FAQs on the Effort Sharing Regulation (ESR) and Access to Justice

05/09/2022

Background

The EU Commission in their Communication on Improving Access to Justice 2020 committed to bringing forward access to justice clauses in all new legislative proposals which might concern environmental matters. This was recognised as required by international law and the EU Green Deal. Yet the Commission have consistently failed to do this in all proposals brought forward under the Fit for 55 work package, leaving it to the EU Parliament MEPs to fight both the EU Commission and the Council for inclusion of such provisions in each new legislative proposal. The ESR is no different, with the EU Commission proposal being notably deficient in access to justice provisions, and the EP yet again being forced to remedy this situation by proposing an access to justice amendment (among other amendments) on the 8th June 2022 (see Appendix to this document). This legislation is now in trilogue, and the EP are fighting to keep the access to justice clause in the proposal. Whether the Member States' Ministers on the Council, and the EU Commission will also adopt a similar stance and move into compliance with the EU's international law obligations remains to be seen.

This briefing sets out to answer some key questions that have arisen in the negotiations regarding access to justice rights and their place in the ESR.

1. Why Does Access to Justice belong in the Effort Sharing Regulation?

a. International Law (the Aarhus Convention) requires it.

The Aarhus Convention requires (Art 9(2) & (3) access to justice be provided in relation to any of the provisions of the ESR that have the potential to breach environmental law or that involve environmental decision making.

The EU ratified the Convention in 2005, and all 27 Member States are also full State Parties to the Convention and bound by its obligations. The Convention provides for access to justice whenever domestic environmental laws are breached, or in cases of environmental harm, or in cases of denial of the rights created by the Convention, like access to information and public participation in environmental decision making. The Aarhus Convention Compliance Committee (ACCC) is a decision-making body established under that Convention and is 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 once ratified by the MoP, are binding on the State Parties. The ACCC has an extensive body of findings relating to access to justice, which make it clear that all environmental decision making (except judicial or legislative functions) and all breaches of environmental law rules, without exception, must be subject to access to justice rights e.g. ACCC/C/2006/18 (Denmark), ACCC/C/2005/11 (Belgium) and ACCC/C/2008/32 (EU) Part II. These findings have been adopted by the CJEU in interpreting access to justice rights at Member State level under EU law, e.g. in "LZ No. 1" Case 240/09 (also known as Slovak Brown Bears No. 1), where the CJEU found that National Courts were obliged to interpret EU law rules in light of the Conventions provisions, specifically Art. 9(3) on Access to Justice.

b. EU Law requires it.

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, the Charter of Fundamental Rights (Art 47) and the EU's participation in the Aarhus

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Convention, leading the Court 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. "LZ No. 1" Case 240/09, "Trianel" Case 115/09). This means that whether the rights are drafted into the ESR or not, they will exist. However, failure to articulate them clearly in the 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.

c. EU Policy requires it.

The EU Green Deal (pg. 23) seeks 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 Communication on Improving Access to Justice 2020 expressly commits to writing access to justice provisions into all legislative proposals affecting the environment. 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 committed to 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) requires it. 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. Previous EU studies such as the COWI Report from 2019 estimate the cost of non-implementation of the EU environmental acquis conservatively at €50bn per year in 2018 alone. 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. 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.

d. The ESR is a Regulation and will not have specific transposing measures.

It is effective without more implementing measures at Member State level. Therefore, it must contain a self-executing access to justice provision. We cannot rely on the Member States to bring in provisions providing for access to justice in relation to a directly effective regulation, this is highly unlikely to happen. All available evidence points to uneven application of access to justice provisions across all Member States, e.g. see the Commission Communication here, and examples of research commissioned by the Commission here, and here.

e. The ESR is key to achieving our Paris Agreement Climate targets and must be rendered enforceable.

Access to justice is a key piece of ensuring effectiveness and implementation of the ESR actually occurs. Often it is only NGOs or citizens interested in environmental matters, and unfettered by political concerns, who are willing and able to call Governments to account for their climate failures (e.g. Climate Case Ireland discussed below). It is rare to see Member States interfere in one another's climate and energy policy, for political reasons. However, NGOs and individuals can act with freedom from the political consequences attendant on Member State action. Also, the EU Commission does not have sufficient resources to identify and take infringement proceedings in relation to every single breach of environmental/climate law that arises. Often NGOs working on the ground in a country or individuals living in a country are the first ones to become aware of a breach and are sometimes best placed to take action on it.

f. Legal certainty requires it.

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Access to justice rights exist in relation to all laws with environmental effects or impacts in every EU Member State, because all EU Member States are also individually State Parties to the Aarhus Convention and are bound by its obligations. Failure to articulate these rights clearly in legislation leads to endless litigation to establish the contours of the right. This could potentially lead to climate measures being delayed due to legal uncertainty about the underlying framework. Clearly outlining access to justice rights in sectoral legislation helps to avoid satellite litigation that could cause delays and problems in attempting to achieve compliance with the Regulation.

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2. **Does access to justice undermine climate action at a crucial time, if challenges are made to climate measures made on foot of the ESR?**

No.

Allowing access to justice to challenge measures made on foot of the ESR enhances accountability (as recognised by the Commission's Communicationon Access to Justice 2020 as a fundamental requirement for implementation) and increases legal certainty. Increased accountability will lead to improved measures and standards of legislating, not worse.

Challenges must have a legal basis to make it through the initial filtering stages that most legal systems have in place – a measure can only be challenged on grounds that it breaches some other environmental law. If this is the case the illegal measure should rightly be challenged. Such cases do not weaken climate action, they strengthen it by preventing bad measures with potentially harmful effects.

Aarhus rights exist in relation to all legislation with environmental effects, whether this is expressly stated or not. This is because the EU and all 27 Member States are parties to the Convention and are bound to implement it by its terms and by the terms of the Vienna Convention on the Law of Treaties. However, failure to clearly enunciate these rights in the legislation itself leads to satellite litigation to establish the nature of the rights in relation to the specific legislation. This could delay action under the legislation. Greater legal certainty about the nature of the rights reduces the likelihood of satellite litigation and increases stability of the economic and regulatory environment for businesses and society.

Also, any fear of climate measures being held up by frivolous litigation is easily dismissed by consideration of (a) the massive barriers to access to justice well documented by multiple studieshere, here and here. (b) the preponderance of evidence on the subject which shows that introduction of access to justice rights never leads to a huge increase in litigation or of frivolous litigation. See the EU Commissions impact assessment on removal of restrictions on access to justice at EU level under the Aarhus Regulation revision in 2021 (see section 5.2), which demonstrated that 95% of potentially challengeable EU acts relating to the environment had gone unchallenged and that based on metrics only a slight increase in challenges was expected should all restrictions on challenge be removed. Statistics from Germany and the UK show that broad standing rights do not significantly increase the number of environmental cases. Filters remain in place – standing rules, costs barriers, very limited NGO capacity for litigation, know-how, the requirement for breach of environmental laws. Decisions must contravene environmental law before they are reviewable. Running court cases takes financial resources and manpower, scarce for NGOs on tight budgets. The likelihood of vexatious requests is therefore low.

3. **Is it clear from the proposed amendments on what basis Member States could be brought to court for their actions?**

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Yes.

The amendment as drafted highlights the specific provisions under which challenges can be brought (failure to comply with Articles 4 to 8 of the Regulation or failure to comply with provisions subject to Art 10 of EU Regulation 2018/1999).

4. **It is better to include provisions on access to justice only in legislation with specific obligations (e.g. on environmental permitting) rather than in overarching legislation such as ESR?**

No.

As mentioned, that fact that the ESR is a regulation and therefore directly effective on the ground in Member States as soon as it is passed means that it is possible for it to come into operation without any transposing measure. Therefore, this means it must have also an access to justice measure included as a package in advance, otherwise it is unlikely that one will be introduced by Member States as they will not necessarily be creating transposing legislation as they would be with a Directive, which would provide them with the opportunity to put in place domestic access to justice provisions before the measures become operative.

5. **Is it allowed by the EU legal order to introduce an access to justice provision?**

Yes.

Sometimes the argument is made that the principle of subsidiarity prevents the EU from acting in relation to access to justice at Member State level. However, it is clear on reading the relevant Treaty Article, 5(3), in the context of the extensive and well documented failings in access to justice by Member States, that it is not only permissible, it is arguably required that the EU act in this area to improve access to justice and fulfil their commitment to do so in the EU Green Deal.

Article 5(3) TEU: "Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level."

6. **Does access to justice ever improve Member State climate action?**

Yes.

As outlined above and recognised at the core of EU law and policy making, access to justice is an essential element of the rule of law and accountability. As such, it is a key component of effective environmental governance and helps ensure implementation. Often Member States only implement their environmental and climate obligations when forced to do so through litigation by interested NGOs or individuals. Some good examples of high-profile cases where NGOs exercise of access to justice rights improved their countries climate action measures are set out below. Finally, it is important to note that while the prospect of litigation delaying climate action (or any other important State action) is always touted as a reason to deny or restrict access to justice rights, examples of such vexatious litigation are exceedingly rare. NGOs cannot afford to waste precious man-hours on pointless litigation, nor can they afford the costs of same even in countries where

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cost balancing measures are in place. Neither can citizens. For this reason, studies show that introduction of access to justice rights does not lead to a massive increase in litigation.

Some case examples where the exercise of access to justice rights led to improved climate action measures in a Member State include:

- *Urgenda* (The State of The Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda, ECLI:NL:HR(2019)2007) - the court finds the state needs to show how its proposed reduction of 20% would be adequate to meet its targets for 2030 and 2050 and to keep the 2% and 1.5% global targets within reach. The state had failed to do so, and that failure to justify its policy was an issue for the court.

- *Neubauer* (Neubauer, et al. v. Germany 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20) - plaintiffs argued that targets contained in the Federal Climate Change Act 2019 violated Article 20a of the German Constitution- the Basic Law- which guarantees the natural foundations of life for future generations. 2019 Act required a steady reduction in greenhouse gas emissions of 55% by 2030 against a 1990 baseline; emissions limits were set for different sectors up to 2030, but no limits were set beyond that year. The German Constitutional Court found the complainants' fundamental rights were breached because the level of emissions allowed up to 2030 was so great that it limited the options for reducing emissions after 2030, thereby creating a risk to freedom in the future.

- *Commune de Grande-Synthe v France* - concerned France's planned greenhouse gas reductions: were they sufficient to meet the national target of carbon neutrality by 2050 (which was enshrined in the 2019 Energy and Climate Act)? Court reaches the conclusion that a key reduction target could not be achieved, unless new measures were adopted in the short term. The Council also noted that the government itself recognised that the measures currently in force would not achieve the target of a 40% reduction in greenhouse gases.

- *Climate case Ireland* (Friends of the Irish Environment CLG v The Government of Ireland, Ireland and the Attorney General [2020] IESC 49) - the Irish Supreme Court quashed, on appeal, the government's 2017 National Mitigation Plan (NMP) made pursuant to the Climate Action and Low Carbon Development Act 2015. The court found that the NMP failed to comply with the 2015 Act, because the government had not given "at least some realistic level of detail" on Ireland's obligations to reduce greenhouse emissions.

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Appendix

EU Parliament's Proposed Access to Justice Provision adopted 8th June 2022

Am 42

'Article 15b

Access to justice

1. Member States shall ensure that, in accordance with their national legal system, members of the public concerned who meet the conditions set out in paragraph 2, including natural or legal persons or their associations, organisations or groups, have access to a review procedure before a court of law, or another independent and impartial body established by law, to challenge the substantive or procedural legality of decisions, acts and omissions:

(a) that fail to comply with the legal obligations provided for in Articles 4 to 8 of this Regulation; or

(b) that are subject to Article 10 of Regulation (EU) 2018/1999.

For the purposes of this paragraph, an act or omission that fails to comply with legal obligations arising under Articles 4 or 8 includes an act or omission with respect to a policy or measure adopted for the purposes of implementing those obligations, where that policy or measure fails to make a sufficient contribution to such implementation.

2. Members of the public concerned shall be deemed to meet the conditions referred to in paragraph 1 where:

(a) they have sufficient interest; or

(b) they maintain impairment of a right, where administrative procedural law of a Member State requires that as a precondition.

What constitutes a sufficient interest shall be determined by Member States consistently with the objective of giving the members of the public concerned wide access to justice and in conformity with the Aarhus Convention. To that end, the interest of any non-governmental organisation promoting environmental protection and meeting any requirements under national law shall be deemed to have sufficient interest for the purposes of this paragraph.

3. Paragraphs 1 and 2 shall not exclude the possibility of being able to have recourse to a preliminary review procedure before an administrative authority and shall not affect the requirement to exhaust administrative review procedures prior to having recourse to judicial review procedures, where such a requirement exists under national law. Any such procedure shall be fair, equitable, timely and not prohibitively expensive.

4. Member States shall ensure that practical information is made easily available to the public on access to administrative and judicial review procedures.'

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