



European Commission proposal for a Soil Monitoring Law

Technical Briefing on the importance of access to justice

The European Commission's current proposal for a [Directive on Soil Monitoring and Resilience](#) (Soil Monitoring Law, or SML) sets an overarching objective to "continuously improve soil health in the Union with the view to achieve healthy soils by 2050". It is a positive step that the proposal includes an article on access to justice. However, this provision should be improved to guarantee the right of wide access to justice for members of the public, including environmental and health NGOs. This technical briefing gives an **overview of the importance of access to justice and provides policy recommendations for strengthening Article 22 to ensure its effectiveness.**

→ **RECOMMENDATION** Maintain and strengthen Article 22 on access to justice

The inclusion of a specific article on access to justice is a right step towards ensuring better enforcement and implementation of the law and promoting environmental democracy. While this article holds a significant merit, it is important to acknowledge that its effectiveness relies heavily on the SML's accompanying governance structure. **To fully harness the potential of this article, it is imperative to establish a robust governance framework**, which includes legally-binding targets and mandatory soil district management plans (see more in our [technical briefing on governance](#)).

What does "access to justice" mean?

[Access to justice](#) is the **right for individuals and NGOs to go to court when there is a violation of the law**. It makes it possible to challenge the decisions, acts or omissions of public authorities that go against existing legal commitments. It is an essential element of democracy and the rule of law. It ensures that laws are enforced, that decisions by the majority are upheld, and that authorities are held accountable.

Access to justice is a **safeguard against legal obligations becoming empty promises**. With extreme temperatures across Europe, draughts, floods, erosion and biodiversity loss, citizens must be able to hold their governments to account in their national courts when legally-binding soil health obligations are not met.

While there is EU legislation on the right to access to information and public participation in environmental matters at Member State level, this is not the case for access to justice. Consequently, **many national legal systems have no (or insufficient) provisions enabling the public to go to court over environmental decisions or omissions** (see [EEB report](#)). In practice, NGOs and citizens often find it difficult obtaining standing in front of a court or face impeditive obstacles such as high costs and lack of practical information.

Access to justice as a legal obligation

- **Access to justice is required by the Aarhus Convention**, which binds the EU and its Member States. Article 9(2), (3) and (4) of the Convention requires access to justice to challenge acts and omissions which contravene provisions of laws relating to the environment and contributing to the protection of the right to live in an environment which is adequate for personal health and well-being.
- **Article 19(1) of the Treaty on European Union requires Member States to provide remedies sufficient to ensure effective judicial protection** in the fields covered by Union law, as also recognised in Recital (49) of the Commission's proposal.
- **Article 47 of the Charter of the Fundamental Rights of the European Union establishes the right to effective judicial protection.**

These provisions of international and EU law leave no room for doubt when it comes to the need to ensure wide access to justice for the public.

What does Article 22 do?

- It **enables the public to go to court over:**
 - the substantive or procedural legality of the assessment of soil health;
 - any measures taken pursuant to the Directive;
 - any failures to act of the competent authorities;
 - failure to fulfill the public participation requirements of Articles 10(1) and 12(4), as well as any information requirements under the Directive (mainly Articles 16 and 19).
- It would enable **accountability for any other legally-binding requirements** which may be introduced into the text by the co-legislators.
- It **strengthens the implementation and enforcement of the Directive** across all Member States and ensures every citizen and NGO will benefit from the same rights of access to court.
- It puts EU Member States **in compliance with their Aarhus Convention obligations.**¹

What does Article 22 not do?

- **It does not create any new substantive obligations** for Member States. Rather, it enables the public to exercise existing rights which should be guaranteed already but are not in practice.
- **It does not open the floodgates to court cases.** By enabling access to justice at the national level, issues are solved at the source rather than escalating them to the European Commission or the European Court of Justice, empowering people to enforce laws directly.
- **It does not water down the obligations of Article 9(3) and (4) of the Aarhus Convention.** Rather, it strengthens them by transposing them into national law. In national courts, reliance on international conventions is less effective than reliance on national legislation, and ensuring effective access to justice based only on the provisions of the Aarhus Convention can be a lengthy process.
- **It does not impact the scope of the EU Aarhus Regulation No 1367/2006.** The EU Aarhus Regulation is strictly limited to acts and omissions of the EU institutions and bodies and would not apply to acts or measures of competent authorities under the SML.

¹ Articles 9(2), (3) and (4) <https://unece.org/DAM/env/pp/documents/cep43e.pdf>

Why does Article 22 need to be maintained in the Soil Monitoring Law?

1. **Rule of law:** Accountability of public authorities is a fundamental democratic principle in a community of law, such as the EU. Access to justice is the tool to exercise that principle. It is an international obligation under the Aarhus Convention and international human rights treaties.
2. **No additional legal obligation:** The inclusion of an access to justice provision would fit into the approach taken by the Commission since its 2020 Communication on 'Improving access to justice in environmental matters in the EU and its Member States' to introduce operative provisions in sector-specific EU legislation to make access to justice practicable at Member State level.
3. **Certainty:** Clearly articulating in legislation when and what decisions can be challenged and by whom enhances legal certainty and reduces the need for satellite litigation, benefiting business and society with more streamlined processes.
4. **Compliance:** Citizens will be able to hold their national public authorities and governments to account for their obligations under the SML.
5. **Level playing field:** A strong access to justice provision in the SML will support a level playing field on the monitoring and assessment of soil health.

How should Article 22 be strengthened?

- (1) **Include human health organisations:** Article 22 states that Member States should ensure that members of the public that have a sufficient interest or that maintain the impairment of a right, are included under the scope of the article. In addition to non-governmental organisations, the article should explicitly mention the role of non-governmental organisations promoting the protection of human health. These are identified as members of the 'public concerned' in Article 3(19) and therefore their interest should be equally deemed sufficient to access justice.
- (2) **Disallow additional procedural standing rules:** The article should disallow in an explicit manner additional procedural standing rules, such as the requirement for members of the public to have participated in the decision-making procedure or to limit themselves to claims invoked during the public participation process (material preclusion), as that would effectively obstruct the public's right of fair and equitable access to justice. This wording would be in line with the case law of the European Court of Justice.²

It is imperative that the co-legislators not only retain but strengthen the present access to justice provision under Article 22, as it is essential for ensuring the proper implementation and enforcement of the Directive at Member State level. However, the effectiveness of this provision also hinges on the establishment of a robust governance framework under the Directive, which should include legally-binding and time-bound soil health targets as well as clear administrative acts, such as soil district management plans, that could be enforced and potentially challenged before national courts (see more in our [technical briefing on governance](#)).

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² C-826/18 Stichting Varkens in Nood and Others, ECLI:EU:C:2021:7, para. 59.