

| ROADMAP   |  |                 |            |
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| TITLE OF THE INITIATIVE   | Communication on access to justice at national level related to measures implementing EU environmental law |                 |            |
| LEAD DG – RESPONSIBLE UNIT – AP NUMBER  | DG ENV – D.4   | DATE OF ROADMAP | 21/07/2016 |
| LIKELY TYPE OF INITIATIVE   | Communication  |                 |            |
| INDICATIVE PLANNING   | <i>Insert hyperlink to forecast report</i>   |                 |            |
| ADDITIONAL INFORMATION  | <a href="http://ec.europa.eu/environment/aarhus/">http://ec.europa.eu/environment/aarhus/</a>              |                 |            |
| <b>This indicative roadmap is provided for information purposes only and can be subject to change. It does not prejudice the final decision of the Commission on whether this initiative will be pursued or on its final content and structure.</b> |  |                 |            |

## A. Context, Subsidiarity Check and Objectives

| Context   |
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| <p>Non-implementation of European Union ("EU") environmental law causes significant damage to the health of human beings and animals and to the quality of air, soil and water. The 7<sup>th</sup> Environment Action Programme ("7<sup>th</sup> EAP")<sup>1</sup> estimates the costs at broadly EUR 50 billion a year<sup>2</sup>. The public (i.e. citizens, non-governmental organisations or businesses) potentially plays a vital role in identifying infringements of EU environmental law caused by administrative decisions, acts or omissions. Where members of the public under the criteria set out by national law can bring a case before a national court and ask for a review, this is an essential element in ensuring the correct application of EU environmental law in the Member States.</p> <p>In 1998, the EU and its Member States signed the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters ("the Aarhus Convention"). Ratified by all Member States and by the EU in 2005, the Convention establishes that, in certain cases, well-defined natural and legal persons can bring a case to a court or to other impartial bodies in order to allow for the review of acts or omissions of the private or the public sector.</p> <p>The political context of this initiative relates to the general importance that Member States and EU institutions alike attach to improved implementation.<sup>3</sup></p> <p>In 2003, the Commission adopted a proposal for a Directive on access to justice in environmental matters<sup>4</sup>. However, the proposal did not gather sufficient support from Member States. Therefore, in 2014, the Commission withdrew the proposal<sup>5</sup>, indicating that it would consider alternative ways of meeting the obligations under the Aarhus Convention and conduct an impact assessment.</p> <p>The 7<sup>th</sup> EAP which sets out environmental policy goals for the period 2014-2020, provides a further context for the initiative. In particular, priority objective 4 envisages that <i>"citizens will have effective access to justice in environmental matters and effective legal protection, in line with the Aarhus Convention (...) and recent case law of the Court of Justice of the European Union"</i>. Furthermore, the European Parliament in its resolution of 10 September 2015 on the 30<sup>th</sup> and 31<sup>st</sup> annual reports on monitoring the application of EU law (2012-2013) (2014/2253(INI)) calls on the Commission to act on access to justice in environmental matters.</p> <p>Finally, several Member States have been found in violation of their obligations on access to justice under the Aarhus Convention by the Aarhus Convention Compliance Committee ("ACCC") and need to adapt their national laws. Even though compliance with the Aarhus Convention can be ensured under the current system provided</p> |

<sup>1</sup> Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'

<sup>2</sup> 7th EAP, Paragraph 56; COWI 2011, 'The costs of not implementing the environmental acquis'.

<sup>3</sup> See Better Regulation agenda [http://ec.europa.eu/smart-regulation/index\\_en.htm](http://ec.europa.eu/smart-regulation/index_en.htm)

<sup>4</sup> COM(2003) 624 final – 2003/246/COD.

<sup>5</sup> COM(2013) 739 final Annex to Commission Work Programme 2014

by the Treaty, an EU initiative at this stage will contribute to ensuring that the adaptation of the national laws is carried out in compliance with the international obligations of the Aarhus Convention and the principles of EU law.

The aim of providing effective access to justice in the environment field is based on EU law and international treaties as part of the EU legal order and the initiative will take account of, and be coherent with, the following:

- The founding Treaties provide for access to justice in Article 19(1) of the Treaty on the European Union ("TEU") and in Article 47 of the Charter of Fundamental Rights.
- There has been an increase in Commission activity on access to justice, as evident in particular in the activities of DG JUST, i.e. promoting human rights through the Charter and setting up the [e-Justice portal](#).
- The EU has adopted various legislative acts to contribute to the implementation of the requirements of the Aarhus Convention at the level of Member States<sup>6</sup> and EU level<sup>7</sup> in relation to Article 9(1) and (2), as well as Article 9(3) of the Aarhus Convention as far as EU institutions are concerned (Regulation 1367/2006),
- Case-law of the Court of Justice of the European Union ("CJEU"), notably in the *Janecek* and *Slovak Brown Bear* cases<sup>8</sup> has moved in the direction of confirming the need to ensure a wide access to justice under the conditions set out therein.
- The Commission adopted a Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law on 11 June 2013, whose principles should be applied horizontally. The principles contained are relevant for an access to justice initiative as far as the Aarhus Convention covers matters under civil law. The Convention is expressly mentioned in the recommendation as having been taken into account. The present initiative will therefore exclude from its scope matters falling under the Recommendation as far as civil law matters are concerned<sup>9</sup>.

## Issue

So far as Member States are concerned, codified common minimum EU standards on access to justice in environmental matters exist only in those areas which are harmonised by EU secondary law, e.g. the Environmental Impact Assessment Directive<sup>10</sup> and Industrial Emissions Directive<sup>11</sup>.

Studies<sup>12</sup> and complaints from members of the public (e.g. concerning no access to justice in the context of the Habitat Directive 92/43/EEC) have revealed that, outside the scope of harmonised EU law, the current legislative provisions in the Member States on access to justice in environmental matters differ considerably and that several problems and obstacles exist in practice. Additionally, in the context of harmonised EU law, the CJEU has issued several judgments which have clarified some of the requirements on access to justice in environmental matters.

The following are affected:

**Citizens and NGOs** are adversely affected by some obstacles in acceding the courts. This helps to explain why a stream of preliminary references have been submitted to the CJEU by different national courts, seeking

<sup>6</sup> Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC (OJ L 41, 14.2.2003, p. 26) and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156, 25.6.2003, p. 17).

<sup>7</sup> Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.9.2006, p. 13).

<sup>8</sup> In Case C-237/07, *Janecek*, the Court recognised a citizen's entitlement to challenge the absence of an air quality management plan (despite German law considering that the citizen had no standing to bring such a case), and, in Case C-240/09, *Slovak Brown Bears*, the Court found that Article 9(3) of the Aarhus Convention had no direct effect but that Member State courts must nevertheless facilitate access by the general public.

<sup>9</sup> OJ. L 201/60 of 26.7.2013

<sup>10</sup> Directive 2011/92/EU

<sup>11</sup> Directive 2010/75/EU

<sup>12</sup> See <http://ec.europa.eu/environment/aarhus/studies.htm>

clarification on whether access should be given and under what conditions. The public is affected more indirectly when ineffective access to justice contributes to implementation failures, e.g. unhealthy air pollution levels resulting from administrative inaction. A Communication on Access to Justice should clarify the role of members of the public in initiating review mechanisms at Member State level to address such inaction.

**Public administrations and national courts** face growing burdens and costs due to litigation centred on issues related to access to justice. Providing greater clarity based on the existing case law as regards the rules to be applied on costs should contribute to efficient public administration as well as the administration of justice.

**Businesses** are negatively affected by delays in administrative decision-making related to prolonged litigation due to unclear access to justice rules, such as on standing rights and scope of review. National courts are increasingly filling the gaps in national procedural law, particularly in the area of legal standing, but, because their rulings relate to specific cases, they cannot provide overall clarity and predictability necessary for investment decision. Timing and a clear legal framework are particularly relevant for SMEs which cannot afford unnecessarily long authorisation procedures and uncertainty about litigation risks and scope. Unequal competition conditions in the Member States, caused by differences in the efficiency of the national courts systems, may also potentially disturb business. Businesses can also suffer where ineffective access to justice contributes to a failure to provide them with the clean environment on which many of them depend or a failure of government to make investments that are good for the green economy.

### Subsidiarity check

The current legislation in the Member States on access to justice in environmental matters, in areas not covered by EU secondary law such as Directive 2011/92 on environmental impact assessment for certain plans and projects and Directive 2010/75/EU on industrial emissions, differs considerably. For areas which are not captured by the scope of these EU acts (e.g. acts and plans in the area of nature, water, waste or air, which do not fall under the scope of these two Directives), Member States have chosen different approaches. While in some Member States the general applicable law also covers some of the access to justice aspects related to environmental matters, in other Member States either it is impossible for the public to access the courts in environmental matters (no standing rights are granted) or other obstacles such as high costs, long procedures and a limited scope of review prevent the public from taking court actions.

Studies<sup>13</sup> and the findings of the Aarhus Convention Compliance Committee (ACCC)<sup>14</sup> indicate that, to a greater or lesser extent, all Member States fail to ensure compliance with the requirements of effective access to justice in environmental matters and fail to give access to courts in certain areas in particular in the areas of nature, water, air and waste, in accordance with the Aarhus Convention as interpreted by the CJEU. This is despite the fact that, since the application in the EU of the Aarhus Convention as from 2005, Member States which had gaps in their legal systems on access to justice in environmental matters have had sufficient time to take the necessary corrective actions.

The CJEU has already provided some important clarifications, mainly in the context of preliminary rulings, which, in some cases, for transparency and clarity reasons, need to be made explicit by way of a Communication. In some other cases, the rulings have revealed the need to further specify certain aspects in order to ensure an effective regime of access to justice in environmental matters in the Member States (e.g. scope of review). These clarifications will be made in full accordance with existing case law.

Due to different and unsatisfactory levels of compliance in Member States with provisions of international law which have become part of EU law<sup>15</sup>, the possibilities for the public to assist in enforcing EU environmental policy are not equal throughout the Union. The public in some Member States continues to be deprived of rights granted by EU law. The objective of ensuring a minimum standard of environmental protection throughout the Union is jeopardised because members of the public cannot exercise effectively their role as advocates on behalf the environment. A Communication will help clarifying the requirements on access to justice under the current EU legal framework.

### Main policy objectives

<sup>13</sup> See footnote 12.

<sup>14</sup> See e.g. ACCC /2010/48 <http://www.unece.org/env/pp/compliance/Compliancecommittee/48TableAT.html>

<sup>15</sup> See Article 216(2) of the Treaty on the Functioning the European Union

The Communication aims at presenting coherently the existing requirements on access to justice in environmental matters in the EU *acquis*, as interpreted by the CJEU, by drawing also the consequences deriving for the Member States from the case law of the CJEU. The specific objectives envisaged by clarifying the legal framework on access to justice in environmental matters are to:

- help clarify in a horizontal interpretative document the approach to access to justice in environmental matters;
- help improve the efficiency of public administration and the administration of justice;
- maximise the benefits of environmental legislation;
- enhance the predictability for investments.

To this end, the Communication will address several access to justice guarantees as provided for in the Aarhus Convention and also specified by case law of the CJEU, i.e. (1) standing; (2) scope of challenge; (3) procedural safeguards including timeliness and protection against being exposed to prohibitive costs as a litigant; and (4) effective remedies, including injunctions to prevent irreparable environmental harm taking place.

Finally, this should offer guidance to those Member States that have not yet drawn the consequences for their national legal systems of the case law of the CJEU.

## B. Option Mapping

The following are the main options for addressing the challenges of ensuring satisfactory access to justice:

### **1st option:** business-as-usual relying on CJEU case-law:

No immediate changes in the national laws necessary. However, clarification and development of the law only if cases are referred to CJEU by the national courts or by the Commission.

### **2<sup>nd</sup> option:** Interpretative Communication regarding the existing EU rules on access to justice in environmental matters, building upon the existing cooperation with judges, stakeholders, eJustice:

No new binding rules for the MS, but will provide clarity and improve the efficiency of public administration. The light adoption procedure would help the Commission deliver an effective initiative in the short term. In case of non-compliance with existing requirements under the EU *acquis*, the Commission will continue using infringement procedures to ensure their enforcement.

### **3<sup>th</sup> option:** legislative proposal on access to justice:

Due to its binding effect, it is an effective way to ensure that the obligations stemming from the Aarhus Convention and EU law are transposed in the MS national laws. It would help reach the objective of creating a transparent, legal framework for access to justice in environmental matters in a single piece of legislation. There are however subsidiarity concerns regarding the effect of a legislative proposal on Member States' administration of justice.

**4<sup>th</sup> option:** include access to justice requirements in new and existing EU secondary environmental legislation, in some sectors where shortcomings are mostly found. Sector by sector approach, focusing on the areas for which problems have been identified (nature, water, waste, air).

### **Conclusion:**

An interpretative Communication would be based on existing provisions of EU secondary law, international obligations stemming from the Aarhus Convention and case-law of the CJEU. It would be less burdensome and intrusive for Member States in comparison to a new legal instrument. This option also has advantages over mere reliance on case law of the CJEU, as the Communication may give guidance. Member States which do not as yet fulfil the existing obligations will be helped to make changes in their national legislation, including through the recently adopted Environmental Implementation Review<sup>16</sup>. A guidance document will provide a clear idea of what the Commission expects at national level based on the current rules. In case of non-compliance with the existing legal obligations, the Commission will continue to use infringement procedures to ensure their enforcement. Another advantage over a legislative option is the more rapid adoption procedure, which would ensure quick guidance for Member States that are currently revising their legislation.

<sup>16</sup> [COM/2016/0316](#); Delivering the benefits of EU environmental policies through a regular Environmental Implementation Review

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| <b>Proportionality check</b>   |
| A non-legislative instrument such as an interpretative Communication does not affect the procedural autonomy of Member States. Basing the interpretative guidance on existing rules imposes no new rules on Member States, but gives a clear view of the Commission's expectations for their application at national level and a strong basis for further cooperation between Member States and the Commission, especially through the Environmental Implementation Review.  |
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| <b>C. Data collection and Better Regulation instruments</b>  |
| <b>Data collection</b>   |
| The information and data available largely relate to experience gained from the Commission's own work with national stakeholders. In order to obtain a comprehensive overview of the different measures adopted or in place in the Member States to implement Article 9(3) of the Aarhus Convention, a study was commissioned in 2007. Another set of studies was prepared by individual academic contractors on factual and economic aspects of access to justice. The studies are published on the Commission's Europa website <sup>17</sup> . |
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| <b>Consultation approach</b>   |
| No further public consultation is envisaged for an Interpretative Communication.<br>Bilateral consultations with stakeholders and experts (including business groups, NGOs, judges) took place as from 2011 in the broader context of this initiative. No further consultation activities are envisaged for this Interpretative Communication.   |
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| <b>Will an Implementation plan be established?</b>   |
| <b>No.</b> As specified in the Better Regulation Guidelines, implementation plans are to accompany proposals for major directives or proposals for major regulations with implementation requirements similar to those of a directive. Since the present initiative will be a Communication, no implementation plan needed.  |
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| <b>Will an impact assessment be carried out for this initiative and/or possible follow-up initiatives?</b>   |
| No further impact assessment is envisaged for the Interpretative Communication.  |
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<sup>17</sup> <http://ec.europa.eu/environment/aarhus/studies.htm>