



Commission Notice on Access to Justice in Environmental Matters, 2017/C 275/01

**Daniele FRANZONE, Senior expert, European
Commission , DG Environment**

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Outline of presentation

I.	Basics: Notice, background
II.	Decisions, acts, omissions – Role of national courts
III.	Access to justice in environmental matters
IV.	Legal standing
V.	Scope of review
VI.	Effective remedies
VII.	Costs
VIII.	Concerns linked to the Notice
IX	EU-level support



I - (1) Why an initiative on access to justice specifically for environmental matters in 2017?

Commission has stressed the importance of **redress mechanisms** at national level (COM(2017)198 final) to complement more strategic Commission enforcement.

For environment, it is necessary to **overcome basic barriers** that exist in many legal systems, in particular, if the right to go to court is very restricted.

Significance of **Aarhus Convention (1998)**, ratified by EU in 2005.

Case-law of the CJEU has considerably evolved since 2003 (Proposal for a Directive) and now covers much of the subject-matter of the proposal.

I - (2) Why a Notice and what is the Notice?

- **EU access to justice provisions** are included in some EU secondary environmental legislation (EIA, industrial emissions, Seveso Directive, liability, access to information), but there are still large gaps (e.g. in the area of nature, air, waste, water);
- **A Commission proposal** of 2003 sought to fill the gaps but did not receive the necessary support from MS.
- Commission **Notice (Interpretative Communication)**, published in Official Journal C275 of 18 August 2017
- Focuses on what the Court of Justice (CJEU) has said about how national courts should deal with private environmental litigation against public authorities (38 cases cited in the Notice).

ANNEX I

List of relevant case-law of the CJEU for access to justice in environmental matters:

Judgment of 30 May 1991, *Commission v Germany* C-361/88, EU:C:1991:224
Judgment of 17 October 1991, *Commission v Germany* C-58/89, EU:C:1991:391
Judgment of 24 October 1996, *Kraaijeveld* C-72/95, EU:C:1996:404
Judgment of 14 July 1998, *Safety Hi-Tech* C-284/95, EU:C:1998:352
Judgment of 29 April 1999, *Standley* C-293/97, EU:C:1999:215
Judgment of 7 December 2000, *Commission v France* C-374/98, EU:C:2000:670
Judgment of 7 January 2004, *Wells* C-201/02, EU:C:2004:12
Judgment of 7 September 2004, *Waddenzee* C-127/02, EU:C:2004:482
Judgment of 13 March 2007, *Unibet* C-432/05, EU:C:2007:163
Judgment of 25 July 2008, *Janecek* C-237/07, EU:C:2008:447
Judgment of 15 April 2008, *Impact* C-268/06, EU:C:2008:223
Judgment of 3 July 2008, *Commission v Ireland* C-215/06, EU:C:2008:380
Judgment of 16 July 2009, *Commission v Ireland* C-427/07, EU:C:2009:457
Judgment of 30 April 2009, *Mellor* C-75/08, EU:C:2009:279
Judgment of 15 October 2009, *Djurgården* C-263/08, EU:C:2009:631
Judgment of 12 May 2011, *Bund für Umwelt und Naturschutz* C-115/09, EU:C:2011:289
Judgment of 18 October 2011, *Boxus* Joined Cases C-128/09 to C-131/09, C-134/09 and C-135/09, EU:C:2011:667
Judgment of 8 March 2011, *LZ I* C-240/09, EU:C:2011:125
Judgment of 26 May 2011, *Stichting Natuur en Milieu* C-165 to C-167/09, EU:C:2011:348
Judgment of 16 February 2012, *Solvay and others* C-182/10, EU:C:2012:82
Judgment of 28 February 2012, *Inter-Environnement Wallonie* C-41/11, EU:C:2012:103
Judgment of 15 January 2013, *Križan* C-416/10, EU:C:2013:8
Judgment of 14 March 2013, *Leth* C-420/11, EU:C:2013:166
Judgment of 11 April 2013, *Edwards and Pallikaropoulos* C-260/11, EU:C:2013:221
Judgment of 3 October 2013, *Inuit* C-583/11P, EU:C:2013:625
Judgment of 7 November 2013, *Altrip* C-72/12, EU:C:2013:712
Judgment of 19 December 2013, *Fish Legal and Shirley* C-279/12, EU:C:2013:853
Judgment of 13 February 2014, *Commission v United Kingdom* C-530/11, EU:C:2014:67
Judgment of 19 November 2014, *Client Earth* EU C-404/13; EU:C:2014:2382
Judgment of 6 October 2015, *East Sussex* C-71/14, EU:C:2015:656
Judgment of 15 October 2015, *Commission v Germany* C-137/14, EU:C:2015:683
Judgment of 14 January 2016, *Grüne Liga Sachsen* C-399/14, EU:C:2016:10
Judgment of 21 July 2016, *Commission v Romania* C-104/15, EU:C:2016:581
Judgment of 15 October 2015, *Gruber* C-570/13, EU:C:2015:683
Judgment of 28 June 2016, *Association France Nature Environnement* — C-379/15 EU:C:2016:603
Judgment of 8 November 2016, *LZ II* C-243/15, EU:C:2016:838
Judgment of 10 November 2016, *Eco-Emballages*, C-313/15 and C-530/15 EU:C:2016:859
Judgment of 17 November 2016, *Stadt Wiener Neustadt* C-348/15, EU:C:2016:882
Order of the President of the Court of 24 April 2008 in *Commission v Malta* C-76/08 R EU:C:2008:252
Opinion 1/09, *Creation of a Unified Patent Litigation System*, EU:C:2011:123

I- (3) The Commission's Approach to drafting Notice

Create no new legal obligations but draw inferences from EU legal principles and CJEU case-law in case of gaps in EU secondary legislation

Cover all relevant aspects of access to justice in a comprehensive way, i.e. rights, standing, scope of review, effective remedies, costs, at the same time keeping the length reasonable

Target a broad readership of legal practitioners and business

Scope of the Notice: Decisions, acts and omissions by public authorities of the Member States; it does **not** address litigation between private parties and the judicial review of acts of EU institutions via EU courts.

II - (1) Decisions, acts and omissions at the national level

Parliament: national primary legislation

Minister: regulatory acts (statutory instruments)

Government and government departments: plans, consent systems, enforcement

Local government and specialised bodies: environmental infrastructure, monitoring, plans, consents, enforcement

II – (2) Decisions, acts and omissions at the national level: what can go wrong?

Primary legislation and regulatory acts: **adopted late; content incomplete or too narrow**

Designations: **not made or incomplete**

Land-use and sectoral plans: **no strategic assessment or incomplete assessment; inconsistency and incoherence**

Quality standards: **breaches**

Environmental action plans: **delayed or inadequate**

Infrastructure investments: **not made or insufficient**

Consent and operating requirements: **no assessment or weak assessment and conclusions; inaction against illegal development or operational nuisances**

Transparency: **no active dissemination, slow responses to information requests**

II – (3) Role of national courts in environmental litigation

National courts are not only in charge of oversight of national measures (decisions, acts or omissions) but are also '***the ordinary courts***' for implementing EU law within the legal systems of the Member States (Opinion CJ 1/2009, ground 80).

They deal with:

- **Private enforcement** involving litigation *against* public authorities;
- **Private enforcement** involving litigation *between* private parties;
- **Public enforcement** involving criminal law and legal actions *by* public authorities

III – (1) Access to justice in environmental matters: notion

A set of guarantees to allow **court challenges** by **individuals and their associations** against **decisions, acts and omissions** of **public authorities**

Guarantees relate, amongst others, to:

standing;

scope of review;

effective remedies;

costs;

practical information

IV

(Notices)

NOTICES FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES AND AGENCIES

Commission Notice on access to justice in environmental matters

(2017/C 275/01)

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III – (2) Dual approach: rights of the public and obligations on Member States – Notice Section C1

Dual rationale: Uphold rights *and* obligations, Article 288 TFEU, *fish can't go to court*, role of NGOs; according to the CJEU, access to justice is ensured through an **approach based on the rights of the public and an approach based on obligations on Member States.**

IV- (1) Legal standing – overview

Aarhus Convention and Notice, Section C.2

Requests for environmental information (Art.9(1) AC)

Specific activities subject to public participation (Art. 9(2) AC)

Requests for action under the environmental liability rules (Art. 9(3) AC)

Other subject-matter, including national implementing legislation, general regulatory acts, plans and programmes (Art. 9(3) AC)

IV – (2) Legal standing: EU secondary law

In a few cases EU legislation gives legal standing and identifies some possible claims (EIA Directive 2011/92/EU; Industrial Emissions Directive 2010/75/EU; Seveso Directive 2012/18/EU; Environmental Information Directive 2003/4/EC; Environmental liability Directive 2004/35/EC),

Example: Article 11 of the EIA Directive

- public concerned
- decisions, acts or omissions subject to public participation.
- sufficient interest or impairment of rights
- environmental NGOs: legal standing *de lege*
- scope of review: procedural and substantive legality

Special issues dealt with by the EUCJ: - Prior participation

- Preclusion

IV – (3) Legal standing (2) – Article 9(2) of the Aarhus Convention

Article 9(2) of the Aarhus Convention:

Each Party shall (...) ensure that members of the public concerned having a sufficient interest or, alternatively, maintaining impairment of a right (...) have access to a review procedure before a court of law (...) to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of **Article 6** (...)

Article 6(1)(b) of the Aarhus Convention

Each Party shall (...) also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions;

IV – (4) Legal standing: C-243/15 - *LZ II*

Article 6(1)(b) of the Aarhus Convention applies to the procedure laid down in Article 6(3) of the Habitat Directive 92/43/EEC (appropriate assessments). Therefore, Article 9(2) applies to all decisions taken in the framework of Article 6(3) of the Habitat Directive.

Rationale of the case can be applied **to other sectors of EU environmental law** (e.g. Water Framework Directive **C-664/15 – *Protect Natur***).

Challenge **procedural and substantive legality** of the contested decision or act in its entirety (CJEU judgment 15.10.2015, C-137/14, point 80),

IV - (5) Legal standing: (3) Article 9(3) of the Aarhus Convention

Article 9(3): "Each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment."

C-240/09 – LZ 1, "Slovak Brown Bear": "it is for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of the Aarhus Convention and the objective of effective judicial protection of the rights conferred by EU law" (point 51).

IV – (6) Legal standing (4) – Article 288 TFEU – risks for human health

Air quality cases:

C-237/07 - *Janecek* – air quality plan

C-404/13 - *Client Earth* – air quality plan

C-165 to 167/09 - *Stichting Milieu* – national emission ceiling

IV – (7) Legal standing- new CJEU cases

Case C-529/15 - *Folk*: clarifies both a right (to use the environment) and a standing right in relation to the Environmental Liability Directive (Relevant to paragraphs 55 and 89 of the Notice)

Case C-664/15 – *Protect Natur*: application of the principles established in case 243/15 – *LZ II* to the Water Framework Directive (Relevant to paragraph 70 of the Notice)

V - (1) Scope of review

Notice, Section C.3

Possible grounds and arguments for judicial review:
the extent to which grounds and arguments may be restricted

Intensity of scrutiny: The extent to which national judges have to review the legality of acts and omissions

V - (2) Scope of review: possible grounds of judicial review

Art.9 (2) cases: specific activities with public participation

- Individuals: Restriction possible to grounds which entitled to legal standing (C-137/14 – **Commission v Germany**)
- eNGOs: no restriction of the ground possible (C-115/09– **Trianel**)

Art. 9(3) cases:

No specific case law

- individuals: restrictions possible comparable to Art. 9(2)
- eNGO: at least those provisions which gave rights to action before a court, however: NGO enjoy a broad right to protect the environment and invoke obligations before a court (C-243/15 - **LZ II and C-664/15 Protect Natur**)

V - (3) Scope of review: possible arguments in judicial review

Preclusion: scope of review may not be reduced to the objections raised during the administrative procedure (C-137/14 – ***Commission v Germany***)

The principle applies to case falling under Article 9(2). For Article 9(3) see Protect Natur C-664/15, points 88 to 90)

Provisions to protect against arguments submitted abusively or in bad faith are allowed

V - (4) Scope of review: intensity of scrutiny

- EU law does not provide specific rules for the intensity of scrutiny
- CJEU: 'in the absence of further detail in EU law, it is for the legal systems of the Member States to determine that extent, subject to observance of the principles of equivalence and effectiveness' (**C-71/14 – *East Sussex*** – access to information context, point 53)

Conclusion: The level of scrutiny is determined by the objectives of the substantive EU law (C-71/14, point 58).

- This approach was confirmed by the judgment of the CJEU (Grand Chamber) of 16.05.17, in Case C-682/15 in administrative co-operation between Member States in fiscal matters and, indirectly, by the Case C-664/15 ***Protect Natur***.

V - (5) Scope of review: intensity of scrutiny

Both procedural and substantive legality need to be scrutinized

Procedural legality (e.g. public participation requirements)

Substantive legality

- **Facts of the case**
- **Assessment of the merits of a decision, act or omission (examples: significant effect on a Natura 2000 site, significant effect in an EIA context, appropriateness of measure in an air quality plan)**

V - (6) Scope of review: intensity of scrutiny

Additional aspects:

Scrutinizing **regularisation decisions**

Scrutinizing decisions on **plans**

Scrutinizing **national legislation and regulatory acts**

New case (after the adoption of the Notice):

Comune di Corridonia, 26 July 2017, joint cases C-196/16 and C-197/16. Clarifies role of national courts in scrutinizing regularization decisions linked to the Environmental Impact Assessment Directive and related effective remedies (relevant to paragraphs 135 and 164 of the Notice).

VI - (1) Effective remedies - overview

Notice, Section C.4

- Minor procedural defects
- Suspension, revocation, annulment of unlawful decisions or acts, including disapplication of legislation and regulatory acts
- Omissions
- Making good unlawful harm (*including compensation for pecuniary damage*)
- Interim measures (referred to as '*injunctive reliefs*' in Article 9(4) of the Aarhus Convention)

VII - (1) Costs – context

Notice, Section C.5

Article 9(4) of the Aarhus Convention and some EU secondary legislation:

Court procedures must not be prohibitively expensive (NPE requirement)

No *a priori* objection to loser pays

VII - (2) Costs: general principles

Covers

- **all** costs of participation: legal representation, court fees, cost of experts, financial security
- **all** stages of proceedings: appeals as well as first instance

Reasonable predictability

VII - (3) Costs: assessment criteria

In Case C-260/11, **Edwards**, CJEU has established subjective and objective criteria which have to be taken into account in making a cost order:

- **Subjective criteria** include: (1) financial situation of the litigant; (2) prospects of success; (3) importance of what is at stake; (4) complexity of the case; (5) frivolous nature of the claim at its various stages;
- **Objective criterion**: costs of proceedings may not be objectively unreasonable.

New case (after the adoption of the Notice):

CJ Judgment 15.03.2018, Case **C-470/16 – North East Pylon**: asks national judges to extend the NPE requirement across environmental litigation.

VII – (4) Costs: cost allocation regimes

CJEU does not establish cost allocation regimes – however, the cost regime should respect the NPE requirement.

Examples of cost allocation approaches:

Loser pays principle

Back-to-back cost allocation

Protective cost orders (cost caps)

One-way cost shifting

VII– (5) Costs:(4) legal aid

No obligation in EU secondary legislation to provide legal aid for environmental cases

Article 47(3) of Charter of Fundamental rights requires that legal aid should be made available, but the right to legal aid is not absolute and may be subject to restriction

A legal aid scheme may not in itself demonstrate that costs are not prohibitive -> depends on the conditions (e.g. excluding NGOs)

VIII - Concerns linked to the Notice: Notice itself

**Helping readers: Related Citizen's Guide
using FAQ approach**

**New CJEU case-law: Correlation table to
track new cases**

IX - EU-level support: funding relevant to access to justice in environmental matters

Programme of co-operation with national judges:

https://www.era.int/cgi-bin/cms?_SID=6007682c167bcc34db5dd583b8a9ceeca4ddf67100603765788254&sprache=sitemap_en&bereich=artikel&aktion=detail&idartikel=123789

LIFE Programme (Governance and Information):

<http://ec.europa.eu/environment/life/funding/life2018/traditional/index.htm>



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Thank you!