EPBD Revision (Energy performance of buildings directive) Access to Justice amendment FAQs

UPDATE 16/11/2021

Please cite this document as:

Alison Hough, 'EPBD Revision (Energy Building Performance Directive) Access to Justice amendment FAQs, EJNI Briefing Paper November 2022 available here.

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Introduction

This briefing note relates to the proposed revision of the Energy Performance of Buildings Directive 2010/31/EU. The EU Commission's proposal seeks to strengthen emissions reduction of the buildings sector as part of the Fit for 55 work package and the RenoWave Strategy, which implement the commitments in the European Green Deal. The objective is to achieve a zero-emission and fully decarbonised building stock by 2050, introducing EU–wide minimum energy performance standards for buildings and Energy Performance Certificates among other measures. This is a crucial climate mitigation measure as buildings account for 40% of EU energy consumption and 36% of GHG emissions, but has taken on further significance in light of the war in Ukraine and the Winter Energy Crisis.

A proposal was put forward for inclusion of access to justice rights in the revised Directive, designed to implement Aarhus Convention rights. This is in line with the stated policy of the EU Commission of doing just that, as well as the explicit requirement of the Aarhus Convention to introduce legislative provision for the Convention's rights. This note highlights that Aarhus rights clearly do belong in a directive grounded in the Energy Title, and goes on to answer questions on the implications of an access to justice amendment. The text of the proposed amendment is appended.

1. Can access to justice just be dealt with at Member State level?

No, Member State performance in this area has been dismal to date.

The issue of accountability cannot be left up to Member State legislatures as all available data (including that from the EU Commission) shows Member State performance to date on access rights has been poor in the area of the access rights, particularly access to justice. The latest round of EIR reporting also demonstrates these failures, and the latest EU Commission Communication on EIR 2022[1] (from Sept 2022) specifically emphasises the need to improve implementation of Aarhus rights[2] in order to shore up Europe's rapid environmental deterioration and failure to meet environmental and climate change targets.

The weak performance in the area of Access to Justice shows that it helps to transpose those requirements into EU law, not least because that would allow for effective enforcement at the EU and rather than leaving it all to the necessarily dilatory and over-stretched international mechanism.

All previous attempts (2003 - 2014) to bring in a cross-cutting access to justice measure in the form of a Directive have been blocked by Member States.

[1] Communication from the Commission "Environmental Implementation Review 2022 Turning the tide through environmental compliance" COM/2022/438 final. Available at

[2] It states: "*The country reports also point to remaining shortcomings in implementing the three pillars of the Aarhus Convention: access to information, public participation and access to justice, which affects implementation and enforcement at national level. So, what can be done? While we each have a part to play, the political will is the crucial ingredient for governments and decision-makers to drive the timely, correct and efficient implementation of EU environmental policies and regulations, achieve their objectives and reap their benefits. In its Communication on 'Improving access to justice in environmental matters in the EU and its Member States'.*"

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2. Is the EPBD a law relating to the environment within the meaning of the Aarhus Convention?

Yes, see the CJEU in C-873/19 (9th Nov 22) and C-594/18P authorities for a broad interpretation of "law relating to the environment".

The Grand Chamber of the CJEU as recently as the 9th November 2022 (in C-873/19, Deutsche Umwelthilfe eV v Germany) have affirmed that a law does not have to be made under Art 192 to be a "law relating to the environment" for the purposes of the Aarhus Convention (para 53[3]). The judgement in the latest round of the Volkswagen Defeat Devices saga found that categorical exclusion of standing to challenge a product authorisation under Regulation No. 715/2007 was a breach of the obligation to implement the Convention. This case demonstrates what happens when EU law is not crystal clear on when access to justice rights are available, which inevitably leads to satellite litigation clogging up both the National Courts and the CJEU to establish the existence of these rights. This is why access to justice clauses in these types of Directives are essential.

What is more, the CJEU has also been completely clear that energy measures are subject to environmental requirements: see, for example, paragraph 100 of Case C-594/18 P, Austria v Commission.

This supports the ACCC (Aarhus Convention Compliance Committee) findings in previous complaints such as ACCC/C/2011/63 (Austria), para. 52 and ACCC/C/2013/85 & ACCC/C/2013/86 (United Kingdom), para. 71 referring to Aarhus Convention Implementation Guide, pp. 187 and 197, of a broad interpretation of what is a "law relating to the environment".

The EPBD clearly amounts to law relating to the environment, which is evident from its environmental objectives and specific environmental requirements. [See for example Article 1, which provides 'This Directive promotes the improvement of the energy performance of buildings and the reduction of greenhouse gas emissions from buildings within the Union, with a view to achieving a zero-emission building stock by 2050 taking into account outdoor climatic and local conditions, as well as indoor climate requirements and cost-effectiveness.'] It follows that Articles 9(3) and (4) of the Convention require access to justice to challenge breaches of the EPBD, and remedies for such breaches.

It is also clear from Art 191 TFEU that the EPDB is an environmental law within the meaning of the Treaties. This is clear from the matters listed in Art 191 as coming within the scope of 'environmental policy': preserving, protecting and improving the quality of the environment; protecting human health; prudent and rational utilisation of natural resources; promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.

Finally, the ACCC has been clear that any act or decision can be environmental where it has potential environmental implications.

[3] C-873/19, 09 Nov 22, Grand Chamber Para 53: "*The fact that Regulation No 715/2007 was not adopted on the basis of a specific legal basis relating to the environment, such as Article 175 EC, now Article 192 TFEU, is not such as to exclude the environmental objective of that regulation and its belonging to the 'law relating to the environment'*."

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3. Are Aarhus rights "out of scope" in a Directive grounded in the Energy Title?

No. Art 194 is expressly "without prejudice" to Art 192(2)(c) Environment and "with regard" to protection of the environment.

The purpose of the creation of the Energy Title in the TFEU was to pave the way for EU action on Energy matters, creating competence, not limiting it. This competence cannot, and was not intended to create artificial distinctions between for example, renewable energy and environment, which are inextricably linked. This is obvious from the wording of the Art 194. Art 194 measures are to be adopted 'with regard for the need to preserve and improve the environment' (Article 194(1)) and in particular it later refers to operation **without prejudice to Art 192(2)(c)**, the part of the environment article which refers to energy measures. Article 194 measures are also subject to the integration principle (Article 11 TFEU) which requires the following: 'Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.' This covers all of the Union's policy area and there is no legal basis whatsoever for excluding energy related measures from this: indeed the intrinsic linkage between energy and the environment and the express requirements of Article 194(1)(c) make it obvious that the integration principle is particularly important for energy measures.

Previous directives made under Art 194(2) (Energy) have implemented Aarhus rights, clearly demonstrating that there is no bar to legislation made on this basis implementing Aarhus Rights.

For example, the recitals to the directive on renewables, 2018/2001, made under Art 194, make the operation of the entire directive subject to the provisions of the Aarhus Convention.

Directive 2012/27/EU (recast Energy Efficiency directive), also promulgated under Art 194(2), contains provisions implementing the Aarhus Convention, providing for public access to information on the energy efficiency of buildings owned by public authorities.

The Governance Regulation 2018/1999 underpins energy and climate action in the European Union, and creates the framework within which the EPBD operates. It is made also under the dual basis of Art 192 and 194(2). It also has extensive provisions in the recitals and substantive text implementing aspects of the Aarhus Convention (e.g. public participation rights).

The EU is obliged to give effect to the access to justice rights contained in the Aarhus Convention whenever it is dealing with a law relating to the environment (see Art 9(3)), and it is clear that the EPBD is such a law.

4. Why is an Access to Justice amendment needed?

For coherence of EU rule of law, internally and externally, and for clarity.

The EU are party to the Aarhus Convention (since 2005) which requires (under Art 9) that access to justice in environmental matters be guaranteed for members of the public including NGOs. Access to justice means that individuals/NGOs can go to court to review a decision that breaches domestic or EU law in relation to the environment, or causes environmental harm. It is permitted under Art 9 of the Aarhus Convention that standing be restricted to those with sufficient interest/maintaining impairment of a right, but this must be implemented in accordance with CJEU and ACCC rulings on access to justice which require broad access to justice.

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A number of other directives have access to justice provisions included in them, such as the EIA Directive, the IED Directive, and referenced above in Directive 2018/2001 on energy efficiency.

The Aarhus Convention Compliance Committee (ACCC) and the CJEU have been clear and consistent in its findings that energy or other matters cannot be "red circled" off in a category-based way from the Convention's application, and that it applies equally to energy legislation with environmental implications[4]. That the EPBD has environmental implications is clear from the fact its revision is procured as part of the EU's efforts to meet its emissions obligations under the Paris Agreement, which has motivated its review as part of the Fit for 55 package via the European Green Deal, and from the objectives of the proposal in reducing emissions to tackle climate change.

The European Green Deal itself promised to enhance Member State level access to justice, and the Commission Communication on Access to Justice 2020 makes it crystal clear that this will be done through provisions on Aarhus rights inserted into what they describe as "sectoral" level directives.

The Vienna Convention on the Law of Treaties makes it clear that a State Party cannot rely on a provision of internal or domestic law to justify non-compliance with a Treaty (Art 27). This is a principle recognised to be customary in international law. Therefore, even if it were accepted that the provisions here were "out of scope" they are still required for compliance with international law. Art 26 of the VCLT requires parties to an international law agreement to engage in good faith with the agreement ('pact sunt servanda').

The provisions of the Aarhus Convention are clear that Parties must not only take the necessary steps to ensure the Convention is implemented (Art 3(1)), but for access to justice, they must do so through their legislative frameworks (see the wording of Art 9). This means there is a requirement for specific provision for access to justice to be clearly and explicitly stated in legislation.

Finally, introduction of an access to justice provision in this directive is demanded by stated EU policy on access to justice on the environment, for example in the EU Green Deal, the 2017 Notice on Access to Justice, and the 2020 Communication on Improving Access to Justice in the EU and its Member States, where is was made a key priority by the EU Commission for the EU co-legislators to include such provisions in draft legislation.

The issue of accountability cannot be left up to Member State legislatures as all available data (including that from the EU Commission) shows massive failures in the area of the access rights, particularly access to justice. The latest round of EIR reporting also demonstrates these failures, and the latest EU Commission Communication on EIR 2022[5] (from Sept 2022) specifically emphasises the need to improve implementation of Aarhus rights[6] in order to shore up Europe's rapid environmental deterioration and failure to meet environmental and climate change targets.

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[4] See generally the findings in ACCC/C/2010/54 on the failure to adopt clear regulatory requirements in the legal framework in order to ensure public participation in Ireland's National Renewable Energy Action Plan (particularly para 98). , and ACCC/C/2008/32 No. 2 and ACCC/C/2015/128 more generally on how categories of decision making cannot be excluded in the context of EU State Aid decision making.

[5] Communication from the Commission "Environmental Implementation Review 2022 Turning the tide through environmental compliance" COM/2022/438 final. Available at

[6] It states: "*The country reports also point to remaining shortcomings in implementing the three pillars of the Aarhus Convention: access to information, public participation and access to justice, which affects implementation and enforcement at national level. So, what can be done? While we each have a part to play, the political will is the crucial ingredient for governments and decision-makers to drive the timely, correct and efficient implementation of EU environmental policies and regulations, achieve their objectives and reap their benefits. In its Communication on 'Improving access to justice in environmental matters in the EU and its Member States'.*"

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Clear access clauses in sectoral directives at Member State level provide legal certainty as to the nature and scope to these rights. They help avoid the inevitable satellite litigation (e.g. the recent Deutsche Umwelthilfe eV v Germany, C-873/19) that would follow if these matters were not clarified by Europe, which is good for business, and providing a regulatory "level playing field" across the EU, which avoids penalising MS's with good provision for access rights. They can enhance effectiveness of the laws they are included in. The inclusion of access to justice provisions in particular ensures the public/NGOs in each Member State can take their Governments to task when they bow to business lobbies and fail to meet their environmental/climate obligations under EU law. This is key for good environmental governance.

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Appendix: Proposed Access to Justice Amendment (AM1400)

Amendment

Article 24 a

Access to Justice/Just Transition

1. Member States shall ensure that, in accordance with their national legal system, members of the public concerned who meet the conditions set out in paragraph 2,including natural or legal persons and their associations, organisations or groups have access to a review procedure before a court of law or other independent and impartial body established by law with a view to challenging the substantive or procedural legality of decisions, acts or omissions:

(a) that fail to comply with the legal obligations provided for in Articles 3, 5, 7, 8,9, 11, 15, 16, 19, 20 of this Directive; or

(b) that are subject to Article 10 of Regulation(EU) 2018/1999.

2. Members of the public concerned shall be deemed to meet the conditions referred to in paragraph 1 when:

(a) they have a sufficient interest; or

(b) they claim the impairment of a right where administrative procedural law of a Member State requires such a right to be a precondition.

3. Member States shall determine what constitutes a sufficient interest for the purpose of paragraph 2, consistent with the objective of giving the public concerned wide access to justice in conformity with the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters. To that end, any nongovernmental organisation promoting environmental protection and meeting any requirements under nationa law shall be deemed to have a sufficient interest or having rights capable of being impaired for the purpose of paragraph 1 of this Article.

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

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