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ENVIRONMENTAL JUSTICE NETWORK IRELAND

AARHUS ACADEMY:

ACCESS TO ENVIRONMENTAL JUSTICE MYTH BUSTER

This paper is one of a series of papers designed as a resource for NGOs and those working on EU legislative developments. It summarises the most common arguments made against including Aarhus Convention rights in EU laws relating to the environment, and exposes the flaws in the basis of them. This paper is structured in FAQ format and focuses on Access to Justice on the environment.

AUTHOR

Alison Hough, Environmental Justice Network Ireland & Technological University of the Shannon.

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Background

The Aarhus Convention mandates principles of open democracy in the area of the environment such as access to environmental information, and the right of the public to participate in decision making. These principles apply at all levels of governance and the Convention obliges Parties to implement the Convention's principles such as access to information, public participation and access to justice through their legislation and policy instruments, and to protect those who seek to exercise their rights under the Convention. The EU is a party to the Convention and these obligations apply in full to it as well as to its Member States who are also parties. The Convention requires parties to provide access to justice for breaches of environmental law and for violation of the rights of public participation and access to information in the Convention. Access to justice is 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.

However, the EU has a chequered history when it comes to compliance with the Convention's obligations, as can be seen from decisions of the Aarhus Convention Compliance Committee (ACCC) that relate to the EU. This lack of enthusiasm for implementing the Convention's provisions can also be seen from recent legislative proposals from the EU Commission as part of the Fit for 55 Package which did not have Member State level access to justice provisions (while other proposals like the Nature Restoration Regulation, (Art 16) and the revision of the Ambient Air Quality Directive (Art 27) did have Access to Justice clauses, as do many existing environmental laws such as the EIA and IED Directives). The lack of access to justice clauses in all of the Fit for 55 and European Green Deal (EGD) proposals by the EU Commission showed a distinct lack of awareness of, and commitment to these values. This was the most radical and far-reaching revision of environmental legislation in the history of the EU, and represents a missed opportunity to achieve better implementation of the Convention.

During the trilogue negotiations for the Fit for 55 package, various elements within the EU Parliament attempted to introduce amendments that would give effect to Aarhus Convention obligations, with the intention of aligning EU law with its international law obligations, enhancing the rule of law internationally and reaffirming the EU's position as a global leader in environmental democracy, as well as guaranteeing citizens their basic democratic rights. However, these attempts were rebuffed by the other institutions (and sometimes other EU Parliamentarians). This was sometimes done on the basis of flawed arguments, such as that it was legally impossible to introduce access to environmental justice clauses into energy laws. These arguments often arose out of a lack of understanding of EU law principles such as subsidiarity, or the nature of the EU's relationship with the Aarhus Convention. The purpose of this document is to address some of these arguments.

Contents

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)).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) (Barritt,, 2022), and includes express reference to the right to "an environment adequate to his or her health and well-being" (Article 1 "Objective").

The Aarhus Convention is of key strategic importance in terms of providing the EU and Member States a mandate to strengthen environmental democracy and environmental accountability, and fundamental rights protection. It also adds value economically by improving governance (increasing attractiveness for investment), and procedural economy by ensuring better early-stage decision making, which in turn makes it less likely that project consents are overturned, because they were sound to begin with. 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 and Decision I7) charged with reviewing compliance by the signatories. This includes dealing with complaints from a variety of sources - receiving 'submissions' from State Parties regarding other State Parties breaches of the Convention's terms. It can receive "communications" from NGOs and individual members of the public. The secretariat of the Convention itself also has the power to make "referrals". This makes it a type of watchdog, ensuring consistent and effective application across all the 47 State Parties. The ACCC interpretations of the Convention are acknowledged to be authoritative, and although their findings and decisions are not binding law before domestic courts in most countries, they are legally binding on the States to which they are addressed once they are approved by the Meeting of the Parties (Fasoli & McGlone 2018).

In terms of access to information, parties must gather and actively disseminate certain environmental information, as well as provide access to environmental information on request. Parties must allow the public to participate in environmental decision making from permitting to plans and programs. The "public concerned" (those affected) must be identified and are *inter alia* entitled to notice of the proposed decision that may 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 also 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 relating to the environment is breached. This includes acts and omissions that contravene any laws that relate to the environment, 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".

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

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

Yes. As a fully ratified party to the Convention, the EU was envisaged as such by the drafters of the Convention, in the category "Regional Economic Integration Organisation" (REIO) as similar to a State Party (in areas of exclusive competence, or areas of shared competence where it has acted, assuming competence), and which must implement all the obligations of the Convention in order to fulfil its international law obligations. Its continuing failure to do so undermines the EU legal order as well as the Convention itself. The argument is often made that the EU made a derogation in the area of access to justice and therefore is not obliged to implement Art 9(3) of the Convention. However, this is not accurate. The EU did not make any derogation when it ratified the Convention. It did make a declaration that Art 9(3) obligations would remain with the Member States until such time as the EU took steps to implement these, as part of the shared competence structure applicable in the area of the Environment. This in no way prevents the EU from exercising its legislative capacity in this area, particularly as environment is an area of shared competence.

3. Do Aarhus Rights belong in Fit for 55 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 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 intended 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 have been that individuals and NGOs can take their Member State to court if their actions were insufficient to meet the obligations of the Regulation. However, the EP Clause was conceded in trilogue in the fact of Member State and Com opposition.

4. Are Aarhus Rights 'out of scope' in proposals under the Energy title or relating to energy law?

No. The argument is commonly made that Aarhus Rights are only relevant to legislation under the Environment Title (Art 192) and are not relevant to proposals under the Energy Title (Art 194 Energy law proposals). However, this question has already been resolved by the EU Courts that there is no artificial line to be drawn between an environmental law and an energy law, and that it covers any law related to the environment regardless of the Treaty basis of that law.

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' (Art 194(1)). 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 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 (environmental policy integration) and Art 194, as well as Art 37 of the Charter of Fundamental Rights, 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 cites

Directive in both Art 192 and Art 194 as its legal basis, which obviously could have been the case with the EPBD proposal also.

Directive 2012/27/EU (recast Energy Efficiency directive), also promulgated under Art 194(2), 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 have been found to be inadequate as established by the ACCC).

The EU must implement the conventions provisions, 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 also laws relating to the environment. 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).

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 to be inconsistent and incomplete.

The implementation of Aarhus rights and access to justice in particular has been shown by numerous studies to be inconsistent and incomplete, in particular access to justice. The inclusion of these rights in EU legislation are required by EU law and Policy, and by international law (the Aarhus Convention). 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 setting out the obligation to interpret national law in light of Art 9(3)), "Trianel" Case 115/09).

The failure to anchor these rights clearly in 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.

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´s Communication on Improving Access to Justice, produced in 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 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.

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

No, this is a myth. This is one of the most common objections to broadening access to justice at EU or at Member State level on the basis that allowing members of the public and NGOs the power to review certain decisions made by EU institutions or to object to projects/licenses will result in these rights being exercised frivolously in almost every case by those opposed to all development. This argument has the benefit of appeal to "common sense", and of course

everyone has a story or anecdote of a project held up over a single flower on the site belonging to a protected species, or what appeared to be a technical failure in relation to documentation. However, if data, instead of anecdote, is relied on, one sees that such matters are not borne out in practical reality.

Data is limited, but any data gathered in countries which broadened their standing rights as a result of the introduction of the Aarhus Convention does not support the contention that broader standing leads to those rights being abused or misused, for example studies from the UK and Germany show no or only modest increases in the amount of environmental litigation in the years following introduction of Aarhus rights via legislation in those Member States. This is also evident from Irish statistics, which show that the level of judicial review on environmental grounds has remained relatively steady since ratification of the Convention in 2012. Irish statistics on judicial review actions are not usually provided broken down into environmental and non-environmental cases but in general the category into which they would fall (High Court Judicial Reviews initiated) has remained relatively steady at between 500-600 cases initiated per year since 2012, with 558 cases initiated 2012, 588 in 2013, 558 in 2020 and 614 in 2021) despite a general media and political consensus that it has lead to an increase in vexatious litigation delaying projects. Similarly, at EU level, the impact assessment (pg 224 of the Final Study) for amendment of the Aarhus Regulation in 2021 estimated that there would be a negligible increase in use of complaint mechanisms if standing rights were broadened (and showed that only 5% of currently challengeable EU acts had been challenged between 2006-2018). Also, most jurisdictions and mechanisms (including the ACCC) have mechanisms for filtering our vexatious or frivolous complaints at an early stage.

The reality is that taking and maintaining court cases, particular at the level of legal complexity of the CJEU, require skills, knowledge, time and resources available to only very few. The main category of the public that have all these attributes are a limited category of environmental NGOs. All such organisations have legal status, therefore Boards of Directors and funders to whom they must justify the use of their limited resources of time and money. It would not be possible for such organisations to challenge every single decision made, and any organisation that acted in such a manner would quickly find their funding drying up. The reality is that NGOs have to be extremely selective and strategic about their litigation choices, and litigation represents a considerable risk in terms of cost, manpower and reputation.

For members of the public such actions are even more unrealistic. Very few members of the public have the resources to hire a team of experts and lawyers to run on a court case for a public interest point, and only exceptional members of the public have that rare combination of skills and time to devote to running such cases as lay litigants.

Even if such organisations or individuals do manage to get to the point of initiating litigation, it is usually the case that there checks and balances in place in early course such as the “leave

stage" in judicial review in Ireland and the UK which is expressly for the purpose of filtering vexatious claims.

7. Can these matters not just be addressed at Member State 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. 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 (for which there are some limited cross cutting measures already) and access to information (for which there extensive well implemented obligations except in the area of the proactive dissemination obligations in Article 5) 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.

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.

Access rights are of crucial importance to implementation of EU environmental law and policy, particular in a cycle of never-ending crisis when it would be easy for longer term goal like climate mitigation to be knocked off course in favour of addressing short term crises. Access to justice enables citizens to keep Governments on track with their climate obligations. 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 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 specifically emphasises the need to improve implementation of Aarhus rights 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 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,

2. To provide consistency across the EU, which is good for business. This gives a regulatory "level playing field" across the EU, which avoids penalising MS's 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.

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.

As already established above, Aarhus rights are supported at the Member State level in relation to environmental information and decision-making, and access to justice. When these rights are not clearly anchored in specific legislation 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 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 such 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.

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

No, this is mixing up the Aarhus Regulation with Aarhus Obligations of Member States.

The Aarhus Regulation 1367/2006 as amended by Regulation 1767/2021, sets out the circumstances in which NGOs (and from April 2023 in some cases, individuals) can seek to access to justice in the CJEU following unsatisfactory internal review of an EU administrative act. 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. It is totally separate from any legislative provisions in sectoral directives providing for access to justice in relation to for example, Member States climate action plans.

10. Will introducing access to justice 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.

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 argument can be rebutted by reference to the many 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. Additionally, court findings can provide certainty as to the legal requirements giving strong political justification for more ambitious climate action.

High-profile cases where NGOs exercise of access to justice rights improved their countries climate action measures and ensured that they were sufficiently ambitious have included**,** 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 of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General [2020] IESC 49). 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 Government's 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 Irish National Mitigation Plan 2017 was ultimately 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.

- 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.

11. What EU laws currently contain Aarhus rights?

Many EU laws contain some Aarhus rights, but few are implemented adequately. Some Aarhus rights are contained in 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, which are all anchored by the Objective of the Convention in Art 1 of ensuring "the right of every person of present and future generations to live in an environment adequate to his or her health and well-being".

(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 members of the public have the right to 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

More problematic is the obligation of 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, and to comply with the proactive dissemination obligation in Article 5 and to comply with the PRTR. 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.

Permitting procedures are the most regulated under EU law. The EIA Directive, Habitats Directive and Industrial Emissions Directive all include the requirement to organise public participation procedures. These Aarhus rights have a strong basis in the Public Participation Directive 2003/35/EC, but its implementation leaves a lot to be desired.

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, but these rights overlap to some extent.

Access to justice to appeal refusals to provide access to information are regulated under the already mentioned Directive on Access to Information.

In some cases subject to article 6 of the Aarhus Convention, access to justice is regulated, largely 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 clarify the nature and scope of the obligations under the Convention for Member States.

The least implemented area under EU law is 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.

One of the most important contributions of EU legislation to the Member States' implementation of Aarhus access to justice requirements is in filling the gap created by the well documented uneven and flawed Aarhus implementation by EU Member States. EU laws and the subject would be more readily enforceable by the public than the international requirements of the Aarhus Convention. It also has a "normative" effect when these rights are included in EU laws, creating a best practice signal for Member States to follow in other areas. National provisions for access to justice (implementing EU law obligations) would increase national ownership of climate obligations.

12. Do the EU Treaties/'Plaumann Test' 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. It is worth noting also the Aarhus Regulation as amended in 2021 introduced a much broader form of access to the CJEU in environmental cases with no issue, this was not prohibited at EU level by Plaumann, nor would it be 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 regarding the nature of Aarhus Convention obligations and access to justice requirements 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.

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 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.