

Short Note: Access to justice under the EU Climate Law

The EU Climate Law provides the framework for the EU's climate action in the coming decades. As well as enshrining the EU reduction targets into law, it sets out a governance framework to ensure that the EU can deliver the Green Deal. To that end, it is crucial that the Climate Law also creates mechanisms that ensure accountability to the law, so that its commitments are respected in practice.

In its position on the EU Climate Law, the European Parliament proposes to add a provision that would allow affected persons as well as environmental NGOs to start a case before a national court where a Member State violates EU law when preparing and adopting an Integrated National Energy and Climate Plan (NECP) or a Long Term Strategy (LTS) (see the Annex for the exact wording). This note provides some explanation as to why this access to justice provision is both legally consistent and necessary.

The wording

The wording proposed by the European Parliament is almost identical to other pieces of EU environmental law, such as the EIA Directive and the Industrial Emissions Directive.¹ The Court of Justice has provided extensive interpretation of these provisions, which will facilitate their implementation on Member State level and gives a clear indication what the provision will mean in practice.

Importantly, the provision does not modify the substantive obligations that rest on the Member States when preparing their NECPs and LTSs. Rather, it gives a possibility for those affected to go to court when there is a violation of EU law. This is an essential requirement in a society governed by the rule of law. In other words, it opens the door to the court; it does not determine the outcome.

What cases may an NGO or affected citizen bring based on this provision?

Firstly, there is a possibility to go to court where the Member State fails to conduct a public consultation on their NECPs and LTSs as foreseen by Art. 10 of the Governance Regulation. For instance, if a Member State does not conduct any public consultation or does not prepare a summary of the public's views, this could be the subject of a court challenge. This does not mean that the whole NECP or LTS must necessarily be quashed. However, the national courts must be able to order the authorities to remedy the public consultation failures.

Moreover, applicants can allege that an NECP or a LTS violates a substantive requirement of EU environmental law. This presupposes that the EU law in question regulates the public authority's actions in sufficiently precise and unconditional manner. Since the Governance Regulation leaves considerable discretion to Member States and the EU Commission only issues non-binding recommendations, the possibilities for such substantive challenges will be limited in practice.

Nonetheless, one can imagine scenarios in which an NECP or LTS does violate EU law. For instance, if a Member State were to abandon any contribution to the climate neutrality target (Art. 2(1) Climate Law).

¹ Arts 1(2)(e) and 11 of the EIA Directive (Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment) and Arts 3(17) and 25 of the IED (Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control)).

This would require a rather egregious case of non-action or open refusal, as the target is of course a very general obligation and the national NECPs and LTSs are only one of the contributing instruments.

Any other clear and precise obligation of EU environmental law, whether present or future, could equally be invoked if Member State authorities fail to respect it.

The need for the provision

The Court of Justice of the EU (CJEU) has been very clear that persons directly concerned by a violation of a directly effective provision of EU environmental law must be able to go to court.² This means that NGOs and affected persons must have court access where national authorities fail to adopt specific plans or programmes mandated by EU law or adopt inadequate plans or programmes. Concretely, the CJEU has held that members of the public must be able to challenge Air Quality Plans,³ National Air Pollution Control Programmes⁴ and Nitrate Action Programmes.⁵

The Court's case law is based on the doctrine of direct effect as well as the fundamental right to an effective remedy (based on Art. 47 Charter of Fundamental Rights) and the Aarhus Convention (Art. 9.3). The Aarhus Convention is an international treaty that the EU and all of its Member States have ratified. It requires that members of the public have the possibility to challenge acts and omissions of public authorities that violate laws related to the environment. This fundamental right to an effective remedy applies to all breaches of EU law.

Largely, the Parliament's provision therefore only writes into legislation what is already required by EU law. However, experience shows that it is nonetheless important to have this added clarity. In practice, NGOs and affected persons are able to go to court for EU law violations in some Member States, while possibility remains remote in others. This means unequal protection for EU citizens and a lack of level playing field. The Parliament's provision is therefore necessary to ensure equal rights for all Europeans.

In a Communication published in October,⁶ the EU Commission has acknowledged these problems and called on the Council and the Parliament to introduce explicit access to justice provisions in sectoral legislation. The Parliament's provision is exactly such a sectoral provision and gives the first opportunity for the legislators to demonstrate that they are committed to addressing this issue. The Climate Law relies on the NECPs and LTSs under the pre-existing Governance Regulation to achieve the emission reductions necessary to bring the EU to net zero. This is why it is crucial to ensure that the public can hold public authorities to account if they do not carry out their duties in accordance with the law. The Parliament's provision is the most effective means of doing this.

Ultimately, the provision ensures that the Regulations agreed by the Council and the Parliament are respected equally in all Member States and, hopefully, continuous progress towards the climate targets.

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² See for instance, Cases C-664/15 *Protect* and C-197/18 *Wasserleitungsverband Nördliches Burgenland and Others*.

³ C-237/07 *Janecek*, and C-404/13 *ClientEarth*.

⁴ C-165 to C-167/09 *Stichting Natuur en Milieu*.

⁵ Case C-197/18 *Wasserleitungsverband Nördliches Burgenland and Others*.

⁶ Communication from the Commission on Improving access to justice in environmental matters in the EU and its Member States, COM/2020/643 final, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0643> .

Annex: The Parliament’s proposed access to justice provision

Amendment 88
Proposal for a regulation
Article 10 – paragraph 1 – point 2 b (new)
Regulation (EU) 2018/1999
Article 2 – point 62 a (new)

(2b) *in Article 2, the following point is added:*

‘(62a) ‘public concerned’ means the public affected or likely to be affected by, or having an interest in, the environmental decision-making procedures referred to in Chapters 2 and 3; for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.’

Amendment 92
Proposal for a regulation
Article 10 – paragraph 1 – point 5 a (new)
Regulation (EU) 2018/1999
Article 11 a (new)

(5a) *the following Article is inserted:*

‘Article 11a

Access to justice

- 1. Member States shall ensure that, in accordance with their national laws, members of the public concerned who have a sufficient interest or who claim the impairment of a right where administrative procedural law of a Member State requires such a right to be a precondition have access to a review procedure before a court of law or other independent and impartial body established by law with a view to challenging the substantive or procedural legality of decisions, acts or omissions subject to Article 10 of Regulation (EU) 2018/1999.*
- 2. Member States shall determine the stage at which decisions, acts or omissions may be challenged.*
- 3. Member States shall determine what constitutes a sufficient interest and impairment of a right, consistent with the objective of giving the public concerned wide access to justice. To that end, non-governmental organisation covered by the definition in Article 2(62a) shall be deemed as having a sufficient interest or having rights capable of being impaired for the purpose of paragraph 1 of this Article.*
- 4. This Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to 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.*
- 5. Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.’*