Making "Fit for 55" fit for purpose: The role of Access Rights

Introduction

In response to the ever-worsening climate and biodiversity crises, that have seen widespread disruptive weather events and environmental degradation on an unprecedented scale, as well as producing tens of millions of "climate refugees", the EU developed a new environmental policy "The EU Green Deal". The EU Green Deal" (2019) set the ambitious target of making Europe the first climate neutral continent by 2050, and to reduce emissions by 55% by 2030, in order to meet their NDC's under the Paris Agreement. A key element of this is the "Fit for 55" work package (July 2021) legislative proposals. This is the most comprehensive revision of the EU environment and climate acquis in the history of the EU. **It represents an unprecedented opportunity to bring the EU into compliance with its international law obligations**, and secure the effectiveness of EU environmental law, by introducing environmental "access rights" into the legislative proposals. Environmental "Access Rights" is the collective term for rights such as access to justice, public participation and access to information required by international law, the Aarhus Convention.

The EU Green Deal also represents an opportunity to make the EU greener, fairer, more economically prosperous and more secure. The twin Climate and Biodiversity crises are well under way with record breaking Autumn heatwaves and melting ice shelves. Latest reports indicate the window for decisive action is narrowing, and transformative change is required. Coinciding with the Ukraine War and Winter Energy Crisis, it is clear a rapid shift is needed. RePower EU seeks to address this by switching up the EU energy mix, increasing renewables. However, there is a danger of policies that continue to subsidise fossil fuels like coal as alternatives to the now prohibitively expensive oil, and hard to access gas. This juncture demonstrates the ways in which slow climate action and fossil fuel dependency lead to greater instability and threat to the socio-economic fabric of the EU. Strong climate action and robust accountability mechanisms have never been more necessary. Indeed, while the ambition of RePowerEU is commendable, its framing of environmental permitting requirements as barriers to development of renewable projects, rather than necessary preconditions, is regrettable. Such a deregulatory approach has potential to undermine the protection of Aarhus rights and could compromise the ability of the public to hold decision-makers accountable in the energy transition that is so urgently needed. The revision of the Renewable Energy Directive also seeks to promote this objective of streamlining of project consents. There is need for great caution to ensure that the desire to achieve environmental targets is not allowed to undermine essential environmental governance and accountability. The Derrybrien Windfarm Case (C-215/16, C-261/18) in Ireland stands as a stark reminder of what happens when renewables targets are pursued at the expense of proper procedures, and is potentially headed for its third infringement case before the CJEU.

It is essential that robust and decisive laws are passed now to reach our Paris Agreement targets, and to guarantee Europe's energy future. An essential element of any legal measure is implementation/enforcement. Without this, such climate laws are just nice ideas on paper.

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Access rights are of crucial importance to implementation of EU environmental law and policy. The EU Green Deal, (pg. 23) recognised the fundamental importance of these rights for ensuring accountability and implementation of the Union environmental acquis, and it committed to enhancing access to justice in particular. Not only does accountability ensure effectiveness of EU law, it saves the Union billions. It is estimated that non-implementation of EU environmental law costs the Union collectively a conservative estimate of €55Bn per year. The EU Commission has also recognised the fundamental importance of access to justice in implementing EU environmental law in its policy documents.

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[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.

Clear access clauses in sectoral directives and regulations have a threefold improvement effect at Member State level:

1. To give political cover to Member State Governments to introduce access to justice and accountability measures that are unpopular with business lobbies;

2. To provide legal certainty as to the nature and scope to these rights, avoiding the inevitable satellite litigation 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 MSs with good provision for access rights; and

3. To 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. The latest IPPC WGII Report (2022) has identified justice and implementation as key adaptation measures against climate change, because this is a key element of good climate and environmental governance.

The EU Parliament must defend the international rule of law, the internal cohesion of the EU legal and policy ecosystem, and our climate future, by ensuring robust accountability mechanisms are built into legislative proposals on environment and climate matters.

Accountability IS good for business - access rights enhance the implementation of laws, enhancing the rule of law and creating legal certainty which is a vital condition for businesses to thrive. Justice and inclusive

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[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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participation are highlighted by the latest IPPC report on Adaptation (2022) (e.g. pg. 2606, Table 17.2) as an essential plank of climate adaptation and resilience measures. Access rights are required by a range of policies from SDG16, the EU Green Deal, the 8th EAP (Recital 35 & Art 3(af), and the EU's Development of an Assessment Framework for Environmental Governance, May 2019. Access to justice is massively beneficial to economies[3], preventing in the longer term greater spending on remedying the costs of social harms caused by unresolved legal disputes[4]. On a longer terms scale, business will not be able to operate if the EU and global leaders operate a "business as usual" approach. Massive disruption to the global economy and business is already visible as a result of climate change. Preventing climate chaos through effective environmental regulation is key to ensure our economic stability and collective future.

This paper focusses mainly on access to justice but also endeavours to address some issues with the other access rights where possible. Other access rights will be the focus of briefings currently under development. It sets out to answer some common questions around whether access rights amendments belong in proposals under the Fit for 55 work package, and EU climate and energy law more broadly.

Access to Justice in the Fit for 55 package

Access to justice on environmental matters is a requirement under international law through the Aarhus Convention, to which the EU and all the Member States are parties. It is also a commitment made by the EU's own law and policies, including the EU Green Deal and the Commission 2020 Notice on Access to Justice[5]. However, to date the Fit for 55 legislative proposals by and large do not live up to this commitment (while other proposals like the Nature Restoration Regulation, (Art 16) and the revision of the Ambient Air Quality Directive (Art 27) have Access to Justice clauses). Thankfully the EU Parliament have stepped up to defend the Rule of Law and environmental democracy in the EU by introducing these clauses into directives like LULUCF, the EPBD and regulations like the ESR.

This briefing paper will discuss the following questions:

1. What does the Aarhus Convention/compliance with international law require of EU law?
2. Will introducing these amendments impede climate action? **No.**
3. Can these matters not be addressed at MS level? **No. EU Action is required.**
4. Do Access to justice rights amendments belong in Fit for 55 package proposals? **Yes.**
5. Do Aarhus rights belong in energy laws? **Yes.**
6. Do Aarhus rights belong in Directives and Regulations? **Yes.**
7. Which EU laws currently contain Aarhus rights? **Many EU laws contain some Aarhus rights, but few are implemented adequately.**
8. Do the EU Treaties/Plaumann allow access to justice clauses to be inserted into Fit for 55 laws (revised 2021)? **Yes.**
9. Will such access to justice clauses affect/be affected by the Aarhus Regulation, (revised 2021)? **No.**

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[3] Farrow et al., Everyday Legal Problem and The Cost of Justice in Canada: Overview Report, 2016, https://www.cfcj-fcjc.org/sites/default/files/Everyday%20Legal%20Problems%20and%20the%20Cost%20of%20Justice%20in%20Canada%20-%20Overview%20Report.pdf

[4] Law Council of Australia, The Justice Project Final Report, August 2018, p. 15 https://www.lawcouncil.asn.au/justice-project/final-report

[5] 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" (COM/2020/643 final) at https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52020DC0643

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1. What does the Aarhus Convention/compliance with international law require of EU law?

The Aarhus Convention is an international environmental and human rights convention which ensures environmental accountability by setting out the environmental "access rights" which are public participation in environmental decision making and associated rights for access to environmental information and access to justice (the right to go to court to defend the environment or the access rights). It sits at a conjunction of environmental protection, open, transparent governance, and fundamental human rights, and expresses what have come to be recognised as "procedural" human rights (the rights of access to information, participation and justice).

It is of key strategic importance in terms of providing the EU and Member States who are pro-human rights and democracy with a mandate to strengthen environmental democracy and environmental accountability, and fundamental rights protection. The EU ratified the Convention in 2005 but has yet to achieve full implementation. All 27 EU Members States are also full parties in their own right to the Convention and subject in full to its obligations.

The Aarhus Convention Compliance Committee (ACCC) is a decision-making body established under that Convention (Art 15) charged with receiving 'communications' (complaints) regarding State Parties breaches of the Convention's terms. It can hear these from other State Parties, but also more unusually from NGOs and individuals. This makes it a type of watchdog, ensuring consistent and effective application across all the 47 State Parties. The Compliance Committee interpretations of the Convention are acknowledged to be authoritative, and although they are not binding law before domestic courts in most countries due to the prevalence of dualist legal systems, they are legally binding on the States to which they are addressed once they are approved by the Meeting of the Parties.

The Convention explicitly requires Parties, including the EU, to implement these "access rights" through their legislative frameworks (Art 3(1)).

In terms of access to information, parties must gather and actively disseminate environmental information, as well as providing access to it on request. Parties must allow the public to participate in environmental decision making from permitting to plans and policies. The "public concerned" (those affected) must be identified and are particularly entitled to notice of the proposed decision that will affect them and to be provided with information in relation to it, but the general public, including NGOs may participate in the decision-making process through submissions or observations, which must be taken into account. The State Parties must also provide access to justice where access to information or participation rights are denied, or where domestic law in relation to the environment is breached. It covers acts and omissions that contravene any laws that relate to the environment[6]. stating that the requirement of Article 9(3) "is to provide a right of challenge where an act or omission - any act or omission whatsoever by a Community institution or body, including any act implementing any policy or any act under any law – contravenes law relating to the environment".

[6] ACCC/2005/11 (Belgium), para. 28. See also ACCC/C/2008/32 (European Union), Part II, paras 98-99

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Access to justice is an essential element of the Rule of Law[7], and failure to vindicate these rights will further exacerbate the rule of law crisis in Europe.

2. Will introducing these amendments impede climate action? No.

These amendments are at their heart measures about the oversight of public decision making as it pertains to the environment. Where a measure contravenes environmental law, it can be challenged. Climate action measures that breach existing environmental law are inherently invalid and should be quashed. Such measures are likely to do as much harm as help.

The power of access to justice to enhance climate action can be seen many cases around Europe and the world. For example, in Climate Case Ireland 2020, an Irish NGO, Friends of the Irish Environment (building on the landmark "Urgenda" Dutch Climate Case), challenged the Irish Governments National Mitigation Plan 2017 as inadequate to meet Ireland's Paris Agreements targets, Ireland's Climate Action and Low Carbon Development Act 2015 (the Climate Act 2015), the Constitution and human rights obligations, because it was lacking in sufficient practical detail as to how the climate targets and domestic legislative objectives were to be achieved. The was National Mitigation Plan 2017 quashed by the Supreme Court, and replaced with much a much more effective and detailed plan. This put Ireland in a much better position to engage in effective climate action than it would otherwise have been. It also enhanced the regulatory environment in which businesses operate by ensuring the Government set out a clear, consistent framework for how climate action was going to be undertaken in the State.

Accountability can only enhance climate action, and helps protect the environment/biodiversity, which in turn contributes to climate mitigation because of the strong link between the climate crisis and the biodiversity/habitat loss crisis.

One argument against greater accountability measures in relation to climate measures is that Member States will go for the lowest possible targets in their national legislation if they know they will be held accountable for them. This is not the case, as can be seen by high profile examples of access rights being used very effectively to improve climate ambition at Member State level. Access rights are a key component of effective environmental governance and help ensure implementation. Often Member States only implement their environmental and climate obligations when forced to do so through litigation by interested NGOs or individuals.

There are at this stage **many examples of high-profile cases where NGOs exercise of access to justice rights improved their countries climate action measures and ensured that they were sufficiently ambitious**, e.g. Urgenda (The State of The Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda, ECLI:NL:HR(2019)2007) in the Netherlands where the State was obliged to show that its measures were sufficient to meet its Paris agreement targets, Neubauer (Neubauer, et al. v. Germany 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20), Commune de Grande-Synthe v France, Climate case Ireland (Friends

[7] General Assembly resolution 67/1, Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/Res/67/1 (30 Nov. 2012), https://www.un.org/ruleoflaw/ files/A-RES-67-1.pdf .

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of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General [2020] IESC 49). Most recently the UK Governments Net Zero Strategy was found insufficiently detailed and in breach of the UK Climate Change Act 2008, after a suit by Friends of the Earth and others in the Friends of the Earth -v- BEIS judgment by the UK High Court on the 18th June 2022.

Finally, it is important to note that while the prospect of litigation delaying climate action (or any other important State action) is always touted as a reason to deny or restrict access to justice rights, examples of such vexatious litigation are exceedingly rare. This is based on the myth that access rights lead to frivolous court cases taken by people who are just opposed to all development (that they are "cranks charter" as the Irish courts once put it[8]). This is not borne out by statistical analysis on rates of judicial review in UK, Germany and other countries after introduction of access rights.

NGOs cannot afford to waste precious time (or reputational damage) on pointless, obstructive litigation, nor can they afford the costs of same even in countries where cost balancing measures are in place. Neither can citizens. For this reason, studies show that introduction of access to justice rights does not lead to a massive increase in litigation.

3. Can these matters not be addressed at MS level? No. EU action is required.

As discussed above, Member State performance to date on access rights, in particular access to justice, has been poor with all available data showing problems with access to justice at Member State level in every country in the EU. Access to justice is frequently under attack in Member States, particularly with the rise of populism in many EU countries. A strong message from the EU supporting access rights is required in order to shore up weakening of democratic rights and the rule of law. Member States are required to implement Aarhus access to justice requirements as Aarhus Parties. However, the weak performance in the area of Access to Justice, and the marginally better (but still generally inadequate) performance in the area of public participation and access to information (for which there are some limited cross cutting measures already) 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.

4. Do Access to justice amendments belong in Fit for 55 package proposals? Yes.

The Fit for 55 proposals consists almost entirely of directives and regulations which have application at Member State level.

A practical example of what introducing access rights means can be seen in the revision of the ESR (Effort Sharing Regulation). The ESR requires Member States to keep emissions below certain targets in the area of

[8] Kavanagh v MJELR [2007] IEHC 389, para c

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road transport, heating of buildings, agriculture, small industrial installations and waste management (falling outside the ETS), in order to maintain the Unions overall 2030 trajectory. It divides responsibility for this between Member States and obliges them to take the steps necessary to implement this. The new EU Com proposal intends to revise it to reflect the increased overall EU target in the new EU Climate Law of 55% reduction by 2030 (increased from 40%). The EU Parliament adopted an amendment which provided for access to justice when these obligations were not met, or when public participation obligations were not met. The effect of this would be that individuals and NGOs can take their Member State to court if their actions are insufficient to meet the obligations of the Regulation.

These proposed Aarhus amendments concern the application of Aarhus Rights at Member State level only.

The inclusion of these rights in legislation that will be implemented at Member State level is necessary and justified for several reasons:

(i) Required by EU Law

Public Participation in environmental decision making, and Access to Information have been the subject of express EU law provisions. The right of access to justice as described by the Aarhus Convention has been expressly recognised in CJEU case law as arising out of the EU Treaties (Art 19(1) effective legal protection), the Charter of Fundamental Rights (Art 47 effective judicial protection, Art 37 environmental protection) and the EU's conclusion of the Aarhus Convention, leading the CJEU to hold that EU laws must be applied by National Courts in a manner consistent with the access to justice requirements of the Aarhus Convention (e.g. "Protect Natur" Case 664/15 (para 58), "LZ No. 1" Case 240/09 (para 52), "Trianel" Case 115/09). Failure to articulate these rights clearly in the legislation will lead to uncertainty as to their ambit and application, which will then need to be resolved through extensive satellite litigation in the domestic courts of many countries. This will create undue administrative burden on the court systems of Member States, as well as significant and unnecessary legal/regulatory uncertainty. This regulatory uncertainty has a negative effect on the economic, social and business spheres in the Member States. Legal certainty is a much better outcome.

(ii) Required by EU Policy

Art 7 TFEU creates an obligation of consistency with EU policy - "The Union shall ensure consistency between its policies and activities". The EU Green Deal (pg. 23) is a ground-breaking policy seeking to position the EU as a global leader in environmental governance and expressly commits to improving access to justice for citizens and NGOs at Member State level. The EU Commission has been tasked with this mission. The EU Commission Communication on Improving Access to Justice 2020 expressly commits to writing access to justice provisions into all legislative proposals affecting the environment. The 2020 Commission Communication states that it is a priority for the co-legislators to include provisions on access to justice in EU legislative proposals made by the Commission for new or revised EU law concerning environmental matters." This Communication highlighted the failings in access to justice at Member State level that are extensively documented in various studies. It called on Member States to remove barriers to access to justice and at the same time argued for introducing access to justice provisions in all legislative proposals that affect the environment, as a key priority area of action. This was part of the EU Commission effort to meet

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their obligations as set out in the EU Green Deal. The 8th EAP (Environmental Action Plan) at Article 3(af) of the 8th EAP commits to a high standard of access to justice and implementation of the Aarhus Convention as a key enabling factor in achieving the EU's environmental priorities. At paragraph 35 of the Recitals it states that access to justice is an integral element of implementation of the 8th EAP. The Plan recognises the relationship between access to justice and implementation. The fundamental relationship between access to justice and effective environmental governance was also recognised in the EU's own Development of an Assessment Framework for Environmental Governance, May 2019.

(iii) Required by International Law

The EU is a 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. The provisions of the Aarhus Convention are clear that Parties must take the necessary steps to ensure the Convention is implemented through a "clear, transparent and consistent framework"(Art 3(1)). The most effective way to achieve a consistent cross-EU implementation of these obligations would be through specific obligations in EU directives/regulations (particularly political agreement on a cross-cutting access to justice directive has proved impossible).) The Aarhus Convention Compliance Committee (ACCC) has 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[9]. Article 9(3) requires Parties to provide a right of challenge where an act or omission — any act or omission whatsoever by a Community institution or body, including any act implementing any policy or any act under any law — contravenes law relating to the environment.

5. Do Aarhus rights belong in energy laws? Yes.

Energy laws are laws relating to 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. This competence was in no way 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 which is stated to be "without prejudice" to the application of any other article, 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. Art 194 measures are to be adopted 'with regard for the need to preserve and improve the environment'. It is clear that in any event the integration principle (Article 11 TFEU) says 'Environmental protection requirements must be integrated into the definition and implementation

[9] 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 on how categories of decision making cannot be excluded in the context of EU State Aid decision making.

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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 for excluding energy related measures from this, nor would this be logical given the intrinsic linkage between energy and the environment. This is consistent with the CJEU's jurisprudence in the area, for example in the case of C-594/18P Austria v. Commission where they relied on Art 11 TFEU and found that energy projects and State Aid decisions must be subject to the environmental law of the EU.

Previous directives made under Art 194(2) have implemented Aarhus rights.

For example, the recitals to the directive on renewables, 2018/2001 make the operation of the entire directive subject to the provisions of the Aarhus Convention. This is a directive made under Art 194(2). It is interesting to note that this Directive is being amended currently, and the new proposal sites Directive in both Art 192 and Art 194 as its legal basis, which obviously could also have been the case with the EPBD proposal.

Directive 2012/27/EU (recast Energy Efficiency directive), also promulgated under Art 194(2), also contains provisions 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 energy proposals in the Fit for 55 package operate. 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, which incidentally have been found to be inadequate when reviewed by the ACCC).

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 for EU law that this includes energy laws, as these are environmental laws.

For further analysis of when a law is a "law relating to the environment" see Client Earth's Guide to Access to Justice, page 32 which cites 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 for broad interpretation by the ACCC).

6. Do Aarhus rights belong in Directives and Regulations? Yes.

Directives require transposition at Member State level in order to become operative, but on the fulfilling of certain conditions can become directly effective with no further transposing measures. **The inclusion of clear access rights in Directives makes it more likely that such rights will be properly vindicated at Member State level, and support infringement action by the EU Commission where they are not.** Examples of access rights already present in EU Directives include the EIA Directive and the IED.

As already established above, Aarhus access rights exist at Member State level in relation to all environmental information and decision-making, and access to justice. When these rights are not clearly articulated it leads to confusion and poor transposition and leaves it to the courts to define these rights, resulting in many court cases considering the different aspects of the rights in the particular national context. The Aarhus Convention requires

that these rights be clearly established on a legislative basis for this reason, to avoid confusion and endless litigation and debate (Art 3(1), Art 9). Inclusion of access rights clauses in EU Directives makes it much more likely that such rights will be the subject of specific legislative provisions at Member State level. This is important for legal certainty and to avoid a multiplicity of litigations that will arise otherwise.

With Directives that fulfil the conditions of direct effect, and regulations which are designed to be directly effective anyway without transposing measures, the need for inclusion of clear access rights is even greater, as there is no transposition process through which they can be added in. Example of access rights in a regulation can be seen in the revised Governance Regulation 2018/1999. The EU Commission recently on the proposed an environmental regulation containing a comprehensive access to justice proposal, the Nature Restoration Regulation, Article 16, and on the 26th Oct 2022 included similar in a directive, the Ambient Air Quality Directive (Art 27).

Inclusion of these rights will bring access rights in these specific areas within EU Commission enforcement powers, giving a clear basis for EU infringement action against Member States if they fail to adequately transpose or otherwise vindicate these rights.

Finally, all evidence currently shows that Member State performance on voluntarily adopting access rights is extremely poor, and they are unlikely to do so unprompted. Access to justice rights in particular are frequently perceived as delaying development through increased litigation, despite studies in UK, Germany and elsewhere showing this is not in fact the case.

7. Which EU laws currently contain Aarhus rights? Many EU laws contain some Aarhus rights, but few are implemented adequately.

Some Aarhus rights are contained in most, if not all, pieces of EU legislation that touch upon environmental and climate protection. The problem is that often this implementation is only very limited and incomplete, meaning that many Aarhus rights remain unenforceable in practice. Without proper implementation under EU Regulations and Directives, they remain rights on paper only.

As mentioned above, the Aarhus Convention has three pillars: Access to Information, Public Participation and Access to Justice. Each of these pillars contains 2 or 3 specific Aarhus rights, which have been implemented to differing extends under EU law:

(i) Access to Environmental Information

There are two important parts of the right to access to environmental information: access to information requests and proactive dissemination of information.

Access to information on request, meaning the right for every citizen to write to a public authority and ask for access to certain documents or other information, is well-established under EU law. A horizontal Access to Environmental Information Directive implements this right under EU law. No immediate action is needed here.

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More problematic is proactive dissemination of environmental information, meaning the obligation for authorities to publish environmental information on their websites and by other means to inform the public without receiving specific requests. Many EU laws pertaining to the environment include some related obligations. For instance, Directive 2012/27/EU (recast Energy Efficiency directive), also promulgated under Art 194 TFEU, contains provisions providing for public access to information on the energy efficiency of buildings owned by public authorities. However, a lot more needs to be done to give the public access to the environmental information they need to understand and get involved in decision-making procedures. This is an important point for almost all legislative files related to climate and the environment.

(ii) Public Participation

Public participation is the right of the public to participate in decision-making procedures that impact on the environment. The Aarhus Convention imposes different requirements depending on the decision that will ultimately be taken.

Public participation in permitting procedures is the most regulated under EU law. The EIA Directive, Habitats Directive and Industrial Emissions Directive include the requirement to organise public participation procedures. These Aarhus rights are well-established and despite minor important improvements that are currently discussed as part of the Industrial Emissions Directive amendment, not much action is required here. The RePowerEU initiative has given rise to concern among the NGO community as the emphasis on streamlining permitting processes and removal of administrative barriers suggests the possibility of removal of some of these public participation rights. While the idea of accelerating renewables is certainly important, participation rights are not what slows this process currently and is the wrong way to go about it.

Public participation is also required in the elaboration of plans and programmes. EU law requires public participation in case a Strategic Environmental Assessment (SEA) is prepared. However, also outside of this assessment, it is important that the public have the possibility to learn about proposals for plans and to express their views. The Public Participation Directive requires such participation for various plans and programmes. However, it only applies to those plans/programmes that are explicitly listed in its Annex. It is therefore important to include new plans/programmes under that Annex or to include public participation requirements directly in new Directives and Regulations. Some current examples for important actions for the European Parliament include: (1) improving public participation requirements under the EU Governance Regulation because the Aarhus Compliance Committee found that these don't meet the requirements of the Convention; (2) ensuring public participation for newly required plans/programmes, such as the Nature Restoration Plans etc.

Public participation should also be ensured in the elaboration of policies and executive regulations. While the elaboration of such regulations and policies is less frequently prescribed in EU Regulations and Directive, it is important to keep this in mind as well.

(iii) Access to Justice

Access to justice concerns the rights of persons to appeal the actions of public and private bodies to the courts or, in some cases, to other independent bodies. The Convention distinguishes access to justice for access to information cases, to challenge permit decisions and to challenge other acts or omission that violate environmental law.

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Access to justice to appeal refusals to provide access to information are also regulated under the already mentioned Directive on Access to Information. There is no need to amend this Directive at the moment.

In permit cases, access to justice is again well regulated by way of the EIA Directive and the Industrial Emissions Directive. The Court of Justice has also given a lot of rulings in this area, which further help. There is therefore no big need to improve this system at the moment. However, again the mentioned RePowerEU proposal risks conflicting with existing Aarhus rights.

The least implemented under EU law are access to justice rights to challenge other acts and omissions that contravene EU environmental laws. This is the main topic of this briefing. In the climate field, access to justice rights are referenced in the recitals Directive 2018/2001 on energy efficiency made under Art 194 (Energy). However, as explained above and below, a lot more needs to be done.

Importantly, other legislative proposals in the environmental field do include proposals for access to justice provisions and it is very important to defend these in the European Parliament. The newly proposed Deforestation Regulation (Art 30 - currently in trilogues), the Corporate Sustainable Due Diligence Directive (Art 19), the Nature Restoration Law (Art 16) and the Ambient Air Quality Directive revision proposals (Art 27) from the EU Commission contain strengthened proposals for Access to Justice. Related to these provisions, both the revision proposals for the Industrial Emissions Directive (Art 79a) and for the Air Quality Directive (Art 28) also contain provisions that would allow persons to claim health damages. In case you have questions as to any of these environmental (rather than climate) proposals, please reach out to ClientEarth at sbechtel@clientearth.org .

8. Do the EU Treaties/Plaumann allow access to justice clauses to be inserted into Fit for 55 laws? Yes.

The "Plaumann Test" governs access to review before the CJEU to annul EU level institutional decision, and will not be affected or otherwise interact with access to justice clauses placed into directives or regulations which are designed to be operative at Member State level.

The EU Treaties absolutely do allow access to justice clauses to be inserted into the Fit for 55 legislative package, and the EU Treaties require EU institutional actors to act to implement the obligations of the Aarhus Convention. Art 216 TFEU makes it clear that international treaties like the Aarhus Convention are binding on the EU institutions and Member States. Art 7 TFEU emphasises the need for consistency between policies and activities of all aspects of the EU, and Art 21(3) emphasises the need for internal and external consistency. Art 11 TFEU emphasises that environmental protection needs to be integrated into all functions of the EU's operations, as does Art 37 of the Charter of Fundamental Rights. Article 19(1) TFEU emphasises the need for effective legal protection, and Article 47 of the Charter of Fundamental Rights provides in similar terms for the right to effective judicial protection. This means EU Citizens should be able to secure the effectiveness of EU law before the Member State Courts, consistent with the findings of the CJEU in Janecek (C-237/07), LZ No.1 C-240/09 & LZ No. 2 (C-243/15) Protect Natuur (C-664/15), Trianel C-115/09 and others.

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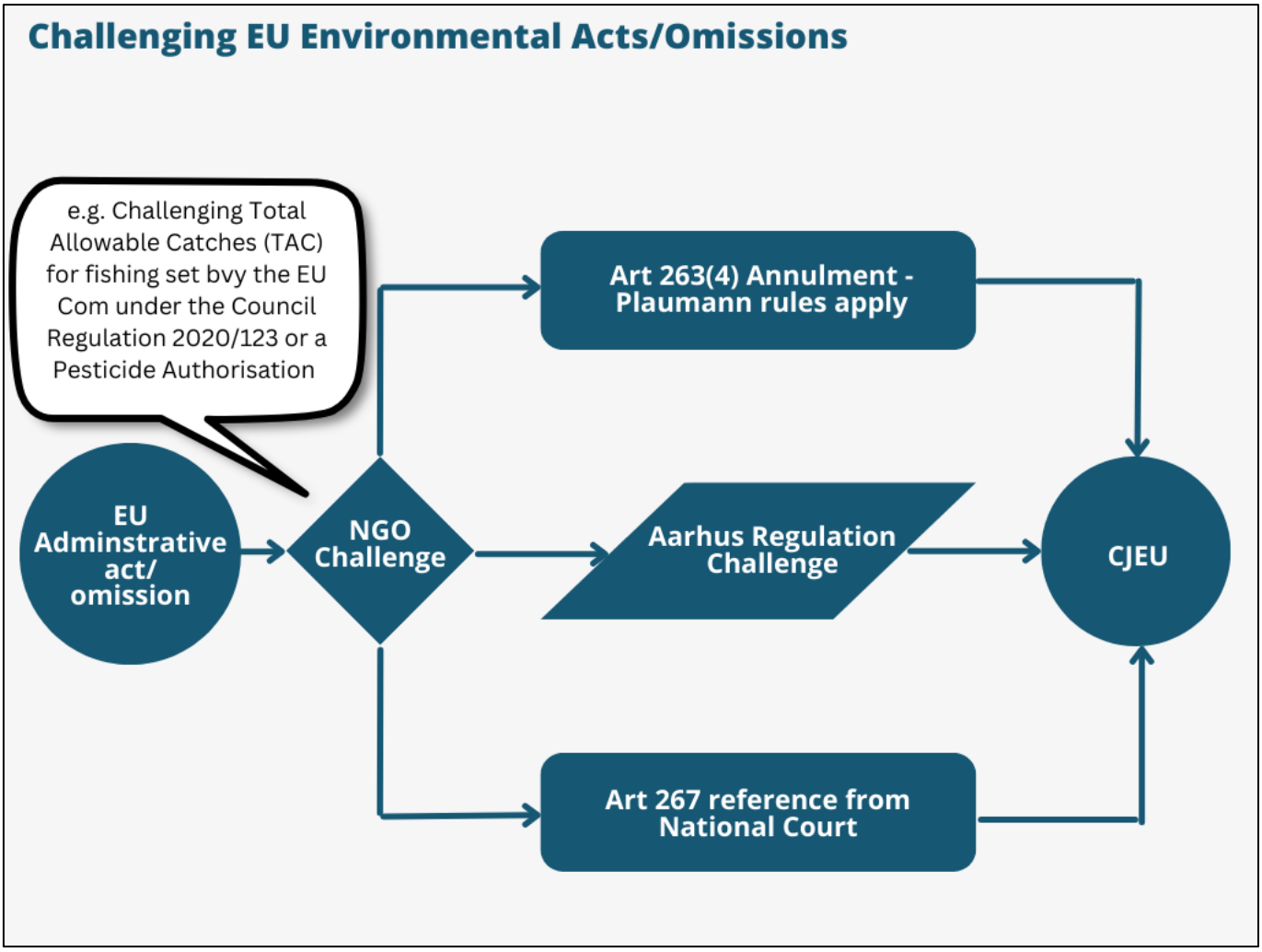
9. Are access to justice clauses in individual directives needed after the revision of the Aarhus Regulation? Yes.

Similar to (7) above, the Aarhus Regulation (revised 2021) governs EU level decision making and is not implicated in access to justice provisions in regulations and directives which will operate at Member State Level.



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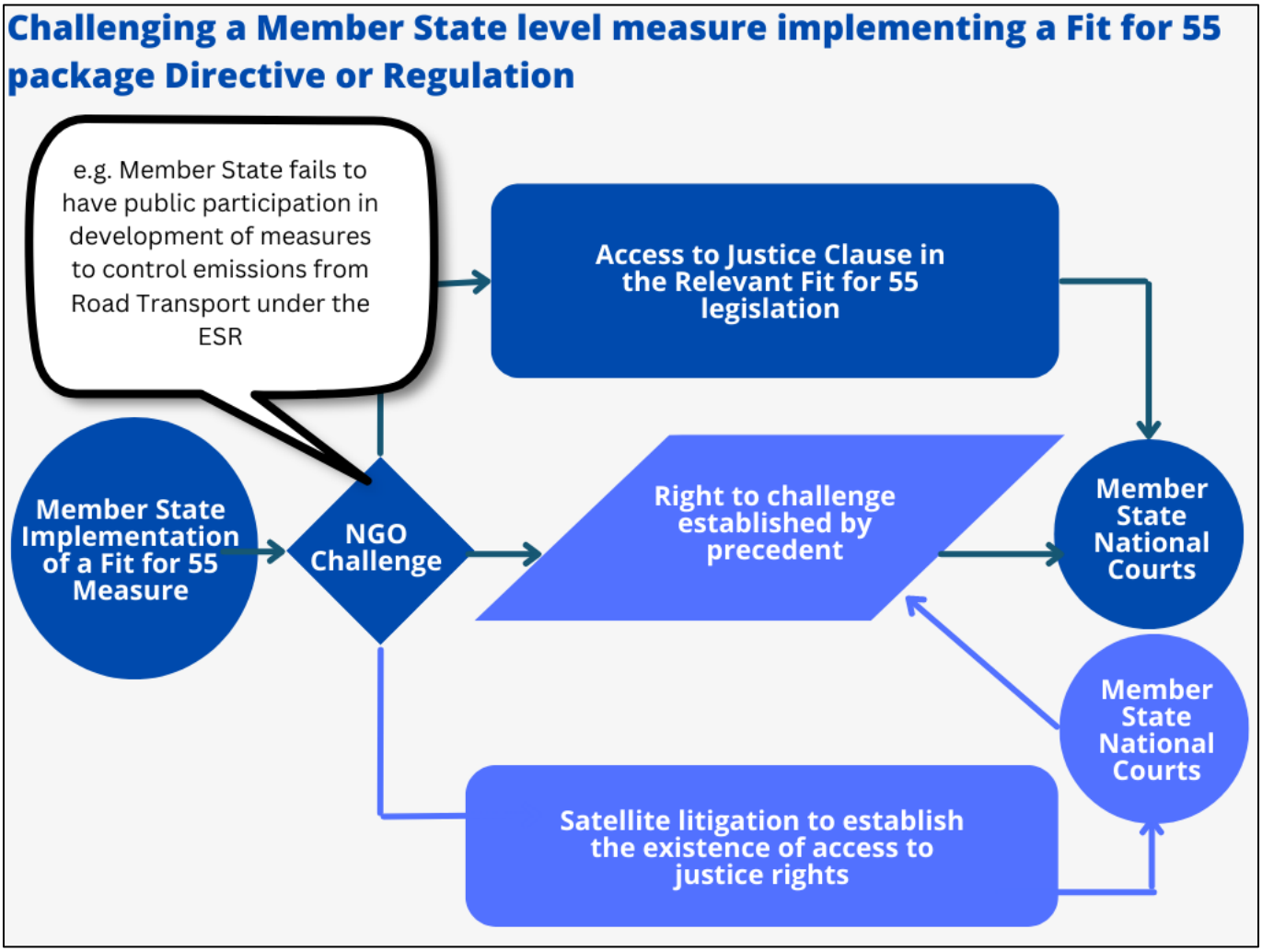

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