

# Energy Performance of Building Directive and Access to Justice

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This briefing paper discusses potential amendments to the Energy Performance of Buildings Directive which are being put forward by the [EEB](#) (who represent 180 member organisations in 38 countries with in excess of 30 million members). The EEB are concerned to ensure the efficacy of the Directive and its compliance with international law as it is a vital component in the fight against climate change, with buildings being responsible for more than 36% of GHG emissions, and 40% of energy consumption. It is important this directive is rendered highly effective to ensure we meet our Paris Agreement obligations and to ensure compliance with the ESR. **The proposed amendments are necessary in order to fulfil the EU's obligations under international law, specifically the [Aarhus Convention](#), to ensure the coherence and cohesion of EU law and to ensure that the substantive measures contained in the directive will be effective.**

## 1. The Access to Justice Amendment

The Aarhus Convention requires (in Art 9) that broad access to justice be facilitated by the legal frameworks of the Parties to the Convention (of which the EU is one). Sectoral/directive level access to justice provisions are also required in order to ensure clarity and certainty of EU law and coherence of the law with the stated EU Commission policy of sectoral level access to justice provisions ([COM 2020 \(643\)](#) Note on Access to Justice) and the various rulings on access to justice at Member State level.

Without specific access to justice measures, it will not be clear to members of the public that they have a right to challenge the compliance of their Member State with the provisions of this directive and preliminary litigation to establish this right is likely to be necessary. Access to justice by the public/NGOs is a vital part of ensuring that Member States comply with their obligations under the Directive, and in ensuring the Directive is actually implemented properly in practice. Such provisions are common, e.g. in Art 11 of the [Environmental Impact Assessment Directive](#).

## 2. The Public Participation Amendment

This amendment provides for public participation in national building plans. The provisions on public participation are also necessitated by EU and International law, specifically the Aarhus Convention and its implementation in EU law by way of the Public Participation [Directive 2003/35/EC](#).

While the right to public participation in the decision making under the Directive will continue to exist even if the EP does not include an amendment to this effect, failure to include such an amendment will mean that the parameters of the right will be uncertain. This almost guarantees that litigation will result from any decisions taken under the directive in order to clarify the nature and extent of the right.

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It is preferable that the nature and extent of a right in relation to a legislated decision-making process be set out in the legislation itself, so that it is clear to those trying to navigate and exercise those rights that they do in fact exist. This enhances the clarity and certainty of the law which enhances the exercise of those rights and reduces litigation about their existence. Such rights are present in many other Directives and Regulations (e.g. the EIA Directive, the Governance Regulation NECPs).

It should also be borne in mind that this Directive fundamentally impacts on the rights of citizens (e.g. building owners, tenants, inhabitants of neighbourhoods) and particularly their economic rights and amenity, so it is vital that in a functioning democracy they have adequate opportunity to have meaningful input into the decisions made that will affect these rights.

### 3. Access to Information

This is a proposal for a measure providing general public access to the register of building's energy performance (currently proposed to be limited to owners/tenants/managers of buildings). Access to information is also guaranteed by both the Aarhus Convention (Art 4) and by EU law ([Directive 2003/4/EC](#)). Even if no provision on access to information is included in the Directive, the right to access the information on the emissions of buildings in the proposed Art will exist, according to the Directive and the CJEU judgments. Similar to public participation, failure to include clear and precise language framing the parameters of the right will lead to litigation to establish this. It is therefore much more beneficial to include a clear statement of the nature and extent of these rights in the legislation. Anything less is also likely to lead to denial of the right of access to information.

The information on a building's energy performance falls within the definition of "environmental information" contained in Art 1 of Directive 2003/4/EC and does not fall within any of the exceptions in that Directive, therefore must legally be made publicly accessible.

### 4. General Points

Overall, a key consideration is that Article 3(1) of the Convention obliges the Parties to the Convention to take the necessary regulatory and legislative steps to implement the Convention fully in their legal systems, and these amendments are aimed at fulfilling this obligation.

They are also in accordance of the [EU Charter of Fundamental Rights](#), Art 41 the right to good administration, and Art 47 which guarantees the right to an effective remedy.

**Finally, it is worth noting that there is no legal impediment to these amendments. These amendments do not seek to affect any conditions of access to justice or public participation in relation to the CJEU or the EU institutions, they would be effective at Member State level only as the Directive is addressed to and operational at Member State governments only.**

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