Aarhus Academy: Access to Justice myth buster

During the course of the Fitfor55 package trilogues, attempts by elements in the EU Parliament to introduce Member State level access to justice clauses were largely resisted by the other institutions, and Member States via the Council. This was often on the basis of flawed legal arguments that gained acceptance through repetition. This resource is designed to provide concise rebuttals to these arguments and is a summary of a longer FAQ briefing, available here.

1. What is the Aarhus Convention, and does it apply to the EU?

The Aarhus Convention is a legally binding, 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, access to environmental information rights for access to environmental information and access to justice (the right to go to court to defend the environment or the access rights) (UN 2014). The Convention explicitly requires Parties, including the EU, to "establish and maintain a clear, transparent and consistent framework to implement the provisions of this Convention" (Article 3(1)). The EU ratified it in 2005 and all Member States have also ratified it at different dates. Therefore, it is legally binding on the EU, and all of the institutions are obligated to have regard to it when carrying out their functions.

2. Does the Aarhus Convention affect the EU when legislating?

Yes. The EU must ensure it complies with its international law obligations when legislating, and the Aarhus Convention is no different. All EU institutions must ensure they comply with the Convention's obligations when carrying out their functions.

3. Do Aarhus Rights belong in Fit for 55 proposals?

Yes. The package consisted in the main of Directives and Regulations that were laws relating to the environment. In many cases they provided opportunities for public participation in environmental decisions, and as a result should have also included explicit provision for access to justice, to ensure these rights are vindicated. Many studies show that access to justice at Member State level is problematic in different ways across all Member States, therefore EU level action is required to protect individuals rights.

4. Are Aarhus Rights only relevant to legislation under the Environment Title (Art 192) and not relevant to proposals under the Energy Title (Art 194 Energy law proposals)?

No. It is often argued that Aarhus rights are "out of scope" for laws proposed on the basis of the Energy Title TFEU. This is incorrect. Energy laws, particularly ones to tackle climate change and emissions, are laws relating to the environment within the meaning of the Convention. This is clearly stated in Article 194(1) which explicitly references the environment, and already confirmed in the case law of the CJEU.

5. Do Aarhus rights need to be safeguarded in EU legislation when they are already transposed in national legislation?

Yes. Aarhus implementation by the Member States has been shown by numerous studies and EU Commission documents to be inconsistent and incomplete. Without actions at EU level individuals will continue to be denied their rights under the Convention.

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The Access to Justice Observatory Project has been generously funded by the European Climate Foundation and is led by Alison Hough BL who is a lecturer in law at Technological University of the Shannon. For more information on EJNI or the Access to Justice Observatory Project, visit our website: www.ejni.net or email admin@ejni.net

6. Will broadening access to justice damage the economy by slowing down/impeding governance or business?

No. The most common objections to broadening access to justice is that it will result in these rights being exercised frivolously in almost every case by those opposed to all development. This is simply not supported by the available data. For example studies from the UK and Germany show no or only modest increases in the amount of environmental litigation after introduction of access rights. This is also evident from Irish statistics on Judicial Review from ratification in 2012 to present, despite overall increase in case load in the Courts in that time. Additionally, almost every jurisdiction has a mechanism for filtering out applications which are frivolous or vexatious early on.

7. Can these matters not be addressed at MS level?

No. EU Action is required. 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.

8. 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 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.

9. Will such access to justice clauses affect/be affected by the Aarhus Regulation, (revised 2021)?

No. This is mixing up the Aarhus Regulation (which affects only EU-level institutions) with Aarhus obligations of Member States. This legislation only concerns access to justice in relation to EU level decisions by EU institutions or bodies, and has no impact on access to justice at Member State level.

10. 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 has the potential to contravene environmental law, it should be subject to challenge. Climate action measures that breach existing environmental laws, or which fall short of legislative requirements, 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.

11. Do EU laws currently contain Aarhus rights?

Yes. Many EU laws contain some Aarhus rights (e.g. EIA Directive, IED Directive, the Governance Regulation), but few are implemented adequately.

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12. Do the EU Treaties/Plaumann Test allow access to justice clauses to be inserted into laws aimed at Member States?

Yes. The "Plaumann Test" is an interpretation by the CJEU of the criteria for seeking to anull an act of an EU institution or body (Art 263(4) TFEU). The Plaumann Test is not relevant to access to justice at Member State level as it only governs access to the CJEU in annulment actions vis a vis the acts of EU institutions/bodies, not Member State level actions.

13. 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.

14. Are Aarhus right are stronger if they are not regulated at EU or national level because that would risk watering down the international obligations.

No. In the dualist system of EU law, international law obligations are not effective until implemented, and therefore are more "watered down" by non-implementation at EU level. This is evident in the complete inability of individuals to utilise the Article 263(4) annulment mechanism to challenge EU acts due to the restrictive "Plaumann" interpretation, until the Aarhus Regulation was introduced, and later amended to provide access to the CJEU for review on environmental grounds.

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