

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

Introduction

In response to the ever-worsening climate and biodiversity crises, the EU developed a new environmental policy “The EU Green Deal”. The [EU Green Deal](#) (2019) to make the EU climate neutral by 2050, and to reduce emissions by 55% by 2030. A key element of this is the “[Fit for 55](#)” work package (July 2021) legislative proposals. **It represents an unprecedented opportunity to bring the EU into compliance with its international law obligations, make the EU greener, fairer, more economically prosperous and more secure.** [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.

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 Justice¹. 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.

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 requires parties to ensure 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). The EU and all Member States are full parties and bound by its obligations. Access to justice in particular is an essential element of the Rule of Law², 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.**

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), National Mitigation Plan 2017 [quashed by the Supreme Court](#), and replaced with much a much more effective and detailed plan. Accountability

¹ 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>

² 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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can only enhance climate action, and helps protect the environment. 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. 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. It helps to transpose those requirements into EU law, not least because that would allow for effective enforcement by the EU Commission.

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.

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](#)).

(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 the EU Commission [Communication on Improving Access to Justice](#) 2020, the [8th EAP](#) and the [Communication on the EIR 2022](#) all highlight implementation of the Aarhus Convention as a key enabling factor in achieving the EU's environmental priorities.

(iii) Required by International Law

The EU and all MS's are parties to the Aarhus Convention which requires (under Art 9) that access to justice in environmental matters be guaranteed for members of the public including NGOs. The most effective way to achieve a consistent cross-EU implementation of these obligations would be through specific obligations in EU directives/regulations. The ACCC has been clear that it applies equally to energy legislation with environmental implications³.

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

³ 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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Energy laws are laws relating to the environment. This is obvious from the wording of the [Art 194](#) (Energy) 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. This is consistent with the case of [C-594/18P Austria v. Commission](#), as well as ACCC findings (e.g. ACCC/C/2011/63 (Austria), para. 52 and ACCC/C/2013/85 & ACCC/C/2013/86 (United Kingdom), para. 71).

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

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 well as the Governance Regulation. The EU Commission included such clauses in some recent legislative proposals including, the [Nature Restoration Regulation](#), Article 16, and on the 26th Oct 2022 included similar in a directive, the [Ambient Air Quality Directive](#) (Art 27).

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.

(i) Access to Environmental Information

Access to information on request is well-established under EU law. A horizontal [Access to Environmental Information Directive implements this right under EU law](#). A lot more needs to be done on active dissemination to give the public access to the environmental information they need to understand and get involved in decision-making procedures..

(ii) Public Participation

The EIA Directive, Habitats Directive and Industrial Emissions Directive include the requirement to organise public participation procedures. The RePowerEU initiative has given rise to concern as it suggests the possibility of removal of some of these public participation rights.

EU law requires public participation in case a [Strategic Environmental Assessment](#) (SEA) is prepared in plans and programs. The [Public Participation Directive](#) also 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.

(iii) Access to Justice

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. Access to justice to appeal refusals to provide access to information are also regulated under the already mentioned Directive on [Access to Information](#).

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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. 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. 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. **The EU Treaties absolutely do allow access to justice clauses to be inserted into the Fit for 55 legislative package.** EU institutions must act to implement the obligations of the Aarhus Convention. EU citizens should be able to secure the effectiveness of EU law before the Member State Courts, consistent with the findings of the CJEU (e.g. see LZ No. 2 (C-243/15) Protect Natuur (C-664/15) and others).

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

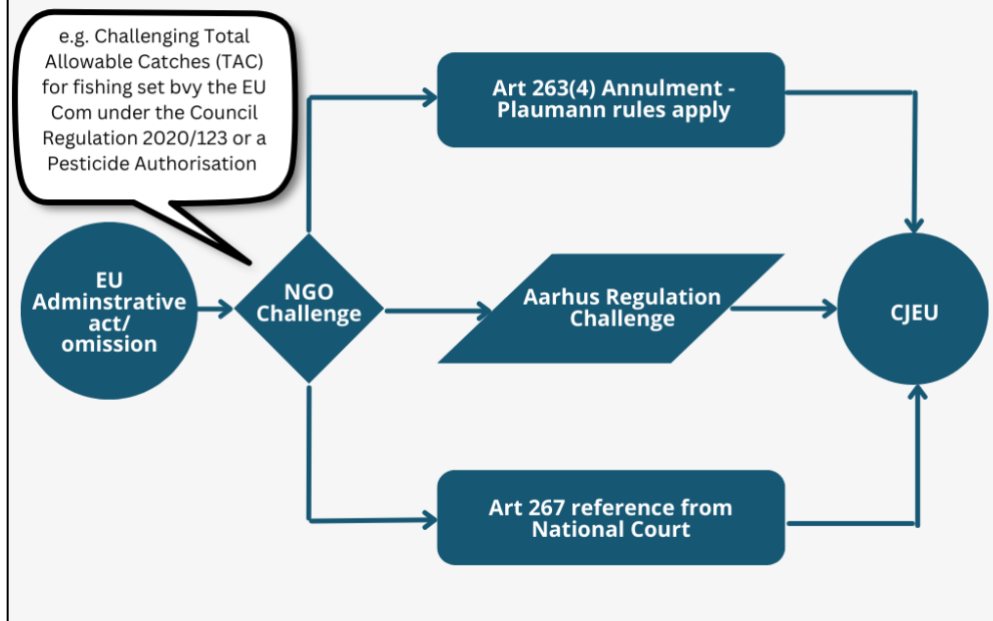
Similar to (7) above, the Aarhus Regulation (revised 2021) governs EU level decision making and is not implicated in access to justice provisions in regulations and directives which will operate at Member State Level.

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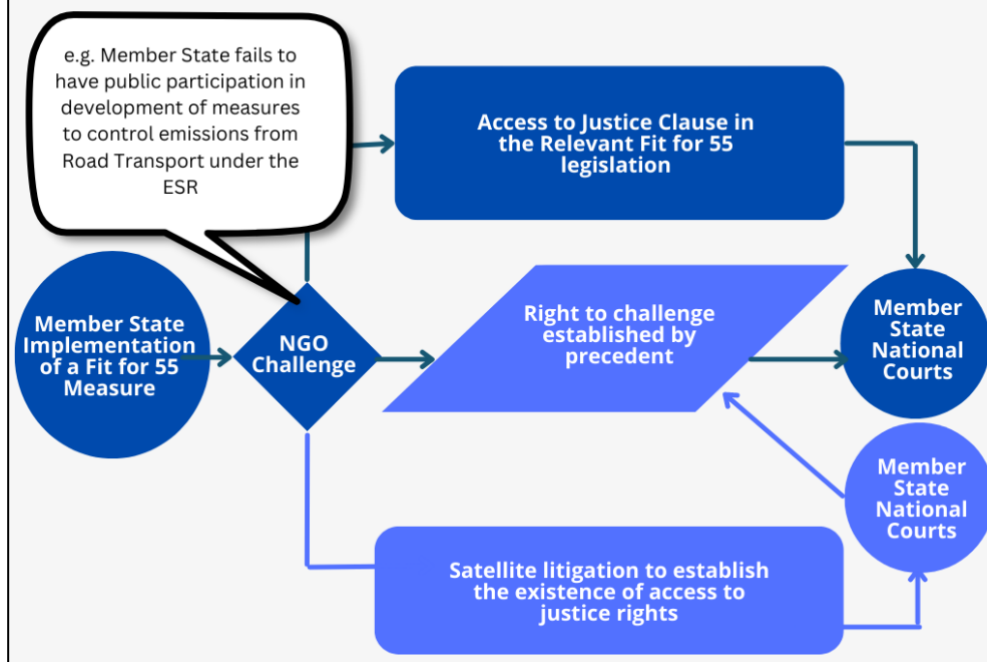
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Challenging EU Environmental Acts/Omissions



Challenging a Member State level measure implementing a Fit for 55 package Directive or Regulation



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