

Opinion of the European Economic and Social Committee on
‘Communication from the Commission of 28 April 2017 — Commission Notice on Access to Justice
in Environmental Matters’

(C(2017) 2616 final)

(2018/C 129/10)

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Consultation	European Commission, 31.5.2017
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Plenary Assembly decision	25.4.2017
Section responsible	Agriculture, Rural Development and the Environment
Adopted in section	21.11.2017
Adopted at plenary	7.12.2017
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Outcome of vote (for/against/abstentions)	171/5/2

1. Conclusions and recommendations

1.1. The EESC welcomes this Interpretative Communication in providing a valuable overview of EU Court of Justice case-law regarding Access to Justice at a national level in environmental cases up to the date of its publication. It will bring further benefits of increased certainty and clarity to decision makers within national courts and administrative structures, and to businesses and citizens **if** its dissemination is effectively rolled out.

1.2. The EESC recognises that consistency in Access to Justice across the EU is an essential factor underpinning the single market and the consistent implementation of EU law rights in the Union, and provides necessary clarity and certainty for markets and investors.

1.3. The EESC calls for overarching and binding EU legislation necessary to achieve consistency and completeness in implementing Access to Justice throughout the Union, to complement this welcome step on Access to Justice by this Communication. The Commission's own Staff Working Document ⁽¹⁾ assessed binding EU legislation as the ideal approach. The EESC also acknowledges the analysis and recommendations of the Darpö report ⁽²⁾ in this regard, which was commissioned by the Commission. Member States need to be supportive of such objectives and not frustrate their pursuit.

1.4. For the Communication to have real effect, it needs to be complemented by training and education at Member State level across the intended audiences, and in particular for the judiciary, administrative review bodies, and citizens.

1.5. The Commission needs to prioritise sufficient resources and funding to effectively support such plans, as do the Member States.

1.6. The Communication does not seek to override national jurisdictions and sets out the rulings and clarifications of the Court of Justice which are a binding basic requirement. That point, and a requirement that there should be no derogations or back-sliding, should be stated in future versions of the Communication.

⁽¹⁾ <https://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-255-F1-EN-MAIN-PART-1.PDF>

⁽²⁾ <http://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf>

1.7. This Interpretative Notice needs to be kept up to date. To ensure accuracy and currency is maintained, timely updates to the content, and refreshers to the intended audience, are essential to reflect developments in the jurisprudence of the CJEU. A dynamic and updated tool for civil society, public administrations and judiciary bodies should be explored.

1.8. Feedback from expert communities and gaps and omissions in the Communication for Member States should be prioritised and addressed also, including consideration on how to address areas where there are gaps in the current jurisprudence of the Court.

1.9. An independent, objective, comprehensive and up-to-date baseline needs to be developed, **and maintained**, reflecting the positive developments and issues with Access to Justice at Member State level, and all elements of Article 9 of the Aarhus Convention.

1.10. Given the importance of references for preliminary rulings in ensuring the consistency of EU law in this area ⁽³⁾, the Commission should fully explore and report on the usage and compliance with that provision in all Member States, and investigate and pursue all barriers to its use.

1.11. In a global context of harassment and persecution of environmental defenders, the EU should lead in facilitating Access to Justice.

1.12. The EESC highlights the limitations of the Interpretative Communication in failing to include the findings of the independent Compliance Committee of the Aarhus Convention (ACCC). This important and useful body of work can complement the Commission's Communication, and support decision makers and citizens with Access to Justice and should be referenced.

1.13. The EESC supports the Aarhus Convention and its full implementation by and within the EU. It is therefore essential that the findings on compliance of the ACCC, appointed by the Parties, are fully endorsed by the Parties.

1.14. The EESC recognises the sensitivities associated with the recent findings by the ACCC regarding the non-compliance on Access to Justice within EU institutions. The EESC presses for urgent and constructive engagement on this matter by the EU in the period before the next Meeting of the Parties. In particular, it will be important to prioritise with environmental NGOs and civil society, a broad and ambitious approach to the ways and areas in which the EU can improve the implementation of the Convention and Access to Justice within and by the EU institutions. A parallel and complementary approach to Access to Justice within and by the EU institutions, associated guidance and rollout activities should also be addressed.

2. General comments

2.1. The document published by the Commission is an interpretative notice. It provides an overview of the case-law of the EU's Court of Justice (CJEU) regarding Access to Justice at national level for cases dealing with the environment. It takes the form of a detailed legal analysis clarifying certain of the legal and procedural requirements and standards concerning environmental cases. Topics such as remedies, costs, time lines, time limits, scope, standings and efficiency are covered.

2.2. The Communication's objective is to provide 'clarity and a reference source' for the audience of national administrations, national courts and individuals and NGOs who exercise a public interest advocacy role, and 'economic operators who share an interest in the predictable application of the law' (para. A9). Paragraph 8 sets out the background for this objective in terms of the problems experienced by that audience, including but not limited to: businesses, SMEs, individuals, NGOs and the public consequent on problems with the implementation of Access to Justice in Member States.

2.3. It also sets out the importance of the environment as 'our life support system' and how its preservation, protection and improvement is 'a shared European value'.

⁽³⁾ Article 267 of the Treaty of the Functioning of the EU.

2.4. It sets out the EU's broad context for Access to Justice with reference to the Treaties and the principle of effective judicial protection and also Article 47 of the Charter of Fundamental Rights of the European Union, and the Human Rights Convention on *Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (the Aarhus Convention). The EU and the 28 Member States are among 47 Parties to the Convention, in addition to countries from Europe and Central Asia.

2.5. In 2003, the EU adopted two legislative proposals, one on 'Access to Environmental Information' ⁽⁴⁾, and one on 'Public Participation' ⁽⁵⁾. These provided for Access to Justice in a limited scope in certain specified existing Directives. An additional regulation was adopted in 2006 on the implementation of the Aarhus Convention in the EU ('Aarhus regulation' ⁽⁶⁾). The Commission adopted a legislative proposal on Access to Justice in 2003 ⁽⁷⁾. Diverging views among Member States and lack of political will to get it passed prompted its withdrawal in 2014 ⁽⁸⁾. The lack of a Directive continues to be problematic and needs to be addressed. The EESC calls for overarching and binding EU legislation on Access to Justice.

2.6. The EU and the Member States are signatories to the Aarhus Convention, and have ratified it. At its first session in 2002, the Meeting of the Parties (MoP) to the Convention established a compliance mechanism for the Convention, including the ACCC. The ACCC investigates communications about non-compliance of a Party, and makes findings and recommendations on them. That is presented to the MoP. Without exception until the 6th MoP in 2017, these have always been fully endorsed by the Parties.

2.7. The Communication **acknowledges** major hurdles remain within certain Member States. Some countries block access almost entirely, others limit scope, in others significant costs are an issue, and some make no provision for effective remedies. A well maintained and independent baseline report needs to be developed to provide clarity on the specific issues within Member States, and also to highlight existing best practice.

2.8. The Commission sets out the rulings and clarifications of the Court of Justice and these are binding basic requirements. That point, together with a requirement that there should be no derogations or back-sliding, should be clearly stated in future versions of the Communication.

2.9. The publication of the Commission's Communication comes amidst an intense controversy as to whether the EU fully complies with its own obligations under Article 9 of the Convention. This follows on a communication to the ACCC alleging non-compliance, and the ACCC made a finding ⁽⁹⁾ of non-compliance in relation to the EU's own implementation of Access to Justice, with associated recommendations.

2.10. In July 2017, the EU Council unanimously decided to accept these findings, subject to amendments (a position promoted by the Commission), and also reiterated its support to the Aarhus Convention ⁽¹⁰⁾. The proposed amendments for the MoP decision on the findings of the ACCC propose, inter alia, that the MoP would 'take note' of the findings rather than 'endorsing' them. The EESC highlights a contradiction in the EU seeking to not endorse the findings of the ACCC while reiterating support for the Convention. This approach if adopted by other Parties to the Convention has the potential to seriously undermine the independent compliance mechanism, and the strength and effectiveness of the Convention as a consequence.

2.11. In the September 2017 MoP to the Convention in Montenegro, a decision was taken to defer the decision by the MoP on the findings of the ACCC that the EU was non-compliant. This followed on from robust statements from alternative viewpoints and discussions at the MoP. The MoP has always operated by consensus, and as there was no consensus on the matter, and further to a coordination meeting of the EU Member States, it was agreed to defer the decision to the next MoP in 2021.

⁽⁴⁾ Directive 2003/4/EC.

⁽⁵⁾ Directive 2003/35/EC.

⁽⁶⁾ Regulation (EC) No 1367/2006.

⁽⁷⁾ <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52003PC0624>

⁽⁸⁾ See withdrawal of obsolete Commission proposals, OJ C 153, 21.5.2014, p. 3.

⁽⁹⁾ https://www.unece.org/fileadmin/DAM/env/pp/compliance/C2008-32/Findings/C32_EU_Findings_as_adopted_advance_unedited_version.pdf

⁽¹⁰⁾ <http://data.consilium.europa.eu/doc/document/ST-11150-2017-INIT/en/pdf>

2.12. The EESC recognises the sensitivities associated with the recent findings of the ACCC on the non-compliance of the EU. The EESC presses for urgent, timely, and constructive engagement by the EU before the next MoP. In particular, it will be important for the EU to engage and to prioritise with environmental NGOs and civil society at large, a broad and ambitious approach to the ways and areas in which the EU can improve the implementation of the Convention and Access to Justice within and by the EU institutions. A parallel and complementary approach to implementing Access to Justice within and by the EU institutions, with associated guidance and rollout activities should also be addressed.

2.13. The Commission's interpretative notice comes out of a long and failed process to adopt specific measures at EU level on Access to Justice. This included:

- the withdrawal of the proposal for an Access to Justice Directive,
- the failure to amend all relevant directives individually to include Access to Justice provisions, for example, key environmental directives like the Birds and Habitats Directives have not been amended to reflect clear and comprehensive Access to Justice Provisions,
- the failed attempts to amend specific directives to provide for Access to Justice Provisions ⁽¹¹⁾.

2.14. Measures harmonising the way national courts deal with environmental cases are necessary: the EU legal standards do not appear to be specific enough. Consequently this has resulted in a large number of references to the CJEU for preliminary ruling. The Commission's Communication is meant to clarify rules and standards arising from that CJEU case-law, and by that strengthen legal certainty for stakeholders.

2.15. The Commission has also added its own views to the legal analysis.

2.16. The Communication and the underlying clarification exercise tie in with the Environmental Implementation Review and aim at strengthening it. The EESC stated in a recent opinion ⁽¹²⁾ its support to the EIR process and called for decisive action to implement the environmental *acquis* to its full extent and potential.

2.17. The lack of an Access to Justice Directive leaves a gap at the top of the hierarchy in the legislation that would help in clarifying many of the issues that have created confusion and inconsistencies across Member States, with associated problems for business and for citizens.

2.18. Some Member States have ratified the Aarhus Convention without specifying how Access to Justice would apply in specific cases, or have been unclear or incomplete in their implementation.

3. EESC's position

3.1. The EESC supports the Aarhus Convention and its full implementation by and within the EU. It is essential for the validity and integrity of the Aarhus Convention that the findings of the ACCC are fully endorsed by the Parties.

3.2. The EESC notes that the Aarhus Convention belongs to the international law corpus dealing with Human Rights and is entirely compatible with the fundamental principles of the EU, in both the Treaties and the European Charter of Human Rights. The EESC emphasises the need for the EU to stand up for Human Rights and to be a global leader in this area.

3.3. The EESC urges Member States to speed up the effective implementation of the Aarhus Convention, and in particular to make sure that: Access to Justice in administrative reviews and in the national courts is provided for consistently with the requirements of the Convention, and the essential characteristics for those reviews required by the Conventions Article 9(4). The EESC also recognises the critical interdependence of the three pillars of the Convention, and that they need to be implemented as a complementary whole to have real effect.

⁽¹¹⁾ The National Emissions Ceiling Directive.

⁽¹²⁾ *Environmental Implementation Review*, OJ C 345, 13.10.2017, p. 114-119.

3.4. The document published by the Commission is welcomed and considered to be a very useful and important communication. The EESC recognises that consistency in Access to Justice across the EU is an essential factor in providing for homogenous market conditions, which is fundamental to the success of the single market, and that it is also necessary for a successful implementation of fundamental EU law rights consistently across the Union. This Communication contributes to that.

3.5. The EESC welcomes the Commission's statement that: 'In case of non-compliance with existing legal requirements under the EU *acquis*, the Commission will also continue to use infringement procedures to ensure their fulfilment' (para. A13). The Commission has a necessary and defined role in that regard under the EU Treaties. The effective execution of that role is essential to ensure commitments by the Member States are fulfilled consistently, and that compliant Member States are not unfairly disadvantaged, and homogeneity in market conditions and rights are provided for.

3.6. The EESC takes the position that effectively implemented environmental law provides clarity and certainty for markets and for investors, facilitating sustainable development in the process. The purpose of this guide from the Commission in providing improved certainty and clarity around environmental law is welcomed, despite the limitations of its scope.

3.7. The EESC welcomes that the European Commission has commissioned analyses about access to justice in environmental matters, for example the Darpö⁽¹³⁾ report. This report, and other independent analyses, provide important evaluations on implementation which Member States should be cognisant of.

3.8. The EESC recognises that the definition of 'Public Authority' in Article 2 of the Convention includes: 'The institutions of any regional economic integration organisation referred to in Article 17 which is a Party to this Convention'. Through that definition and through Article 17 itself, the EESC recognises the application of the Convention to Parties such as the EU. The EU has itself signed and ratified the Convention⁽¹⁴⁾. The EESC considers that the EU's ratification instrument for the Convention does not absolve the EU institutions from their obligations in respect of Access to Justice.

4. Next steps

4.1. Further communications or guides are required that include the findings and recommendations of the ACCC, to facilitate further clarity and the implementation and application of the Convention. An Access to Justice Directive can greatly assist in providing clarity and consistency.

4.2. Having a *greater consistency of approach* to implementation would provide greater homogeneity of conditions across Member States for business and facilitate development. Uncertainty is currently leading to delays, extra costs and hindering sustainable development.

4.3. There is an urgent need for *EU wide consultation to develop and maintain an independent baseline evaluation* of Access to Justice at a Member State level. This needs to look at both levels of awareness among civil society, and what is happening in the courts and in administrative reviews. Critically, it must establish what cases are being taken, are not being taken or are hindered in being taken because of Access to Justice issues. The EESC can play a role in using its network of organised civil society to reach a wide audience and is also willing to have a follow up role in communicating the findings of such an evaluation. The evaluation itself must be independent and objective.

4.4. This baseline needs to go beyond the limitations of the Environmental Implementation Review, which is limited by its scope and lack of public participation; and the limitations of the EU Justice Scoreboard. The scope of the baseline should address all aspects of Article 9 of the Aarhus Convention, in particular all the characteristics of reviews specified of Article 9 (4) in the Convention; and support obligation in Article 9(5). Full updates of this baseline should be completed at least every two years.

4.5. The Commission recognises, and the EESC endorses, the vital role of citizens and NGOs in highlighting accountability under the Aarhus Convention. Training and education at Member State level is critical both at citizen level and also at the judiciary level. The Commission:

⁽¹³⁾ <http://ec.europa.eu/environment/aarhus/pdf/synthesis%20report%20on%20access%20to%20justice.pdf>

⁽¹⁴⁾ https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en#EndDec

- needs to develop specific plans to maintain and disseminate the Communication effectively, reflecting in a timely way the relevant developments in the jurisprudence of the Court of Justice, and to work in conjunction with civil society in this,
- will need to prioritise the resourcing and funding of such plans,
- could explore a dynamic and updated tool for civil society, public administrations and judicial bodies to ensure currency and accuracy to reflect relevant developments in the jurisprudence of the Court of Justice,
- should issue progress reports on such plans every 6 months,
- should identify gaps and omissions in the Communication for Member States and prioritise and address these, including giving consideration to areas where there are gaps in the current jurisprudence of the Court, and feedback from expert communities.

4.6. The prohibitive nature of costs in certain jurisdictions can be a significant barrier to justice. The threat of meeting what can be prohibitive costs can be a barrier to Access to Justice. In a global context of harassment and persecution of environmental defenders, the EU should lead in facilitating Access to Justice, and should be particularly proactive in addressing cases where there is harassment, including where costs issues are a barrier.

4.7. There is need for a mechanism whereby the findings of the ACCC can be used to complement the Communication to the Member States and further assist clarity on obligations.

4.8. This Interpretative Notice will have to be regularly maintained and kept up to date, with rolling updates and refreshers to the intended audience. Sufficient resources and funding need to be made available to support effective plans both at Member State level and by the Commission.

4.9. Given the importance of preliminary references ⁽¹⁵⁾ in ensuring the consistency of application of EU law in this area, the Commission should fully explore and report on the usage and compliance with this provision across all Member States, and investigate and pursue any and all barriers to its use.

Brussels, 7 December 2017.

The President
of the European Economic and Social Committee
Georges DASSIS

⁽¹⁵⁾ Pursuant to Article 267 of the Treaty of the Functioning of the EU.