



German Portuguese Slovenian

Civil Society Declaration<sup>1</sup>

on

## Access to Justice for Citizens & NGOs at European Union Level

of

4<sup>th</sup> December 2020

to

**Charles Michel**, President of the European Council,

**Ursula von der Leyen**, President of the European Commission,

&

**Heiko Maas**, German Federal Foreign Minister and President of the General Affairs Council, **Augusto Santos Silva**, Portuguese Minister of Foreign Affairs, & **Dr An e Logar**, Slovenian Minister of Foreign Affairs, as future Presidents of the General Affairs Council

as well as

**Svenja Schulze**, German Federal Minister for the Environment, Nature Conservation and Nuclear Safety & President of the Environment Council, **João Pedro Matos Fernandes**, Portuguese Minister for the Environment and Energy Transition, & **Andrej Vizjak**, Slovenian Environment and Spatial Planning Minister as future Presidents of the Environment Council

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## **Brief Summary in Plain English**

Citizens and their associations can go to court when public or private entities fail to protect the environment.

To enable access to justice for everyone is an international obligation of the Parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, called the "Aarhus Convention", including the European Union.

In the European Union, it is currently very difficult to get access to justice in environmental matters. For example, only a plaintiff that is directly personally affected by an environmental problem is accepted, resulting in a paradox: the more people are generally affected by environmental damage, the harder it seems to be to have access to justice. In European countries there are obstacles in access to justice as well.

Citizens and their associations (civil society) of three countries that *share* the Presidency of the European Union in 2020 and 2021 (Germany, Portugal and Slovenia) jointly call for full implementation by the European Union and its Member States of their obligations to ensure:

- Access to environmental information;
- Public participation in environmental decision-making; and
- Access to justice for citizens and environmental non-governmental organisations.

On access to justice, the signing European civil society associations call:

- That civil society associations are able to demand the European administration to review their decisions;
- That citizens and citizens' associations are able to have direct access to European Union courts; and
- For the adoption of a Directive that frames access to Member States' courts.

## **Brief Summary**

The UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) of 1998 is the first multinational environmental agreement providing procedural rights for the public and non-governmental organisations (NGOs) promoting environmental protection. Citizens and environmental NGOs can invoke European Union (EU) institutions' and bodies' responsibilities when they fail to comply with EU's obligations under the Convention aiming to protect the environment.

The civil society of the current European Union Trio partner countries in 2020 and 2021 (Germany, Portugal and Slovenia) jointly calls for full implementation of all three pillars of the Aarhus Convention by the European Union and its Member States to ensure:

- Access to environmental information;
- Public participation in environmental decision-making; and
- Access to justice for the public.

The European Union currently does not guarantee adequate access to justice in environmental matters in contravention with the legally-binding requirements of the Aarhus Convention. Civil society of the Trio partners requests a comprehensive reform of access to justice at the European Union level, which will bring the European Union and its 27 Member States' action in compliance with the Aarhus Convention. The following steps are needed:

- Improving the procedure of internal review of EU administrative acts;
- Improving direct access to the General Court for individuals and civil society associations as claimants; and
- Adopting an Access-to-Justice-Directive that frames access to Member States' courts.

## **1. Background and Objective**

The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (hereinafter the Aarhus Convention) of 1998 represents one of the most important multilateral environmental agreement opened for accession by any country<sup>2</sup> in the world and regional economic integration organisations referred to in article 17 of the Convention. The Convention recognises the environmental rights of citizens and the role of citizens' initiatives, environmental movements and environmental associations in the monitoring and enforcement of environmental protection.

While the Convention has shaped European Union and Member States' legislation and influenced court practices in many respects, there are still major shortcomings which civil society demands to be corrected.

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<sup>2</sup> Pursuant to article 19 (3) AC the accession to the AC is open for non-UNECE states upon approval by the Meeting of the Parties.

**Three major steps** for reform are proposed:<sup>3</sup>

- Enlarging the scope and terms of the internal administrative review procedure;
- Redefining the concept of individual concern for direct access to the General Court; and
- Providing a legal framework for access to administrative review and to the Member States' courts.

## 2. On the Proposal for an Amendment to the Aarhus Regulation

Civil society welcomes the proposal for an amendment to the Aarhus Regulation<sup>4</sup> on the review of actions or omissions of institutions and bodies of the European Union following the findings of the Aarhus Compliance Committee<sup>5</sup>.

### 2.1. Internal Administrative Review of Acts Adopted by EU Institutions and Bodies

It is a major progress that the proposal includes general executive acts into the range of reviewable acts and extends the scope of review to any contravention with environmental law, as well as allowing some more time for submitting a review.

### 2.2. On Access to the Court of Justice and the General Court of the European Union

However, the implementation of article 9 (3) of the Aarhus Convention by the European Union is insufficient. Access to European Union justice needs reform to be in line with the Aarhus Convention. Civil society suggests that the Proposal should be further aligned with article 9 (3) of the Convention by:<sup>6</sup>

- **Not** introducing a **new restriction** that would exempt those provisions of an administrative act for which Union law explicitly requires implementing measures at Union or national level;
- Allowing for internal review requests directed at the Commission's **state aid decisions**;
- Including **all measures** that have a legally binding effect, in accordance with the CJEU's case law, as opposed to only acts with "external effects";
- Ensuring access to administrative review also to **individuals** when administrative acts directly adversely affect them individually;
- Broadening access to **all civil society associations**, not only NGOs for all administrative acts of "general scope";

<sup>3</sup> After carefully considering several documents: Findings and recommendations to ACCC/C/2008/32 (EU - Part I and II), *Commission, Report on European Union Implementation of the Aarhus Convention in the Area of Access to Justice in Environmental Matters*, SWD(2019) 378 final, 10 October 2019, and the commissioned study *Milieu Consulting, Study on EU Implementation*, 07.0203/2018/786407/SER/ENV.E.4, 10 September 2019; numerous Aarhus-related legal disputes before the Court of Justice of the European Union (CJEU) and the Aarhus Convention Compliance Committee that addressed and impacted the implementation of the AC in the European legal system, e.g. C-401/12 P and C-403/12 P, C-404/12 P and C-405/12 P, T-33/16, T-12/17, T-529/09, C-82/17 P, C-583/11 P, C-274/12, C-456/13 P, C-25/62, T-219/95, R, T-177/01, T-600/15, C-416/17, C-458/19, T-436/17, C-204/09, C-673/13 P, C-71/14, C 237/07, C-165 bis C-167/09, C-529/15, C-41/11, C-664/15, C-240/09, C-243/15, C-201/02, C-41/11, C-399/14, C-420/11, C-416/10, C-348/15, C-379/15, C-470/16, C-260/11, C-427/07, C-276/01, C-279/09 and ACCC/C/2008/32, ACCC/C/2005/11, ACCC/C/2007/21, ACCC/C/2010/51, ACCC/C/2010/50, ACCC/C/2013/91, ACCC/C/2008/31, ACCC/C/2013/81, ACCC/C/2010/48, ACCC/C/2012/76, ACCC/C/2011/58, ACCC/C/2011/63, ACCC/C/2013/85 & 86, ACCC/C/2006/18, ACCC/C/2008/33, ACCC/C/2012/76, ACCC/C/2008/24, ACCC/C/2012/69, ACCC/C/2011/57, ACCC/C/2008/33, ACCC/C/2014/111, ACCC/C/2008/23, ACCC/C/2009/36; *Council, 18-month Programme of the Council of 9 June 2020*, 8086/1/ 20 REV 1, POLGEN 46; *Commission, Communication from the Commission on the European Green Deal*, COM(2019) 640 final, 11 December 2019; *European Parliament, Resolution on the climate and environment emergency*, 2019/2930(RSP), 28 November 2019.

<sup>4</sup> *Commission, Com (2020)642 final*, 14 October 2020, amending the 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 2006 L 264, p. 13).

<sup>5</sup> ACCC/C/2008/32, Part I and II.

<sup>6</sup> Also see in-depth analysis of the proposal and suggestions for amendments by *EEB/CE/J&E, Amending the Aarhus Regulation: an internal review mechanism that delivers the EU Green Deal*, 12 November 2020.

- Ensure that court proceedings are **not prohibitively expensive** for applicants, as required by article 9 (4) of the Aarhus Convention, including setting aside the 'loser pays' principle; and
- Revising the **concept of individual concern** for direct access to the General Court.

While direct access to judicial review of Union legal acts by the Court of Justice of the European Union (CJEU) is in principle provided by article 263 (4) TFEU in the European Union, legal standing to sue is an unsurmountable hurdle for the plaintiff. This is because the requirement that plaintiffs must be "individually concerned" by the challenged legal act is interpreted very narrowly by the CJEU allowing access only if a plaintiff is affected in a way that distinguishes him or her from any other person (the so-called *Plaumann* test<sup>7</sup>). This excludes any action for annulment of a legislative act (which *per se* addresses many persons) as well as of an individual act affecting a larger number of persons. For instance, the EU laws allowing certain amounts of emission of greenhouse gases could not be challenged at the CJEU because the gases are affecting the people at large, neither could an authorisation of a cancerogenic pesticide be challenged although the health of many consumers might be in danger. This is a paradox: The more people that are affected by environmental damage, the harder it is to go to court. The narrow interpretation of "individual concern" hampers direct access to the CJEU both of individuals and NGOs. Access remains *de facto* unavailable even for NGOs that initiate the administrative review of European acts provided by the Aarhus Regulation. Because the final decision resulting from the procedure can only be challenged at the courts under the *Plaumann*-based conditions of legal standing.

The need for a **broader interpretation of the standing requirement of "individual concern"** has already been requested by the General Court in an earlier judgment as well as by Advocates General.<sup>8</sup> Most recently, Advocate General Bobeck stated in a similar vein: "Reading the case-law of the EU Courts with a critical eye, in particular the numerous orders of the General Court, one cannot help but be surprised by the zeal and creativity with which the absence of direct concern, or even any interest to act, will be detected."<sup>9</sup>

The criterion of individual concern should be interpreted as a **serious personal concern**, as it happens in national courts. Procedures initiated in the national courts with preliminary references to the CJEU are only a second best alternative to direct access to the European General Court.

First, because statistics on how often national courts make preliminary references to the CJEU<sup>10</sup> show large differences among Member States, revealing that there are different interpretations of the *Cilfit* doctrine<sup>11</sup>.

Second, because the procedure of preliminary ruling leads to unnecessary detours and a waste of time considering in cases where the core of a case is the compatibility of an EU legislative act with higher rank law. Moreover, as Advocate General Bobeck noted, the preliminary ruling procedure basically is a cassation procedure that is badly suited

<sup>7</sup> C-52/62, *Plaumann v Commission of the European Economic Community*.

<sup>8</sup> E.g. AG Jacobs in C-50/00 P, para. 36 ff.

<sup>9</sup> AG Bobeck in C-352/19, para. 138.

<sup>10</sup> *CJEU, Statistics concerning the judicial activity of the Court of Justice*, in: Annual Report 2019, p. 163; *CJEU, Statistics concerning the judicial activity of the Court of Justice*, in: Annual Report 2011, p. 119.

<sup>11</sup> C-283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*.

to thoroughly examine the facts of a case. Cases involving complex factual environmental issues are better placed at the General Court.<sup>12</sup>

Besides, this declaration is aware of the fact that it is up to the CJEU to change its interpretation of “individual concern”. It is well understood that neither the European Commission, European Parliament nor the Council have the competence to change the court’s interpretation directly. Civil society can nevertheless express its firm opinion that the Plaumann test is not written in stone but should be revised by more appropriate interpretation.

Considering the state of climate and environment emergency, formally declared by the European Parliament on 28<sup>th</sup> November 2019,<sup>13</sup> every organ of the European Union shall engage, within the limits of their competences, in actively contributing for making or allowing full use of Union law for environmental protection.

The European Parliament and the Council can express this as their own views in the **preamble of the revised Aarhus Regulation**, and advise their lawyers to defend this position in any pertinent court cases.

### **2.3. On Access to Justice at Member State Level**

Civil society also welcomes the Union provisions that regulate the judicial review of domestic acts or omissions in national courts.

#### **2.3.1 On Sector Specific Directives Containing Litigation Rights**

Together with the Aarhus Regulation amendment proposal, the Commission has published a new Communication<sup>14</sup> in which it calls on the legislators to include access to justice provisions in sectoral legislation. While civil society approves and supports the adoption of such provisions,<sup>15</sup> this kind of piecemeal approach has so far not born fruit to allow full access to justice. The next opportunity for this approach is the proposal for a European Climate Law, as proposed by the European Parliament.

However, this sectoral approach will never fully address the lack of access to justice in a complete and transparent manner. The transposition of further standing rules for NGOs and individuals in the form of individual pieces of EU secondary legislations would rather risk an even higher level of fragmentation of the supranational legislative framework. This would entail a lack of both legal clarity and legal certainty and pose an unnecessary burden on (supra-)national courts and the Aarhus Convention Compliance Committee. Therefore, the adoption of one single act, preferably in the form of a Directive on access to justice is strongly recommended.

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<sup>12</sup> *AG Bobeck* in C-352/19, para. 143.

<sup>13</sup> *European Parliament, Resolution on the climate and environment emergency*, 2019/2930(RSP), 28 November 2019.

<sup>14</sup> *European Commission, Improving access to justice in environmental matters in the EU and its Member States*, COM(2020) 643 final, 14.10.2020.

<sup>15</sup> E.g. article 6 (1) of Freedom of Access to Environmental Information Directive (2003/4/EC), article 11 EIA Directive, article 25 Industrial Emissions Directive, article 13 Environmental Liability Directive, article 23 Seveso III Directive.

### 2.3.2. On the Proposal for an Access-to-Justice Directive

For 15 years, since the approval of the Aarhus Convention,<sup>16</sup> the European Union has not adopted any general framework regulations to guarantee access to justice in accordance with article 9 (3) of the Aarhus Convention<sup>17</sup> for all areas of environmental law.<sup>18</sup> Only in 2017 did the European Commission adopt a "Notice on Access to Justice in Environmental Matters"<sup>19</sup> after failing to adopt a Directive.<sup>20</sup> Civil society strongly criticises the current legislative stagnation at the European Union level. The Union and its Member States share responsibilities and obligations under the Aarhus Convention.

In the view of civil society, "other measures"<sup>21</sup> are necessary to ensure effective access to justice for individuals and NGOs in environmental matters. The civil society recommends a **Directive on access to justice in environmental matters (A2J Directive)** for an EU-wide uniform and ambitious implementation of article 9 (3) of the Aarhus Convention, as opposed to a piecemeal approach advocated in the new Commission Communication. The A2J-Directive would create a much needed framework which would guarantee legal stability on access to justice in environmental matters. Of outmost importance would be to safeguard with an A2J-Directive that individuals and NGOs exercising their environmental procedural rights are not penalised, persecuted or harassed, especially during Environmental Impact Assessment procedures (so-called whistle-blower protection principle).<sup>22</sup> The Directive should further include, among others, specific rules on legal costs so court proceedings are **not prohibitively expensive**, as required by article 9 (4) of the Aarhus Convention.

Taking into account the urgency of the matter, civil society calls the initiation of a corresponding legislative procedure as soon as possible. A framework directive offers the opportunity to harmonise the conditions of access to justice among Member States considering the previous case law of the CJEU on access to justice in environmental matters. The mere adoption of a new Commission Communication on access to national courts is insufficient.<sup>23</sup> The Directive shall include a no regression clause ("nothing in this Directive shall be interpreted as adversely affecting the rights of access to justice already existing in Member States constitutions or laws") allowing Member States which provide citizens and NGOs broader opportunities of access to justice (e.g. *actio popularis*)<sup>24</sup> to maintain the legal status quo.

<sup>16</sup> With Council Decision 2005/370/EC of 17 February 2005 on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ 2005 L 124, p. 1).

<sup>17</sup> With the exception of article 13 Environmental Liability Directive.

<sup>18</sup> *Schlacke/Schrader/Bunge*, Aarhus-Handbuch, para. 57 et seqq.

<sup>19</sup> *European Commission, Commission Notice on Access to Justice in Environmental Matters*, C(2017) 2616 final, 28.4.2017.

<sup>20</sup> See *European Commission*, Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM/2003/0624 final - COD 2003/0246, 24 October 2003, which was withdrawn by the Commission at the end of 2013.

<sup>21</sup> Within the meaning of article 2 (1) of Council Decision (EU) 2018/881 of 18 June 2018 requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006 (OJ 2018 L 155, p. 6): "The Council requests the Commission to submit, by 30 September 2020, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006, or otherwise to inform the Council on *other measures* required as a follow-up to the study" [emphasis added].

<sup>22</sup> Article 3 (8) AC.

<sup>23</sup> *Schlacke/Schrader/Bunge*, Aarhus-Handbuch, para. 60.

<sup>24</sup> See *Aragão/Carvalho*, *Taking access to justice seriously: diffuse interests and actio popularis. Why not?*, in: ELNI Review, Environmental Law Network International, n.º2/2017, pp. 42-48.

### 3. Further Calls on Institutions and Bodies of the European Union

Civil society urges the Trio Partners to deliver on the European Green Deal by:

- **Regulating access to justice rights** for citizens and their associations as **detailed and clear** as possible in the future, especially through an amended **Aarhus Regulation** and an ambitious **Directive on Access to Justice in Environmental Matters**;
- Providing comprehensive, proactive and broad-based **information<sup>25</sup> and support** for citizens and civil society associations regarding their **litigation rights**;
- Providing comprehensive access to **information on judicial decisions and jurisprudence of national courts**;
- Recognising the valuable contributions of environmental (legal) NGOs for the environment and human health, and by **providing support to engaged NGOs**;
- Providing further **training** for NGO representatives on access to justice;
- Ensuring that the **findings and recommendations** of the Aarhus Convention Compliance Committee on ACCC/C/2008/32 (Part II)<sup>26</sup> are **endorsed** by the Meeting of the Parties (MoP) at the 7<sup>th</sup> MoP in 2021 in accordance with customary international practice; and
- Supporting the effective operation of the **Compliance Committee** and the Aarhus Secretariat with increased and **secured funding**.

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<sup>25</sup> Within the meaning of article 1 (2) Aarhus Regulation. Within the EU-AarKo project of the UFU, information material is being produced to inform citizens about their environmental procedural rights at EU level.

<sup>26</sup> Draft Decision VI/8f, ECE/MP.PP/2017/25.



## Supporting Organisations



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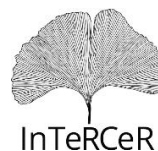
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