



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

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## Outline of presentation

<b>I.</b>	<b>Basics: Notice, background</b>
<b>II.</b>	<b>Decisions, acts, omissions – Role of national courts</b>
<b>III.</b>	<b>Access to justice in environmental matters</b>
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# 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](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!**