European Commission

CITIZEN'S GUIDE TO ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

Environment

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INTRODUCTION

On 28 April 2017, the European Commission adopted a Notice on access to justice in environmental matters[a] to explain in detail what the European Court of Justice has had to say about how national judges should handle legal challenges brought by members of the public against decisions, acts or omissions of public authorities of the Member States that affect the environment[b].

Using a '*frequently asked questions*' format, this Citizen's Guide provides a summary of the main findings of the Notice. The Notice itself is the parent source of information and should be consulted for more detailed explanations. Cross-references are provided throughout the text of the Guide.

The Citizen's Guide was prepared by the Environment Directorate-General of the European Commission. It is not binding or intended in any way to depart from the substantive content of the Notice.

a C(2017)2616, OJC 275, 18.8.2017, p1; available in different language versions at http://ec.europa.eu/environment/aarhus/legislation.htm

b It does not cover legal challenges brought by one private party against another private party, see paragraph 15 of the Notice.

BASICS

What does access to justice in environmental matters mean?

Access to justice in environmental matters is a set of guarantees that allows members of the public to challenge the legality of decisions, acts or omissions of public authorities of the Member States before a national judge. '*Members of the public*' means individuals and their associations.

The set of guarantees covers what should happen before, during and after the bringing of a challenge.

It is made up of:

A right to bring a legal challenge.

A sufficient examination of the challenge by a national judge.

Steps by the judge to put matters right if they agree with the challenge.

Protection of the claimant from facing prohibitive costs for bringing the challenge, in particular if the judge rejects it.

Timeliness in the handling of the challenge.

Practical information on how to bring a challenge.

What kinds of decisions, acts and omissions can be challenged?

Decisions, acts and omissions covered by European Union ('EU') environmental law.

The EU has adopted important laws to protect the environment. These aim to reduce waste and pollution and safeguard the quality of air, water and nature. Their implementation requires:

- National parliaments and ministers to adopt national legislation and regulatory acts that set obligations for individual authorities and create rights for the public;
- Individual public authorities to adopt plans and programmes, oversee environmental impact assessments, consult the public, decide on applications for permits and other authorisations, monitor the state of the environment and fulfil other environmental tasks[1].

Access to justice in environmental matters covers decisions, acts and omissions at these different implementation levels. It may also cover exceptional situations, such as decisions to regularise an unauthorised act or activity[2].

Why allow decisions, acts and omissions to be challenged?

There are two broad justifications.

First, individuals and their associations need to be able to protect any rights that they enjoy under EU environmental law. This means being able to challenge any decision, act or omission which disrespects those rights.

Second, the EU is based on law and the rule of law. It is vital that public authorities can be required to properly fulfil environmental obligations placed on them. Otherwise there is a risk that the law will mean different things in different places and that environmental protection will be lower in some parts of the European Union than it is in others[3].

What kinds of environmental rights do individuals and their associations enjoy?

There are two kinds: procedural and substantive.

Procedural rights usually relate to public participation. They typically have to do with how a public authority informs the public of a proposed decision, receives submissions from members of the public, takes these into account and publicly announces the final decision[4]. EU environmental law attaches high importance to effective public participation since this allows members of the public to express their concerns and have them taken into account.

Substantive rights cover individual interests such as human health, protection of property and entitlement to use the environment for a specific purpose such recreational fishing. Many EU environmental laws aim to protect human health, for example laws to control air pollution or safeguard drinking water. Substantive rights may also arise under EU nature conservation laws, in particular to allow environmental associations to act in the general interest[5]. '*Neither water nor the fish swimming in it can go to court. Trees likewise have no legal standing*'[c]. However, environmental associations may speak for them.

c Opinion of Advocate General Sharpston in Case C-664/15, *Protect*, paragraph 77.

How has access to justice in environmental matters been developed?

The 'EU legal order', i.e. the overall legal system of the EU, requires laws agreed at EU level to be effectively implemented. This involves national judges upholding rights and obligations. In 2005, the EU became bound by an international agreement, the Aarhus Convention[d] which, amongst other things, promotes access to justice in environmental matters and recognises the special role that environmental associations exercise in defending the environment. In parallel, the EU introduced access-to-justice provisions into several specific pieces of EU environmental legislation. Over time, there have been many rulings of the European Court of Justice spelling out what access to justice should mean in practice. Many of these rulings are in response to requests from national judges for the Court's interpretation of how they should deal with specific legal challenges. Such challenges have generally been brought by individuals or associations concerned about the environment. In the EU legal order, the Court's interpretation of EU law is binding for all Member State authorities, including national judges[6].

d Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.

THE GUARANTEES

Right to bring a legal challenge

Individuals or their associations can only be heard by a judge if they have a right to bring a legal challenge. This right is called '*legal standing*'. Legal standing is fundamental. It is a right to protect other rights, i.e. the procedural and substantive rights mentioned under '*Basics*'. Without it, the other access-to-justice guarantees will not come into play[7].

Who has legal standing?

Whether and to what extent someone has legal standing varies according to:

- The rules on standing of each national legal system;
- Whether specific pieces of EU environmental legislation require legal standing to be provided by Member States;
- Whether the proposed legal challenge is being brought by an individual or a recognised environmental association;
- Whether there are EU procedural and substantive rights at stake.

What do national rules on legal standing say?

Different national rules say different things. Some Member States go as far as allowing a general right of standing – the so-called *actio popularis*. Others require a claimant to demonstrate to the judge that they have a sufficient interest to bring the challenge. Still others require the claimant to show that a contested decision, act of omission impairs rights that the claimant enjoys.

Are national rules conclusive?

Not necessarily. If the national rules restrict too much the right to bring a legal challenge, the national judge may need to disregard them in order to comply with EU law. In particular, EU law may require the judge to protect a wider set of procedural and substantive rights than the national rules on standing do.

Which specific pieces of EU environmental legislation require legal standing to be provided?

Those that contain specific provisions on access to justice.

The pieces of legislation in question cover decisions, acts and omissions concerning requests for environmental information, environmental impact assessment, industrial permits and environmental liability[8].

What are the differences between legal standing for individuals and legal standing for environmental associations?

The starting point is that both an individual and an association can bring a legal challenge to protect any rights that they enjoy.

However, the Aarhus Convention and some of the specific pieces of EU environmental legislation mentioned above aim to give an extra guarantee on legal standing to some environmental associations. The justification for this is that the associations act in the general interest with the aim of protecting the environment. If such associations lack legal standing, some important general interests – such as the protection of nature - may never find an advocate. This important role of environmental associations has been recognised by the European Court of Justice.

The extra guarantee given to these associations is that the national judge must treat them as automatically having an entitlement to bring a legal challenge. This means that they are considered to fulfil any standing requirements set out in national law. In contrast, an individual may first have to convince the judge that they have a sufficient interest or a right that has been impaired.

Can Member States limit special recognition of environmental associations to bring a legal challenge?

In principle, yes.

However, the criteria established by the Member State cannot make it excessively difficult for an environmental association to gain recognition. Furthermore, they should take into account the interests of small and local environmental associations. For instance, a required membership level cannot be set too high[9].

What legal standing should be given when EU procedural and substantive rights are at stake?

In a number of significant rulings, the Court of Justice has spelled out the legal standing that national judges should recognise in order to uphold EU procedural and substantive rights and ensure the fulfilment of obligations placed on public authorities. These rulings show that EU law sometimes requires legal standing to be given **even when it is not mentioned in any specific pieces of EU legislation**.

For example, the Court has confirmed the need for national judges to recognise:

- The standing of an environmental association to challenge a public authority's decision approving a project in a site protected under an EU nature law[10];
- The standing of an environmental association to challenge a public authority's decision giving a partial exemption (i.e. derogation) from a ban on hunting brown bears set out in the same EU nature law[11];
- The standing of individuals and associations to challenge the failure of a public authority to adopt a plan required under an EU law aimed at reducing the public's exposure to air pollution[12].

In the cases mentioned, the Court required legal standing to be provided even though the relevant EU laws in question did not contain any specific access-to-justice provisions and even though national rules did not provide legal standing[e].

e Since the Notice was published, a ruling of the Court was handed down in December 2017 in a case concerning a new activity that might affect the quality of a water body, see Case C-664/15, *Protect*.

The judge's examination

The national judge has the job of checking whether the public authority acted in a legally correct way. This is known as '*judicial review*'. It means examining the facts behind the authority's action or inaction. It also means examining what the authority was required to do under the EU environmental laws in question.

The scope of judicial review has two aspects. The first concerns whether the judge can refuse to examine certain areas of law and legal arguments. The second concerns how rigorously the judge needs to examine those facts and arguments that are admissible. This is known as the '*standard of review*'[13].

Can a national judge restrict the areas of law and legal arguments that they will examine?

Yes, to a certain extent.

The European Court of Justice has accepted that, in legal challenges to decisions on specific activities, national judges can restrict an individual to use of legal arguments that support the interests or rights which gave the individual legal standing. However, this restriction does not apply to recognised environmental associations. These are entitled to raise any provision of EU environmental law in their arguments[14].

Can the national judge restrict a legal challenge to the same objections that were made in a previous administrative procedure?

Before a public authority makes a decision, there is sometimes an administrative procedure that allows an individual or an environmental association to express objections. Where the individual or environmental association then brings a legal challenge, some national rules oblige them to stick to the same objections that they made during the administrative procedure. This is known as '*preclusion*' of arguments.

In a ruling related to a legal challenge concerning a public authority's decision on a specific activity, the Court of Justice rejected preclusion. It ruled that preclusion of arguments will not ensure an effective judicial review and that national judges are obliged to assess the procedural and substantive legality of the contested decision[15].

What about arguments made abusively or in bad faith?

The national judge may refuse to examine such arguments, i.e. treat them as inadmissible[16].

Is the same standard of review to be applied across the EU?

To a degree, yes.

On the one hand, different standards of review already exist in different Member States. Some national standards require or permit national judges to carry out a more in-depth examination of contested decisions, acts and omissions than do others. The European Court of Justice accepts the possibility of different standards. Nevertheless, the Court requires that, whatever the standard, national judges must be able to apply effectively any principles and rules of EU law that are relevant. This includes taking into account the details and purposes of specific EU laws and upholding relevant rights and obligations. To that extent, there is a minimum common standard to be applied by all national judges[17].

What should the national judge examine when applying a standard of review?

The national judge should examine the procedural and substantive legality of the contested decision, act or omission.

What is relevant for the national judge's examination of procedural legality?

Procedural legality relates to:

- Whether the public authority concerned had the legal power to make the decision, act or omission being contested;
- Whether the public authority fully and correctly followed a procedure laid down for adopting the contested decision, or act, for example a procedure requiring consultation of the public;
- Whether the decision, or act, can be found in the correct form.

Examination of procedural legality can also cover decisions, acts or omissions concerning the regularisation of unlawful measures[18].

What does an examination of substantive legality involve?

This involves checking whether the substance of the law has been violated. It covers the judge's examination of **the facts behind and the merits of the contested decision, act or omission**.

Why is the national judge obliged to examine the facts of a case?

If a national judge could never review the facts on which the public authority based its decision, this could, from the outset, prevent a claimant from presenting effectively a potentially justified legal challenge. Where the facts are incomplete or wrong, or interpreted wrongly, the mistake has a direct consequence on the quality of the decision, act or omission at stake and may jeopardise the objectives of EU environmental law[19].

What is meant by an examination of the merits of a decision, act or omission?

When adopting a decision or act or refraining from taking action, a public authority will often enjoy a certain margin of discretion. This margin covers the way in which the authority assesses the relevant facts and what conclusions it draws from them. An examination of the merits of a decision, act or omission involves the national judge checking how the public authority used this discretion.

In doing so, the national judge must take into account the details and purposes of specific EU laws and uphold relevant EU rights and obligations. For a number of specific EU environmental laws, the Court of Justice has set out how the national judge should check the public authority's use of its discretion. For example, it has set a strict test for checking use of discretion in relation to decisions on plans and projects that might affect sites protected under an EU nature law[20].

In general, the greater the effect a decision, act or omission has on the environment, the more intense the judge's examination of discretion may need to be. This reflects a principle called proportionality[21].

How can the national judge know what the details and purposes of specific EU laws require?

These may be well established or clear. However, if in doubt, the national judge can – and sometimes must – request the European Court of Justice to provide an interpretation[22].

Does the national judge need to examine the validity of national legislation and regulatory acts?

Sometimes.

In particular, national judges must be ready to examine whether national legislation or regulatory acts unjustifiably

- Curtail rights given to individuals and their associations under EU environmental law;
- Reduce obligations that the Member States is expected to fulfil under EU environmental laws[23].

How is the national judge to deal with questions concerning the validity of EU laws themselves and acts adopted by EU bodies?

There is a procedure which requires the national judge to ask the European Court of Justice to state that EU laws or acts are [themselves] invalid[24]. In this case, the Court itself carries out a judicial review.

Putting matters right

The role of the national judge goes beyond deciding whether or not the public authority acted within the law. In particular, the judge may need to make orders if they find that the public authority acted unlawfully.

Unlawful actions – or lack of action – by a public authority may threaten or cause harm to the public or the natural environment. If the threat or harm is serious, the national judge should issue an order to block, stop or remedy it – and ensure compliance with EU law. Such orders are known as effective remedies or reliefs. Depending on the threat or the harm, different kinds of order may be appropriate. The legal systems of the Member States should enable judges to make such orders[25].

What should happen if a national judge finds that a public authority made a minor procedural mistake?

Minor procedural mistakes do not require effective remedies, provided it can be established that they did not have an impact on the contested decision of the public authority. It is for the public authority and not the claimant to demonstrate this[26].

…. or that an authorisation, regulatory act or national legislation contravenes EU environmental law?

In these circumstances, an order to suspend, revoke or annul the contested decision or act will be appropriate[27].

…. or that a public authority unlawfully omitted to take action?

Public authorities are required to take general or particular measures to ensure compliance with EU environmental law. Should they fail to do so, the national judge may need to step in. For instance, they may have to order the public authority to adopt a legally required air quality plan to address high levels of air pollution[28].

… or that the unlawful action or inaction of the public authority has already caused harm?

Here, orders should aim at making good the harm caused. This may mean requiring an environmental impact assessment to be completed where one was wrongly omitted – or, in extreme cases, requiring unlawful works already carried out to be undone[29]. Provided certain conditions are met, an order may compensate the public for financial losses they have suffered as a result of the unlawful action or inaction[30].

What should be done if there is a risk of harm occurring before the national judge can deliver their final ruling?

It might take a significant amount of time for the national judge to fully assess all the arguments presented to them and deliver a final ruling. Meanwhile, the contested decision, act or omission could already be causing serious or irreparable environmental harm. This risk can be addressed through interim measures – sometimes called injunctive relief. These are orders that suspend a contested decision or act temporarily or, in the case of an omission, oblige the public authority to take some positive temporary action. National legal systems must empower judges to make such orders where appropriate[31].

Costs

Going to court costs money. In most countries, the party who loses must pay the other side's costs as well as their own. This is known as the 'loser-pays principle'. The risk of having to pay a lot of money can be a major deterrent to bringing a legal challenge. This explains why EU law requires Member States to ensure that court procedures relating to EU environmental law are not prohibitively expensive - the '*NPE requirement*'[32].

What does 'not prohibitively expensive' mean?

Prohibitively expensive means that a person is prevented from going to court by reason of the financial burden that might arise as a result[33]. EU law does not establish a threshold for determining when costs become prohibitive. It depends on the particular circumstances. Costs should also be reasonably predictable for a potential claimant[34].

What kind of costs are covered?

The NPE requirement relates to all the costs of participating in a procedure. So, it covers:

- Court fees;
- The costs of legal representation, including costs awarded in favour of the other side;
- The cost of evidence and experts' fees;
- Any financial guarantees that a claimant is asked to provide, for example to obtain an interim order.

It also relates to the costs of different stages of a procedure, e.g. appeals[35].

How should a national judge respect the NPE requirement when applying the loser pays principle?

The loser-pays principle is in line with EU law. However, when making a cost award against an unsuccessful claimant, the national judge must respect the NPE requirement. They can take into account a number of subjective elements related to the specific case and the claimant, such as the claimant's financial situation and the importance of what is at stake for the claimant and the environment. However, the judge must always ensure that the costs awarded are not objectively unreasonable[36].

What is the possible role of legal aid?

Legal aid for those who lack sufficient resources can contribute to ensuring that the NPE requirement is fulfilled. Member States can provide legal aid in a number of different ways[37].

Timeliness

Member States have to ensure that judicial review procedures are conducted in a timely manner. Timeliness is a key guarantee that judicial review will be efficient[38].

Does EU law set specific time limits within which judicial reviews should be completed?

No, EU law does not set any specific time limits.

Can Member States fix time limits for bringing legal challenges?

Yes. Time limits for bringing challenges are in line with EU law provided they are reasonable. Such time limits are justified in the interest of legal certainty.

Practical information

Member States are obliged to provide information to the public on access to justice in environmental matters. They must do so in a sufficiently clear and precise manner. The information should reach a broad and representative public[39].

What are the obligations of Member States regarding the content of the information?

The information should cover all aspects of access to justice that are relevant for a member of the public when they are deciding whether or not to bring a legal challenge. Information should be complete, accurate and up-to-date. All the sources of law used to determine the conditions of access should be covered, including national case-law where this plays an important role. The information should be clear and understandable for a non-lawyer.

Who can be addressed in the Member States to obtain this information?

It is for the Member States to decide who is responsible for providing the information. Usually the Ministry of Justice is a good starting point to ask for the information.

Is information available at EU level?

Yes. Information on access-to-justice rules in the Member States, including with regard to the environment, can be found via the e-justice portal established by the Justice and Consumer Protection Directorate General of the European Commission. The link is here: https://e-justice.europa.eu/content_access_to_justice_in_environmental_matters-300-en.do

[1] Paragraphs 32-33 of the Notice.
[2] Paragraph 135.
[3] Paragraphs 35-37.
[4] Paragraphs 45-47.
[5] Paragraphs 48-57.
[6] Paragraphs 17-30.
[7] Paragraphs 58-107.
[8] Paragraph 28.
[9] Paragraphs 74-83
[10] Paragraphs 69-70.
[11] Paragraph 104.
[12] Paragraph 104.
[13] Paragraph 108.
[14] Paragraphs 115-117.
[15] Paragraph 121.
[16] Paragraph 122.
[17] Paragraphs 140-141.
[18] Paragraph 135.
[19] Paragraph 137.
[20] Paragraphs 144.
[21] Paragraph 150.
[22] Paragraph 149.
[23] Paragraphs 151-153.
[24] Paragraph 154.
[25] Paragraphs 155-173.
[26] Paragraph 158.
[27] Paragraphs 159-162.
[28] Paragraphs 163-164.
[29] Paragraphs 168-169.
[30] Paragraphs 166-167.
[31] Paragraphs 170-173.
[32] Paragraphs 174-195.
[33] Paragraph 181.
[34] Paragraph 182.
[35] Paragraphs 183-185.
[36] Paragraphs 186-188.
[37] Paragraphs 194-195.
[38] Paragraphs 196-201.
[39] Paragraphs 202-209.

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