



Council of the
European Union

Brussels, 14 October 2020
(OR. en)

11854/20

ENV 596
JUR 460
JUSTCIV 112
INF 173
ONU 53

COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	14 October 2020
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2020) 643 final
Subject:	COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS Improving access to justice in environmental matters in the EU and its Member States

Delegations will find attached document COM(2020) 643 final.

Encl.: COM(2020) 643 final



Brussels, 14.10.2020
COM(2020) 643 final

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
COMMITTEE AND THE COMMITTEE OF THE REGIONS**

Improving access to justice in environmental matters in the EU and its Member States

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
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**Improving access to justice in environmental matters in the EU and its Member
States**

I. CALL FOR JOINT ACTION

- 1 The involvement and commitment of the Member States, of the public and of all stakeholders is crucial to the success of the European Green Deal. The Commission committed in the European Green Deal¹ to ‘*consider revising the Aarhus Regulation to improve access to administrative and judicial review at EU level for citizens and NGOs who have concerns about the legality of decisions with effects on the environment. The Commission will also take action to improve their access to justice before national courts in all Member States*’.
- 2 The EU should engage with citizens and stakeholders if the European Green Deal is to succeed and deliver lasting change. The public is and should remain a driving force of the green transition and should have the means to get more actively involved in developing and implementing new policies. To enhance trust in both national and EU administrations, it is equally important to have the necessary ‘checks and balances’ to ensure that acts and decisions can be checked for compliance with environmental legislation. Access to justice in environmental matters, both via the Court of the Justice of the EU (CJEU) and the national courts as Union courts, is an important support measure to help deliver the European Green Deal transition and a way to strengthen the role which civil society can play as watchdog in the democratic space.
- 3 This Communication accompanies a Commission proposal to amend Regulation (EC) No 1367/2006 (Aarhus Regulation) with the aim of improving the internal review of administrative acts ((COM) 2020 ...)². The proposal, when adopted by the co-legislators, will improve implementation of the Aarhus Convention (the Convention)³ ‘*in a way that is compatible with the fundamental principles of the Union legal order and with its system of judicial review*’⁴. It is proposed that environmental non-governmental organisations (NGOs) have broader possibilities to challenge acts and omissions of EU institutions and bodies in accordance with the Convention.

¹ COM(2019) 640.

² [Reference to legislative proposal amending the Aarhus Regulation - 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. 13-19.].

³ United Nations Economic Commission for Europe (UNECE) Convention on access to information, public participation in decision-making and access to justice in environmental matters.

⁴ Declaration made by the European Union in Montenegro, Budva, at the 2017 Meeting of the Parties to the Convention (Budva Declaration).

- 4 The legislative proposal aims to strengthen the EU's system of access to justice in environmental matters. This system, taken as a whole, grants every applicant access to an effective redress mechanism in line with the requirements of the Convention.
- 5 The aim of this Communication is to highlight the vital role that Member States play within the EU's overall system. Member States are to provide and facilitate access to justice in environmental matters governed by acts adopted under EU legislation, including national implementing measures related to non-legislative EU acts. Access to justice includes providing legal standing for NGOs and individuals directly affected by a breach of environmental law⁵ also in a cross-border context. Unfortunately, there are shortcomings in practice. In 2019, the Commission published the Environmental Implementation Review⁶, which identified a series of systemic shortcomings concerning on-the-ground implementation of access to justice in environmental matters in national legal systems. In particular, it highlighted problems faced by NGOs in obtaining legal standing to bring legal challenges on EU-related environmental issues and procedural hurdles, such as prohibitively high costs.
- 6 To improve the EU's system of access to justice in environmental matters, in line with the Convention, to which Member States are parties in their own right, **the Commission calls on Member States to step up implementation of applicable EU laws.** It is equally important that Member States' rules applicable to the judiciary and judicial practice fully implement CJEU case law on access to justice in environmental matters. Furthermore, national legislations should not create a barrier to this, for example by not providing legal standing to NGOs as required under the Convention. To ensure legal certainty in all Member States, national law must meet the requirements of the Convention, of EU legislation and of CJEU case law. National courts should also apply and enforce the applicable rules in light of the requirements set in their national legal orders stemming from EU law.

II. THE IMPORTANCE OF ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS IN THE EU

- 7 Access to an effective remedy and a fair trial is a fundamental right of the EU's legal order.⁷ Effective judicial systems play a crucial role in safeguarding the rule of law enshrined in Article 2 of the Treaty on European Union (TEU)⁸, and in ensuring effective application of EU law and improving public trust in public administrations.
- 8 This is also reflected by Article 19(1) TEU which requires Member States to provide remedies sufficient to ensure effective legal protection in the fields

5 Case C-197/18, *Wasserleitungsverband Nördliches Burgenland*, paras. 31-34.

6 Environmental Implementation Review 2019: A Europe that protects its citizens and enhances their quality of life - COM(2019) 149.

7 Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012, p. 391-407, Article 47.

8 Communication from the Commission to the European Parliament, the European Council and the Council on Further strengthening the Rule of Law within the Union: State of play and possible next steps (COM/2019/163).

covered by Union law, and in CJEU case law on access to justice in environmental matters. Access to justice in environmental matters is also relevant in the context of Article 41⁹ and 47¹⁰ of the Charter of Fundamental Rights of the EU and helps provide legal certainty.

- 9 Individuals and NGOs play a crucial role in identifying potential breaches of EU law by submitting complaints to administrations or taking cases to court. When individuals or NGOs seek justice before a non-judicial, administrative body, the review is called an administrative review; if they seek redress in court, it is called a judicial review¹¹.
- 10 The EU's system of administrative and judicial redress as a whole encompasses not only the internal review mechanism under the Aarhus Regulation and access to the CJEU, but it also relies on national courts. In particular, Article 267 of the Treaty on the Functioning of the European Union (TFEU) allows any natural or legal person who is party to proceedings before national courts to request a preliminary reference to the CJEU regarding the validity of acts adopted by EU institutions. The EU and the national systems of redress taken together are essential to provide effective access to justice in environmental matters in the EU.

III. THE EU AS A PARTY TO THE CONVENTION

- 11 The EU formally became a Party to the Convention in 2005. The 27 Member States are also, separately, Parties to the Convention each with their own and with shared competences, responsibilities and obligations to ensure access to justice in 'environmental matters' under Article 1 of the Convention¹². The onus of complying with the Convention, therefore is subject to this characteristic feature of the EU, where competences are exercised by the EU and its Member States. It is important to recall in the following paragraphs, the specific limits and nature of the obligations stemming from the ratification of the Convention.
- 12 Under the terms of the Convention, the EU is an organisation of regional economic integration. Under Article 19(5) of the Convention, the EU was required to declare when notifying its instrument of ratification '*the extent of their competence with respect to the matters governed by this Convention*'.
- 13 In response, the EU declared that '*the EU institutions will apply the Convention within the framework of their existing and future rules on access to documents and other relevant rules of EU law in the field covered by the Convention.*' Most crucially it added that '*the EU is responsible for the performance of those obligations resulting from the Convention, which are covered by EU law in force*'

9 Right to good administration.

10 Right to an effective remedy and a fair trial.

11 According to the terminology used in the Convention, Article 9(3).

12 'In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.'

and that *'the exercise of EU competence is, by its nature, subject to continuous development'*.

- 14 As a result, the EU institutions and bodies apply the Convention within the framework of the applicable EU rules. The specific features of the EU's legal order must be taken into account when implementing the Convention. This was also confirmed by the CJEU, which explained that the Convention was *'manifestly designed with the national legal orders in mind, and not the specific legal features of institutions of regional economic integration, such as the European Union'*¹³.
- 15 The access to administrative and judicial review is a multi-layered system in the EU. As the CJEU also recalled, as EU law now stands, judicial and administrative procedures concerning access to justice in environmental law fall *'primarily'* within the scope of Member State law¹⁴. Subject to the conditions defined in their national law, individuals and legal entities can request a national court to refer to the CJEU to review the validity of EU acts under Article 267 TFEU.
- 16 In addition, Article 263 (4) TFEU allows natural or legal persons to institute proceedings directly before the CJEU (the General Court) against (i) an act addressed to them; (ii) an act which is of direct and individual concern to them or (iii) a regulatory act which is of direct concern to them and does not entail implementing measures.
- 17 By adopting the Aarhus Regulation, the EU complemented the existing system of review available at EU level as regards both administrative and judicial review. As a result, NGOs active in environmental protection can obtain an administrative review of non-legislative administrative acts of individual scope adopted by EU institutions and bodies¹⁵. The Union, however, chose not to exercise its competence as indicated at the time of ratification and did not adopt separate provisions on administrative review for individuals, under the Aarhus Regulation at Union level, applicable to the EU institutions and bodies.
- 18 Following a complaint submitted to the Convention's Compliance Committee, the Committee concluded that the EU does not currently fully meet its obligations under the Convention's requirements on access to justice in environmental matters¹⁶. The legislative proposal, recalled above¹⁷, aims to remedy this situation by amending the Aarhus Regulation and extending access by NGOs. This Communication complements EU-level action by highlighting the improvements needed at national level.

IV. MEMBER STATES' OBLIGATIONS UNDER EU LAW

13 Case C-612/13 P, *ClientEarth*, ECLI:EU:C:2015:486, paragraphs 40 and 41.

14 Joined Cases C-401/12 P to C-403/12 P, *Council and Commission v Vereniging Milieudefensie a.o.s.*, EU:C:2015:4, paragraph 60; Joined Cases C-404/12 P and C-405/12 P, *Council and Commission v Stichting Natuur en Milieu a.o.s.*, EU:C:2015:5, paragraph 52.

15 And amended by Regulation (...) to cover administrative acts of general scope.

16 As described in Commission Staff Working Document, Report on European Union implementation of the Aarhus Convention in the area of access to justice in environmental matters, SWD (2019)378 final.

17 Paragraph 3.

- 19 Where the action of national authorities has been insufficient or incorrect as regards the respect of the substantive rules protecting the environment, individuals and NGOs have to be able to rely upon the procedural rules that are applicable to them. To safeguard the environment and to empower members of the public and NGOs, the EU has adopted a number of sectoral environmental directives¹⁸, which include provisions on access to justice in national courts. Implementation of these directives enables members of the public including NGOs to exercise their right to go to court in these specific areas. It is well established that the duty to ensure effective judicial protection in environmental matters extends to national courts¹⁹. This duty concerns rights stemming from EU environmental law and the possibility to cite the obligations defined under EU legislation²⁰.
- 20 In order to ensure effective judicial protection of these rights, the obligations of the Member States to secure access to justice in their national courts are not limited to those provided for in the acts of Union secondary law recalled above²¹.
- 21 **First**, under the principle of loyal cooperation laid down in Article 4(3) TEU, it is for the Member States to take all appropriate actions, including effective judicial protection, to ensure that measures required by EU law are adopted and that individuals' rights stemming from EU law are sufficiently protected²². Furthermore, Article 19(1) TEU requires Member States to '*provide remedies sufficient to ensure effective legal protection in the fields covered by Union law*'. Therefore, access to justice in national courts is indispensable for the proper functioning of the EU's system of judicial protection.
- 22 In this regard, national redress mechanisms via the national courts of the Member States are an integral part of the EU's system of judicial redress. National courts are also Union courts, and are linked to the CJEU within the system of preliminary references established under Article 267 TFEU. **This cooperation covers the interpretation of EU law and the examination of the validity of acts of EU institutions.** Access to courts should be possible for both individuals and NGOs on the basis of national procedural rules.
- 23 **Second**, the Convention, which is an integral part of the EU's legal order and binding on the EU institutions and on the Member States under Article 216(2) TFEU, is also applicable to EU law governing environmental protection. In the absence of EU rules governing access to justice in environmental matters, '*it is for the domestic legal system of each Member State to lay down the detailed procedural*

18 For example, Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, p. 1-21, 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 OJ L 143, 30.4.2004, p. 56-75 or Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010, p. 17-119. 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, OJ L 197, 24.7.2012, p. 1-37. 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, OJ L 41, 14.2.2003, p. 26-32.

19 Case C-404/13, *ClientEarth*, ECLI:EU:C:2014:2382, para 52.

20 Case C-237/07, *Janecek*, 2008 I-06221, para 37.

21 See footnote 17.

22 Case C-752/18, *Deutsche Umwelthilfe*, ECLI:EU:C:2019:1114, para. 38.

rules governing actions for safeguarding rights which individuals derive from EU law, [...] since the Member States are responsible for ensuring that those rights are effectively protected in each case²³. In particular, Article 9 (3) of the Convention and Article 47 of the Charter of Fundamental Rights of the European Union, read together, impose on 'Member States an obligation to ensure effective judicial protection of the rights conferred by EU law, in particular the provisions of environmental law'²⁴.

- 24 The CJEU has added that 'in order to ensure effective judicial protection in the fields covered by EU environmental law, it is for the national court to interpret its national law in a way which, to the fullest extent possible, is consistent both with the objectives laid down in Article 9(3) and (4) of the Aarhus Convention and with the objective of effective judicial protection of the rights conferred by EU law'²⁵.
- 25 The effectiveness of the preliminary ruling procedure under Article 267 TFEU regarding the validity of EU acts is therefore dependent on the Member States providing sufficient legal standing to NGOs and individuals. It is their duty to ensure that access to justice is granted in their courts in matters of environmental law covered by EU rules. This includes cases where there is 'a specific issue which has not yet been subject to EU legislation [but which] may fall within the scope of EU law if it relates to a field covered in large measure by it'²⁶.
- 26 CJEU case law developed over the years has clarified that the Member States are obliged to ensure access to justice in environmental matters covered by EU rules, including on decisions, acts and omissions²⁷ in a range of environmental policy areas, such as water²⁸, nature²⁹ and air quality³⁰.
- 27 To take stock of the practical implications of CJEU case law and to help Member State authorities and practitioners to understand the importance of these implications in the fields regulated by EU environmental law, in 2017 the Commission issued a Notice on access to justice in environmental matters³¹ ('the Notice'). The Notice outlined the standards governing access to justice in environmental matters in terms of procedural guarantees and legal standing for NGOs and individuals. It also clarified the requirement to avoid expensive or lengthy procedures and that Member States must make all information related to access to justice publicly accessible, as required by CJEU case law. Member

23 Case C-240/09 *Lesoochranárske zoskupenie*, ECLI:EU:C:2011:125 para 47-48.

24 Case C-664/15 *Protect*, ECLI:EU:C:2017:987, para. 45; Case C-243/15, *Lesoochranárske zoskupenie*, ECLI:EU:C:2016:838, paras 50 and 73.

25 Case C-752/18, *Deutsche Umwelthilfe*, EU:C:2019:1114, para. 39.

26 Case C-240/09, *Lesoochranárske zoskupenie*, para 40.

27 Article 6, 7, 8, 9 of the Convention are relevant to the decisions, acts and omissions concerned.

28 Council Directive 91/676/EEC of 12 December 1991 concerning the protection of waters against pollution caused by nitrates from agricultural sources OJ L 375, 31.12.1991, p. 1-8.

29 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L 206, 22.7.1992, p. 7-50.

30 E.g. Article 23 of the Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe OJ L 152, 11.6.2008, p. 1-44.

31 2017/2616, OJ C 275, 18.8.2017, p. 1-39.

States should follow the developments of CJEU case law, as summarised in the Notice, and take the necessary measures to implement them³².

V. THE WAY FORWARD: PRIORITY AREAS FOR ACTION

- 28 The European Green Deal Communication announced that ‘*the Commission and the Member States must also ensure that policies and legislation are enforced and delivered effectively*’. The Commission is fully committed to working with the Member States to improve access to justice in environmental matters at national level.
- 29 Effective implementation of the adopted EU rules on the ground by the Member States is indispensable in order to draw the full benefits for the protection of the environment. It is also important to ensure that access to the CJEU for members of the public and for NGOs under Article 267 TFEU is not unduly restricted. Removing obstacles to access to justice would yield further benefits by increasing legal certainty, improving administration of justice and reducing administrative burdens.
- 30 The Commission’s 2019 Environmental Implementation Review found that several Member States should take further measures to provide legal standing to environmental NGOs to bring legal challenges on EU-related environmental issues³³. It also found that environmental claimants should not face national procedural hurdles, such as prohibitively high costs (hundreds of thousands of euros in some cases)³⁴.
- 31 In light of the Member States’ obligations set out in Section IV in this Communication and of the Commission’s findings³⁵ regarding the situation on the ground in each Member State, priority action is needed in the following four areas.
- 32 In line with the Commission’s strategic communication entitled *EU law: better results through better application*³⁶, **the first priority area for Member States is to secure the correct transposition of EU secondary law**. This concerns EU environmental legislation that include provisions on access to justice³⁷. Member States have an obligation to transpose these directives correctly and in full with the objective to ensure implementation, in line with Article 291(1) TFEU.
- 33 **The second priority area, is for the co-legislators to include provisions on access to justice in EU legislative proposals made by the Commission for new**

32 See in particular the Notice (and updates) available on the Commission’s website: <https://ec.europa.eu/environment/aarhus/legislation.htm>.

33 Environmental Implementation Review 2019, cited above.

34 Environmental Implementation Review 2019, cited above. Findings of the study on Development of an assessment framework on environmental governance in the EU Member States No 07.0203/2017/764990/SER/ENV.E.4 Final report.

35 See paragraph 30.

36 Communication from the Commission — EU law: Better results through better application C/2016/8600 OJ C 18, 19.1.2017, p. 10-20.

37 See footnote 16.

or revised EU law concerning environmental matters³⁸. This requires active support by the European Parliament and the Council when the Commission comes forward with such proposals. Access to justice provisions will be drafted in light of CJEU case law as summarised in the Notice. In recent years, the Council has been reluctant to adopt such provisions³⁹, departing from its previous approach, which has led in the past to the adoption of the directives mentioned above.

34 In this regard, the Commission takes the view that clear provisions in EU environmental legislation in this matter would be in the interest of legal certainty and also necessary to underpin the obligation to grant effective judicial protection of the rights enshrined in EU law. It therefore invites the European Parliament and the Council to embrace this approach when deliberating on the legislative proposals to be brought forward.

35 The Commission will also make sure that secondary law is fit for purpose by carrying out regular evaluations. For example, as part of the review of EU measures to address pollution from industrial installations announced in the European Green Deal⁴⁰, the Commission will also evaluate, *inter alia*, the provisions affecting the rights of concerned parties, including public participation and access to justice.

36 **The third priority area is the review by the Member States of their own national legislative and regulatory provisions** other than those that transpose the directives referred to above in paragraph 32. National provisions⁴¹ that prevent NGOs active in environmental protection or individuals directly affected by a breach of EU environmental law resulting from the actions or omissions of public authorities. Therefore, it is indispensable to revise these national provisions for the purpose of removing any barriers to access to justice, such as restrictions on legal standing or disproportionate costs, and as a result, ensure effective access to justice in environmental matters in the EU.

37 **The fourth priority area concerns the obligation of national courts to guarantee the right of individuals and NGOs to an effective remedy under EU law.** The role of national courts as Union courts⁴² is one of the cornerstones of the proper functioning of the EU's system of effective judicial protection. Where necessary, national courts must set aside any provisions that are contrary to EU law, even if these are of legislative or regulatory nature⁴³. This should include undue restrictions on legal standing⁴⁴ to ensure that EU rules have full force and effect⁴⁵. The supreme jurisdictions of the Member States have a

38 Based on standards of access to justice established in the Notice.

39 Proposal for a Directive on the quality of water intended for human consumption (recast) COM/2017/0753.

40 This review covers Directive 2010/75/EU on industrial emissions.

41 In particular on water, nature and air quality.

42 Case T-51/89. *Tetra Pak Rausing SA v Commission*, ECLI:EU:T:1990:41, para. 42; Opinion 1/09 of the Court (Full Court) of 8 March 2011, pursuant to Article 218(11) TFEU, *Creation of a unified patent litigation system*, ECLI:EU:C:2011:123, para 80.

43 Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09 *Boxus and Others* and Case C-182/10. *Solvay and Others v Région wallonne*.

44 Case C-240/09 *Lesoochránárske zoskupenie*, ECLI:EU:C:2011:125 and C-197/18. *Wasserleitungsverband Nördliches Burgenland*.

45 Case *Simmenthal*, 106/77, EU:C:1978:49, paragraph 22 and Case C-664/15 ECLI:EU:C:2017:987.

preeminent role to play in this respect, due to their position in the national judiciaries and the influence of their case law on the lower courts. The effectiveness of this role is indispensable for the proper functioning of the EU's general system of access to justice in environmental matters.

- 38 The first, third and fourth priorities set out in paragraphs 32, 36 and 37 will guide the Commission's action in its role as guardian of the treaties when dealing with unduly restricted access to justice in environmental matters covered by EU law. This includes the power to initiate infringement procedures.
- 39 EU legislative action, as described under the second priority area in paragraphs 33, 34 and 35, will also play an important role to support Member States in establishing the required standard of national access to justice⁴⁶. With regard to the national courts, addressed in paragraph 37 above, the Commission will closely follow how national courts, including supreme courts, ensure effective judicial protection in environmental matters in their respective legal orders, and will take action as necessary.
- 40 In pursuing all four priorities outlined above, the Commission will support Member States and step up its work to engage actively with civil society and public authorities to achieve full implementation of applicable EU environmental law. It plans to run further capacity-building initiatives, training and education schemes and information exchange initiatives with civil society for public administrations and NGOs⁴⁷. Areas of cooperation with the judiciary⁴⁸ include the European Judicial Training Network (EJTN)⁴⁹, the European Union Forum of Judges for the Environment⁵⁰, and the Association of European Administrative Judges⁵¹.
- 41 Last but not least, the Commission will continue to monitor the implementation of EU law regarding access to justice in environmental matters. To facilitate this, it will make information available online on the Commission's eJustice-portal⁵² and carry out regular implementation monitoring work as part of the Environmental Implementation Review.⁵³

46 See provisions of the Notice.

47 LIFE project 'Access to Justice for a greener Europe' launched by ClientEarth.

48 Cooperation with judges programme launched in 2008 by DG ENV.

49 www.ejtn.eu/en/.

50 <https://www.eufje.org/index.php?lang=en>.

51 <https://www.aejj.org/>.

52 *Towards a European e-Justice strategy* (COM(2008) 329).

53 See reference under paragraph 5 above.