



ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS IN THE EU LEGAL ORDER: THE “SECTORAL” TURN IN LEGISLATION AND ITS PITFALLS

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ABSTRACT: Access to justice in environmental matters is one of the three pillars of the Aarhus Convention, to which both the EU and its Member States are Parties. In the Convention, access to justice is subdivided into four limbs. Art. 9(3) contains the general obligation of access to review procedures for the public of acts and omissions of private persons and public authorities concerning national law relating to the environment. Art. 9(3) had to be transposed by the Parties to the Convention, taking the discretion left by the vague wording of the provision into account. At the EU level, unlike for art. 9(1) and (2), there is no formal transposition of art. 9(3) in a dedicated Directive, because of Member States' reluctance. The solution found by the Commission to remedy this lack of EU legislation on the matter was the publication of a soft law instrument in 2017. Since then, we have witnessed a shift in the approach used by the EU legislator, with access to justice provisions being incorporated directly into several pieces of “sectoral” legislation (Regulations and Directives), across various environmental areas. This *Insight* aims at retracing the history of art. 9(3) of the Aarhus Convention in the EU legal order and at analysing and evaluating the recent tendency of including access to justice rights in sectoral legislation.

KEYWORDS: access to justice – environment – Aarhus Convention – EU law – procedural rights – sectoral approach.

I. INTRODUCTION

In December 2023, the Commission released its yearly report on the application of the Charter of Fundamental Rights and chose to focus on effective legal protection and access to justice, which are safeguarded in art. 47 of the Charter and art. 19 TEU.¹ As the

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¹ Report COM(2023) 786 final from the Commission of 4 December 2023, 'Effective legal protection and access to justice. 2023 Annual report on the application of the EU Charter of Fundamental Rights'.



Commission itself states, this choice is grounded on the importance of these rights, which are deemed “vital to ensure the full application of the Charter and of EU laws that promote and protect the rights which the Charter enshrines”.²

In environmental matters, access to justice is further safeguarded by art. 9 of the Aarhus Convention, a mixed agreement to which both the EU and the Member States are parties.³ In turn, the Convention is binding – as a matter of EU law – for both the EU institutions and the Member States.⁴ In particular, access to justice in art. 9 is organised on the basis of three pathways, accompanied by an umbrella provision. Art. 9(1) requires access to review procedures relating to information requests submitted under art. 4 of the Convention. Art. 9(2) covers access to review procedures relating to decisions, acts or omissions subject to the public participation requirements foreseen in art. 6 and other relevant provisions of the Convention. Art. 9(3) enshrines a more general obligation of access to review procedures for the public of acts and omissions of private persons and public authorities concerning national law relating to the environment. Finally, the horizontal provision of art. 9(4) sets general minimum standards in terms of timeliness, fairness and effectiveness applying to all review procedures, decisions and remedies under art. 9 itself.

Before the Aarhus Convention entered into force, there was almost no sign of access to justice in EU environmental law.⁵ To comply with its obligations under art. 9, the EU therefore had to enact several pieces of legislation.

While, however, arts 9(1) and 9(2) have found legislative transposition and the requirements of art. 9(4) have been (albeit partially) incorporated in those legislative provisions,⁶ art. 9(3) has had a much more troubled destiny. The issue of access to justice in

² *Ibid.* 3

³ On mixed agreements, see for instance: case C-459/03 *Commission v Ireland* ECLI:EU:C:2006:345, paras 81-84. See also: E Neframi, ‘Mixed Agreements as a Source of EU Law’, in E Cannizzaro (ed.), *International Law as Law of the European Union* (Martinus Nijhoff 2011).

⁴ On the Aarhus Convention, in general, see M Pallemerts, *The Aarhus Convention at ten: interactions and tensions between conventional international law and EU environmental law* (Europa Law Publishing 2011); E Barritt, *The foundations of the Aarhus Convention: environmental democracy, rights and stewardship* (Hart 2020). The Aarhus obligations of EU institutions and bodies are enshrined in the so-called “Aarhus Regulation” (Regulation (EU) 2021/1767 of the European Parliament and of the Council of 6 October 2021 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies). This *Insight* focuses on access to justice at domestic level. The Regulation therefore falls outside of the scope of the present *Insight*

⁵ J Jendroška, ‘Access to Justice in the Aarhus Convention – Genesis, Legislative History and Overview of the Main Interpretation Dilemmas’ (2020) *Journal of European Environmental and Planning Law* 6, who mentions that before the Aarhus Convention, “there was no comprehensive regulation on access to justice in environmental matters in Community (now EU) law – only Directive 90/313/EEC on freedom of access to information on the environment (now replaced by Directive 2003/4/EC) provided for a specific provision on access to justice in case when access to information was refused”.

⁶ See further for a comprehensive overview, M Eliantonio and J Richelle, ‘Article 9 of the Aarhus Convention, its transposition in the EU and its interpretation by the Aarhus Convention Compliance

environmental matters in general, covered by art. 9(3), is described by Jendroška as “extremely contentious”.⁷ When retracing the genesis of art. 9(3), one can notice that several issues in relation to that provision had to be resolved over many heated debates.⁸ Still, a compromise was reached and the provision eventually came to life.⁹

At the EU level, attempting to transpose art. 9(3) did not prove to be any easier.

Despite it being arguably the most important of the three “pathways” contained in art. 9, because of its broad material scope,¹⁰ having been described in the literature as the “enforcement provision” of the Convention,¹¹ the European Union has not adopted a legislative instrument transposing the requirements of art. 9(3) in as far as the procedural laws of the Member States are concerned.

This legislative vacuum has been filled by the intervention of the CJEU as well as by a soft law measure issued by Commission, the Commission Notice on Access to Justice in Environmental Matters.¹² This state of affairs has changed recently, with the Commission actively pursuing the insertion of access to justice provisions in several legislative proposals, raising a number of questions on the adequacy of this regulatory approach. The aim of this *Insight* is to discuss this recent development in light of the imperatives of access to justice and effective judicial protection contained in art. 9 of the Aarhus Convention and art. 47 of the Charter of Fundamental Rights. After a brief overview of the requirements of access to justice stemming from art. 9(3), the “transposition history” of this provision in EU law will be recalled. Subsequently, this *Insight* will move to examining the current – sectoral – approach to transposing the requirements of art. 9(3) and, by examining the current pending proposals as well as legislative acts already adopted containing access to justice provisions, it will consider the regulatory weaknesses of this approach. It will be shown that the insertion and scope of access to justice provisions in these acts seems haphazard and not justified by underlying legal considerations, but rather the product of political compromise. In turn, this fragmented approach cannot be seen as

Committee and the Court of Justice of the European Union – in search of an ‘EU effect?’ in B Todorovic and R Caranta (eds), *Europeanisation of Access to Justice in Environmental Matters: The Aarhus Convention in the Balkans* (Hart, forthcoming).

⁷ J Jendroška, ‘Access to Justice in the Aarhus Convention – Genesis, Legislative History and Overview of the Main Interpretation Dilemmas’, cit. 24.

⁸ *Ibid.* 28.

⁹ *Ibid.* 28.

¹⁰ The Implementation Guide confirms that Article 9(3) is “applicable to a far broader range of acts and omissions than paragraphs 1 and 2”. J Ebbesson, H Gaugitsch, J Jendroska, F Marshall and S Stec, *The Aarhus Convention: An Implementation Guide* (United Nations 2014, 2nd edn) 197.

¹¹ Z Mikosa, ‘Implementation of the Aarhus Convention through *Actio Popularis* – Article 9(3) of the Aarhus Convention and *Actio Popularis*’, in J Jendroška and M Bar (eds), *Procedural Environmental Rights: Principle X in Theory and Practice* (Intersentia 2017) 263, citing: M Hedemann-Robinson, *Enforcement of European Union Environmental Law: Legal Issues and Challenges* (Routledge 2015) 373.

¹² European Commission, ‘Commission Notice on access to justice in environmental matters’, 2017/C 275/01.

appropriately complying with the requirement of ensuring “wide access to justice” under the Aarhus Convention.

II. ART. 9(3) OF THE AARHUS CONVENTION AND ACCESS TO JUSTICE

As mentioned in the introduction, art. 9(3) of the Aarhus Convention requires access to review procedures for acts and omissions of private persons and public authorities concerning – in general terms – “national law relating to the environment”.

According to the provision, access to these review procedures should be granted to the “members of public”, defined in art. 2(4) of the Convention as “one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organisations or groups”.¹³ National law is thus called to specify the notion of “members of the public”. However, as noted by the Aarhus Convention Compliance Committee (ACCC), these criteria should not be too strict.¹⁴

Indeed, the ACCC has clarified that, although Parties are not obliged to establish a system of *actio popularis*, art. 9(3) may not be used to effectively bar almost all members of the public from challenging acts and omissions.¹⁵ Parties’ discretion in respect to standing should be exercised in light of the Convention’s general objective of ensuring wide access to justice.¹⁶

The reference to the role of national law has been explained by the fact that the implementation of access to justice provisions is influenced by existing national rules.¹⁷ Still, importantly for the purposes of this *Insight*, this leeway may lead to a diversity of approaches across legal systems, as well as to a certain unclarity in terms of identification by the Parties of who falls under the category of the “public”.¹⁸

¹³ Art. 2(4) of the Aarhus Convention. On the definition of the ‘members of the public’ and the differences within Article 9 of the Convention, see: J Darpö, ‘Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union’ circabc.europa.eu 30.

¹⁴ Findings and recommendations of the Compliance Committee with regard to compliance by Belgium with its obligations under the Aarhus Convention in relation to the rights of environmental organizations to have access to justice, Communication ACCC/C/2005/11, 16 June 2006 (hereinafter “ACCC/C/2005/11 *Belgium*”).

¹⁵ See *ibid.* and Findings and Recommendations of the Compliance Committee with regard to Communication ACCC/C/2008/32 (Part I) concerning compliance by the European Union, 14 April 2011 (hereinafter “ACCC/C/2008/32 (Part I) *European Union*”).

¹⁶ I Hadjiyianni, ‘Multi-Level Governance in Action: Access to Justice in National Courts in Light of the Aarhus Convention’ (2020) EPL 894.

¹⁷ A Ryall, ‘The Aarhus Convention: Standards for access to justice in environmental matters’, in SJ Turner, DL Shelton, J Razzaque, O McIntyre, JR May (eds), *Environmental Rights: The Development of Standards* (Cambridge University Press 2019) 130.

¹⁸ F Passarini, ‘Legal Standing of Individuals and NGOs in Environmental Matters under Article 9(3) of the Aarhus Convention’ (2023) *The Italian Review of International and Comparative Law*, 286.

The review under art. 9(3) may be alternatively performed by a court or an administrative authority.¹⁹

In terms of *what* can be reviewed, art. 9 has a broad scope, mentioning “violations of domestic law relating to the environment”. In this context, the ACCC has allowed members of the public to allege a breach of environmental law, without the need for the breach to be established *prima facie*.²⁰ Also, the scope of the law relating to the environment as understood under art. 9(3) is not confined to procedural rights and must include both the procedural and substantive legality of a decision.²¹

Finally, it should be noted that art. 9(3) applies to procedures to challenge “acts” by both private persons and public authorities. The question of what falls under the notion of “acts” under art. 9(3) was addressed by the ACCC, for instance, in a case against the European Union, where it was found that State aid decisions qualify as acts as understood by art. 9(3) of the Convention.²² This decision confirms the broad material scope of art. 9(3).

III. ART. 9(3) AND THE EU LEGAL SYSTEM: A STORY OF UNEASY BEDFELLOWS

When signing the Aarhus Convention, the EU made clear that it was intended “to cover its own institutions alongside national public authorities”, and that Member States would be in charge of ensuring that the obligations arising out of art. 9(3) were performed, unless and until provisions of EU law covering the implementation of those obligations would be adopted.²³

More than 25 years later, where do we stand? In 2003 already, with the view of transposing the Convention in the EU legal order, the Commission presented a Proposal for a

¹⁹ The Implementation Guide states: “Paragraph 3 creates a further class of cases where members of the public can appeal to administrative or judicial bodies”. J Ebbesson, H Gaugitsch, J Jendroska, F Marshall and S Stec, *The Aarhus Convention: An Implementation Guide*, cit. 197.

²⁰ ACCC/C/2006/18 *Denmark*.

²¹ J Ebbesson, H Gaugitsch, J Jendroska, F Marshall and S Stec, *The Aarhus Convention: An Implementation Guide*, cit. 197: “[...] national laws relating to the environment are neither limited to the information or public participation rights guaranteed by the Convention, nor to legislation where the environment is mentioned in the title or heading. Rather, the decisive issue is if the provision in question somehow relates to the environment”, and 199. See also: ACCC/C/2005/11 *Belgium* cit. and Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2011/58 concerning compliance by Bulgaria, 28 September 2012.

²² Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/2015/128 concerning compliance by the European Union para. 14. In addition, see for instance: ACCC/C/2008/32 (Part I) *European Union* para. 74 in which the Compliance Committee found that “without ruling out that also other acts and omissions by EU institutions may be covered by article 9, paragraphs 2 or 3, of the Convention, the Committee is convinced that for at least some acts and omissions by EU institutions, the Party concerned must ensure that members of the public have access to administrative or judicial review procedures, as set out in article 9, paragraph 3”.

²³ Milieu Consulting, *Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters* unece.org.

Directive of the European Parliament and of the Council on access to justice in environmental matters.²⁴ However, because of Member States' resistance in the Council, this Directive was never adopted and, in fact, the proposal was eventually withdrawn in May 2014.²⁵

There is, therefore, to date, no dedicated legislative instrument transposing art. 9(3) in the same way art. 9(1) and (2) have been transposed with respect to access to justice at domestic level. Still, it must be noted that art. 9(3) may be considered *de facto* transposed in certain EU law instruments which – by subject-matter – fall within the scope of Art. 9(3) and contain access to justice provisions. For instance, until the “sectoral turn” which we discuss in the section below, this has been the case for the Environmental Liability Directive²⁶ and the Seveso III Directive.²⁷

Following the failure of the Proposal for a Directive on access to justice in environmental matters, and aware of the need to fully and effectively transpose art. 9(3) of the Aarhus Convention in EU law, the European Commission started to undertake some studies on the matter.²⁸ At the time, the evidence pointed clearly to the need for a general legislative transposition of art. 9(3), with the Darpö report labelling the national measures falling within the scope of art. 9(3) as “diverging, random and inconsistent”.²⁹

Notwithstanding this result, the Commission decided in 2017 to issue a soft law instrument, the Notice on access to justice in environmental matters.³⁰ This interpretative communication has the aim to systematise the existing body of CJEU's case law on access to justice and provide concrete guidance to national courts on how to operationalise it.

It is significant, for the purposes of this *Insight*, that the considerations which led the Commission to abandon the idea of a legislative transposition of art. 9(3) in the form of an Access to Justice Directive seems to have been pre-eminently political. As the Commission itself admits in the Notice, “[A] legislative option in the form of a dedicated access to justice legal instrument was also not further pursued in view of the experience with a Commission proposal of 2003 which remained with the Council for over a decade without any agreement being found or in prospect”.³¹

²⁴ Proposal for a Directive of the European Parliament and of the Council on access to justice in environmental matters, COM(2003) 624 final, 24 October 2003.

²⁵ Withdrawal of obsolete Commission proposals, in OJ C 153/03 of 21 May 2014.

²⁶ Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (Environmental Liability Directive).

²⁷ Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances, amending and subsequently repealing Council Directive 96/82/EC (Seveso III Directive).

²⁸ European Commission, *The Aarhus Convention and the EU* environment.ec.europa.eu.

²⁹ J Darpö, ‘Effective Justice? Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union’ cit.

³⁰ European Commission, ‘Notice on Access to Justice in environmental matters’ cit.

³¹ *Ibid.* para. 10.

In the absence of transposition of art. 9(3), the CJEU has, over the course of the years, issued a number of important rulings clarifying the scope of application of this provision. In the *LZ I* case, the Court concluded that, while art. 9(3) cannot be relied directly by litigants before national courts, there is nevertheless a duty for these courts to interpret procedural rules in accordance with the objectives of art. 9(3).³² This case was followed by a number of rulings which all declared art. 9(3) as capable of granting standing to NGOs claiming the violation the Water Framework Directive,³³ requiring national authorities to amend action programmes aimed at reducing pollution from nitrates,³⁴ or challenging an administrative decision granting EC-type approval for vehicles.³⁵ In this line of case law, the Court has often accompanied art. 9(3) with art. 47 of the Charter on the right to an effective remedy.³⁶

This case law has certainly served to compensate the lack of a legislative transposition of art. 9(3).³⁷ Nevertheless, as has been observed, the Court's intervention, albeit valuable, "cannot conceal the pressing need for a more comprehensive regime".³⁸ The next section will show how the idea of a "comprehensive regime" seems currently to have been abandoned even by the Commission, in favour of a sectoral approach.

IV. THE "SECTORAL" APPROACH AND ITS SHORTCOMINGS

IV.1. THE GENESIS OF THE "SECTORAL" APPROACH

In the 2017 Notice on Access to Justice, the Commission noted that "a sector-by-sector legislative approach, focusing on adding access-to-justice provisions in areas in which specific challenges have been identified (such as nature, water, waste and air) would not

³² Case C-240/09 *Lesoochránárske zoskupenie* ECLI:EU:C:2011:125, para. 51.

³³ Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation* ECLI:EU:C:2017:987.

³⁴ Case C-197/18, *Wasserleitungsverband Nördliches Burgenland and Others* ECLI:EU:C:2019:824.

³⁵ Case C-873/19, *Deutsche Umwelthilfe (Réception des véhicules à moteur)* ECLI:EU:C:2022:857. See, however, the latest of these rulings, in which the Court held that enlarging the scope of Article 9(3) does not require the absence of any standing limitations, and hence granting access only when applicants are able to show a "private legitimate interest" as required by Romanian law does not breach the Convention. Case C-252/22, *Societatea Civilă Profesională de Avocați Ploeanu & Ionescu* ECLI:EU:C:2024:13.

³⁶ Further on this, M Eliantonio 'The relationship between EU secondary rules and the principles of effectiveness and effective judicial protection in environmental matters: towards a new dawn for the 'language of rights'? (2019) *Review of European Administrative Law* 95; I Hadjiyianni, 'Judicial Protection and the Environment in the EU Legal Order: Missing Pieces for a Complete Puzzle of Legal Remedies' (2021) *CMLRev* 1; I Hadjiyianni, 'Multi-level governance in Action: Access to Justice in Light of the Aarhus Convention and its Implementation in the EU Legal Order' cit. 889.

³⁷ O Kelleher, 'Systemic Climate Change Litigation, Standing Rules and the Aarhus Convention' (2021) *JEL* 116.

³⁸ C Poncelet, 'Access to Justice in Environmental Matters - Does the European Union Comply with its Obligations?' (2012) *JEL* 295.

help in the short term”³⁹, without further motivating this claim. If we fast forward to 2020, a 360-degree turn is noticeable. In its Communication “Improving access to justice in environmental matters in the EU and its Member States”, the Commission considered that, in order to ensure an effective implementation of the EU environmental *acquis* and in light of the hurdles faced by litigants in national courts, co-legislators should, as a matter of priority, “include provisions on access to justice in EU legislative proposals made by the Commission for new or revised EU law concerning environmental matters”.⁴⁰

Interestingly, this call comes, as the Commission itself highlights both in the Notice and in the Communication, after the Member States did not seem to be so keen on legislating on access to justice in environmental matters either horizontally (as discussed above) or in sectoral legislation. Indeed, in the National Emissions Ceiling Directive, adopted in 2016, access to justice is only mentioned in a recital,⁴¹ and in the Directive on the quality of water intended for human consumption, an access to justice provision was added in the proposal back in 2017,⁴² but did not make it in the final text.

What happened between 2017 and 2020 and why did the Commission, initially vocally opposed to legislating on a sector-by-sector basis on access to justice, turned into a staunch supporter of sectoral legislation on this matter?

In December 2019, the European Commission published its Communication on a “European Green Deal”.⁴³ The aim of this Communication is to step up the EU’s environmental action, so as to meet emissions reduction targets and, ultimately, achieve climate neutrality.

One of the key points underlined by the European Green Deal is how much the involvement and commitment of the public and stakeholders is crucial to achieve the targets it sets. On this basis, the text of the Green Deal mentions that: “[t]he Commission will also take action to improve their access to justice before national courts in all Member States”.⁴⁴

Along the same lines, further developments also called for action in the field of environmental access to justice.

Indeed, in January 2021, the CJEU confirmed, in its decision in the case of *Stichting Varkens in Nood*, the importance of access to justice in environmental matters.⁴⁵ In this case, the CJEU answered preliminary questions regarding the interpretation of art. 9(2) of

³⁹ European Commission, ‘Notice on Access to Justice in environmental matters’ cit. 2.

⁴⁰ Communication COM/2020/643 final from the Commission of 14 October 2020, ‘Improving access to justice in environmental matters in the EU and its Member States’, para. 33.

⁴¹ Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC.

⁴² Proposal for a Directive of the European Parliament and of the Council on the quality of water intended for human consumption (recast), COM/2017/0753, 1 February 2018.

⁴³ Communication COM(2019) 640 final from the Commission of 11 December 2019 on the European Green Deal.

⁴⁴ Communication COM(2019) 640 final cit. 23.

⁴⁵ Case C-826/18 *Stichting Varkens in Nood and Others* ECLI:EU:C:2021:7.

the Aarhus Convention. The CJEU declared that access to justice of the public concerned must be guaranteed, even without prior involvement in the public participation procedure. Although this decision relates to art. 9(2), it impacts the development of legislative proposals and shows how access to justice in environmental matters is viewed in the EU as a separate, autonomous procedure.

In addition to the lever activated by the Green Deal, the 8th Environmental Action Programme (EAP), adopted in 2022, highlights the importance of access to justice as one of the enabling conditions to attain the priorities of the EU in terms of protection of the environment.⁴⁶

These developments show an increased importance of legislative action in the field of access to justice. With horizontal legislation adopted in transposition of art. 9(3) being shelved at the political level, it can be speculated that the Commission opted for a more pragmatic approach to both fulfil its commitments and reach feasible political compromise before the co-legislators.

IV.2. ANALYSIS OF THE SECTORAL PROVISIONS: A PATCHWORK OF INCONSISTENT APPROACHES

The new – sectoral – approach of the Commission for access to justice in environmental matters is visible in a number of proposals and already adopted pieces of legislation. In the following paragraphs, we discuss the proposals and pieces of legislation listed in the 2023 Communication report quoted in the Introduction and retrace the drafting history of the access to justice provisions, pinpointing changes of formulations and possible identifiable patterns. The analysis the legislative history of such provisions shows that their insertion in EU secondary law is not always straightforward.

For example, art. 32 of the EU Regulation on Deforestation-free products, which entered into force on 29 June 2023, contains an access to justice provision mirroring the requirements of art. 9(3).⁴⁷ However, when looking at the Council's approach, we notice that the initial access to justice article submitted by the European Commission in its Proposal (art. 30) was, in fact, deleted.⁴⁸ This deletion raises questions as to the Council's willingness to include an access to justice provision in the Regulation. While the Council wanted to scrap the provision altogether, the European Parliament pushed in the opposite direction and proposed the addition of another paragraph to (then) art. 30, mirroring the text of art. 9(4)

⁴⁶ Decision (EU) 2022/591 of the European Parliament and of the Council of 6 April 2022 on a General Union Environment Action Programme to 2030.

⁴⁷ Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010.

⁴⁸ Council Interinstitutional File 2021/0366(COD): data.consilium.europa.eu.

and (5) of the Aarhus Convention.⁴⁹ Ultimately, the provision in its original form found its way back to the adopted text and now enables citizens to have access to procedures to review the legality of actions taken by Member States under the Regulation.

Interestingly, art. 16 of the Proposal for a Regulation on nature restoration⁵⁰ contains an access to justice provision incorporating the requirements of not only art. 9(3), but also 9(4) and (5) in respect of the action of public authorities when drafting (or failing to draft) national restoration plans. Mindful of the *Stichting Varkens in Nood* ruling, the proposal specified that access to justice must be granted “regardless of the role members of the public have played during the process for preparing and establishing the national restoration plan”.⁵¹ As with the Regulation on Deforestation, the Council deleted the provision altogether,⁵² and it has not re-appeared in the latest EP position at first reading.⁵³ Following the exclusion of the proposal’s provision, the Commission annexed a statement on access to justice to the European Parliament’s legislative resolution.⁵⁴ This relatively vague statement only provides that Member States “should” ensure access to justice for the members of the public concerned, in accordance with the relevant case law and the Commission Notice on access to justice.⁵⁵ The Regulation was eventually adopted on 17 June 2024 by the Council, without any access to justice provision in respect of national restoration plans.⁵⁶

Art. 22 of the proposal for a Directive on Soil Monitoring and Resilience (Soil Monitoring Law) seems to have been following yet another path.⁵⁷ It contains an access to justice provision incorporating the requirements of art. 9(3), (4) and (5). The latter was somewhat modified by the Parliament to include requirements of the *Stichting Varkens in Nood*

⁴⁹ Amendments adopted by the European Parliament on 13 September 2022 on the proposal for a regulation of the European Parliament and of the Council on making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, P9_TA(2022)0311, 13 September 2022.

⁵⁰ European Commission, Proposal for a Regulation of the European Parliament and of the Council on nature restoration, COM (2022)304, 22 June 2022.

⁵¹ *Ibid.* art. 16.

⁵² Council Interinstitutional File 2022/0195(COD): eur-lex.europa.eu.

⁵³ European Parliament, Legislative resolution P9_TA(2024)0089 of 27 February 2024 on the proposal for a regulation of the European Parliament and of the Council on nature restoration (COM(2022)0304 – C9-0208/2022 – 2022/0195(COD)).

⁵⁴ *Ibid.* Annex to the Legislative Resolution, ‘Commission statement on access to justice on the occasion of the adoption of Regulation 2024/... of the European Parliament and of the Council on nature restoration and amending Regulation (EU) 2022/869’.

⁵⁵ *Ibid.*

⁵⁶ Pending publication in the Official Journal, the adopted text of the Regulation of the European Parliament and of the Council on nature restoration and amending Regulation (EU) 2022/869 is available at data.consilium.europa.eu.

⁵⁷ Proposal for a Directive on Soil Monitoring and Resilience (Soil Monitoring Law), COM/2023/416.

ruling, which were not present in the Commission's document.⁵⁸ The Council for the moment seem to have agreed with this approach.⁵⁹ However, the final text has not been adopted, hence it cannot be predicted with certainty how the final provision will look like, but the erratic approaches of both Commission and European Parliament emerge clearly if one juxtaposes this provision and its development with the two discussed above.

The unpredictability of the developments of access to justice provisions becomes even more visible when examining art. 25 of the proposal for a Directive concerning Urban Wastewater Treatment.⁶⁰ Also this provision, like the one in the Soil Monitoring Law, incorporates the requirements of art. 9(3), (4) and (5). However, it is this time the Council which, making a 360 degree turn in comparison to the Deforestation Regulation, not only kept this provision but added the requirements stemming from the *Stichting Varkens in Nood* ruling.⁶¹ The European Parliament at first reading unsurprisingly agreed with this addition and the fate for this access to justice provision seems to be sealed in favour of a broad formulation.⁶²

When revising the Ambient Air Quality Directive in 2022, the European Commission inserted an article on access to justice to challenge air quality plans: art. 27.⁶³ It is worth noting that the Preamble to the new Directive explicitly refers to the 8th EAP as guiding the objectives of the Directive, and mentions that better access to justice is one of the tools helping to achieve the objective of a non-toxic environment.⁶⁴ This inclusion further reinforces the impact of the 8th EAP on the recent policy-making. Art. 27(2) now covers the requirements set in art. 9(3), (4) and (5) of the Aarhus Convention, and it also confirms that standing is not conditional on prior public participation in the drawing up phase of the air quality plans, thereby implementing the reasoning of the CJEU in *Stichting Varkens in Nood*.⁶⁵ The introduction of the access to justice provision in the Directive was considered by the European Parliament Rapporteur as one of the positive aspects of the Commission's proposal.⁶⁶ The European Parliament made some changes to the wording of

⁵⁸ European Parliament, Legislative resolution P9_TA(2024)0204 of 10 April 2024 on the proposal for a directive of the European Parliament and of the Council on Soil Monitoring and Resilience (Soil Monitoring Law) (COM(2023)0416 – C9-0234/2023 – 2023/0232(COD)).

⁵⁹ Council Interinstitutional File 2023/0232(COD): eur-lex.europa.eu.

⁶⁰ Proposal for a Directive of the European Parliament and of the Council concerning Urban Wastewater Treatment (recast), COM(2022)541, 26 October 2022.

⁶¹ Council Interinstitutional File 2022/0345(COD): eur-lex.europa.eu.

⁶² European Parliament, Legislative resolution P9_TA(2024)0222 of 10 April 2024 on the proposal for a directive of the European Parliament and of the Council concerning urban wastewater treatment (recast) (COM(2022)0541 – C9-0363/2022 – 2022/0345(COD)).

⁶³ Proposal for a Directive of the European Parliament and of the Council on ambient air quality and cleaner air for Europe (recast), COM(2022) 542 final, 26 October 2022.

⁶⁴ See *ibid.* Preamble 6.

⁶⁵ *Ibid.* art. 27.

⁶⁶ European Parliament, Report on the proposal for a directive of the European Parliament and of the Council on ambient air quality and cleaner air for Europe (recast) www.europarl.europa.eu.

art. 27, and added a sub-section to art. 27(3), to include the following requirement: “Member States shall determine at what stage the decisions, acts or omissions may be challenged, to the extent where the access to a review procedure before a court of law, or another independent and impartial body established by law, is not rendered impossible or excessively difficult”.⁶⁷ The notes of the policy debate that took place on 20 June 2023 at the meeting of the Council on environment show that the delegations seemed in favour of the access to justice provision, and were positive about including this aspect to the recast of the Directive.⁶⁸

Finally, art. 16 of the Proposal for a Directive on substantiation and communication of explicit environmental claims (the so-called “Green Claims” Directive) covers access to justice.⁶⁹ Accordingly, this article incorporates the requirements laid down in art. 9(3), (4), and (5) of the Convention. The amendments in the text adopted by the European Parliament actually go even further than the Commission’s proposal, as they modify Art. 16 so as to include more precise and detailed rules.⁷⁰ It can be argued that the EP’s amendments contribute to greater compliance with the Aarhus Convention, or at least the spirit thereof, which is to ensure that citizens have access to environmental procedural rights, including access to justice. The Council seems to agree with this approach (and limited itself to adding the criterion of “impairment of a right” to obtain standing, which is in line with what is foreseen by the Aarhus Convention).⁷¹ If the text is adopted in the current form, access to justice will be ensured in broad terms for claims under this Directive.

The table below presents the various positions of the institutions in respect of access to justice provisions in the acts discussed above, with the Commission’s proposals sorted in chronological order. As this table shows, there is no logic behind the insertion or deletion of access to justice requirements in legislative proposals. Indeed, the Commission directly included the requirement stemming from the *Stichting Varkens in Nood* ruling in its proposal for a recast of the Ambient Air Quality Directive in October 2022, but did not do it in the text of its proposal for an Urban Wastewater Treatment Directive released the same day. Similarly, the subsequent proposal for a Directive on Soil Monitoring and Resilience, published in July 2023, did not contain any reference to the *Stichting Varkens in Nood* requirement. This reference was later added by the European Parliament. It must,

⁶⁷ Amendments adopted by the European Parliament on 13 September 2023 on the proposal for a directive of the European Parliament and of the Council on ambient air quality and cleaner air for Europe (recast) (COM(2022)0542 – C9-0364/2022 – 2022/0347(COD)).

⁶⁸ Council of the European Union, ‘Proposal for a Directive of the European Parliament and of the Council on ambient air quality and cleaner air for Europe (recast) - Policy debate’, 2 June 2023, 9935/23 eur-lex.europa.eu.

⁶⁹ Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive), COM(2023)166, 22 March 2023.

⁷⁰ European Parliament, Legislative resolution P9_TA(2024)0131 of 12 March 2024 on the proposal for a directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive) (COM(2023)0166 – C9-0116/2023 – 2023/0085(COD)).

⁷¹ Council Interinstitutional File 2023/0085(COD): data.consilium.europa.eu.

however, be noted that the absence of the *Stichting Varkens in Nood* requirement in the Deforestation Regulation and in the Green Claims Directive makes sense from a substantive point of view: these legislative acts do not contain any decision-making under which a public participation procedure is envisaged.

Finally, there is no chronological explanation to the positions of the Parliament or Council, which sometimes delete the provisional articles on access to justice, and sometimes reinforce them. It therefore seems that the choice of whether and when to include access to justice provisions in sectoral environmental legislation, and of the level of precision of these provisions, is a political one, guided by political negotiations rather than tangible, legal justifications.

Act	Commission	Council	Parliament	Final text
Deforestation Regulation (COM proposal on 17.11.2021)	Requirements of art. 9(3)	Article on access to justice deleted	Requirements of art. 9(3), (4), and (5) added	Requirements of art. 9(3)
Nature Restoration Regulation (COM proposal on 22.6.2022)	Requirements of art. 9(3), (4), and (5) + <i>Stichting Varkens in Nood</i> requirement	Article on access to justice deleted	Article on access to justice remained deleted	No access to justice provision
Ambient Air Quality Directive Recast (COM proposal on 26.10.2022)	Requirements of art. 9(3), (4), and (5) + <i>Stichting Varkens in Nood</i> requirement	Requirements of Art. 9(3), (4), and (5) + <i>Stichting Varkens in Nood</i> requirement + inclusion of new requirement in art. 27(3a) accepted	Inclusion of the new requirement in art. 27(3a)	Not yet adopted
Proposal for an Urban Wastewater Treatment Directive (COM proposal on 26.10.2022)	Requirements of art. 9(3), (4), and (5)	<i>Stichting Varkens in Nood</i> requirement added	Requirements of art. 9(3), (4), and (5) + <i>Stichting Varkens in Nood</i> requirement kept	Not yet adopted
Green Claims Directive (COM proposal on 22.3.2023)	Requirements of Art. 9(3), (4), and (5)	Amendments accepted and "impairment of a right" criterion added	Multiple amendments to make the provision even clearer and more precise	Not yet adopted

Act	Commission	Council	Parliament	Final text
Proposal for a Directive on Soil Monitoring and Resilience (COM proposal on 5.7.2023)	Requirements of Art. 9(3), (4), and (5)	Requirements of Art. 9(3), (4), and (5) + <i>Stichting Varkens in Nood</i> requirement kept	<i>Stichting Varkens in Nood</i> requirement added	Not yet adopted

TABLE. Positions of the EU institutions with respect to access to justice provisions in relevant secondary EU legislation

V. CONCLUSION

In 2014, writing about the transposition of art. 9(3) in the EU, Hedemann-Robinson spoke about a “fragmented delivery of safeguards and protections”.⁷² Ten years later, after a number of political twists and turns, a sectoral approach to the transposition of art. 9(3) seems to be the chosen way forward. While the inclusion of access to justice provisions in sectoral legislation is likely to contribute to ensuring better protection of rights, the question of consistency among the many legislative acts covering the environmental field in the EU arises. First of all, the Regulation and Directives mentioned above only represent a minor part of EU environmental law. Access to justice under art. 9(3) of the Aarhus Convention aims at encompassing all environmental areas. However, the current approach implies that EU citizens and ENGOs will only be able to reply on a mechanism of access to justice foreseen by EU legislation (and thus to be foreseen in national law) in certain areas. Secondly, even within the mechanisms covered by the current – limited – sectoral approach, clear discrepancies in scope emerge, with the ensuing difficulties for Member States to transpose this mosaic of similar – yet not completely overlapping – obligations. All in all, the emerging picture, while a step in the correct direction, cannot be regarded as fulfilling the objective of ensuring the “wide access to justice” promise of the Aarhus Convention.

⁷² M Hedemann-Robinson, ‘EU Implementation of the Aarhus Convention’s Third Pillar: Back to the Future over Access to Environmental Justice?’ (2014) *European Energy and Environmental Law Review* 168.