, EL, IE, IT, LUX, MT, PT, RO, SI, ES, UK

³⁸ BG, HR, CY, EL, IE, IT, LV, MT, PT, RO, SK, ES, SE, UK

review of administrative decisions are part of the regulatory setting. The general objectives of this initiative are to simplify and clarify the regulatory framework so as to enhance the predictability of the outcome of decisions of the public administration. If there is a doubt about the legality of a decision or its conformity with environmental law, it is important that this is clarified in substance in a timely manner rather than by several degrees of justice on procedural issues. The improvement of standing rules and the greater availability of environmental review mechanism is already the consequence of case-law of the CJEU and of sectoral legislation. The choice is between letting this process progress in a patchwork, inconsistent manner, to the detriment of overall clarity, or to steer it to create a level playing field of clear rules. **The initiative therefore does not add burden on business nor may it lead to the withdrawal of planned investments.** It is important to underline that Member States in which relatively fewer barriers to access to justice have been identified (e.g. NL, FR) or where barriers have recently been removed as a consequence to case-law (e.g. DE, SE) are among those generally considered to be the "safest" for investments.

Impact on SMEs and micro-enterprises

SMEs are particularly vulnerable to unclear regulatory setting. They would therefore benefit from the existence of clearer rules. In addition, SMEs will also directly benefit from the widening of standing rules and applying an adequate scope of review, as well as the more effective legal procedures. They will be able to access courts to challenge the legality of environmental decisions which concern them, even indirectly, such as plans and programmes. SMEs as defendants, if the decisions of the administration concerning them are well founded, will not have to fear from greater complaint possibilities by NGOs. It should not be forgotten that judicial review is about the legality of the decisions and it is not a supplementary level of bureaucracy which can arbitrarily change the administrative decisions. It is therefore fully in the interest of business.

5.2. Analysis of impacts of the considered options

The following table shows the impact of the different options on the public, businesses and public authorities/courts. The assessment is on the assumption that Member States have not transposed the requirements for the procedural guarantees pursuant to the Aarhus Convention and general principles of EU law, as interpreted by the CJEU, notably the principle of an effective judicial protection.

	Impact on public	Impact on business	Impact on public authorities/courts
A. POLICY OPTIONS			
0. Baseline scenario	No additional costs/benefits	No additional costs/benefits	No additional costs/benefits
A. Guidance document and monitoring	Improvement in those areas where awareness raising may make authorities/courts change their practices, e.g. standing, costs, scope of review, remedies, timeliness.	Improvement if courts make use of the guidance document as a reference in their decisions. If not, negative impacts of uncertainty will prevail.	Improvement if courts make use of the guidance document as a reference in their decisions (e.g. granting standing, cost decisions)
B. Further intensification of	Improvement could be achieved in case that a	Improvement could be achieved in those cases	Improvement could be achieved in those cases

actions of infringements	Member States does not transpose a procedural guarantee at all (e.g. no standing in certain sectors of environmental law, no interim relief in environmental matters)	where a Member States is forced to change its legislation. However, this is only the case in blatant breaches of the existing obligations (e.g. granting no standing at all). Otherwise legal uncertainty remains.	where a Member State is forced to change its legislation. However, this is only the case in blatant breaches of the existing obligations (e.g. granting no standing at all).
C. Setting a coherent framework for access to justice	Legal certainty as regards the rights to exercise access to justice	High level of legal certainty	Clear legal framework for decisions and judgements
D. Integrating access to justice requirements in new and existing EU secondary environmental legislation	Some as in option C for each sector of EU environmental law addressed	Some as in option C for each sector of EU environmental law addressed	Some as in option C for each sector of EU environmental law addressed

The choice to be made is on what vehicle to use to make it work across the EU or whether to do anything at all. There are sectors where the rules have been interpreted by the CJEU (air quality for example) and the evolution of jurisprudence shows that the interpretation will sprawl onto other sectors and other Member States. But it will be a lengthy and costly process. This section analyses the four considered options in terms of effectiveness, efficiency and consistency with other overarching EU policy objectives. The main objective is to set out the key advantages and disadvantages of each option in terms of their ability to achieve the general, specific and operational objectives keeping in mind the different problems identified, and so enable a structured comparison. The basis of this analysis is the baseline assessment set out earlier in this report.

For the assessment of 'business as usual', reference is made to section 2.4 above.

Option A – Non-legislative measures

With respect to the baseline option, the impact would depend on the extent to which Member States amend their national law and adapt their practice as a consequence of the publication of the guidelines. The non-binding character of the guidelines makes it less likely that they will be systematically relied upon, in particular in the context of litigation. Cases of procedural litigation might continue to delay decisions. However, even without immediate legal effect, an interpretative guidance document provides a clear view of the Commission on the existing requirements in the area of access to justice based on the interpretation of the case law of the CJEU. The online public consultation concluded that only 29 % of all stakeholders consider that guidance in ensuring legal certainty and level playing field is the most effective instrument, while 37,4% consider this as the least effective means (see more details in Annex 1).

In the field of justice, there is a need for clear rules which can be relied upon by plaintiffs, defendants as well as by the judiciary. With reference to the guidance document Member States have further incentives and arguments to propose necessary legislative changes to their

national laws. A guidance document would by its nature not be able to harmonise definitions, set minimum standing requirements to be relied upon by NGOs, legal persons and individuals, requirements on costs and efficiency of judicial procedures. It also could not introduce rules on an alternative dispute resolution systems. However, the light adoption procedure would help the Commission deliver an effective initiative in the short term. In particular in combination with other instruments such as the Environmental Implementation Review process and eventually its enforcement powers, the Commission would ensure the wide application of the existing obligations as interpreted by the case law of the CJEU, which covers most of the aspects relevant for access to justice in environmental matters.

Socio-economic impacts

Possible social ('external') costs related to environmental damage, would be further internalized, to the extent the Member States improve access to justice in line with the interpretative guidance. At European level, a level playing field of clear rules would be gradually achieved. Opportunity costs would continue to emerge due to protracted procedural litigation.

A judicial authority is likely to follow an interpretative guidance document in case that it is based on the case law of the CJEU on a voluntary basis, inspired by relevant case-law and good practices. This will have positive effects on potential plaintiffs (individuals, legal persons or NGOs) and will enhance legal certainty as the entire EU acquis as interpreted by the CJEU will be presented in one document. The impact of the initiative will increase with the Commission's effort to make Member States introducing the necessary changes to their national legislation and practices.

Environmental impacts

To the extent that Member States would proactively promote the use of the guidelines, improvements can be expected as compared to the baseline.

Conclusions

In conclusion, the effectiveness and efficiency of the option can be summarised as follows:

- **Effectiveness:** The general and specific objectives, would be achieved to a lesser extent than with a binding instrument. The promotion of an alternative dispute mechanism would not be addressed. There would be improvement in the application of environmental law by courts due to a greater awareness of best practices. As regards the operational objectives, this option could potentially have some effect in tackling the issues that are caused by a lack of knowledge of already existing obligations as interpreted by the CJEU. A national judge could, via the guidelines, come more rapidly in contact with a principle set out by the CJEU in relation to a case concerning another Member State but which could be relevant in all Member States. Although on the operational objectives 1 to 6 some improvement can be expected, the extent to which they can be achieved is uncertain.
- **Efficiency:** The objectives of increasing awareness of the existing EU law obligations as interpreted by the CJEU and improving networks can be achieved at a very low cost, therefore in these terms the efficiency of the option is rather significant;
- **Consistency with other overarching EU policy objectives:** this option would be consistent with the recent trend of adopting non-legislative documents rather than adopting new legal obligations.

Option B – Commission infringement action – Addressing existing gaps in Member States

The primary purpose of the infringement procedure is to ensure that Member States give effect to EU law in the general interest. Infringement procedures tackling cases of bad application of EU legislation can also remedy to individual situations of non-compliance. When addressing instances of non conformity of the legislation (e.g. in case C-530/11 whereby the Commission challenged the UK failure to ensure that judicial procedures pursuant to public participation are not prohibitively expensive), they provide results beyond individual non-compliance cases (i.e. to sectors). However, their impact would be confined to the case/sector/ Member States. The number of procedural litigation cases and the associated opportunity costs would remain high until a great number of infringements will have been solved.

The online public consultation concluded that 39,8 % of all stakeholders consider that in ensuring legal certainty and level playing field infringement is the most effective instrument, while 22,3% consider this as the least effective means (see more details in Annex 1).

In any case, the Commission cannot replace Member States primary responsibility to correctly implement and apply EU legislation.

Socio-economic impacts

Under this option, legal certainty could improve, because of the information that becomes available through the infringement procedures. If so, potential plaintiffs can make better decisions concerning the chance to prevail in court and costs of litigation. The information arising from the outcome of infringement procedures can also be beneficial for defendants. However, an overall clear regulatory framework will not be realized by this option, since only issues subjected to infringements will be clarified. Principles stemming from a given court-case may prove difficult to be applied in relation to a different situation. Given the time necessary for reaching the end of the infringement procedure, there is a risk that some projects may be stopped until the CJEU has ruled on specific interpretations. This could cause significant impact on business, including SMEs.

Infringements could lead to additional costs in Member States ranging from costs for adaptation of the legislation to possible fines. As mentioned above, costs of complying with environmental rules are not considered as costs of the initiative on access to justice: they arise anyway from the Treaty. Preliminary rulings and infringement procedures leading to CJEU Judgments are very useful for interpreting the exact obligations flowing from EU law provisions, but it takes time. Member States might also start to ensure compliance only after the Court rulings, meaning that results would only be achieved after some years from the start of the infringement procedure.

Environmental impacts

This option would be better than the baseline for the environment, depending on the number of cases and their outcomes. However, there is still substantial uncertainty and the final environmental result may only materialize after a long period - if at all - depending on the end of the judicial procedures, including at CJEU level.

Conclusions

As regards the general objectives, some achievements can be achieved where the case-law would entail greater clarity on key issues. However, comparing the targeted nature of

infringements with the systemic scale of the problems identified, the improvements risk to remain marginal. Of the specific objectives, only in relation to the second (improving application of environmental law by national courts) some improvement can be imagined. Generally operational objectives 1 to 5 can be pursued via infringements, the level of improvement depending on the extent to which it will be possible to achieve the necessary adaptation of the national legislation and practice on the basis of infringement procedures as well as on the necessary time required by infringement procedures. Operational objective 6 cannot be pursued by way of infringements. Another weakness of this option is that it is somehow difficult to distinguish this option from the baseline, under which infringements would start in any case, if the Commission is to fulfil its duties under the TFEU. However, the Commission has already identified the need to increase the responsibilities of Member States, which are best placed to tackle non-compliance cases. National courts are "EU Courts" in the sense that they are bound by EU legislation and case-law. However, if national courts cannot be easily accessed in environmental cases by individuals, legal persons and NGOs, the chances to address non-compliance cases at national level decrease and the Commission would eventually be "forced" to intervene. The Commission could therefore, under option B, envisage a systematic "wave" of infringements in order to ensure that Member States comply with secondary legislation and case-law on access to justice.

The following conclusions can be drawn on effectiveness and efficiency:

- **Effectiveness:** it is likely that stronger action in the field would lead to some positive results, though limited to specific cases/sectors. Moreover not all objectives can be achieved (objectives 4, 5, 6) are not achievable through infringements only.
- **Efficiency:** Costs of this option would considerably be higher as opposed to the baseline. It would take time to see concrete results. Overall, weighing the necessary efforts against the expected results may limit the efficiency of this option.
- **Consistency with other overarching EU policy objectives:** the Commission has engaged in a process aimed at increasing the responsibility of Member States in implementing the *acquis*, a new wave of infringements in this field might appear contradictory to that objective, although of course the Commission retains responsibility to act as Guardian of the Treaty under Articles 258 and 260 TFEU.

Option C – Binding instrument setting a framework for access to justice incorporating case-law of the CJEU

The option of binding legislation is the best one in order to create legal certainty via a single regulatory framework. The principles set out in the relevant case-law and in sectoral legislation would be codified and made operational in relation to environmental law in general. There would be reduced or no interpretation doubts, leading to the reduction of cases of procedural litigation.

Option C will also allow to repeal the sectoral legislation on access to justice, which is consistent with the Commission approach presented in its REFIT Communication³⁹ towards making EU law lighter and "fit for purpose", which is aimed at simplification, codification or recasting. The sectoral provisions in question are those included in the Directives on Industrial Emissions, Environmental Impact Assessment and Seveso III⁴⁰.

The online public consultation also concluded that 67 % of all stakeholders consider that a binding legal instrument is the most effective way to ensure legal certainty and level playing field, while 22 % consider this as the least effective means (see more details in Annex 11).

Socio-economic impacts

Potential plaintiffs would be able to estimate the costs/benefit ratio of a legal procedure and optimise their behaviour. With clear law, legal uncertainty and judgmental errors are reduced. In the end, perpetrators will then be forced to internalize external costs to society. The clear regulatory setting created by the new directive and the more effective public administration will provide (more) legal certainty to potential defendants and may therefore lead to optimal decisions on their part (investments in safety and pollution abatement, materials used in production, etc.). If so, industry will be better able to predict the outcome of permitting procedures and to include the external effects of environmental harm into their calculations. In this sense, there is no risk that wider standing or better conditions for access to justice would lead to the withdrawal of investments by the industry. On the contrary, investments will benefit, in terms of certainty about the outcome of permit procedures, from a clearer regulatory setting. Opportunity costs related to procedural litigation would be minimized. Given that clearance rates in administrative law matters are lower than 100% in many Member States and few of them have a limited budget allocated to courts⁴¹, this option (and especially clarifying rules on standing and the scope of review) will free part of the funds and improve courts performance.

There will be costs in formulating and implementing the directive for the Commission and Member States respectively. There will also be a need for communication about this directive. It may be held that in the long run these costs will be lower than the total social costs of legal uncertainty.

Will the number of court cases at national level increase as a consequence of wider standing possibilities for individuals, legal persons and NGOs? This question was also raised in the public consultation by some business representatives. However, as the studies and evidence collected by DG ENV shows, **each time a Member State opened standing possibilities, there was no significant increase in environmental court cases** (this was clearly stated by national judges during the consultation process. In particular, environmental cases are only a fraction of all administrative law cases; the German experience following the *Trianel* Judgment - described in section 2.2 above - also indicates no dramatic change in the courts workload following the opening of standing rules). Moreover, should environmental mediation be introduced as an alternative to resolving disputes, this would obviously reduce the case load and hence costs for courts.

Environmental impacts

³⁹ COM (2013)685

⁴⁰ Compare with table in section 2.1.

⁴¹ The EU Justice Scoreboard, COM(2016)199 final.

This option will (depending on the final contents of the new directive) have positive consequences for the environment. It will create more certainty, leading to a better internalisation of external costs caused by environmental damage. From an environmental and public health perspective, option C would bring advantages compared to the baseline option, because the level of implementation of environmental law and compliance with its requirements and limit values will improve.

Conclusions

As repeatedly highlighted in this report, the key issue at stake is legal certainty, which can best be achieved by a set of clear and binding rules. The general objectives would therefore be best achieved via this option, which directly implies the necessary changes and adaptation in the national legislation and practice leading to the required clarity and simplification in the regulatory setting. Also the specific and operational objectives would be best achieved via this option. As a consequence investments will benefit from a more certain and simpler set of rules, making the perspectives of all stakeholders clearer. Clearer rules on access to justice will also not necessarily result in a higher number of cases, given that litigation on procedural issues will decrease. On the other hand, clearly the benefits to health and the environment are to be expected from improved implementation of environmental law, given that effective access to justice contributes to better implementation.

The following conclusions can be drawn on effectiveness and efficiency:

- **Effectiveness:** Compared to the baseline, all desired operational objectives would be achieved, it is therefore a very effective option; With this option the alternative dispute mechanism could be addressed.
- **Efficiency:** option C would also be very efficient as a single piece of legislation would address multiple objectives without entailing significant costs;
- **Consistency with other overarching EU policy objectives:** Option C fits well within the simplification approach and the objective of improving effectiveness of justice without creating an unnecessary burden. It would also **streamline existing secondary legislation** by repealing specific access to justice provisions in sectoral legislation.

However, the proposal made by the Commission in 2003 did not receive the necessary support by the Council until it was finally withdrawn in 2014. There is no evidence that the Member States would support a new legislative initiative in this area. In 2016 a new NEC-Directive 2016/2284 was adopted, The European Parliament made a proposal in the negotiations with the Council to introduce a respective access to justice provision in this legal act, based on the Aarhus Convention. The Commission supported this initiative by the Parliament, however, in the final negotiations this aspect was dropped as it did not receive sufficient support by Member States. It is therefore reasonable to assume that the lack of Member State support that led the Commission to withdraw the proposal in 2014 has not changed, hence the prospects of having a new proposal adopted and take effect on the ground are thus very limited.

Option D: Several legislative initiatives aimed at integrating access to justice provisions in existing EU secondary environmental legislation

Under this option not all objectives can be achieved, as the Commission would have to rely on non-harmonized rules under different sectoral directives (EIA, IED, ELD) in order not to create different rules for different sectors (unless the Commission was to reopen existing legislation, which is politically unfeasible, as some proposals, such as the revision of the EIA Directive, are almost at the phase of final adoption; some Directives, have just been revised in the last years, such as the EIA Directive in 2014, the Seveso Directive in 2012 and the IPPC/Industrial Emissions Directive in 2010.). For instance, it would be impossible to harmonise provisions on alternative dispute resolution methods (mediation).

Socio-economic impacts

This option comes close to the creation of legal certainty in the addressed sectors. Potential plaintiffs would be able to estimate the costs/benefit ratio of a legal procedure and optimise their behaviour. A drawback of this option would be that legal certainty as regards access to justice can only be achieved by gradually amending the *acquis* over a number of years. From an efficiency perspective, it would be far more costly than other options. Defendants would also face more certainty. However, the advantages would only come about gradually when all of the environmental *acquis* is covered by access to justice provisions. Therefore, presuming that the introduction of access to justice in secondary law needs a very long time span, this would not be an efficient solution.

There would be a considerable administrative burden on the part of the EU and the Member States seeking to modify several existing directives and relevant pieces of national legislation. The costs of formulating and adopting access to justice provisions in all relevant secondary *acquis* would be much higher. If we compare the costs of institutions having to draft separate provisions in each of the pieces of secondary law, as compared to drafting a single instrument covering the entire scope, it becomes evident that Option D would be considerably more burdensome for the institutions.

In addition applies what is mentioned above under option C about the unlikeness of getting the proposed changes adopted by the Council.

Environmental impacts

This option would be beneficial for the environment insofar as it will lead to internalization of external costs. In the light of the limited scope of the provisions on access to justice, it would however not lead to a generalised high level of protection before many years.

Conclusions

The general objective of achieving a simplified and clarified framework cannot be achieved, nor will the specific objective of adopting a streamlined approach. Some of the operational objectives can be pursued in the targeted sectors. However, it seems not feasible to pursue operational objectives 4 to 6 in a systematic way via sectoral legislation.

The following conclusions can be drawn on effectiveness and efficiency:

- **Effectiveness:** Some of the desired results would be achieved, it is therefore an effective option, though not all objectives could be achieved in all sectors until all relevant secondary legislation will be amended. Some of the operational objectives (1 to 3) will be achieved in a non-harmonized manner depending on the sectorial legislation.
- **Efficiency:** option D is certainly not efficient if one takes account of the resources that would be needed to achieve the desired results.

- **Consistency with other overarching EU policy objectives:** Although fitting with the objective of improving the application of the rule of law, option D is not in line with the simplification approach.

COMPARING THE OPTIONS

In accordance with the principle of proportionality the Union may not go beyond what is necessary to achieve the desired high level of environmental protection by effective judicial protection of EU-derived rights. The initiative seeks to clarify the minimum standard necessary to comply with the obligation deriving from Article 9 of the Aarhus Convention and the principles of the EU as established by the CJEU and which can be achieved by all Member States. At the same time the initiative will allow Member States to go beyond this minimum standard if they wish. The EU initiative would also be flexible enough that it could be adapted to the different legal systems and traditions in the Member States. No Member State will be forced to make radical changes to its legal system. As indicated, depending on their specific situation Member States may have to undertake certain reforms of their rules and/or practices on access to justice in environmental matters. The Commission has conducted an extensive survey of Member States' situation. As a general conclusion it can be seen that all Member States face problems with access to justice in environmental matters. However, it was also found that no Member State will be "disproportionally affected", meaning that they need not significantly re-organise their justice system, although some will have to undertake changes in their legislation and practice in order to adapt them to the requirements under EU law.

It also has to be noted that in several important areas of EU environmental law (e.g. EIA-Directive, Industrial Emissions Directive) access to justice requirements already exist. Member States will therefore not be obliged to implement a complete new system but will rather be asked to adapt and specify, if needed, their existing regimes.

Option A would mean no additional binding rules for the Member States, but would provide clarity and improve the efficiency of public administration. The light adoption procedure would help the Commission deliver an effective initiative in the short term. In case of non-compliance with existing requirements under the EU acquis, the Commission will continue using infringement procedures to ensure their enforcement. The impact of option A in terms of effectiveness will greatly depend on how the guidance document will be diffused among the courts and on whether the courts will follow them. In any case, it is very difficult to predict the effect of non-binding guidelines in the field of justice. The overall efficiency of option A is nevertheless positive since the effort/resources necessary for producing the guidelines will be rather limited. This option may prove more useful if chosen in combination with one of the other options, in particular with option B. In case of non-compliance with existing requirements under the EU acquis, as described in the guidance document, the Commission could continue using infringement procedures to ensure their enforcement, as well as other mechanism such as the Environmental Implementation Review process to achieve compliance. An alternative dispute mechanism, however, could not be established by this option.

Option B will have positive impact in relation to some of the operational objectives, whereas it would be rather neutral in relation to the others. Considering the time and resources needed

to pursue infringements, option B is low in efficiency terms. While an only infringement-driven intervention would lead to full compliance in a given case/sector/Member State, the Commission is not able to systematically identify all situations of non-compliance and, moreover, the differences in national practices may also derive from different interpretations which are not necessarily in contradiction with the Aarhus Convention, but in relation to which there is a need for harmonisation given the high integration of Member States economies (see also section 2.6). Furthermore, the Commission's more strategic approach to enforcement entails focusing its infringement efforts on the most important breaches of EU law.⁴² As guardian of the Treaties, the Commission has the duty to monitor the application of EU law and has discretionary power when exercising this role. In this role, the Commission's actions would support and complement option A. An alternative dispute mechanism, however, could not be established by this option.

Option C is the one that best allows to achieve the general objective of clarification and simplification in relation to all the general, specific and operational objectives. Rules for an alternative dispute mechanism could be established by this option. A streamlined approach is also quite effective if one compares the necessary limited effort to produce a general directive on access to environmental justice with the results this will lead to. Due to its binding effect, it is an effective way to ensure that the obligations stemming from the Aarhus Convention and EU law are transposed in the Member States national laws. It would help reach the objective of creating a transparent, legal framework for access to justice in environmental matters in a single piece of legislation. There are however subsidiarity concerns regarding the effect of a legislative proposal on Member States' administration of justice. In addition, the recent experience with the NEC Directive suggests that the lack of support from Member States, which made the Commission withdraw the 2003 proposal in 2014, remains. This option is therefore not likely to be adopted and hence take effect on the ground.

Option D is a sector by sector approach, focusing on the areas for which problems have been identified (nature, water, waste, air). The review of individual directives will provide an opportunity to upgrade access to justice requirements within individual instruments or sectors. A positive impact can be expected on some of the objectives. However, these changes will be sporadic and will not allow to take account of the systematic challenges presented in the problem definition. The same political consideration as described for option C also apply for this option.

⁴² "EU law: better results through better application", OJ C 18, p. 10, 19.01.2017.

MONITORING AND EVALUATION

Progress indicators for the key objectives

Once implemented, the Commission will evaluate the selected and implemented option(s) in order to assess how it has(have) worked in practice. The purpose of the evaluation, which reasonably should be carried out a first time after 3 years from the implementation date, will be to assess whether the necessary clarity has been achieved in the regulatory framework so that decisions will not be delayed due to legal conflicts on procedural rules (standing, scope of review, costs, etc.). As a consequence, the main focus of the evaluation will be on the clarity of the regulatory framework. In practice, this implies the **identification of indicators** which can be used in order to monitor the progress towards achievement of the specific objectives. The following indicators have been identified for this purpose:

1. Procedural litigation on access to justice. The number of environmental cases concerning access to justice (standing, costs, scope of the review, remedies, injunctive relief) can be easily monitored and yearly comparisons can be made in order to see whether the new rules, once in place, deliver the expected effect. Two sub-sets of indicators can be identified in this context, one relating to the number of cases at national level, the second related to the number of complaints addressed by individuals or NGOs to the Commission on access to justice at national level. Monitoring Court cases at national level will also allow to identify cases where investments are affected by litigation on access to justice, in particular by delayed decisions.

The necessary data could be collected through annual national reports on the functioning of justice, which are regularly published by ministries and judges associations and organisations (CEPEJ, ACA). This will not add an administrative burden on Member States .

2. Number of interpretative questions referred to by national courts to the CJEU on the interpretation of EC law. By monitoring the cases referred to the court it will be possible to assess the effectiveness of the measure taken so far in improve access to justice.

3. Using existing framework contracts in the context of the Environmental Implementation Review (EIR) to assess how Member States implement obligation stemming from EU law. The results of the assessment can be discussed with Member States in package meetings or dedicated bilateral meeting as part of the EIR process.

For the purpose of this evaluation, all the options envisage a component of data collection, collation and periodic (every 3 to 5 years) evaluation of the functioning of national review mechanisms. In particular, basic data will be collected on the basis of a common internet portal. This would allow to monitor the efficiency of the procedures in terms of the various requirements (timeliness, costs and so on). Complaints to the Commission are easily monitorable via the existing registration system and database.

The results of the evaluation will indicate whether there is a need for further intervention.

How will compliance with the options be ensured? What will be the implementation challenges?

In the case of option A, compliance with guidelines has to be promoted. Awareness raising, training of judges and national administrations may, to a certain extent, favour better compliance with the guidelines. In the case of option B, compliance with possible court judgments issued as a consequence of infringements can be ensured by bringing further Court actions based on Art. 260 TFEU.

Compliance with options C and D would be ensured through existing enforcement possibilities, including infringements. It is important to underline again that options C and D would not require investment by the Member States, since the **relevant review procedures already exist. Compliance with newly agreed legislation at EU level implementing Article 9(2 to 4) of the Aarhus Convention would reasonably not represent a challenge, since the judiciary is by definition the sector of the public administration that has the highest familiarity with enforcement of rules and can best implement new legislation.** Provided the adopted rules are sufficiently clear and are correctly publicised, there is no reason to think that the judiciary would have any difficulty in applying them from a very early stage. In other terms, in comparison to environmental directives in the air or water sector, which are expected to bring results after a number of years, a legislative initiative on access to justice in environmental matters is likely to deliver results already in the short term without creating implementation challenges. Should diverging practices arise at national level which are not in line with the newly agreed legislation, it will be necessary to assess whether the rules will have to be amended. However, as mentioned, the content of the initiative would ensure an overall coherency while allowing Member States to choose the specific legal instruments which suit best their traditions (e.g. on costs: capping, legal aid). The options involving EU legislation would in any case foresee an evaluation phase and a review clause.

By way of conclusion, implementation would be a challenge in case of option A, due to the non-binding nature of the instrument, as well as option B, since the Commission would need to secure that the relevant individual Court cases are correctly implemented. Option C, the streamlined single solution, would entail the greatest advantages for monitoring its implementation, whereas option D would require the monitoring of several pieces of legislation and which are likely to be transposed in Member States by way of various implementing acts, making it overall very burdensome to perform conformity and compliance checks.

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ANNEX 1: PROCEDURAL INFORMATION

1. Consultation of the Impact Assessment Board

A draft of the present Impact Assessment was submitted to the Impact Assessment Board (IAB) in October 2013 and a revised draft, taking into account the opinion of the Board issued on 22 November 2013, in February 2014. On 18 March 2014 the Board issued a further set of recommendations which were addressed in a third version of the report. On 21 May 2014 the IAB made its final remarks, including further recommendations to improve the report. Those were addressed in the revised IA report as follows:

Improve the problem definition and better explain the EU added value	In section 2.2 the problem definition was further elaborated, including a description of the elements which should be addressed in an initiative in order to provide an added value.
Further clarify how the disparities in access to justice in environmental matters in different Member States lead to internal market and competition distortions	In section 5.1 new text was added to clarify further the relevance of access to justice in environmental matters in order to avoid internal market and competition distortions.
Better motivate that setting requirements for scope of review, costs of legal procedures, timeliness of national procedures, possible remedies as well as the role of alternative dispute resolution at the EU level is justified from the subsidiarity point of view.	In section 2.6 the issue of subsidiarity was further motivated.
Further specify exactly how CJEU rulings have limited the possibility for Member States to interpret the application of Article 9(4) of the Aarhus Convention.	A table in section 2.2. under a new heading "description of the baseline" includes references to and a description of the case law of the CJEU concerning the interpretation of the requirements of Article 9(4). Case law is only available related to the requirements of non-prohibitively costly procedures.
Clarify which of the main barriers to access to environmental justice in Member State systems listed in the table can be considered as non-implementation of Aarhus Convention.	In section 2.2. a table was included to show the requirements of the Aarhus Convention, including those topics which are considered as a barrier to access to justice in environmental matters.
Clarify how the existing legislation and the case-law of the CJEU limit the choices for these elements.	The table in section 2.2. includes references and a short description of the case law of the CJEU concerning the topics addressed by the Aarhus Convention and the present initiative.
Better motivate the conclusions on effectiveness of different options.	In section 5.2 the assessment of the different options and their comparison was revised and amended in view of the question of effectiveness.

2. SUMMARY OF THE RESULTS OF THE ONLINE STAKEHOLDER CONSULTATION

(i) Introduction

An online stakeholder consultation took place from 28 June to 23 September 2013 to collect the views of all relevant stakeholders, at national and EU level, and the public on access to justice. Its outcome showed that the large majority of the stakeholders are supporting an EU action in the field of access to justice in environmental matters.

About 645 responses were received via the electronic questionnaire and via e-mail. Replies originated from organizations representing the private sector (~ 29%), including environmental NGOs, judges, businesses, business organisations, national and trans-European networks and organisations of environmental professionals. About 69% of the responses were sent by citizens and about 2% by public authorities, mostly national environmental ministries. The consultation document and the responses will be published on the Europa website. A consultation was also held linked to the 7th EAP, where a significant number of comments were provided in the field of access to justice.

(ii). Summary outcome

The main outcome of the consultation can be summarized as follows:

The responses confirmed that respondents regard ensuring a level playing field across the EU as a top priority in order to guarantee effective access to justice.

86% of the respondents confirmed that it is either important or very important that there is a level playing field across the EU Member States, meaning that all actors should have broadly equal access to justice in a possible conflict situation. From a cross-border perspective it also means that these respondents support that the same minimum conditions for access to justice are made available in different Member States. 22% thought that this is "necessary", while 6% indicated that it is "somewhat necessary" or "not necessary". Amongst business representatives this is perceived by a majority of 56.2% to be important and 31.2% somewhat important. Public authorities contributing to the online questionnaire by a large majority (88,9%) also agreed with this objective. Responses have confirmed that the majority (62%) of respondents are not satisfied with the current level of access to justice in their respective Member States.

Only 3,8 % of the respondents are very satisfied with access to justice in their respective Member State, while 9% is satisfied, and 21,3% is somewhat satisfied. As regards access to justice in other Member States, only 1.1% is very satisfied, 4.8% is satisfied, 19.7% somewhat satisfied and 40.6% is not satisfied at all. The figure is relatively high as regards those, who have no opinion on the subject (33.9%). Business representatives are divided on this matter, as only 18.8% is very satisfied, 37.5% is satisfied, 25% is somewhat satisfied and 18.8% is not satisfied at all. 33.3% of public authorities were satisfied, 22.2% somewhat satisfied and 33.3% were not satisfied with access to justice in their respective Member State.

Respondents stated a large majority (75,2%) that they think it is either very important or important that the Council and the European Parliament as co-legislators have a role in shaping specific rules on access to justice in environmental matters.

A large majority (67%) of respondents agreed that "adoption of specific rules on environmental access to justice in EU legislation" should be the top priority activity.

Respondents were rather divided on the question of awareness-raising of stakeholders. 29.3% (business: 31,2%, MS: 43,2%, NGOs: 21,3%, citizens: 31,4%) indicated this as a preferred top priority activity, 33.3% a medium priority and 37.4% (business: 18,8%, MS: 22,2%, NGOs: 46,3%, citizens: 35,7%) regarded this as a low priority activity. Slightly different figures emerge from assessing the need for Infringement action by the European Commission against the Member States. Nearly 40% preferred this option as being top priority (business: 31,2%, MS: 33%, citizens: 38,9%, NGOs: 46,3%), while almost 38% thought this should be medium priority activity and 22% (business: 25%, MS: 22%, citizens: 27%, NGOs: 8,8%) thought this is of low priority. The majority (56,2%) of the business representatives indicated that they attribute some level of importance to involving the Council and the European Parliament as co-legislators to have a role in shaping specific rules on access to justice in environmental matters. 66.7% of public authorities contributing to the questionnaire indicated that an EU legal instrument would be the most appropriate way to address the problems. Those Member States who submitted comments separately have indicated that they would not consider this as the top priority activity (overall: 41%). The online public consultation also showed that 66,9 % (business: 43,8%, citizens: 61,8%, NGOs: 88,2%) of all stakeholders consider that a binding legal instrument is the most effective way to ensure legal certainty and level playing field, while only 21,7% (business: 43,8%, citizens: 26,5%, NGOs: 5,9%) consider this as the least effective means.

A very high percentage of respondents have signalled that they think that an important (19.7%) or very important (60.7%), (aggregate: over 80%) advantage of having an EU legal instrument in the field would be that legal certainty would be ensured for stakeholders.

Ensuring adequate protection for the environment and human health was conceived as a very important advantage of an instrument by 76.2% of the respondents. The advantage of reducing the administrative burden for business was considered very important by 18.1%, important by 26.6%, somewhat important by 30.9% and not important by only 22.2%.

Ensuring cost-effectiveness for national, regional or local administrations, including court administrations and the administrations of similar bodies was attributed at least some level of importance by a majority of 80% of respondents. Creation of a level playing field between economic operators was considered to be very important (26.8%), important (26.1%) or somewhat important (27.7%), all together extending over 80% of the respondents who attributed some level of importance to the subject. 81,2% of business representatives awarded at least some level of importance to the advantage of an EU legal instrument in the field by creating legal certainty. 100% of public authorities contributing to the questionnaire indicated that an EU legal instrument would have the advantage of creating legal certainty and that it would improve the protection of the environment and health of citizens.

The majority (52,6%) of stakeholders (MS: 67,7%, business: 12,5%; citizens: 44,6%, NGOs: 80,9%) contributing to the online questionnaire said that they do not have concerns as regards an EU legal instrument ensuring effective access to national courts in environmental matters having an effect of overloading the national court systems and increasing the burden on national, regional or local administrations, including court administrations and the administrations of similar bodies. Overall who are very concerned in this regard represent only 20,9% (MS (only concerned): 22,2%, business: 25%, citizens: 26,3%, NGOs: 5,1%).

Some stakeholders are concerned to some extent (overall: ~48%; MS: ~77%; business: ~80%, citizens: ~52%, NGOs: ~20%) that a binding EU instrument would not respect national legal traditions. Those who are not concerned represent 52,1% (MS: 22%, business: 12,5%, 46,2%, NGOs: 79,4%).

The public consultation confirmed that it is very important to have a legal framework that is clear and predictable on all aspects of environmental access to justice.

For instance, for the large majority of the respondents it is very important (68%) or important (21,4%) that standing of individuals is addressed in a clear legal framework, the percentage of those, who think this is not important is only 2,7%.

68% of the respondents found that it is very important and 19% that it is important (aggregate: 87%) that a clear legal framework is put in place as regards the standing rules of associations. The large majority (81,2%) of business representatives also considered that there is a certain level of importance to ensuring legal certainty by an EU legal instrument. The large majority of all respondents confirmed that it is either important (23.9%) or very important (64.8%) that the timeliness of court proceedings should also be ensured by clear and predictable rules. The majority (~77%) of stakeholders also confirmed that a binding instrument should provide for clear rules on the scope of judicial review. Stakeholders with a large majority confirmed that it is either very important or important (~80%) that remedies, including injunctive relief and costs rules should be predictable, based on a clear legal framework.

Over 85 % (66% of public authorities, 86% of business, 84% of citizens, 91% of NGOs) of the stakeholders are of the opinion that there is some level of importance in having non-judicial conflict resolution in the environmental field that would provide for amicable out-of-court settlement of differences, with timely and not prohibitively expensive procedures.

14.9% (14,2% of all citizens, 25% of business, 11% of public authorities, 16,5% of NGOs) of all respondents asked for an optional mechanism for non judicial conflict resolution established in an EU legal instrument on access to justice in environmental matters, while 36% (33% of citizens, 12,5% of business, 22% of public authorities, 48% of NGOs) was of the opinion of having non-judicial procedures regulated in a binding instrument. 42.3% was convinced that the best way of ensuring non-judicial means of resolving conflicts was via awareness-raising and exchange of best practices (44,5% of citizens, 44% of business, 44% of public authorities, 33% of NGOs).

(iii) Summary of main concerns raised by the different stakeholders in the context of a possible legislative instrument (Option C) and how the Commission would address these in a legislative instrument

The different views of the stakeholder groups and MS, according to the comments submitted in the course of the public consultation, can be summarized as follows:

NGOs are in general not satisfied with the current level of access to justice in their respective MS (e.g. Germany, Belgium) whereas the **Industry** considers the level of access to justice generally as satisfactory and is sceptical whether the adaptation of EU rules would add value in ensuring effective access to justice in environmental matters at Member State level.

Representatives of the **Industry** voiced concerns of the appropriateness of legislative action at EU level. Their main arguments are that Art. 9 (3) of the Aarhus Convention is already legally binding in all EU Member States - thus no further action is needed – and that a harmonization

of administrative or judicial proceedings in environmental matters could not take the different legal systems and traditions of Member States into account.

Most of the comments submitted on behalf of the Industry ask inter alia for the following elements to be considered if the option of an EU legislative proposal would be retained: appropriate provisions avoiding frivolous litigation, certain admissibility criteria should be fulfilled in order to get standing (no *actio popularis*), standing should be conditional upon previous participation, arguments not used in a previous administrative procedure should not be admitted and administrative or judicial proceedings should be timely.

NGOs on the other hand consider a legal framework at EU level needed to bring all Member States in line with Article 9 (3) and Article 9 (4) of the Aarhus Convention and thus improve access to justice in environmental matters.

The main elements which are considered to be important by NGOs are effectiveness (in particular access to justice should be widely available for the public with a low threshold for legal standing for both individuals and NGOs), scope of review by national courts (courts should be able to review the procedural as well as the substantive legality of decisions), timeliness of procedures, not prohibitively expensive costs, effective remedies, standing should not be conditional upon previous participation in administrative procedure and representation by professional lawyers should not be compulsory.

The few **MS** which contributed separately, not via the online questionnaire, namely the United Kingdom, Ireland and the Netherlands expressed support for a non-binding instrument and are not supportive of an EU legislative action in the field.

Ireland in particular expressed reservation as regards the intention to include the scope of review, timeliness and costs issues in a legislative instrument, stating that it has already transposed appropriately the requirements of the Aarhus Convention.

All of these MSs however acknowledge the importance of ensuring an effective system of access to justice in environmental matters.

BUSINESS

Topics	Concerns raised	How concerns are proposed to be addressed by the Commission
Duration	Based on the perception that EU legislation on access to justice would allegedly provide for more cases brought against projects, delaying business	Any new initiative would aim to ensure that procedures are timely and that there are no undue delays encountered by the stakeholders

Frivolous litigation	Concerns as regards abuse of rights by the members of the public that would have a negative impact on business interests	Any new initiative would provide for appropriate safeguards to be implemented by the MS and would not limit MS discretion in this regard (loser pays principle, possibility not to award standing in cases of clearly vexatious, frivolous claims)
Actio popularis	Concerns as regards giving too broad standing rules and not requiring the members of the public to fulfil any preconditions to get standing	Any new initiative by the Commission would not aim at actio popularis, however, MS would have the possibility to maintain their existing system, where actio popularis is already in place (PT, LV)
Certain admissibility criteria for standing	Concerns were raised that there need to be certain criteria set up for NGOs	Any Commission initiative would address NGO standing in a way that would leave an appropriate level of discretion for MS to establish appropriate national criteria, while also ensuring that NGOs promoting environmental interests are guaranteed standing
Endangering existing wide-ranging legal traditions in the field	A harmonisation risks not to sufficiently take the different legal systems and traditions of MS into account	Any Commission initiative would constitute a framework and that would respect legal traditions of MS

MEMBER STATES

Topics	Concerns raised	How concerns are proposed to be addressed by the Commission
Duration	Ireland expressed its doubts as to the possibility of addressing the issue of timeliness in an EU legislative instrument	Any new initiative would aim to ensure that procedures are timely and that there are no undue delays encountered by the stakeholders. In doing so the Commission would refrain from setting timeframes, or difficult procedural guarantees. Based on the principle of procedural autonomy, MSs would be free to choose appropriate procedural safeguards, as long as these achieve the required objective of timely procedures.

Costs	The necessity or added value of further legislative action on prohibitively expensive costs is also questioned. The CJEU found in C-260/11 (Edwards) that costs must be considered using both objective and subjective criteria. In IE's view, any attempt to provide for this in legislation could only be in vague terms, adding nothing to the existing legislative situation.	The Commission would only address the already existing legal obligation of not prohibitively expensive procedures as clarified by the case-law. Also on this point IE's concern is taken on board, as any initiative would not go beyond what is required by the Aarhus Convention and the case-law of the CJEU.
Scope of review	The Aarhus Convention provides for the review of the substantive and procedural legality of any decision. IE questioned what could be added to existing requirements in further EU legislative action.	Any initiative would not go beyond the requirements of the Aarhus Convention, requiring review of substantive and procedural legality.
Endangering existing wide-ranging legal traditions in the field	UK and Ireland indicated that given the huge variance in the legal framework across the MS, it would be extremely difficult for any EU legal instrument to both improve further on the current effectiveness of access to justice and at the same time respect the legal tradition of a MS.	Any Commission initiative would address access to justice in order to constitute a framework and respect legal traditions of MS. This is one of the reasons it was decided that administrative review would not be a compulsory element of the review process, as this would undermine effectiveness and deviate from existing traditions (e.g. in FI, where there is no compulsory administrative review)
Increasing administrative burden	The UK highlighted that an EU binding instrument would lead to increasing burdens, and it also considered that this disadvantage would outweigh any	Any initiative would only be based on proportionate requirements stemming from existing legal obligations of the Aarhus Convention and EU case-law. There will be no additional administrative burden imposed on MS by any EU initiative in the field.

	potential benefits of EU legislative action in this area.	
Addressing non-judicial conflict-resolution	<p>The UK expressed its view that awareness-raising and exchange of best practices would be the most effective first step in ensuring non-judicial conflict resolution.</p> <p>For the Netherlands it is not clear how non-judicial conflict resolution relates to the obligations flowing from the Aarhus Convention</p>	The Commission is of the view that based on the present impact assessment non-judicial conflict-resolution is clearly in the interest of MS. Mediation can indeed be considered as an important complementary element of the access to justice toolbox and even reduce the costs of justice.
Covering more options in the IA	Bulgaria requested to include one more option for consideration within the IA, namely legislation by way of adopting sectoral rules on access to justice.	The Commission included this option in the IA

NGOs

Topics	Concerns raised	How concerns are proposed to be addressed by the Commission
Conditions of NGOs standing	Concerns raised that criteria set up by MS might be too restrictive	Any new initiative would aim to ensure that there are no restrictive standing conditions, as interpreted by the Court. Nonetheless MS would have based on the principle of procedural autonomy and subsidiarity to set up certain non-restrictive conditions.
Condition of prior participation	Concerns were raised that the standing conditions for the members of the public would be linked to	Exhausting administrative review before going to court is an important legal tradition in most of the MS (DE, HU, CZ, SK, etc.). This shall be respected by any Commission initiative and is compliant with the Aarhus Convention.

	prior participation during administrative procedures the	Setting the condition of making comments during the participation phase before going to court (preclusion) is not acceptable if it is done too restrictively, as stated by the CJEU. Nonetheless MS would be left a certain leeway to implement these rules.
Non-judicial conflict resolution	Concerns were raised that any initiative in this regard would serve to downgrade access to justice.	Any non-judicial conflict resolution mechanism would be set up in a way that it would not endanger effective access to justice. On the contrary, it would aim to ensure the accessibility of the full toolbox on access to justice, including mediation and non-judicial conflict-resolution.

(iv) The outcome of previous relevant consultations

The 2013 consultation built on relevant previous consultations and documents.

The **Council Conclusions of 11 June 2012** also called for improving access to justice⁴³.

The **Commission Communication** on Improving the Delivery of Benefits from EU Environment Measures: Building Confidence through Better Knowledge and Responsiveness, COM(2012)95 raised the subject of access to justice.

The **stakeholder consultations for the proposal for the 7th EAP** confirmed the need to upgrade the EU legal framework on access to justice⁴⁴.

The **7th EAP** as adopted recognises access to justice as one of the key objectives⁴⁵.

In its Opinion to the Commission proposal for the 7th EAP (2013/C 17/07)⁴⁶, the **Committee of the Regions** stressed that calling for "[...] general criteria for national complaint-handling; and a Directive on Access to Justice,"

⁴³ http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/envir/130788.pdf

⁴⁴ <http://ec.europa.eu/environment/newprg/results.htm>

⁴⁵ Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet, OJ L 354/2013 p 171.

⁴⁶ Opinion of the Committee of the Regions on 'Towards a 7th Environment Action Programme: better implementation of EU environment law'; [http://eur-](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:017:0030:0036:EN:PDF)

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:017:0030:0036:EN:PDF>

ANNEX 2: PROBLEMS ENCOUNTERED ON ACCESS TO JUSTICE IN MEMBER STATES

1. Statistics as provided by The Supreme Court Judges Association, ACA-Europe "Preventing backlog in administrative justice", Luxembourg 2010 based on the XXII Congress of ACA Europe

<i>Court</i>	Duration of case before High Administrative Court	Duration from first-instance stage to final ruling by high administrative court (months)	Comments
<i>ECJ</i>	In 2009, average duration of preliminary reference proceedings and direct applications proceedings was 17, 1 months, and the duration of proceedings on appeal was 15,4 months	N/A	
<i>Austria</i>	+/- 20 months	N/A	Tendency over 5 years: slight diminution
<i>Belgium</i>	Duration for issuing a ruling on a cassation case 6.7 months (71% of rulings issued within 6 months)	33 months	Belgium has in principle no high administrative heading up the system of administrative courts. Recent trend has been towards longer duration to new procedures and types of dispute
<i>Bulgaria</i>	N/A	N/A	High administrative court also hears disputes at first-instance stage
<i>Croatia</i>	36 months	N/A	
<i>Cyprus</i>	Between 30 and 36 months	Between 42 and 48 months	
<i>Czech Republic</i>	6 months	10 months at first-instance stage + 6 months = 16 months	
<i>Denmark</i>	20.7 months		Statistics do not distinguish between civil and administrative proceedings
<i>Estonia</i>	N/A	11.5 months	No data for a specific case
<i>Finland</i>	Between 5 and 16 months depending on the case, average of 10.2 months but pertains to other courts as well as the high administrative court	N/A	No statistics on the total duration of proceeding from the first-instance stage to a final ruling by Supreme Administrative Court; durations vary depending on the nature of cases
<i>France</i>	11 months (2009)	42.5 months	Duration relatively stable over 3 years despite slight overall decrease in durations. Duration in months extrapolated from statistics at each stage
<i>Germany</i>	1/ Review proceedings (review of points of law) 13 months; 2/ Complaints, leave to appeal 4 months; 3/ Ruling passed in first instance 11-19 months	1/ Main proceedings 30.8 months (at first- and second-instance stage) + Any appeal maximum of 13 months, so 43.8 months in total	Does not apply to all proceedings [urgent action example, are decided on in an average of 1.9 months (first resp. second instance)]. Approximate figures given that Germany is a federal State
<i>Greece</i>	N/A	N/A	
<i>Hungary</i>	(Since 2009, cases must be ruled upon within 4 months) To date, between 10 and 12 months	6 months + 10 to 12 months = between 16 and 18 months	
<i>Italy</i>	Normal proceedings: 30 months Fast-track proceedings: less than 12 months	Normal proceedings: 48 months Fast-track proceedings: 30 months	
<i>Latvia</i>	Between 2 and 6 months	40 months	
<i>Lithuania</i>	10 months in 2009	15 months	Durations having become longer in recent year Duration from first-to final-instance stage determined via assessment.
<i>Luxembourg</i>	N/A	N/A	
<i>Malta</i>	N/A	N/A	

<i>Poland</i>	12months	3-5months	
<i>Portugal</i>	7 months	24 months at first-instance stage + 7 months = approximately 30 months	
<i>Romania</i>	88% less than 6 months, 12% more than 6 months	N/A	
<i>Slovakia</i>	Maximum of 48 months	Between 6 and 24 months at the first-instance stage + maximum of 48 months, so maximum potential duration 96 months	Not possible to determine an average or minimum duration, only a maximum one
<i>Slovenia</i>	10 months in appeal cases, 12 months for cassation cases	12 months at first-instance stage + 10 months at appeal stage or 12 months at cassation stage = approximately 20 months	
<i>Spain</i>	20 months	29 months at first-instance stage + 20 months at cassation stage = 49 months	
<i>Sweden</i>	N/A	N/A	

2. Presentation of shortcomings in Member States on implementation of access to justice in environmental matters (based on studies⁴⁷ carried out by experts from all Member States, representing their individual opinions)

A. Barriers in the environmental procedure

The table below represents the main barriers to access to effective justice in the legal systems included in the study. An **X** indicates that there are significant barriers to access to justice in the indicated area.

INSUFFICIENT NGO STANDING (NGO STAND)
 INSUFFICIENT INDIVIDUAL STANDING (IND STAND)
 PROHIBITIVE COSTS (€)
 INSUFFICIENT TIMELINESS (TIME)
 INSUFFICIENT INJUNCTIVE RELIEF (REL)
 INSUFFICIENT SCOPE OF REVIEW (SCOPE)

PROBLEM AREA	NGO STAND.	IND STAND.	COSTS	TIME	RELIEF	SCOPE	Explanation
MS							
AT	X						Strict application of "Schutznormtherie" (only those whose right is impaired can access Courts), very strict criteria for internal review (IR).
BE	X	X					No standing for NGOs in certain civil cases.

⁴⁷ In 2012 the Commission has contracted professor Jan Darpö, chair of the Aarhus Convention Access to Justice Task Force and a number of re-known national experts in the field to draw up the state of play of implementation by 28 Member States on the implementation by Member States of Articles 9 (3) and (4) of the Aarhus Convention. Member States and civil society are welcome to comment on these [studies](#). In some cases tables were modified by Commission based on available information from other sources. http://ec.europa.eu/environment/aarhus/access_studies.htm

							Uncertain access in relation to administrative omissions. Unstable case law of the Supreme Administrative Court since the entry into force of the Aarhus Convention.
BG	X	X	X	X			Unpredictable standing for individuals, limited NGO standing in sectorial legislation and against administrative omissions, risk of high lawyers' fees, weak legal aid, strict IR criteria in certain cases.
HR	X	X	X	X	X		Complexity of the environmental legislation, limited possibilities for individuals to challenge environmental decisions according to specific legislation, slowness in achieving IR.
CY	X	X	X	X	X		Schutznormtheorie, limited possibilities to challenge decisions.
CZ	X	X			X		Schutznormtheorie, administrative omissions, seldom injunctive relief and too late, some limitations in the possibilities to challenge land use plans and decisions on "noise exceptions".
DK	X	X	X		X	X	Problems with decisions (and non-decisions) that fall outside the administrative appeal system (NMK), potentially high costs in courts, lack of suspensive effect.
EE			X		X		Chilling effect of costs, ineffective administrative review, strict criteria for injunctive relief.
FI	X	X					Uncertain access in relation to administrative decisions according to specific legislation and to administrative omissions.
FR			X				Costs, partly because of the mandatory representation by a lawyer.
DE	X		X				Limited possibilities for individuals to challenge environmental decisions that do not "concern" them according to a narrowly defined Schutznormtheorie, restricted access for NGOs outside EIA procedure and nature conservation laws.
EL			X	X			High lawyers' fees, extreme delays in the environmental procedure, strict criteria for IR, weak enforcement.
HU	X	X					Limited access in relation to administrative omissions.
IE			X	X	X	X	High legal costs, court proceedings can take considerable period of time, complexity of the legislation.
IT	X		X	X			Uncertain access for local branches of NGO, for administrative omissions; costs, lack of efficiency and timeliness.
LV				X			Schutznormtheorie in relation to NGOs in Constitutional Court, decisions on species protection not appealable, slowness.
LT			X				Chilling effect of costs, civil liability for cross-undertakings in damages.
LUX	X	X	X				Uneven standing in different acts, "national importance" criteria for NGO standing, liability for lawyers' fees, complexity of the environmental legislation.

MT	X	X	X	X	X		Uncertain standing in different legislation, uncertainties regarding liability for costs, need for legal aid scheme, strict criteria for IR.
NL		X					Schutznormtheorie, less effectiveness in those cases when legal redress is only available for members of the public by way of action in civil courts.
PL	X	X					Limited access in some sectoral legislation, administrative omissions, some decisions are made through non-appealable “plans”.
PT			X	X		X	Slowness, costs of lawyers and of obtaining factual elements of proof, limited intensity of the legal review.
RO			X	X			Cost issues, slowness, strict criteria for obtaining IR.
SK	X	X		X	X	X	Schutznormtheorie, limited access in relation to decision-making procedures without any public participation, problems with suspension and injunctive relief.
SI	X		X				Limited NGO standing, cost of experts.
ES			X	X	X		Costs, slowness, some “plans” and projects approved by parliamentary acts not appealable, general ineffectiveness in the legal system.
SE	X			X			No standing for NGOs to challenge administrative omissions or decisions outside the scope of the Environmental Code.
UK	X	X	X	X	X	X	Costs, inequality of arms in the procedure, complexity of the environmental legislation and legal system, limited scope of review.

B. Costs in the environmental procedure

This table depicts the costs in the environmental procedure as experienced by the *country reporters*. The table is divided into eight different categories, where an **X** represents the existence of administrative fees, court fees, mandatory lawyers in court (ML), the Loser Pays Principle (LPP), mitigating factors, such as schemes for lawyers' fees or Protective Cost Orders (PCO), limited responsibility for the costs (one-way cost shifting, OCS) of authorities, legal aid available for the members of the public (LA) and funds available for NGOs (FU). The table concludes with an evaluation of costs as a barrier to access to justice.

Country	Adm Fees	Court fees	ML	LPP	PCO etc.	OCS	LA	FU	Costs as barrier to A2J?
Austria		240€	X ⁴⁸	X ⁴⁹	X ⁵⁰	X ⁵¹	X ⁵²		With regard to costs for private expert opinion.
Belgium	6,20 €	82-350€	X ⁵³	X ⁵⁴	X ⁵⁵		X ⁵⁶	X	Chilling effect
Bulgaria		5-10 €		X	⁵⁷	⁵⁸			Yes (especially if compared with the low living standard).
Croatia	X	X	X	X			X ⁵⁹	X ⁶⁰	Yes (uncertainty)..
Cyprus				X ⁶¹					Yes (uncertainty)
Czech Republic		125-200€	X ⁶²	X		X	X	X	
Denmark	500 DKK (60€)	67-10,000 €		X			X		Yes (in courts, not in the MKN).
Estonia		X	X ⁶³	X		X	X ⁶⁴	⁶⁵	Yes
Finland		0-226€		X ⁶⁶				X	

⁴⁸ Not in administrative procedures or, as from 1st January 2014 on, in procedures before the administrative courts of first instance. In proceedings before the Administrative Court (*Verwaltungsgerichtshof*) complaints need to be signed by a lawyer. Mandatory representation by lawyers in proceedings before the civil courts of first instance, if the value of the case exceeds EUR 5.000 and before all higher civil courts.

⁴⁹ Not in administrative appeal procedures or, as from 1st January 2014 on, in procedures before the administrative courts of first instance.

⁵⁰ Fixed lump sum amounts in proceedings before the Administrative Court *Verwaltungsgerichtshof*.

⁵¹ In proceedings before the Administrative Court (*Verwaltungsgerichtshof*) the reimbursement of the costs by an individual is limited to a lump sum of EUR 610,60. In proceedings before the Constitutional Court (*Verfassungsgerichtshof*) the reimbursement is limited to a lump sum of EUR 2.856. In proceedings before the civil courts, different cost types (*Prozesskosten*) are subject to reimbursement by the loser, whereas a regulation defines lump sums.

⁵² Not in administrative procedures or, as from 1st January 2014 on, in procedures before the administrative courts of first instance.

⁵³ Only in Supreme Court in civil cases.

⁵⁴ LPP only in general courts, not before the administrative courts.

⁵⁵ Allowance system before ordinary courts.

⁵⁶ Only for individuals.

⁵⁷ There is a great difference between the amount of attorneys' fees asked by the state authorities and the business. In BG state authorities usually are represented in court by their staff lawyers. The fee asked by state authorities can rarely exceed 100 EUR. This can be seen as a mitigating factor.

⁵⁸ Though there is no OCS principle/provision in BG legislation administrative courts often simply do not state on a demand by a business entity for the losing party (an NGO or a citizen) to pay its fee

⁵⁹ Only for individuals.

⁶⁰ Not for litigation.

⁶¹ Preset schedules for litigation costs.

⁶² Only in higher courts.

⁶³ Only in civil proceedings in the Supreme Court.

⁶⁴ Available under restrictive conditions.

⁶⁵ No specific funds for legal aid available. General funds can be used for this purpose to a limited extent.

France		35-150€	X	X			X ⁶⁷	X	Yes
Germany		SW: 5,000€/i	X ⁶⁸	X	X			X	Yes
Greece		180-700 €	X	X			X		Yes
Hungary		2-10€		X		X	X		
Ireland		200-350€		X ⁶⁹		X	X	X	Yes
Italy		60-1,500€	X	X					Yes
Latvia		14-28€		X					
Lithuania		X		X	X		X		
Luxembourg			X	X			X		Yes (high level of lawyers' costs).
Malta	X	X	X			X			Yes
Netherlands		150-310€	X	X ⁷⁰		X	X		Not generally, but in the civil courts.
Poland		50€/i	X ⁷¹			X	X		
Portugal		50-2,500€/i +	X	X					Yes, no top limit for costs.
Slovakia		66€/i							
Slovenia	X	X	⁷²				X	X	
Romania		11-66€/decision		X			X		Yes (high costs, very limited availability to legal aid).
Spain		50-200/300-600€ ⁷³	X ⁷⁴	X			X	X	Frequently.
Sweden		No						X	
United Kingdom		60-6,000€		X	X		X		Yes

⁶⁶ Not in the administrative courts.

⁶⁷ Only for individuals.

⁶⁸ Only in higher courts.

⁶⁹ IE has introduced special costs rules for certain categories of environmental litigation. Where the special costs rules apply, each side bears its own costs, subject to certain exceptions.

⁷⁰ Lawyers are mandatory and loser pays principle applies in civil courts.

⁷¹ Not in the regional administrative courts.

⁷² Only in civil cases before the circuit courts and in appellate judicial proceedings.

⁷³ Proposal pending for raise of court fees.

⁷⁴ Mandatory to have two attorneys.

C. Effectiveness in the environmental procedure

This table depicts issues pertaining to the effectiveness of the environmental procedure. The table is divided in to six different categories, where an **X** represents the existence of automatic suspensive effect on administrative appeal (SE/AA), automatic suspensive effect on judicial review (SE/JR), strict conditions for obtaining injunctive relief (IR/SC), a requirement for bonds to obtain injunctive relief (BO). An X in the TI-column means that there are problems with the timeliness of the procedure. And, finally, problems with the enforcement of administrative decisions and judgment are indicated by an X in the EnF-column.

Country	SE/AA	SE/JR	IR/SC	BO	TI	EnF	Explanation
Austria	X	X ⁷⁵	X				
Belgium				X		X	Bonds only in exceptional cases.
Bulgaria	X	X			X	X	
Croatia	X ⁷⁶		X	X	X	X	
Cyprus			X	X	X		
Czech Republic	X			X			
Denmark	X		X	X			
Estonia			X	X ⁷⁷			Restrictive rules for injunctive relief.
Finland	X	X			X		Exceptions to suspensive effect exist (e.g. right to commence).
France			X		X	X	Only in two cases provided by law, the judge must issue injunction.
Germany	X	X	X				
Greece			X		X	X	Strict criteria for IR.
Hungary	X			X	X		

⁷⁵ As regards courts of first instance.

⁷⁶ Many exceptions.

⁷⁷ Only in civil court proceedings.

Ireland			X	X	X		
Italy	X ⁷⁸	X		X	X		
Latvia	X	X ⁷⁹	X			X	Problems with the enforcement of admin decisions.
Lithuania			X		X		
Luxembourg			X				
Malta			X		X ⁸⁰	X	
Netherlands		X					
Poland	X		X	X			Bonds only when challenging construction permits.
Portugal		X	X		X	X	
Romania		X	X		X	X	Strict conditions for IR, slow procedures in court.
Slovakia	X		X		X	X	
Slovenia	X		X			X	
Spain			X	X	X	X	
Sweden	X	X			X		If the applicant gets a “go-ahead decision”, the criteria for IR are quite generous for the PC.
United Kingdom	X		X	X	X		Complicated structure of appeal (60 different routes), reluctance to ask for IR because of the requirement for bonds.

⁷⁸ Suspension is possible in appeal procedures, but they are not really used.

⁷⁹ For building permits only.

⁸⁰ In the Environmental and Development Planning Tribunal, there is a 3 months' time limit, whereas there is no specific time frames for the court proceedings.

The main findings of the 2011 COWI study “The Costs of Not Implementing the Environmental Acquis”⁸¹

This important study report examines the costs associated with the gaps in implementing the EU environmental *acquis*. These costs relate to many impacts – in particular, potential environmental benefits are not realised, but also impacts such as uncertainty for business and infringement costs. The costs are often not easy to quantify but, as an indicative estimate, the costs of the implementation gap between current legally binding targets and the current level of implementation could be equivalent to around 50 billion Euros per year. It is of course not possible to establish in quantitative terms how much of these costs could be avoided by effective access to justice systems, since implementation depends on a number of factors and on the interaction between these factors.

The study states that the available data and indicators suggest that there are implementation gaps across most of the environmental sectors and in almost all Member States. It summarizes the findings in relation to the implementation gaps as follows:

- *In the waste sector there are large gaps in relation to waste recycling and waste prevention. Though the trend is to recycle or recover more waste and landfill, there are many gaps in relation to achieving both already binding targets as well as agreed future recycling targets. Too much waste is landfilled in many Member States including the use of sub-standard sites. Enforcement of the legislation on shipment of waste is an issue as up to 20% of the waste shipments might be illegal.*
- *In the field of biodiversity/nature there are some gaps in the designation of Nature 2000 sites and, most importantly, the 2010 and 2020 targets of putting an end to biodiversity losses have not been achieved.*
- *Concerning the local air quality there are relatively large implementation gaps and the gaps cover most Member States. The gaps are both in relation to the current policy targets and to the agreed future targets.*
- *For water there are some gaps in compliance with the key water quality legislation in relation to current targets. For agreed future targets such as those included in the Water Framework Directive there are obviously bigger gaps.*
- *For other sectors such as chemicals and noise, there are few quantifiable targets against which to measure the level of implementation. Key legislation, for example REACH, will only have full effect in the future and its harmonised implementation reduces the risk of significant gaps. A significant share of the urban population is exposed to noise, but the legislation does not specify quantitative reductions for example in terms of number of people exposed.*

⁸¹ http://ec.europa.eu/environment/enveco/economics_policy/pdf/report_sept2011.pdf

As regards the costs of non-implementation, the study indicates that they comprise many types whereby the main ones are the "not realized environmental benefits" of the legislation:

	Costs (future targets) billion EUR per year	Comments
Waste	~90	Not realised environmental benefits (including GHG reductions) and value of recycled material
Biodiversity/Nature	~50	Very uncertain - may be an overestimate - indicates an order of magnitude based on the GDP share of the global loss.
Water	~5-20	Based on WTP for "good ecological status" from a few Member States (MSs) – spillover effects on bio-diversity and nature not included. The Flooding and the Marine Directives might also add to the costs.
Air	~20-45	Include acute health impacts (mortality and morbidity). The limit values for PM, ozone and NOX are exceeded in zones where 20% - 50% of the EU population lives.
Chemicals (REACH)	~4-5	Benefits of REACH based on the assumed share of illness caused by exposure to dangerous substances - uncertain estimate. Long-term effects of chemical legislation could be much higher.
Noise	~0-40	Health impacts of noise exposure, actions plans would not necessarily eliminate all the costs.
Total	~200-300	An order of magnitude estimate

Concerning the impact on the industry, the study states:

“The impact on businesses from the uncertainty about implementation of the environmental legislation could be substantial. These costs are less easily quantified, but they should not be neglected.

- *One effect is on the eco--industries. Studies suggest that uncertainty about the environmental policy affects innovation in environmental technologies. Such innovations are very important as they can reduce the costs of compliance and they can create new markets and job opportunities. The EU27 eco-industry is estimated to have an annual turnover in excess of 300 billion EUR so it is clear that if uncertainty about implementation of the environmental legislation affects the industry by just a few percentages, this amounts to significant costs. A recent study on the costs of not implementing the waste legislation has estimated that full implementation of all waste legislation would lead to an additional waste (and recycling) industry turnover of 49 billion and an additional job creation of about 600,000 jobs.*

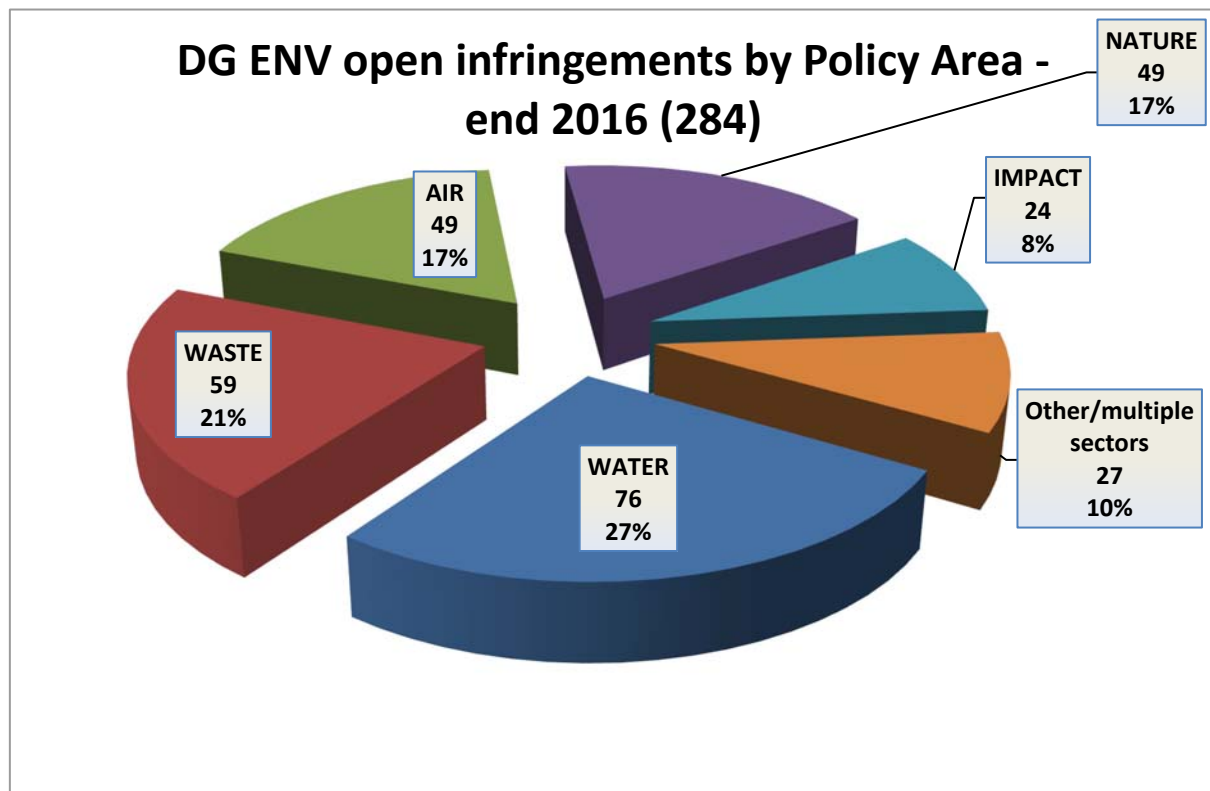
- *The uneven implementation across Member States distorts competition among EU industries as it means different compliance costs. Lack of implementation can also lead to additional administrative costs if standards vary across Member States. These effects are less well documented compared to the impact on the eco-industries.”*

The study considers that costs of non-compliance include the costs related to infringement cases and summarizes in this respect:

“The implementation gaps create additional and unnecessary costs for competent authorities in the Member States. In 2009 there were 451 infringement cases related to environmental legislation. Each requires time and resources at the relevant Member State authorities. If the case is brought before the European Court of Justice, the financial penalty is likely to be in the order of several million euros and the level is increasing.

The effect of an infringement case or the risk of facing one could be that certain measures needs to be implemented in an accelerated manner compared to a more "normal" compliance implementation. If investments have to be made over a very short time span, they are likely to be more expensive. Hence, if implementation gaps are due to no implementation activity, there is a risk that compliance costs could be higher than if the implementation had been better planned.”

The diagram below shows the state of environmental infringements by sector at the end of 2016.



ANNEX 4: EXAMPLES OF NATIONAL PRACTICES IN RELATION TO ENVIRONMENTAL REVIEW MECHANISMS

1. Examples of national judges applying Article 9 (3) of the Aarhus Convention

BELGIUM

Country/Region:	Belgium
Court/body:	Supreme Court (Cour de cassation)
Date of judgment:	11 June 2013
Internal reference:	Hof van Cassatie, 11 June 2013, Nr. P.12.1389.N

The Court held, pursuant to Articles 2 (4), 3 (4), 9 (3) of the Aarhus Convention that Belgium has engaged itself to secure access to justice for environmental NGOs when they wish to challenge acts or omissions of private persons and public authorities which contravene domestic environmental law, provided they meet the criteria laid down in national law. Those criteria may not be construed or interpreted in such a way that they deny such organizations in such a case access to justice. Judges should interpret the criteria laid down in national law in conformity with the objectives of Article 9 (3) of the Aarhus Convention.

GERMANY

Country/Region:	Germany
Court/body:	Federal administrative court
Date of judgment:	5 September 2013
Internal reference:	(Reference: BVerwG 7 C 21.12)

The case was about the air quality plan of the city of Darmstadt which provided for several measures to decrease nitrogen oxides. The Federal administrative court decided that accredited environmental NGOs can claim the compliance with the regulations on air quality management plans based on the Slovak Brown Bear case (C-240/09).

SWEDEN

Country/Region:	Sweden
Court/body:	Stockholm Administrative Court of Appeal
Date of judgment:	7 February 2013
Internal reference:	4390–12.

The case concerned a decision under administrative provisions on “protective hunting” to cull an individual wolf, known as the Kynna wolf. The appeals court found that the lower court

had committed an error in denying standing to an NGO which challenged the hunting derogations. According to the appeals court Article 9(3) of the Aarhus Convention grants the public the right to challenge acts and omissions that violate national environmental law. Jurisprudence of the CJEU in Slovak Brown Bears established that while Article 9(3) does not have direct effect, national procedural law must be interpreted so to give effect to Union law. Thus, Swedish administrative law, which generally requires appellants to be “concerned” and negatively affected by a decision, must be interpreted in such a way that it is possible for environmental organizations to challenge administrative decisions that conflict with EU environmental law.

Country/Region	Sweden
Court/body	Environmental Court of Appeal
Date of judgment	11 November 2012
Internal reference	M 2908-12, MÖD 2012:47

The Hårryda municipality case concerned a County Board administrative decision on precautionary measures for a stormwater management pond (urban runoff). An NGO appealed against the decision on precautionary measures as in its view it was not sufficient to protect the frog habitat.

The court concluded that the standing provisions in the Swedish law have to be interpreted in line with article 9 (3) of the Aarhus Convention (including the Slovak Brown Bears case) and European Union legislation and entitled the NGO to appeal against the county Board's decision.

Country/Region	Sweden
Court/body	Environmental Court of Appeal
Date of judgment	11 November 2012
Internal reference	M 3163-12, MÖD 2012:48

This case concerned an application to asphalt an airport landing area. This was to be done near an area protected by the Habitats Directive (Natura 2000). A local branch of a Swedish NGO appealed the decision of the municipality and asserted that the activity also required a permit because its negative impact on the protected area and that it should not be permitted. This Court granted standing with reference to the Aarhus Convention and the judgment in the Slovak Brown Bears case (C-240/09)

FINLAND

Country/Region	Finland
Court/body	Supreme Administrative Court
Date of judgment	23 May 2011
Internal reference	SAC 2011:49

The case concerned an expropriation permit for a gas pipeline which had been subject to an EIA procedure (an Annex II project). In its reasoning the Court referred to the relevant provisions of the EIA Directive, the Aarhus Convention and the corresponding national provisions and quoted extensively the judgment of the ECJ in the Slovak case (C-240/09)

2. National practices relevant for access to justice

STANDING IN Member States – NEGATIVE EXAMPLE

SCHWARZE SULM – No standing for environmental NGOs in Austria

The province of Styria issued a permit according to water and nature conservation law for a hydro power plant in the Natura 2000 site. NGOs, who had concerns regarding the legality of the project, could not challenge the decision as the project fell outside the scope of the EIA-Directive.

If Austria had implemented the Aarhus Convention properly this uncertain legal situation would have been avoided. In this case legal standing of environmental organizations could have been used to as for a judicial review of the procedural and substantive legality of the permit decision.

STANDING IN MEMBER STATES - POSITIVE EXAMPLE

STANDING IN SWEDEN

In Sweden a permit decision concerning an industrial activity not covered by the Industrial Emissions Directive can be challenged by the public concerned – including environmental NGOs before a court. The permit does not take legal effect so long as the appeal is pending. The applicant (operator) can, however, ask for a “go-ahead decision” by the permit body. The appellants can counter this by asking the Environmental Court for an injunction (“inhibition”) of that decision as a matter to be judged upon as a preliminary issue. The appeal procedure is reformatory, enabling the Environmental Court to decide on both formalities and the substances of the case. As a general rule, the trial will result in a new permit decision. There are no costs connected to such appeals or requests for injunctions. The public concerned is not required to use lawyers to represent them in court. The appeal procedure takes a little less than one year.

SCRUTINY OF REVIEW BY JUDGES - LIMITATIONS IN MEMBER STATES

DESCRIPTION OF THE IRISH SYSTEM'S PROBLEMS ON THE SCOPE OF REVIEW

The standard of review applied by the courts in planning and environmental cases was set down by the Supreme Court in *O'Keeffe v An Bord Pleanála* [1993] 1 IR 139.

According to that judgement the circumstances under which the court can intervene on the basis of irrationality with the decision-maker involved in an administrative function are limited and rare.

There are serious doubt if a sytem which provides only for a review of procedural issues, such as deadlines respected, and does not oblige to go into the factual aspects of the case brought before the court is in line with the requirements of the Aarhus Convention and EU secondary law, which reuires the review of the procedural and substantive legality of an act or decision.

PROBLEMS RELATED TO COSTS IN NATIONAL SYSTEMS

CASE OF IRISH CITIZEN ON COSTS - 1 MILLION EURO

A development consent in Ireland was challenged by a neighbour living in the vicinity of the construction site. He challenged the permit on the basis of a number of alleged procedural errors in breach of national rules implementing EU requirements on environmental impact assessment. He introduced appeals to a number of instances including the High Court and finally the Supreme Court. Due to the procedures extending over a decade he is now liable for costs of approximately one million EUROS.

CASE EXAMPLES SHOWING PROBLEMS WITH INJUNCTIVE RELIEF

CASE IN SPAIN - MARINA DE VALDECAÑAS CASE”: 41 MILLION EUROS TO STOP A HARMFUL PROJECT IN NATURA 2000.

In Spain based on national rules, it is for the judge to decide whether there is a need to provide a safety deposit (a bond or so-called "cross-undertaking in damages").

In the “Marina de Valdecañas” Case the Regional Court found that the permission to a big urban project to create an artificial island for resorts and golf courses in a lake was unlawful and annulled it. The Regional Court accepted the petition of provisional enforcement of the judgment but asked the NGO to pay a **bond of 41 million** of euros to stop the project. The bond would attend the financial risks of the developer in case that the Supreme Court would not confirm the first instance judgment.

ANNEX 5: ESTIMATED ADMINISTRATIVE AND FINANCIAL BURDEN FOR SETTING UP EFFECTIVE FRAMEWORKS UNDER THE DIFFERENT OPTIONS⁸²

1. Table showing an approximative estimate on administrative burden incurred by MS and EU institutions for setting up frameworks under the different options

	Option 0 - baseline scenario	Option A - guidance and training	Option B - putting more emphasis on infringements	Option C - new legislative instrument	Option D - sectoral legislation
Duration of implementation period necessary	30 years	18 years	8,5 years	5 years (2,5-3 years to adopt+2 years to transpose)	17,5 years
Number of persons involved by Member State/year on average	5 supposing each would work for 10 days	5 (supposing 15days/person)	10 (supposing 30 days/person)	5 (supposing 20 days/person)	5 (supposing 20 days/person)
Working hours for each Member State on average/year	5 persons x 8h/day x 10 days = 400 hours	5 persons x 8h/day x 15 days = 600 hours	10 persons x 8h/day x 30 days = 2400 hours	5 persons x 8h/day x 20days = 800 hours	5 persons x 8h/day x 20days = 800 hours
Costs of working hours in MS on average/year	+41,5 EUR/hour x 400 x 28 MS 464,800 EUR/year	41,5EUR /hour x 600X28 697,200EUR /year	41,5EUR /hour x 2400X 28MS 278,8800 EUR/year	41,5EUR/hour x 800 x 28 MS 929,600 EUR/year	41,5EUR/hour x 800 x 28 MS 929,600 EUR/year
Costs of working hours in MS	30 x 464800 = 13 944 000 EUR	18years x x 697200EUR =approx. 12,549,600 EUR	8,5 years x2788800 =approx. 23,704,800 EUR	5 years x 929600=approx. 4,648,000 EUR	17,5years x 929600 EUR=approx. 16,268,000 EUR
Number of persons involved by the Commission	6 (on policy work and follow-up of preliminary references)	6 (on policy work and follow-up of preliminary references, drafting guidance and training material)	10 (policy work + infringement)	2,5	2,5
Working hours for	3600 hours (on average)	4500 hours (on average)	9375 hours (125	4000 hours (On average 200	4000 hours (On average 200

⁸² The below table is based on rough estimates and is aimed to only demonstrate the magnitude of differences between the efforts needed to achieve the different options.

Commission/ year	80 days/person)	100 days/person)	days/person)	days/person)	days/person)
Costs of working hours on average for Commission	41,5 EUR/hour x 3600 149400 EUR	41,5 EUR x 4500 186750 EUR	41,5 x 9375 EUR +389062 EUR	41,5 x 4000 EUR 166000 EUR	41,5 x 4000 EUR 166000 EUR
Costs of working hours for Commission	4,482,000 EUR	approx. 3,268,125 EUR	approx. 3,307,027 EUR	830,000 EUR	approx. 2,905,000 EUR
Impact on business - average delay of investment activities in Member States currently	High probability of preliminary references (3 years) + bad practices of long duration (3-5 years) of administrative procedures	High probability of preliminary references (3 years) + bad practices of long duration (3-5 years) of administrative procedures could be eventually reduced based on good will of judges and decision- makers	Gradual, slow clarification to the exact requirements for review procedures – positive impact estimated in 7- 10 years' time (until then see columns 1-2: 3-5 years)	Clarification of conditions, ideal situation of more expeditious procedures to be expected in 2-5 years. Once optimal level of implementation average length of procedures: 1-2,5 years	See columns 1-3 (3 years average) until the optimal level of implementation is not reached

These figures are calculated assuming an average hourly wage for officials dealing with legislative and policy activity in public administrations in the 28 MS.⁸³ These figures are also based on the assumption that a shorter time-span for reaching an optimal level of implementation requires a smaller allocation of human resources and therefore requires less costs for the MS and the Commission.

Under the **baseline scenario (Option 0)**, implementing the case-law would require an estimated period of at least 30 years, implying an overall expenditure of 13,944,000 EUR (400 working hours/year for each MS) and 4,482,000 EUR (3600 working hours/year) for the Commission. These amounts are the consequence of the patchwork and unclear nature of the current legislation, implying protracted litigation at EU and MS levels and putting additional burden on administrations to adapt to the developing national and EU case-law

In case of **Option A**, a continuous major effort would need to be invested in training and guidance, with resource implications for the Commission. There would also be need for some activity and follow-up by MS in implementing the recommendations, but as these are non-binding, the level of engagement could vary considerably. The estimated expenditure necessary over a period of 18 years would require MS to invest 12,549,600 EUR (600 working hours/year for each MS), while for the Commission this figure would mean

⁸³ Calculator as provided by SG, Impact Assessment Board website :
<https://myintracomm.ec.europa.eu/corp/sg/en/impact/Pages/general.aspx>

3,268,125 EUR (4500 working hours/year).

Option B would entail intensified infringement activity by the Commission. Considerable time and human resources would need to be invested in infringement procedures by both the MS and the EU institutions. Considering the time taken by the Court, a total of 2-4 years would be needed to close a case. In case of preliminary references this can be estimated at 5-7 years including the national litigation prior to the reference and also the follow-up of the CJEU ruling. MS would have to face an amount of 23,704,800 EUR (2400 working hours/year for each MS), while the Commission would have to allocate 3,307,027 EUR (9375 working hours/year) over a time-span of 8,5 years by focusing more resources on intensified infringement activity.

Option C would involve drafting of an EU legislative instrument, implying an intense, though short term, workload on the part of Member States as well as the Commission. 2-3 years would be needed to adopt the instrument at the EU level, with 2 years deadline for transposition by the Member States. Covering all 28 MS, over a time-span of 5 years an expenditure of approximately 4,648,000 EUR (800 working hours/year for each MS) would be necessary, while for the Commission during the same period 830,000 EUR (4000 working hours/year) would be needed.

A sub-option of the legislative approach, namely **Option D**, to adopt sectoral legislation, due to its piecemeal nature would imply allocation of 2,905,000 EUR (4000 working hours/year) for the Commission and 16,268,000 EUR for MS (800 hours/year for each MS) over a time-span of 17,5 years. It can be seen that the workload would be similar to that of option C, in the short term, however, in the long term, it would take approximately four times longer (and as a consequence four times the human resources) to reach the same level of implementation.

ANNEX 6: RECOMMENDATIONS ON ACCESS TO JUSTICE FROM VARIOUS STAKEHOLDERS

1. Recommendations as provided by Jan Darpö and his group experts in the framework of study on Member States' implementation of access to justice in environmental matters⁸⁴

(i) General proposals

- There is a need for a Union directive on access to justice in environmental matters.
- The scope of application for that directive should mirror the 2003 proposal, covering all Union legislation that has the objective of protecting or improving the environment, including legislation relating to human health and the protection or the rational use of natural resources.
- Some of the 2003 proposal's definitions should also be used, e.g. "administrative acts" and "administrative omission".

(ii) Standing and the scope of the review

- The definition of those members of the public who shall be granted access to justice under the directive may be copied from the basic one used in the EIA Directive, that is, "the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures (...). For the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest".
- The double approach to standing for individuals used in the EIA Directive and the IPPC/IED Directive, expressly referring to interest-based or right-based systems should be avoided.
- There are good reasons for having criteria for ENGO standing and they can – at least to some extent – reflect the ones used in the 2003 proposal. However, the requirements for registration and auditing of the annual accounts should be avoided. Also the time criterion may be abandoned, or, at least, combined with a general possibility to show public support by presenting 100 signatures from members of the public in the area affected by the activity at stake.
- The directive should contain an express provision on anti-discrimination, reflecting Article 3.9 of the Aarhus Convention.
- A provision clarifying that members of the public should have access to a review procedure regardless of the role they have played in the participatory stage of the decision making should also be included.

⁸⁴ http://ec.europa.eu/environment/aarhus/access_studies.htm

- The scope of review should include both the procedural and the substantive legality of the contested decision. In order to clarify the latter, the directive might indicate that the applicant should have the possibility to challenge the content of the contested decision and that the reviewing body is responsible for investigating the case in any relevant aspect that the applicant invokes.
- The issue of administrative omissions needs to be addressed. The model used in the 2003 proposal for an access to justice directive, which outlined a procedure for challenging non-decisions or passivity by the responsible public authorities, is a way forward for so doing.

(iii) Costs in the environmental procedure

- Rules for the capping of costs in the environmental procedure should be included in the directive. However, those rules should be made generally applicable for all Union law on the environment.
- A general provision on costs should be included in the access to justice directive, emphasizing that the costs in environmental proceedings shall be set by the application of both a subjective test and an objective test. Accordingly, what is prohibitively expensive for an ordinary citizen, civil society group or ENGO shall be decided taking into account both the claimant's financial situation and the cost of living in the country. The provision shall also state the necessity to take due account of the public interest in environmental protection in the case. The rules on cost liability shall contribute to the aim of wide access to justice for members of the public.
- A provision is needed stating that fees for the participation in environmental decision making shall be avoided. In addition to this, appeal fees and court fees should be set at a reasonable level, preferably applying a flat rate.
- Schedules for the capping of costs in environmental proceedings are recommended. If cost schedules are not set by express legislation, there should exist a possibility for the applicant to get a separate decision on the cost issue at an early stage of the proceedings.
- With respect to public authorities, a provision on one-way cost shifting is needed.
- There is also a need for a provision stating that when deciding on legal aid, due account should be taken of the public's interest in the case. In addition to this, the schemes should allow for ENGOs to receive legal aid under certain conditions.
- Stronger liability for costs may apply in malicious and capricious cases.

(iv) Issues on effectiveness

- A provision on injunctive relief is needed that emphasizes the importance of the availability of such an interim decision from the reviewing body. The provision should be made generally applicable for all Union law on the environment.
- The provision on injunctive relief should stress the importance that national courts must give to environmental protection and other public interests when deciding on injunctive relief. If the operation concerns vital public interests or interests that are protected under EU environmental law, the starting point should be that the operator must have very strong reasons for commencing before the case is finally decided. To

this end, mere economic reasons do not suffice. The same should apply in situations where there is widespread resistance against the operation.

- An express provision which prohibits bonds or cross-undertakings in damages should be inserted in the forthcoming directive.
- Finally, an express provision on the requirement of timeliness of the environmental procedure is needed.

2. Recommendations by the association of European administrative judges on the 2003 proposal for a directive on access to justice in environmental matters following the workshop of the working group on environmental law held in Brussels on the 14th of March 2008 (also available here:

http://ec.europa.eu/environment/aarhus/pdf/aeaj_comments.pdf)

The Aarhus Convention is not regarded as self-executing. The Aarhus Convention allows for more detailed regulation. The Working Group therefore principally supports the Proposal in order to establish common European standards. However, it is questionable if the Proposal goes any further than the Aarhus Convention itself. The Proposal could simply be seen as a binding variation of Article 9 of the Aarhus Convention. It does not seem necessary to differentiate between "members of the public" and "qualified entities" (see Article 4 and 5 of the Proposal). The Preamble of the Aarhus Convention demands that effective judicial remedies be accessible to the public, "*including organisations*". The term "qualified entities" could lead to a restrictive interpretation of the Aarhus Convention in the sense that only approved associations must have access to justice. The Working Group is of the opinion that Article 6 of the Proposal should foresee exceptions, if the initial administrative procedure includes a thorough investigation, participation of stakeholders and a public hearing like e.g. the German "Planfeststellungsverfahren". In these cases a request for internal review would lengthen the procedure and present an obstacle for judicial remedies.

Recommendation on Best Practice

The AEAJ Working Group like judges' organisations in general does not feel constricted to evaluate existing rules. The Working Group does not solely focus on the compliance of national law with European Law or International Public Law. The following recommendations on best practice shall be more than correct interpretation of higher range law and more than the lowest common denominator. But of course judicial traditions must be respected as much as possible.

(i) Notion of "Environmental Matters"

For reasons of legal certainty it is recommended to make use of the enumerative method. The law on urbanism should be included in the catalogue of environmental matters.

(ii) Legal standing of NGOs

It is regarded as indispensable for the enforcement of environmental law that NGOs have legal standing before the courts. However, it seems not advisable to grant access to associations which have not been approved since these groups tend to defend individual interests of their members only.

(iii) Legal standing of public self-government bodies

In some Member States legal standing is granted to self-government bodies. However, it does not seem vitally essential for the enforcement of environmental law.

(iv) Public attorney in Environmental Matters

The institution of an "ombudsman" is not a necessary feature where the rules on legal standing are liberal. The opposite holds true if the rules on legal standing are restricted. If the ombudsman is truly independent he/she can contribute to the enforcement of environmental law.

(v) Suspensive Effect and Interim Relief

In some Member States the suspensive effect must be granted by the public authority or the court. In other Member States suspensive effect of an action is a general rule, subject to exceptions.

In any case, an effective system of interim relief must be installed. The procedure has to be easily available. It must be speedy, protect against irreversible damage. The courts should be prepared to order suspensive effect in so-called *in-dubio-situations*.

(vi) Two judicial instances?

In the most Member States the judiciary comprises courts of first instance and courts of appeal. Although this is not regarded as essential, the Working Group recommends a second instance which may be limited to a review on the grounds of law, not facts, in order to assert the unity of the legal order.

(vii) Investigation in the Judicial Procedure

According to the legal tradition in some Member States (e.g. Hungary, Poland) the courts do not engage themselves in the investigation of the facts so that they will not quash a decision where the public authority has wrongly investigated the facts. These Member States rely on a request for internal review.

By majority of votes the Working Group is of the opinion that such a limitation of the grounds on the basis of which a decision can be quashed is not desirable in environmental matters since the investigation of the facts - at least in the first instance –may be more important than the interpretation of law.

(viii) Representation by a Lawyer

The issue of representation by a lawyer is connected with the burden of costs. In most of the member States the representation by a lawyer is obligatory before courts of second instance. This is regarded as a good practice.

(ix) Privilege for NGOs concerning Legal Aid?

The general rules seem to be sufficient.

(x) Low Costs or Dispensation for NGOs?

In many Member States court fees are already quite low and therefore have no prohibitive effect on access to administrative justice. But if the fees are high and the "loser pays it all" principle is in place the financial risk can be a serious obstacle. The Working Group recommends a dispensation of court fees including costs of evidence for NGOs if they exceed a small lump sum.

ANNEX 7: ACCESS TO JUSTICE REQUIREMENTS IN EXISTING SECTORAL EU ENVIRONMENT LEGISLATION

The following is an overview of the main existing access to justice requirements in the EU environment *acquis*:

1. EU secondary environmental law

(i) Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC

Article 6

Access to justice

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.

(ii) 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

Article 11

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 non-governmental 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."

(iii) Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) ('IED')

Article 25

Access to justice

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.

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.

(iv) Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC ('Seveso III Directive')

Article 13

Land-use planning

1. Member States shall ensure that the objectives of preventing major accidents and limiting the consequences of such accidents for human health and the environment are taken into

account in their land-use policies or other relevant policies. They shall pursue those objectives through controls on:

- (a) the siting of new establishments;
- (b) modifications to establishments covered by Article 11;
- (c) new developments including transport routes, locations of public use and residential areas in the vicinity of establishments, where the siting or developments may be the source of or increase the risk or consequences of a major accident

Article 15

Public consultation and participation in decision-making

1. Member States shall ensure that the public concerned is given an early opportunity to give its opinion on specific individual projects relating to:

- (a) planning for new establishments pursuant to Article 13;
- (b) significant modifications to establishments under Article 11, where such modifications are subject to obligations provided for in Article 13;
- (c) new developments around establishments where the siting or developments may increase the risk or consequences of a major accident pursuant to Article 13.

Article 23

Access to justice

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.

(v) Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage

Article 12

Request for action

1. Natural or legal persons:

(a) affected or likely to be affected by environmental damage or

(b) having a sufficient interest in environmental decision making relating to the damage or, alternatively,

(c) alleging the impairment of a right, where administrative procedural law of a Member State requires this as a precondition,

shall be entitled to submit to the competent authority any observations relating to instances of environmental damage or an imminent threat of such damage of which they are aware and shall be entitled to request the competent authority to take action under this Directive.

What constitutes a "sufficient interest" and "impairment of a right" shall be determined by the Member States.

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 subparagraph (b). Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (c).

2. The request for action shall be accompanied by the relevant information and data supporting the observations submitted in relation to the environmental damage in question.

3. Where the request for action and the accompanying observations show in a plausible manner that environmental damage exists, the competent authority shall consider any such observations and requests for action. In such circumstances the competent authority shall give the relevant operator an opportunity to make his views known with respect to the request for action and the accompanying observations.

4. The competent authority shall, as soon as possible and in any case in accordance with the relevant provisions of national law, inform the persons referred to in paragraph 1, which submitted observations to the authority, of its decision to accede to or refuse the request for action and shall provide the reasons for it.

5. Member States may decide not to apply paragraphs 1 and 4 to cases of imminent threat of damage.

Article 13

Review procedures

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.

(vi) Regulation (EU) no 1257/2013 of the European Parliament and of the Council of 20 November 2013 on ship recycling and amending Regulation (EC) No 1013/2006 and Directive 2009/16/EC Access to justice provisions

Recital 18

In accordance with the case-law of the Court of Justice, the courts of the Member States are required to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention.

(vii) Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC

Recital 27

The aim of this Directive, inter alia, is to protect human health. As the Court of Justice has pointed out on numerous occasions, it would be incompatible with the binding effect which the third paragraph of Article 288 of the Treaty on the Functioning of the European Union (TFEU) ascribes to a directive to exclude, in principle, the possibility of an obligation imposed by a directive from being relied on by persons concerned. That consideration applies particularly in respect of a directive which has the objective of controlling and reducing atmospheric pollution and which is designed, therefore, to protect human health.

2. Aarhus Convention

Article 2 (4)

For the purposes of this Convention,

4. “The public” means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups;

Article 9

1. Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law.

2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned

(a) Having a sufficient interest or, alternatively,

(b) Maintaining impairment of a right,

where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or

omission subject to the provisions of article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.

What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above. Such organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above. The provisions of this paragraph 2 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.

3. In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall 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. In addition and without prejudice to paragraph 1 above, the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive. Decisions under this article shall be given or recorded in writing. Decisions of courts, and whenever possible of other bodies, shall be publicly accessible.

5. In order to further the effectiveness of the provisions of this article, each Party shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

ANNEX 8: RELEVANT STUDIES, ACADEMIC AND OTHER LITERATURE

1. European Commission documents

Decision of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 "Living well, within the limits of our planet",
http://ec.europa.eu/environment/newprg/pdf/PE00064_en.pdf

Commission Communication: Improving the Delivery of Benefits from EU Environment Measures: Building Confidence through Better Knowledge and Responsiveness, COM(2012) 95final
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0095:FIN:EN:PDF>

Commission Communication on Implementing European Community Environmental Law, COM(2008) 773final
<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0773:FIN:EN:PDF>

Study coordinated by Professor Michael Faure from Maastricht University on the possible economic implications of access to justice in environmental matters
<http://ec.europa.eu/environment/aarhus/studies.htm>

Set of studies coordinated by Professor Jan Darpö from Uppsala University, chair of the Aarhus Convention Access to Justice Task Force, describing the implementation of Articles 9 (3) and (4) of the Aarhus Convention by each of Member State as well as a synthesis report <http://ec.europa.eu/environment/aarhus/studies.htm>

Study on national complaint-handling mechanism which also includes an examination of national mediation mechanisms in 10 Member States.
<http://ec.europa.eu/environment/aarhus/studies.htm>

Preventing backlog in administrative justice, Luxembourg 2010 based on the XXIIInd Congress of ACA Europe Supreme Court of Administrative Judges
http://www.juradmin.eu/colloquia/2010/General_Report_2010_EN.pdf

[Inventory of EU Member States' measures on access to justice in environmental matters](#), Final Milieu Ltd. Reports, September 2007

[Study on the Implementation of the Aarhus Convention in the New Member States and Bulgaria, Romania and Turkey](#), Final Report, August 2004

[Access to Justice in Environmental Matters](#), Final Report by professors de Sadelaar, Dr Gerhard Roller, Miriam Dross, 2002

Bakkes, J.A., Bräuer, I., Ten Brink, P., Görlach, B., Kuik, O.J., and Medhurst, J. (2008), Cost of Policy Inaction, Scoping study for DG Environment, MNP / IEEP / Ecologic / IvM / GHK.

Study on the use of Alternative Dispute Resolution in the European Union, Final Report, 2009, Civic Consulting of the Consumer Policy Evaluation Consortium (CPEC)”

2. Other sources from NGOs

EEB Aarhus implementation study (2008):

<http://www.eeb.org/activities/transparency/AARHUS-FINAL-VERSION-WEBSITE-12-07.pdf>

Justice and Environment study on access to justice in environmental matters

http://www.justiceandenvironment.org/_files/old-uploads-wordpress/2010/05/JE-Aarhus-AtJ_Report_10-05-24.pdf

Justice and Environment study, effects of a Directive in Slovakia,

http://www.justiceandenvironment.org/_files/file/2012/Access%20to%20Justice%20-%20questionnaire%202012_SK.pdf

3. OECD Reports (available at <http://www.oecd.org/environment/>)

Illegal Trade in Environmentally Sensitive Goods, OECD Trade Policy Studies, 2012

Water Governance in OECD Countries: A Multi-Level Approach, OECD studies on Water, 2011

Ensuring Environmental Compliance: Trends and Good Practices, 2009

4. Other sources

CEPEJ report evaluating European judicial systems – 2012 edition

Report on Assessment of the compliance costs including administrative costs/burdens on businesses linked to the use of ADR, 2011, Civic Consulting.

European judicial systems Edition 2010 (data 2008): Efficiency and quality of justice, European Commission for the Efficiency of Justice (CEPEJ), p.159
<https://wcd.coe.int/wcd/com.intranet.InstraServlet?command=com.intranet.CmdBlobGet&IntranetImage=164098&SecMode=1&DocId=1653000&Usage=2>

Flash Eurobarometer 299 (hereafter EB 299) on "consumer attitudes towards cross-border trade and consumer protection", The Gallup Organisation 2010
http://ec.europa.eu/public_opinion/flash/fl_299_en.pdf

EB 342 on consumer empowerment, 2011, TNS opinion and social, p.192 (hereafter EB 342)
http://ec.europa.eu/public_opinion/archives/ebs/ebs_342_sum_en.pdf

Flash Eurobarometer 300 on "retailer attitudes towards cross-border trade and consumer protection", The Gallup Organisation 2010, p.79 -hereafter EB 300. , p. 220.

The Cost of Non-ADR – Surveying and showing the actual costs of Intra-community Commercial Litigation. Funded by the European Union (EC – funded "specific programme Civil Justice 2007-2013), implemented by a consortium led by ADR Center, in collaboration with the European Company Lawyers Association (ECLA) and the European association of Craft, Small and Medium sized Enterprises (UEAPME).

Jans, J.H. and Vedder, H.H.B. (2012), *European Environmental Law after Lisbon*, 4th edition, Groningen: Europa Law Publishing.

EU environmental law / Ludwig Krämer, 7th edition, 2011;

Droit européen de l'environnement : jurisprudence commentée / Marc Clément, Larcier 2012;

Environnement et Marché Intérieur (Editions de l'Université de Bruxelles 2010) by Nicolas de Sadeleer (2010)

Access to justice in environmental matters by Jonas Ebbesson 2002, Kluwer Law International

Ebbeson, J. (2011), "Access to Justice at a National Level. Impact of the Aarhus Convention and European Union Law", in Pallemmaerts, M. (ed.), *The Aarhus Convention at Ten. Interactions and Tensions between Conventional International Law and EU Environmental Law*, Groningen, Europa Law Publishing.

Aarhus Convention at Ten, Groningen 2011 (editor: Marc Pallemmaerts), Europa Law Publishing

Environmental Law and Justice in Context by Jonas Ebbesson, Phoebe Okowa 2009 Cambridge University Press

The Wild Has No Words: Environmental NGOs Empowered to Speak for Protected Species as Swedish Courts Apply EU and International Environmental Law Yaffa Epstein* and Jan Darpö** (2013) available at:

http://www.jandarpö.se/upload/3_JEEPL_2013_3_Epstein_Darpö.pdf

De Sadeleer, N., Roller, G. and Dross, M. (2005) (eds.), *Access to Justice in Environmental Matters and the Role of NGOs. Empirical Findings and Legal Appraisal*, Groningen: Europa Law Publishing.

ANNEX 9: HISTORY OF POLICY DEVELOPMENT ON ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

- 1996 Still-evolving body of access to justice case-law starting with the *Kraaijeveld* ruling recognising access to justice irrespective of specific formal provisions of EU law
- 1998 Signature by European Community of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (Aarhus Convention)
- 2001 Entry into force of the Aarhus Convention
- 2003
- European Community enacts Aarhus-inspired access to justice legislation for environmental impact assessment (EIA), integrated pollution prevention and control (IPPC) and access to information
 - Commission adopts a general proposal on access to justice
- 2005
- Last meeting held in Council dealing with the Commission's Access to Justice Proposal
 - Ratification of the Aarhus Convention by Council Decision 2005/370/EC, without an EU access to justice instrument in place
- 2006 Access to justice in environmental matters at EU level addressed by adoption of the Aarhus Regulation⁸⁵
- 2009 Entry into force of the Lisbon Treaty and the Charter of Fundamental Rights, incorporating the principle of effective judicial protection⁸⁶
- 2012
- Commission Communication on "Improving the delivery of the benefits from EU environment measures: building confidence through better knowledge and responsiveness"⁸⁷ *inter alia* refers to access to justice
 - Commission launches country studies on access to justice as well as a study on economic impacts of possible Commission initiatives
 - Commission convenes two expert groups to present the studies in November⁸⁸
 - European Parliament Resolution on the review of the 6th Environment Action Programme⁸⁹ *inter alia* calls for a directive on access to justice

⁸⁵ 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 L 264, 25.9.2006, p. 13)

⁸⁶ The Treaty on European Union (TEU) and Treaty on the Functioning of the European Union (TFEU) strengthen access to justice in general, including via explicit reference in Article 19(1) of the TEU on sufficient remedies to ensure effective legal protection and incorporation of the Charter on Fundamental Rights (Article 47 of which covers the conditions of access, including legal aid).
Improving the delivery of the benefits from EU environment measures: building confidence through better knowledge and responsiveness (COM/2012/95). Having noted the lack of progress with the 2003 proposal, the Communication observes that "the wider context has changed, in particular the Court of Justice has confirmed recently that national courts must interpret access to justice rules in a way which is compliant with the Aarhus Convention. National courts and economic as well as environmental interests face uncertainty in addressing this challenge."

⁸⁹ European Parliament resolution of 20 April 2012 on the review of the 6th Environment Action Programme and the setting of priorities for the 7th Environment Action Programme – A better environment for a better life (2011/2194(INI)); "68. Underlines that the 7th EAP should provide for the full implementation of the Aarhus Convention, in particular regarding access to justice; stresses, in this connection, the urgent need to adopt the directive on access to justice; calls on the Council

- June 2012 Council Conclusions⁹⁰ *inter alia* call for improved access to justice in environmental matters
 - Opinion of the Committee of the Regions calls for an access to justice directive⁹¹
 - Proposal for a 7th EAP⁹² aims at improved access to justice in line with the case-law
- 2013
- European Parliament Resolution⁹³ *inter alia* calls again for a directive on access to justice
 - Meeting of the competent Working Group of the Council on 13 May 2013.
 - European Commission announced that it intends to withdraw the pending Directive on access to justice in environmental matters in the framework of the REFIT exercise⁹⁴
 - Adoption on the 20th November of the decision on the 7th EU Environment Action Programme, calling for improved access to justice in environmental matters
- 2014
- The 2003 proposal on access to justice in environmental matters is withdrawn
 - The Commission starts looking into options order to improve access to justice in environmental matters at national level.

to respect its obligations resulting from the Aarhus Convention and to adopt a common position on the corresponding Commission proposal before the end of 2012;”

⁹⁰ Conclusions on setting the framework for a Seventh EU Environment Action Programme at the 3173rd ENVIRONMENT Council meeting Luxembourg, 11 June 2012

⁹¹ calling for "...; general criteria for national complaint-handling; and a Directive on Access to Justice;"

⁹² To maximise the benefits of EU environment legislation, highlights that EU citizens will gain better access to justice in environmental matters and effective legal protection, in line with international treaties and developments brought about by the entry into force of the Lisbon Treaty and recent case law of the European Court of Justice."

⁹³ European Parliament resolution of 12 March 2013 on improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness (2012/2104(INI)) "29. Regrets that the procedure for adopting the proposal for a directive on public access to justice in environmental matters(9) has been halted at first reading; calls, therefore, on the co-legislators to reconsider their positions with a view to breaking the deadlock; 30. Recommends, therefore, the pooling of knowledge between the respective judicial systems of the Member States that deal with infringements of, or failure to comply with, EU environmental legislation;(...)

"41. Emphasises the important role of the citizens in the implementation process, and urges the Member States and the Commission to involve them in a structured way in this process; notes also, in this regard, the importance of citizens' access to justice; 42. Calls on the Commission and the Member States to explicitly define a specific timeframe in which court cases relating to the implementation of environmental law shall be resolved, in order to prevent the implementation of the environmental law and delays in court cases from being used as an excuse to avoid compliance and hinder investments; calls on the Commission to assess how many investments have been held back because of delays in legal proceedings relating to irregularities on the implementation of environmental legislation;"

⁹⁴ EC Communication on the REFIT, page 8 in Annex it also stated: The Commission will consider alternative ways of meeting its obligations under the Aarhus Convention and is conducting an impact assessment while awaiting an ECJ judgement.

ANNEX 10: CASE-LAW OF THE CJEU, RELEVANT FOR ENVIRONMENTAL ACCESS TO JUSTICE

The CJEU case-law on access to justice continues to evolve. Most of it is the result of preliminary references from national courts to the CJEU in which the former seek clarification of what their role should be in applying EU environment law.

While some of the case-law relates to specific existing access to justice provisions⁹⁵ and while some of it touches on the Aarhus Convention, other parts rest on general principles of EU law, in particular the principle that there should be **effective judicial protection** of rights derived from secondary EU law.

A. Standing, effective judicial protection of rights derived from EU secondary law

Case C-72/95, *Kraaijeveld*⁹⁶

This case, which pre-dates the Aarhus Convention, involved a challenge to the adequacy of a Member State's transposition of the Environmental Impact Assessment ("EIA") Directive⁹⁷.

Case C-237/07, *Janecek*⁹⁸

The CJEU recognised a citizen's entitlement to challenge the absence of an air quality management plan, despite the fact that national law considered that the citizen had no standing to bring such a case and that there were no specific access to justice provisions in the relevant EU air legislation.

Case C-240/09, *Slovak Brown Bears*⁹⁹

This case concerned an environmental association's entitlement to challenge a ministerial hunting derogation from the strict species protection provisions of the Habitats Directive¹⁰⁰. The CJEU found that Article 9(3) of the Aarhus Convention had no direct effect but that, despite the absence of access to justice provisions in the Habitats Directive, Member State courts should nevertheless facilitate access by environmental associations.

Case C-263/08, *Djurgarden*¹⁰¹

The case involved a challenge to Swedish national rules which restricted standing to environmental associations with at least 2000 members. The CJEU held that the number of

⁹⁵ i.e. in relation to environmental impact assessment (EIA) and integrated pollution prevention and control (IPPC)

⁹⁶ Case C-72/95 ECR 1996 Page I-05403

⁹⁷ Directive 2011/92/EU

⁹⁸ Case C-237/07 ECR 2008 Page I-06221

⁹⁹ Case C-240/09 Lesoochránárske zoskupenie [2011] European Court Reports 2011 Page I-01255

¹⁰⁰ Directive 92/43/EEC

¹⁰¹ Case C-263/08. ECR [2009] Page I-09967 (Djurgarden-ruling)

members required cannot be fixed by national law at such a level that it runs counter to the objectives of the EIA Directive and in particular the objective of facilitating judicial review of projects which fall within its scope.

Case C-115/09, *Trianel*¹⁰²

This case involved a challenge to national legislation providing that only environmental associations, which can demonstrate that their rights were impaired can have standing in courts for purposes of access to justice in relation to EIA and integrated pollution prevention and control ("IPPC"). The CJEU held that this is contrary to EU law, and that environmental association need not demonstrate an impairment, as they fulfil the EIA Directive's requirement of promoting environmental protection.

Cases C-128/09, *Boxus and Others*; C-182/10, *Solvay and Others*¹⁰³

The parliament of the Walloon Region adopted a legislative instrument approving certain transport projects, thereby limiting the possibility for citizens and environmental associations to challenge them pursuant to the EIA Directive.

The CJEU found that by virtue of their procedural autonomy, the Member States have a discretion in implementing Article 9(2) of the Aarhus Convention and Article 11 of the EIA Directive, subject to compliance with the principles of equivalence and effectiveness. It is for them, in particular, to determine, in so far as the abovementioned provisions are complied with, which court of law or which independent and impartial body established by law is to have jurisdiction in respect of the review procedure referred to in those provisions and what procedural rules are applicable.

However, the CJEU ruled that based on Article 9 of the Aarhus Convention and Article 11 the EIA Directive would lose all effectiveness if the mere fact that a project is adopted by a legislative act which does not fulfil the conditions set out in paragraph 37 of the judgment were to make it immune to any review procedure for challenging its substantive or procedural legality within the meaning of those provisions.

Case C-243/15 – LZ II

A Slovak NGO claimed that it should have been admitted as a party in the administrative procedure to approve a fence in a Natura 2000 site. After questions were referred to the CJEU, the latter court held that the NGO was entitled to participate in an administrative procedure based on Article 6(1)(b) of the Aarhus Convention read in conjunction with Article 6(3) of the Habitats Directive, 92/43/EEC. By extension, it also enjoyed standing in line with Article 9(2) of the Aarhus Convention.

¹⁰² Trianel-case, C-115/09. ECR [2011] - European Court Reports 2011 Page I-03673

¹⁰³ Joined cases C-128/09 to C-131/09, C-134/09 and C-135/09. European Court Reports 2011 Page I-09711- not yet reported and Solvay and Others C- 182/10. ECR [2012], not yet reported

B. Costs of bringing a legal challenge

The cost of bringing legal challenges is a potential obstacle to access to justice. Article 9(4) of the Aarhus Convention thus requires procedures not to be prohibitively expensive. This stipulation is found in EU secondary legislation in the existing provisions on access to justice for EIA and IPPC and the case-law below involves interpretation of these provisions.

Case C-427/07, *Commission v Ireland*¹⁰⁴

The CJEU held that the Irish transposition of the Public Participation Directive was not in conformity with EU law. It found that a national practice under which the courts may decline to order an unsuccessful party to pay the costs and can, in addition, order expenditure incurred by the unsuccessful party to be borne by the other party is merely discretionary and did not satisfy the duty to transpose.

Cases C-260/11, *Edwards*¹⁰⁵ and C-530/11, *Commission v UK*¹⁰⁶

Edwards arose out of an unsuccessful challenge in the UK courts to an approval given to a cement works. The unsuccessful plaintiff was ordered to pay the costs of the national proceedings and, in this context, the UK Supreme Court introduced a preliminary reference focusing on the interpretation of the proviso that costs should not be prohibitively expensive. In particular it asked whether there should be a "subjective" test (i.e. how much a specific plaintiff could afford) or an "objective" test (i.e. general affordability independent of the means of the actual plaintiff) or a combination of these. The CJEU found that the test can include subjective or case-specific criteria but that these should never be objectively unreasonable.

C. Scope of judicial review

The scope of the review in respect of which access is granted is an important consideration. It determines whether the plaintiff should be allowed to invoke only procedural defects or be allowed to raise issues of substantive legality as well.

Case C-72/12, *Altrip*¹⁰⁷

The case is a preliminary ruling request from the German Federal Administrative Court concerning Germany's implementation of the access to justice provisions of the (EIA Directive). In particular, the national court has asked if the obligation to carry out a substantive and procedural review of a decision would require that a decision based on an incorrect EIA can be challenged. The court has also asked if it is compliant with EU law that an EIA decision can only be reversed if the error

¹⁰⁴ Case C-427/07. ECR [2009] Page I-06277

¹⁰⁵ Case C-260/11: Reference for a preliminary ruling from Supreme Court of the United Kingdom— Regina on the application of David Edwards, Lilian Pallikaropoulos v Environment Agency, First Secretary of State, Secretary of State for Environment, Food and Rural Affairs in OJ C 226, 30.7.2011, p. 16–16

¹⁰⁶ Case C-530/11: Action brought on 18 October 2011 — European Commission v United Kingdom of Great Britain and Northern Ireland in OJ C 39, 11.2.2012, p. 7–8 - On-going cases on the topic of prohibitive costs.

¹⁰⁷ Altrip C-72/12 Case: Reference for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court) Leipzig (Germany) lodged on 13 February 2012 — Gemeinde Altrip (Municipality of Altrip), GebrüderHörtGmbH, Willi Schneider v Rhineland-Palatinate in OJ C 133, 5.5.2012, p. 15–16

affects subjective rights of the applicant and if without the error the decision would have been different in respect of these rights. The Court in its ruling took a broad approach and ruled that the EIA Directive must be interpreted as precluding the Member States from limiting the applicability of the provisions to cases in which the legality of a decision is challenged on the ground that no environmental impact assessment was carried out, while not extending that applicability to cases in which such an assessment was carried out but was irregular.

D. Effective remedies

Access to justice inevitably brings up the issue of remedies: what is the national court to do if it finds that there has been a procedural or substantive breach of EU environment law?

Article 9(4) of the Aarhus Convention refers to “*adequate and effective remedies, including injunctive relief as appropriate*”.

The case-law summarised under this sub-heading highlights:

- The openness of the CJEU to consider effective remedies other than by reference to Aarhus;
- The issue of revocation of consents given in breach of procedural or substantive requirements;
- The need for injunctive relief to form part of the measures to give effect to existing access to justice provisions;
- The potential for state liability to compensate for breaches of EU environment law.

Case C-201/02, *Wells*¹⁰⁸

In the context of a dispute related to the EIA Directive, the CJEU ruled that it is for the national court to determine whether it is possible under national law for a consent already granted to be revoked or suspended, or alternatively, to grant compensation for the harm suffered.

Case C-416/10, *Križan*¹⁰⁹

The CJEU held that by virtue of their procedural autonomy, the Member States have discretion in implementing Article 9 of the Aarhus Convention and Article 15a of Directive 96/61 (supposing by way of analogy that these provisions are applicable to the EIA Directive access to justice provisions), subject to compliance with the principles of equivalence and effectiveness. It is for them, in particular, to determine, in so far as the abovementioned provisions are complied with, which court of law or which independent and impartial body established by law is to have jurisdiction in respect of the review procedure referred to in those provisions and what procedural rules are applicable. It must be added that the guarantee of effectiveness of the right to bring an action provided for in Article 11 of the EIA Directive requires that the members of the public concerned should have the right to ask the court or competent independent and impartial body to order interim measures such as to prevent

¹⁰⁸ Case C-201/02. European Court Reports 2004 Page I-00723

¹⁰⁹ Križan and Others C-416/10.

pollution, including, where necessary, by the temporary suspension of a disputed permit pending the final decision.

Case C-420/11, *Leth*¹¹⁰

This preliminary reference concerned the consequences of an omission to undertake an EIA, in particular the possibility for citizens to seek compensation.

Case C-404/13, *Client Earth*¹¹¹

The CJEU clarified what remedies a national court must provide for in case that a Member State is found in breach of legislation on air quality.

¹¹⁰ Case C-420/11.

¹¹¹ Case C-404/13.

E. Overview of cases

	Preliminary references on access to justice in environmental matters	Rulings based on infringement actions on access to justice in environmental	Reported cases making reference to the Aarhus Convention, specifically the Slovak Brown Bear case (C-240/09)
2007	Case C-237/07, Janecek	Commission vs Ireland C-427/07	
2008	C-263/08; C-128/09, Boxus and Others; C-182/10, Solvay and Others		
2009	C-115/09; Case C-240/09, Slovak Brown Bears		
2010	C-416/10, Križan		
2011	C-260/11, Edwards	C-530/11, Commission v UK	
2012	C-72/12, Altrip; Case C-420/11, Leth	Ireland, Slovenia,	
2013	C-404/13 (ClientEarth)	Austria, Germany, Czech Republic, Slovakia, Malta	Germany (BVerwG 7 C 21.12112); Sweden (4390–12.9; MOD2012:47 and MOD2012:48); Belgium (Nr. P.12.1389.N); Finland (SAC 2011:49) (see ANNEX 7.1 for details)
2014		C-137/14 Commission v Germany	
2015	C-243/15 – LZ II		

ANNEX 11: COHERENCE WITH THE COLLECTIVE REDRESS RECOMMENDATIONS

Collective redress is a mechanism that allows, for reasons of procedural economy and/or efficiency of enforcement, many similar legal claims to be bundled into a single Court action. Depending on the type of claim, it can take the form of an injunctive relief (if it is aimed at stopping an unlawful practice) or of a compensatory relief (aimed at obtaining compensation for damage suffered).

These actions fall under the realm of civil disputes between private entities ("horizontal justice") and are very important in some areas, such as consumer protection. Alike in the case of environmental matters (which is generally "vertical justice", namely implying an action against the public administration¹¹³), the Commission has worked for several years to develop standards for collective redress in the field of competition and consumer law. In the framework of the consultation processes, the point was made by stakeholders that a coherent system was needed because collective redress can be relevant also for multiple areas, including environment. For this reason, among others, the Commission adopted in 2013 a non-binding recommendation on common principles for injunctive and compensatory collective redress mechanisms in the MS concerning violations of rights granted under Union Law.

Collective redress can be relevant for certain civil disputes concerning the environmental *acquis*, in particular where mass harm results from situations analogous to those that can arise in the field of consumer or competition law. Breaches of the standards laid down in the Drinking Water Directive (98/83/EC) are a good example. Consumers of drinking water are entitled to receive drinking water that is clean and safe and consumers' relationship with drinking water suppliers is frequently contractual or quasi-contractual. Civil disputes may involve private claimants suing a public authority, where a municipality runs a drinking water supply, or private utilities, where the latter provide water services.

The 2013 Recommendation on collective redress can therefore be considered as partially falling under the scope of Article 9 (4) of the Aarhus Convention, which refers to the availability of adequate and effective remedies. The main differences between the collective redress Recommendation and the current initiative can be summarized as follows:

Subject matters	Collective redress	Access to justice in environmental matters
Scope of the instruments	Mainly civil disputes	Administrative matters
Who can bring a claim	At least two or more natural or legal persons and an entity entitled to bring a representative action (e.g. NGO), or public authority representing individual interests	Citizens and their associations representing individual interests, non-governmental organisations also representing the environment
What action can be launched	1) claim for cessation of illegal behaviour	Action against administrative omissions and acts having an effect on the environment (not

¹¹³ The distinction between "horizontal" and "vertical" entails some degree of simplification since it may well be the case that public administrations are involved in civil disputes

	collectively (injunctive collective redress) 2) claim for compensation collectively by two or more natural or legal persons in mass harm situations (compensatory collective redress)	necessarily causing damage to individuals, likelihood of occurrence of negative environmental impact is enough)
Procedural guarantees	Fair, equitable, not prohibitively expensive and timely procedures	Fair, equitable, not prohibitively expensive and timely procedures
Loser pays principle	Mandatory subject to the individual conditions provided for in the relevant national law.	Not mandatory, in certain cases not compatible with the requirement of not-prohibitively expensive procedures
Relation to public enforcement	The Recommendation implies some limitation of the principle of exhaustion of administrative review procedures	Aarhus provisions on access to justice are without prejudice to national rules on the exhaustion of administrative review procedures

Bearing in mind a partial overlap of scope, any initiative on access to justice on environmental matters **shall be without prejudice to the provisions of the existing recommendation on collective redress**. As any initiative on access to justice in environmental matters would only address access to justice implying an action against the public administration, the access to justice covering civil disputes would continue to fall under the scope of the collective redress recommendation.

ANNEX 12: GLOSSARY OF MAIN LEGAL TERMS

"Access to justice" Ensuring effective redress for citizens and their associations, including environmental associations, by allowing them to challenge acts or omissions of the public administration before a court of law or other independent and impartial body established by law (also known as "locus standi" or standing). This involves broad access rights, with timely and not prohibitively expensive procedures, including effective remedies covering also injunctive relief, as appropriate.

"Non-judicial conflict resolution" sometimes referred to as **"alternative dispute resolution (ADR)"** means amicable ways of resolving disputes between opposing parties with the help of a third party (often referred to as a mediator) acting in a professional and impartial manner.

"Not prohibitively expensive procedures" means that the legal costs incurred by the parties to the proceedings should not be set a level that effectively deters or bars citizens and their associations from bringing legal challenges.

"Legal costs" shall mean, in relation to the expression "not prohibitively expensive", costs as a whole incurred in relation to participating in a review procedure, in particular court fees, lawyers' fees, experts' fees, third party fees, requirement of cross-undertakings and bonds.

"Legal certainty" means that there is a clear legal framework, where all potential parties to litigation are aware of the full breadth of their rights and where legislation is in place on access to justice in environmental matters, so that decision-makers, including judges, have clear rules to rely upon, when resolving legal conflicts in the field.

"Effective remedy" is the action ordered/taken by the national court if it finds that there has been a breach of procedural or substantive environmental law by a public authority or other party. This would mean in particular, revocation of consent; interim measures, until a final decision is delivered (**injunctive relief**) or ensure compensation for damages suffered.

"Interim measures" measures delivered by a court of law or another independent and impartial body established by law aimed at mitigating the potential damages to the environment by providing a partial or full, and/or temporary or final administrative or judicial injunction relating to the the execution or omission of an administrative act;

"Injunction" the order to stop or to undertake certain action issued by courts and administrative review bodies, when initial or additional damage may still happen and the violation is continuing, or where prior damage can be reversed or mitigated.

"Scope of review" is the extent to which the national court will review a decision taken by a public authority, in particular whether it will only look at the procedural legality of the decision or review the substance of the decision.

"Substantive and procedural legality"¹¹⁴ in relation to decisions, acts or omissions of public authorities, it depends on whether the substance of the law has been violated (substantive legality) or if the public authority has violated procedures set out in law (procedural legality). Mixed questions, such as the failure to properly take comments into account, are also covered.

¹¹⁴ Based on the Aarhus Implementation Guide (second edition, published: April 2013) http://staging.unece.org/fileadmin/DAM/env/pp/ppdm/Aarhus_Implementation_Guide_second_edition_-_text_only.pdf