Access to justice in the EU's procedural climate governance framework: a case study of the NECPs

Maiju Mähönen, University of Eastern Finland

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Content

1. Introduction

To successfully achieve the transition to climate neutrality and beyond, adherence to the obligations outlined in EU climate legislation is paramount. Yet, limited access to justice poses a significant challenge to ensuring compliance, potentially jeopardizing the legitimacy of the transition. Especially the ability to seek judicial review is intricately tied to the legitimacy of public decision-making.[1] In terms of facilitating emissions reductions, research indicates that access to justice through climate litigation can lead to direct changes in law or policy, as well as indirect outcomes like shifts in government behaviour.[2] It also has the potential to elevate mitigation ambition[3], although such effects are not always guaranteed.[4] Nevertheless, overall climate litigation in Europe has more often resulted in outcomes that advance climate action rather than impede it.[5]

Mirroring many aspects of national climate change framework laws, the European Climate Law (ECL)[6] and the Governance Regulation[7] serve as the cornerstones of the EU's procedural climate governance framework by laying down the general structure for EU climate policy and governance.[8] Recent research has identified several different functions of procedural climate governance, including planning and access to justice.[9] Regarding planning, the key instruments mandated by EU law – the National Energy and Climate Plans (NECP) and Long-Term Strategies (LTS) – find their foundation in the Governance Regulation. However, concerning access to justice, neither the Governance Regulation nor the ECL includes provisions on judicial oversight.[10] This report examines the functionality of the generally applicable access to justice scheme within the EU's procedural climate governance framework, with a specific focus on analysing access to justice

[1] M Smith, Centralized enforcement, legitimacy, and good governance in the EU (Routledge 2009), 26.
[2] J Peel and H M Osofsky, 'Climate Change Litigation' (2020) 16(1) Annual Review of Law and Social Science 21, 33.
[3] L Maxwell, S Mead, D van Berkel, 'Standards for adjudicating the next generation of Urgenda-style climate cases' (2022) 13(1) Journal of Human Rights and the Environment 35.
[4] See for example B Mayer, 'The Contribution of Urgenda to the Mitigation of Climate Change', (2023) 35(2) Journal of environmental law 167.
[5] J Setzer 'Climate litigation in Europe A summary report for the European Union Forum of Judges for the Environment' (LSE Grantham Research Institute on Climate Change and the Environment, 6.12.2022), 15-16.
[6] Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law') [2021] OJ L 243.
[7] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Governance of the Energy Union and Climate Action, amending Regulations (EC) No 663/2009 and (EC) No 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No 525/2013 of the European Parliament and of the Council (Governance Regulation) [2018] OJ L 328.
[8] B Moore et al, 'Transformative procedural climate governance: Mechanisms, functions, and assessment criteria' (4i-TRACTION Deliverable 5.1, Vrije Universiteit Brussel 31.7.2023), 12.
[9] K Kulovesi et al, 'The European Climate Law: Strengthening EU Procedural Climate Governance?' Journal of Environmental Law (2024) and Moore et al (n 8), 14-20.
[10] See Kulovesi et al (n 9) for a more detailed account on the interrelation between the ECL and the Governance Regulation.

regarding NECPs. It finds that, while wide access to justice in EU environmental matters is theoretically provided for under the Aarhus Convention, barriers to access to justice remain widespread.[11]

The report is structured as follows: Chapter 2 presents an overview of the report's theoretical framework. Chapter 3 addresses the question of existing avenues for access to justice if the rules laid down in the Governance Regulation regarding NECPs are not complied with, identifying potential gaps in access to justice. Subsequently, Chapter 4 discusses whether enhanced access to justice is needed and how it could be achieved, focusing on the Member State level. In this context, the report evaluates whether the on-going revision of the Governance Regulation could offer an opportunity to improve access to justice. Finally, Chapter 5 concludes.

[11] See e.g. Milieu, 'Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters', (Final report, September 2019) and European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Environmental Implementation Review 2022 – Turning the tide through environmental compliance' (2022) COM(2022) 438 final, 23.

2. Framework and methods

The report approaches the concept of procedural climate governance through its potential to facilitate the EU's transition to climate neutrality.[12] In analysing the role of access to justice in this regard, the report is informed by the criterion of overall effectiveness previously defined in the project.[13] This involves studying the elements required to provide effective access to justice in relation to NECPs and in the implementation of the EU's procedural climate governance framework in general. In addition to the overall effectiveness criterion, the report employs a policy resilience criterion and a quality of implementation criterion.[14] The first refers to analysing how well the current framework on access to justice in the EU caters for developments in climate law and policy, and the ability of EU policymakers to reform access to justice within EU procedural climate governance. The latter refers to analysing how well the current rules on access to justice are implemented by the EU and the Member States.

When analysing legal sources, the report applies the doctrinal method (law in books). This is complemented by a review of how the law has been implemented in practise (law in action). The material used consists of the relevant case law of the Court of Justice of the European Union (CJEU), internal review requests, scholarly and expert literature on the Aarhus Convention, EU climate governance, and access to justice in environmental matters, accompanied by relevant studies, reports and stakeholder communication, as well as the practice of the Aarhus Convention Compliance Committee (ACCC).

In terms of limitations, while primarily addressing Member State level concerns, the report also explores avenues for access to justice with view of ensuring the Commission's compliance with its obligations related to NECPs. However, the emphasis is on the planning obligations of the Member States rather than the related monitoring and assessment obligations of the Commission. The report does not investigate the hurdles in access to justice linked to annulment proceedings (Article 263 of the Treaty of the Functioning of the European Union (TFEU)) or action for a failure to act (Article 265 TFEU), although they are acknowledged. It furthermore does not discuss the question of effective remedies.

[12] Moore et al (n 8).
[13] Ibid., 21.
[14] Ibid., 21-23.

3. NECPs and access to justice – review of status quo

3.1 On what legal grounds could NECPs be challenged?

NECPs are the main planning tool for Member States to describe how they will meet EU climate objectives and targets and stay on track to achieve climate neutrality by 2050.[15] According to the Governance Regulation, each NECP must include national objectives, targets, and contributions for the five dimensions of the Energy Union, namely 1) decarbonisation, 2) energy efficiency, 3) energy security, 4) internal energy market, and 5) research, innovation, and competitiveness.[16] The decarbonisation dimension requires that NECPs set out progress and intended policies and measures with a view to the attainment of EU climate targets, including, amongst others, the Member State's national contribution to the EU renewable energy target.[17] In terms of the drafting process, each Member State must ensure that the public is given early and effective opportunities to participate in the preparation of the draft NECPs.[18] In addition, the Member States must establish a multilevel climate and energy dialogue to bring stakeholders together to discuss different scenarios envisaged for energy and climate policies, in the context of which NECPs 'may be discussed'.[19] NECPs must be prepared every 10 years and updated once during that period through an iterative process between the Member States and the Commission.[20] The NECP update process is currently ongoing and the final updates must be submitted to the Commission by 30 June 2024.

In theory, legal challenges related to NECPs could be issued mainly on the following grounds:

1. NECPs are not prepared on time or at all, or other procedural requirements have not been observed in their preparation, particularly those on public participation.
2. The content of NECPs does not comply with the requirements of the Governance Regulation.
3. The progress in implementing the policies and measures laid down in NECPs is insufficient.

[15] European Commission, 'EU wide assessment of the draft updated National Energy and Climate Plans An important step towards the more ambitious 2030 energy and climate objectives under the European Green Deal and RePowerEU' (2023) COM(2023) 796 final, 1.
[16] Article 4 of the Governance Regulation.
[17] Articles 4-5 of the Governance Regulation.
[18] See Article 10 of the Governance Regulation.
[19] See Article 11 of the Governance Regulation.
[20] See e.g. K Kulovesi and S Oberthür, 'Assessing the EU's 2030 Climate and Energy Policy Framework: Incremental change toward radical transformation?' (2020) 29(2) Review of European Community & international environmental law 151, 153.

The Governance Regulation provides the Commission with enforcement measures related to grounds 2 (content) and 3 (implementation) listed above. Regarding the content of NECPs, a key question is whether the objectives, targets and contributions that the Member States submit are sufficient for the collective achievement of the EU's climate targets. If not, NECPs would entail an '**ambition gap'** between existing/planned measures and those that are needed to reach the EU's goals.[21] Regarding the implementation of NECPs, there can be a '**delivery gap'** where there is insufficient progress towards the goals that the Member State communicates in its NECP, and therefore towards the EU's energy and climate objectives and targets.[22] In both situations, the Commission may issue recommendations to Member States whose contributions or progress it deems insufficient and where necessary, propose measures and exercise its powers at EU level to ensure the attainment of these targets.[23] However, the Governance Regulation does not provide explicit enforcement measures in the case of a '**process gap'** when procedural requirements are breached (ground 1 listed above). In practice, clear shortcomings regarding both the drafting process and content of NECPs have been identified in the past.[24] Considering that the first NECPs were submitted in 2019, experience in implementation is at the time more limited.

The grounds listed above relate to shortcomings of the Member States in the preparation or implementation of NECPs, as the primary responsibility regarding NEPCs rests on them. The potential grounds for legal challenges against the Commission could relate to failures to 1) adequately monitor and assess NECPs, 2) issue recommendations, or 3) take EU level measures in case of insufficient ambition or progress. The uncertainties in this regard are discussed below in Chapter 3.2.1.

3.2 Potential avenues for access to justice

3.2.1 The internal review procedure

The main avenue for access to justice regarding alleged failures of the Commission to comply with its obligations under the Governance Regulation is the internal review procedure under the

[21] S Schlacke and M Knodt, 'The Governance System of the European Energy Union and Climate Action' (2019) 16(4) Journal for European Environmental & Planning Law 323, 330-331.
[22] Ibid., 331
[23] Articles 31-32 of the Governance Regulation.
[24] M Duwe et al, 'Planning for net-zero: Assessing the Draft National Energy and Climate Plans' (Ecologic Institute and Climact, May 2019), Climate Action Network Europe, 'Time to step up national climate action – An assessment of the draft National Energy and Climate Plans updates', October 2023, and European Commission 2023 (n 15).

Aarhus Regulation.[25] This is a procedure whereby the EU institutions may be asked to undertake a review of their administrative acts or omissions which allegedly contravene environmental law, including climate law.[26] The reply to the internal review request can be subsequently appealed to the CJEU.[27] In practice, this means bringing an action for annulment against the decision on the internal review request (263 TFEU)[28] or an action for failure to act (265 TFEU) in the event of inaction in addressing the request.[29] When it comes to standing, which is generally notoriously difficult to attain under these provisions, those who made the internal review request should qualify as the 'addressees' of the Commission's decision and be thus given standing[30] (if they satisfy the criteria for making the request[31]). According to the CJEU, this also means that its review is limited to the Commission's decision on the internal review request, excluding judicial review of the initial act or omission subject to internal review.[32]

In the past, the Aarhus Regulation was considerably narrower in scope, and it has also been interpreted restrictively.[33] This has been a problem, as direct access to the CJEU with a view to challenging the legality of EU acts is extremely limited due to the famous Plaumann doctrine.[34] In 2011, the ACCC found that the EU would be in breach of the Aarhus Convention if the Plaumann jurisprudence was not compensated by adequate administrative review procedures.[35] In 2017, it concluded that the then applicable Aarhus Regulation failed to do so[36], leading to the revision of the regulation in 2021.[37] After the revision, the scope of application of the regulation is broader and individuals are also entitled to make internal review requests in addition to ENGOs. The

[25] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 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 (Aarhus Regulation), [2006] OJ L 264, as amended by Regulation (EU) 2021/1767 [2021] OJ L 356.
[26] Article 10 of the Aarhus Regulation.
[27] Article 12 of the Aarhus Regulation. There is some unclarity regarding the wording of the Article, which implies that individuals would not be as well placed to lodge an appeal as ENGOs (see L De Lucia, 'The New Aarhus Regulation and the Defensive Behaviour of the European Legislator' (2022) 15(2) Review of European Administrative Law 7, 19).
[28] Article 12(1) of the Aarhus Regulation and Joined Cases C-212/21 P and C-223/21 P, EIB v ClientEarth, ECLI:EU:C:2023:546, para 53.
[29] Article 12(2) of the Aarhus Regulation and De Lucia (n 27), 19.
[30] Article 263(4) TFEU and G Leonelli, 'Access to the EU Courts in Environmental and Public Health Cases and the Reform of the Aarhus Regulation: Systemic Vision, Pragmatism, and a Happy Ending' (2021) 49(1) Yearbook of European Law 230, 234.
[31] Article 11 of the Aarhus Regulation.
[32] Leonelli (n 30), 234 and Joined Cases C-212/21 P and C-223/21 (n 28), para 54. For more discussion and criticism, see De Lucia (n 27), 25-26.
[33] See e.g. De Lucia (n 27), 27-28, A Hough, 'Access to environmental justice in the EU - Interpretation, Harmonisation and the Search for Consistency' in B Vanheusden et al (eds), Harmonisation in EU environmental and energy law (Intersentia 2022) 101.
[34] See Article 263(4) TFEU and Case C-25/62, Plaumann v Commission of the EEC, ECLI:EU:C:1963:17. The Plaumann doctrine has also been applied in climate cases such in the Peoples' Climate Case (T-330/18, Carvalho and Others v Parliament and Council, ECLI:EU:T:2019:324 and C-565/19 P, Carvalho and Others v Parliament and Council, ECLI:EU:C:2021:252).
[35]ACCC Findings and Recommendations on Communication ACCC/2008/32 (part I), ECE/MP.PP/C.1/2011/4/Add.1 (14.4.2011).
[36] ACCC Findings and Recommendations on Communication ACCC/2008/32 (part II), ECE/MP.PP/C.1/2017/7 (17.3.2017).
[37] See recitals 5-6 of Regulation (EU) 2021/1767.

entitlement criteria for individuals partly reflect the Plaumann doctrine, but they are not to be interpreted as restrictively.[38] Importantly, the revised regulation also allows an internal review request to be submitted on public interest grounds[39], which is rare in EU law. It has addressed many of the most significant prevailing issues in access to justice at the EU level[40], although arguably still not bringing the EU institutions into full compliance with the Aarhus Convention.[41] Regardless, it holds a lot of promise, as traditionally the EU institutions have been more active in promoting wide access to justice at the national level rather than at the EU level.[42]

Although no new requests have yet been lodged by individuals, the revision has resulted in a clear increase in internal review requests lodged by ENGOs.[43] There are several cases pending in front of the CJEU following the Commission's replies to these requests, such as those regarding the Taxonomy Regulation.[44] For the first time, the Court of Justice has also ruled in favour of the applicants following a rejection of their internal review request in *EIB v ClientEarth*, where it emphasised that the provisions of the Aarhus Regulation should be interpreted consistently with the Aarhus Convention as far as possible.[45]

Ten requests for internal review regarding NECPs were submitted to the Commission by NGOs in 2021.[46] They all claimed that the Commission had failed in addressing a decision of the ACCC, which found that the EU has not demonstrated that public participation in the context of NECPs is provided for as required by the Aarhus Convention.[47] All requests were considered inadmissible by the Commission.[48] It emphasised that NECPs are adopted by the Member States and are thus not acts of the EU institutions.[49] It also argued that the applicants had failed to specify which

[38] See Article 11(1a) (a) of the Aarhus Regulation and Recital 19 of Regulation (EU) 2021/1767.
[39] Article 11(1a) (b) of the Aarhus Regulation.
[40] See e.g. Leonelli (n 30).
[41] See e.g. De Lucia (n 27), O Kelleher, 'Systemic Climate Change Litigation, Standing Rules and the Aarhus Convention: A Purposive Approach' Journal of Environmental Law (2022) 34(1) 107, 132, and ACCC Findings and recommendations with regard to communication ACCC/C/2015/128 concerning compliance by the European Union, ECE/MP.PP/C.1/2021/21 (10 September 2021).
[42] See e.g. I Hadjiyianni, 'Judicial protection and the environment in the EU legal order: Missing pieces for a complete puzzle of legal remedies' (2021) 58(3) Common market law review 777, Schoukens, H, 'Access to Justice before EU Courts in Environmental Cases against the Backdrop of the Aarhus Convention: Balancing Pathological Stubbornness and Cognitive Dissonance?' in C Voigt (eds) International judicial practice on the environment: questions of legitimacy (Cambridge University Press 2019) 74, and ACCC/2008/32 (part II) (n 36), paras 80-81.
[43] See e.g. J Delarue, 'The amended EU Aarhus Regulation one year in: new requests in review' (ClientEarth 7.3.2023).
[44] See T-625/22, Austria v. Commission, T-214/23, Greenpeace and Others v Commission, T-215/23, ClientEarth and Others v Commission, T-579/22, ClientEarth v Commission, concerning what can be classified as 'sustainable' in EU taxonomy.
[45] Joined Cases C-212/21 P and C-223/21 P (n 28), paras 66-68.
[46] European Commission, Requests for internal review (<https://environment.ec.europa.eu/law-and-governance/aarhus/requests-internal-review_en>).
[47] Decision VII/8f of the Meeting of the Parties on compliance by the European Union with its obligations under the Convention, ECE/MP.PP/2021/2/Add.1 (18-20.10.2021).
[48] See one of the Commission's replies, addressing all 10 requests (<https://circabc.europa.eu/ui/group/3b48eff1-b955-423f-9086-0d85ad1c5879/library/2046f1dc-1fcc-4c69-b678-ff5baa2dd7f1/details?download=true>).
[49] Ibid., 3.

administrative omission they were challenging.[50] Furthermore, it was unclear whether environmental protection was amongst the primary objectives of all of the applicant NGOs, which compromised their standing under the Aarhus Regulation.[51] Four replies to these internal review requests have been appealed and are currently pending before the General Court.[52] The applicants argue that the NECPs of Sweden and the Netherlands are non-compliant with the Aarhus Convention and have been unlawfully assessed/adopted/published by the Commission, and that the Commission has failed to take measures to address their non-compliance with the Convention.

To fall within its scope of application, the Aarhus Regulation necessitates that the administrative act or omission in question has 'legal and external effects.'[53] For example, the Commission's assessments of NECPs under Article 13 of the Governance Regulation could be considered purely internal, but following *ClientEarth v EIB*, it could also be argued that such assessments can have legal and external effects. The *ClientEarth v EIB* case concerned a resolution which 'definitively fixed' the position of the EIB's Board of Directors regarding the eligibility of project financing, enabling the project to proceed and thus having legal and external effects.[54] As a loose analogy, it may not be too farfetched to argue that should the Commission conclude that a NECP complies with the Governance Regulation, it would strongly imply legal compliance with EU law on behalf of the Member State, making it more difficult to challenge it at the national level as seen from below.

When it comes to issuing recommendations, proposing measures, or exercising powers at EU level, the Commission has an obligation to act if needed, often written in the form of 'shall', although the degree of obligation varies depending on the issue.[55] Regardless, recourse to the internal review procedure in cases where the Commission fails to act cannot be excluded. However, the activation of these obligations is tied to the Commission's own assessment of NECPs. Furthermore, taking measures at EU level may mean coming forward with legislative proposals, which are outside the scope of application of the Aarhus Regulation. Instead, a failure to make legislative proposals should be addressed via the action for failure to act (265 TFEU), which may in theory should be applicable if the Commission fails to submit a proposal on a matter on which the EU is under an obligation to legislate.[56] However, it is uncertain if the Governance Regulation establishes such an obligation.

[50] Ibid., 6-7.
[51] Ibid., 7-8. According to Article 11 of the Aarhus Regulation, to be eligible, the primary objective of the NGO must be promoting environmental protection in the context of environmental law.
[52] T-331/22, NLVOW v Commission, T-344/22, Stichting Nationaal Kritisch Platform Windenergie v Commission, T-345/22, Stöttingfjällets Miljöskyddsförening v Commission, T-346/22, Föreningen Svenskt Landskapsskydd v Commission.
[53] See Article 2(1) (g)-(h) of the Aarhus Regulation.
[54] Joined Cases C-212/21 P and C-223/21 P (n 28), para 109.
[55] For instance regarding recommendations due to ambition gaps, the Commission 'shall' issue them only as regards the EU's target for renewable energy only and 'may' issue them as regards the other Energy Union objectives (Articles 31(1) of the Governance Regulation).
[56] Lenaerts et al, EU procedural law (Oxford University Press 2014), 425.

3.2.2 Litigation before national courts

Interested actors must resort to litigation before national courts to challenge alleged breaches of the Governance Regulation by the Member States, i.e. the actual substantive or procedural flaws of NECPs. National courts are the primary enforcers of EU law and the 'normal' EU courts in all cases that fall outside the jurisdiction of the CJEU.[57] Often Member States have special rules in place concerning access to justice in environmental matters, but as noted above, they have struggled to comply with their obligations in this field. One challenge is that there is strong variation between Member States in how judicial review of administrative action is organised and how standing is granted.[58] Another challenge regarding NECPs is that plans may as a rule be considered non-justiciable in national legal systems, which means that they are not considered suitable for judicial review as they do not yet contain decisions on the actual measures taken. This is the case in Finland[59], where the growing understanding of the importance of climate planning and its legal implications prompted the government to introduce a provision on access to justice regarding national climate plans in the Finnish Climate Change Act (423/2022).[60] Another element which could potentially affect access to court is how NECPs are acknowledged in national law, although it should not make a difference because EU regulations are directly applicable in all Member States.[61]

The only known litigation concerning NECPs at the national level to date are *Greenpeace v. Spain I and II*[62] and a recently lodged case from Romania, which is currently pending.[63] In *Greenpeace v. Spain I and II*, environmental and human rights organisations argued that the Spanish NECP violated the Governance Regulation and fell short of the ambition required by the Paris Agreement, requesting the Supreme Court of Spain to declare the respective parts of the NECP null. The main grounds were that Spain's 2030 climate target of a 23% reduction in greenhouse gas emissions compared to 1990 levels enshrined in the NECP was insufficient, the NECP had not yet been adopted a year after the deadline for the final submission in 2019, an impact assessment was carried out only after its approval, and public participation requirements of the Governance Regulation were not respected. [64] In June 2023, the Supreme Court found that the Spanish Government had complied with both the Paris Agreement and EU legislation.[65] Interestingly, the

[57] Ibid., 13-14. See also Article 19(1) of the Treaty on European Union (TEU).
[58] See M Eliantonio et al, 'Standing Up for Your Right(s) in Europe - A Comparative Study on Legal Standing (Locus Standi) before the EU and Member States' Courts', a study commissioned by the European Parliament (15.8.2012), 14.
[59] In Finland, decisions relating solely to the preparation or enforcement of a matter are ineligible for review under the generally applicable procedural rules (Administrative Judicial Procedure Act 808/2019, paragraph 6).
[60] As amended by the Law on amending the Finnish Climate Act (108/2023), paragraph 21 b.
[61] Article 288(2) TFEU.
[62]<https://climatecasechart.com/non-us-case/greenpeace-v-spain/> and < https://climatecasechart.com/non-us-case/greenpeace-v-spain-ii/>.
[63] A Hereșanu, 'New climate case in the European Union: Romania's first climate lawsuit' (blogdroiteuropéen 20.10.2023).
[64] S G Merinero and M A Tigre, 'Understanding Unsuccessful Climate Litigation: The Spanish Greenpeace Case' (11.9.2023).
[65] Ibid.

Court concluded that although the multilevel climate and energy dialogue was not carried out as required by the Governance Regulation, the NECP could not be declared null given the complexity of creating a platform for the dialogue. It also pointed out that the Commission had already approved the NECP, and apparently even argued that if the Court would order the Spanish Government to modify it, it could be interpreted as disregarding the EU's authority.[66]

Importantly, applicants may also request a preliminary review (Article 267 TFEU) in the context of national proceedings. This is a process by which the national court makes a reference to the CJEU regarding either the validity of acts of the EU institutions (excluding primary law) or how a specific provision of EU law should be interpreted.[67] As national courts must take the preliminary reference judgements of the CJEU into account in their decision-making, having even one case regarding NECPs in front of the CJEU should harmonise the interpretation of the relevant provisions of the Governance Regulation in similar future situations. For example, the preliminary reference procedure could be used to ask the CJEU to clarify how the NECP-related public participation provisions of the Governance Regulation should be interpreted. However, recourse to the preliminary reference procedure is subject to several constraints, such as the willingness of national courts to refer questions to the CJEU.[68] This is demonstrated by the Spanish cases, where a request could have been useful, but no reference was made.

3.2.3 The role of infringement proceedings and the ACCC

In addition to issuing recommendations, which have no binding force[69], the Commission may also launch infringement proceedings against a Member State that fails to implement the Governance Regulation effectively.[70] The Commission first alerts the Member State concerned of its suspected violation of EU law (letter of formal notice), and if it is not satisfied with the Member State's reply, it may issue a formal request to comply with EU law (reasoned opinion). If the non-compliance of the Member State in question persists, the Commission may refer the matter to the CJEU as a last resort. The Commission may initiate infringement proceedings by its own initiative or following a complaint made by concerned stakeholders, such as citizens or ENGOs. However, it has no duty to do so.[71] Furthermore, the parties to the procedure are always the Commission and the Member State in question, so it does not provide access to justice for the public.

The Commission has used infringement proceedings to promote compliance with EU environmental and climate law. It has for example issued a reasoned opinion against Austria because it has allegedly failed to grant ENGOs and individuals standing before a court to challenge all relevant decisions or omissions violating EU environmental law as required by the Aarhus

[66] Ibid.
[67] For an overview, see A Albors-Llorens, 'Judicial protection and EU remedies' in C Barnand and S Peers (eds), European Union law (Oxford University Press 2023) 284, 318-327.
[68] Milieu (n 11), 85-90.
[69] Article 288(5) TFEU.
[70] For an overview, see Lenaerts et al (n 56), 159-214. See also Articles 258-260 TFEU.
[71] Ibid., 423.

Convention.[72] It has also launched infringement proceedings regarding failures to notify Long-Term Strategies under the Governance Regulation.[73] Nothing prevents the Commission from launching infringement proceedings regarding the NECPs as well.[74] However, with respect to ambition and delivery gaps, the primary enforcement measure provided for in the Governance Regulation is recommendations, so one would assume that they would at least need to be issued first.

Finally, concerned citizens or ENGOs may also lodge a complaint to the ACCC, which may take non-confrontational, non-judicial and consultative measures to address it.[75] The ACCC has already handled a complaint from an environmental association arguing that the Italian government has failed to provide sufficient public participation when updating the Italian NECP.[76] The ACCC found the complaint inadmissible because Italy's updated NECP was still in draft form and still needed to undergo a strategic environmental assessment procedure, including public participation, prior to its final submission.[77]

[72] See infringement case INFR(2014)4111, where a reasoned opinion was issued in November 2023.
[73] See infringement cases INFR(2022)2090, INFR(2022)2089, INFR(2022)2088, INFR(2022)2086.
[74] See also S Oberthür, 'Hard or soft governance? The EU's climate and energy policy framework for 2030' (2019) 7(1) Politics and governance 17, 23-24.
[75] United Nations Economic Commission for Europe, 'Guide to the Aarhus Convention Compliance Committee' (second edition May 2014).
[76] ACCC/C/2023/205 Italy.
[77] Ibid.

4. Enhancing access to justice regarding NECPs within Member States

4.1. Is legislative action needed?

Based on the above, several gaps in access to justice in the context of NECPs may be identified. At EU level, there are uncertainties on the extent to which the administrative acts or omissions of the Commission regarding NECPs may fall within the scope of application of the Aarhus Regulation, and the prospect of obtaining judicial review of the act or omission itself appears limited. Whether these uncertainties create barriers to access to justice largely depends on how the Commission and the CJEU interpret the revised Aarhus Regulation.

At Member State level, barriers to access to justice in front of national courts may relate to, in particular:

1. Differences in national procedural rules regarding standing or justiciability.
2. The ambiguous nature of the applicable provisions, limiting the scope of judicial review.
3. Differences in how EU law is interpreted by national courts and the fact that the preliminary reference procedure is not necessarily available.

As mentioned, access to justice in EU environmental matters should be guaranteed in line with the requirements of the Aarhus Convention, to which both the EU and its Member States are Parties.[78] Article 9(1) of the Convention establishes a right to access to justice in relation to requests for environmental information, whereas Article 9(2) establishes a right of the public concerned to challenge decisions, acts, and omissions related to public participation and decision-making under Article 6 of the Convention.[79] The generally accepted interpretation is that plans and programmes fall within the scope of application of Article 9(3) of the Convention[80],which requires that:

> 'Each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene

[78] Council of the European Union, 'Decision 2005/370/EC on the conclusion, on behalf of the European Community, of the Convention on access to information, public participation in decision-making and access to justice in environmental matters' [2005] OJ L 124, Aarhus Convention, 'Status of Ratification' (<https://unece.org/environment-policy/public-participation/aarhus-convention/status-ratification>).
[79] When it comes to NECPs, Article 7 of the Aarhus Convention lays down separate rules for public participation in the context of environmental plans and programmes, although in parts referring to Article 6.
[80] ClientEarth, 'Access to Justice in European Union Law: A Legal guide on Access to Justice in environmental matters' (2021), 14, 31.

provisions of its national law relating to the environment.' (the 'national law relating to the environment' covers applicable EU environmental law[81])

The CJEU has interpreted Article 9(3) of the Aarhus Convention together with EU legal requirements in a manner requiring wide access to justice before national courts, particularly for ENGOs.[82] In fact, it may be argued that there is already a duty to ensure effective judicial protection against EU environmental plans[83], including NECPs.[84] This is supported by the CJEU's case law on Air Quality Plans[85], National Air Pollution Control Programmes[86], and Nitrate Action Programmes[87], which suggests that access to national courts should be available to challenge inadequate plans or failures to adopt plans mandated by EU law.[88] The CJEU has also considered that the scrutiny of national courts should extend to the adequacy of measures laid down in the plans.[89]

However, the justiciability of the provisions related to environmental plans requires that they are sufficiently clear and precise[90], as shown in the Spanish case regarding the multi-level climate dialogue. Furthermore, national courts interpret the Aarhus Convention and all law according to their national legislation, tradition, and legal culture. As a result, it is difficult to reach uniform application of access to justice in the Member States.[91] Indeed, applying the relatively vague provisions of the Aarhus Convention and CJEU case law directly puts the application and interpretation of law into uncharted territory.[92] Therefore, a lack of legal reform could mean a continuation of a state of legal uncertainty, where access to justice is provided for in some Member States but not in others. To address these challenges, legal scholars have recommended adding provisions on access to justice in EU law instruments that require the adoption of plans.[93]

[81] ACCC/C/2006/18 (Denmark) ECE/MP.PP/2008/5/Add.4 (29 April 2008), para. 27.
[82] See for example C-240/09, Lesoochranárske zoskupenie, ECLI:EU:C:2011:125, C-664/15, Protect Natur-, Arten- und Landschaftschutz Umweltorganisation, ECLI:EU:C:2017:987 and C-873/19, Deutsche Umwelthilfe (Réception des véhicules à moteur), ECLI:EU:C:2022:857.
[83] L Squintani and E J H Plambeck, 'Judicial Protection against Plans and Programmes Affecting the Environment: A Backdoor Solution to Get an Answer from Luxembourg' 2016 13(3-4) Journal for European environmental & planning law 294, 307-308.
[84] S Bechtel, 'The New EU Climate Law Symbolic Law or New Governance Framework?' (1.7.2021).
[85] C-237/07, Janecek, ECLI:EU:C:2008:447 and C-404/13, ClientEarth, ECLI:EU:C:2014:2382.
[86] Joined cases C-165 to C-167/09, Stichting Natuur en Milieu, ECLI:EU:C:2009:393.
[87] C-197/18, Wasserleitungsverband Nördliches Burgenland and Others, ECLI:EU:C:2019:824.
[88] See ClientEarth, 'Short Note: Access to justice under the EU Climate Law' (2.12.2020), 2.
[89] C-237/07 (n 85), para 46, C-404/13 (n 85), para 57, Joined cases C-165/09 to C-167/09 (n 86), para 103 and C-197/18 (n 87), paras 71-72.
[90] See also S Bogojevic, 'Human rights of minors and future generations: Global trends and EU environmental law particularities' (2020) 29(2) Review of European Community & international environmental law 191, 199.
[91] Similarly, see L Krämer, 'Comment on Case C-240/09 Lesoochranárske Zoskupenie VLK: Access to Justice in Environmental Matters: New Perspectives' (2011) 8(4) Journal for European Environmental and Planning Law 445, 448 and M Eliantonio, 'The Role of NGOs in Environmental Implementation Conflicts: 'stuck in the middle' between infringement proceedings and preliminary rulings?' (2018) 40(6) Journal of European Integration 753, 760.
[92] A Nagy, 'The Aarhus-Acquis in the EU: Developments in the Dynamics of Implementing the Three Pillars Structure' in R Caranta, A Gerbrandy, B Müller (eds.), The making of a new European legal culture: the Aarhus Convention at the crossroad of comparative Law and EU law (Europa Law Publishing 2018) 19, 64.
[93] See Squintani and Plambeck (n 83), 324.

4.2. Including a provision on access to justice in the Governance Regulation

4.2.1. Past experiences in harmonising access to justice in EU environmental matters

There are different options for harmonizing access to justice in EU environmental matters through legislative means. Because barriers to access to justice are widespread, a general directive on access to justice in environmental matters has been recommended in studies[94] and the European Commission published a proposal to that effect in 2003.[95] However, the proposal was withdrawn in 2014 because the Member States considered it too intrusive into their national judicial systems and did not find legislative action at EU level needed to implement Article 9(3) of the Aarhus Convention.[96] Hence, the option of horizontal harmonisation does not appear very feasible from a political point of view, and the Commission has subsequently adopted a so-called sectoral approach to access to justice in environmental matters.[97] This means proposing access to justice provisions in individual pieces of EU environmental legislation.[98]

The design of the potential access to justice provision included in the Governance Regulation could be informed by past applications of the sectoral approach. Access to justice provisions have already been included in the Access to Environmental Information Directive (2003/4/EC), the Environmental Liability Directive (2004/35/EC), the Industrial Emissions Directive (2010/75/EU), the Environmental Impact Assessment Directive (2011/92/EU), and the Seveso III Directive (2012/18/EU). Notably, most of these provisions implement Article 9(2) of the Aarhus Convention, and only the Environmental Liability Directive implements Article 9(3).[99] In addition, the recently adopted Regulation on the Deforestation-free Products (2023/1115/EU) includes an access to justice provision falling within the scope of application of Article 9(3). One option for an access to justice provision regarding NECPs would be to model the existing provisions on access to justice within the scope of application of Article 9(3). However, when studying these two provisions more closely, only the provision included in Regulation on the Deforestation-free Products clearly models the wording of Article 9(3), whereas the provision of the Environmental Liability Directive

[94] J Darpö, 'Effective Justice? Synthesis Report of the Study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in Seventeen of the Member States of the European Union' (2013), 45 and Krämer (n 91), 448.
[95] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters' (2003) COM(2003) 624 final.
[96] M Eliantonio, 'The Proceduralisation of EU Environmental Legislation: International Pressures, Some Victories and Some Way to go (2015) 8 Review of European Administrative Law 99, 112.
[97] S Bechtel, 'Access to Justice to enforce the European Green Deal' (ClientEarth 9.3.2023).
[98] European Commission, 'Improving access to justice in environmental matters in the EU and its Member States' (2020) COM(2020) 643 final, para 33.
[99] ClientEarth 2021 (n 80), 32.

is a hybrid between Articles 9(2)-9(3).[100] Hence, there are no consistent examples of access to justice provisions in matters falling within the scope of application of Article 9(3). The two provisions that exist also showcase a diffusion between Articles 9(2) and 9(3) of the Aarhus Convention.

In this regard, it is important to understand the differences between Articles 9(2) and 9(3). Like with Article 9(2), the scope of review of Article 9(3) covers both substantive or procedural legality of decisions, acts or omissions within its the scope of application.[101] However, Article 9(3) is limited to contraventions of environmental law. Another key difference relates to the definition of standing. Article 9(2) grants standing to the 'public concerned', i.e., the public affected or having an interest in the environmental decision-making in question. However, ENGOs shall be deemed to have an interest in cases falling within the scope of application of Article 9(2).[102] Hence they have 'a presumed standing'.[103] In comparison, standing is granted to 'members of the public'[104] under Article 9(3), which refers to natural or legal persons in general and provides no presumed standing for ENGOs. However, the case law of the CJEU implies that the presumed standing of ENGOs should also be applied under Article 9(3).[105] In general, the diverse design of the provisions is not problematic as such if it does not result in more narrow access to justice than what the Aarhus Convention requires. This means that access to justice regarding environmental plans should not be linked to public participation only, reflecting the scope of application of Article 9(2) of the Aarhus Convention rather than Article 9(3).

4.2.2. Lessons learned from efforts to harmonise access to justice in EU climate matters

Considering the limited number of examples of access to justice provisions implementing Article 9(3) of the Aarhus Convention, attention may be directed to recent efforts to incorporate access to justice provisions into climate legislation. Recently, the European Parliament has proposed

[100] The persons referred to in Article 12(1) are defined modelling Article 9(2) of the Aarhus Convention.
[101] ACCC/C/2008/33 (United Kingdom) ECE/MP.PP/C.1/2010/6/Add.3 (24 August 2011), para 124.
[102] See Article 2(5) of the Aarhus Convention, according to which 'the public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.
[103] See A Danthinne, M Eliantonio, M Peeters, 'Justifying a presumed standing for ENGOs: A legal assessment of Article 9(3) of the Aarhus Convention' (2022) 31(3) Review of European Community & international environmental law 411.
[104] See Article 2(4) of the Convention, according to which 'the public' means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups.
[105] Danthinne, Eliantonio, Peeters (n 103), 414.

access to justice provisions in the Effort Sharing Regulation[106] and the LULUCF Regulation.[107] These provisions were rejected by the Council with the support of the Commission, reportedly 'in its haste to strike a deal.'[108] It appears it was argued that such provisions could open the floodgates to ENGOs assailing the courts, potentially weakening climate action by delaying or compromising the implementation of planned measures.[109] This arguably overstates ENGOs' capacity for legal action and neglects the fact that historically climate litigation has been more likely to strengthen climate action.[110]

Notably, during the negotiations of the ECL in 2020, the Parliament also suggested a provision for access to justice in the Governance Regulation which would have allowed challenging NECPs in court.[111] This provision was also removed during trilogue negotiations at the insistence of the Council[112], on account of the fact that the provision would also have applied to the energy aspects of the Governance Regulation, going beyond the scope of the Aarhus Convention and the ECL.[113] Overall, the application of the sectoral approach to access to justice in EU climate matters has not been successful so far.

Lately, the possibility of including an access to justice provision in the Governance Regulation has been brought forward again.[114] Should it focus on obligations related to NECPS and LTSs, a point of comparison for such a provision could be drawn from the currently pending revision of the Air Quality Directive.[115] Here, both the Commission[116] and the Parliament[117] have proposed the

[106] European Parliament, 'P9_TA(2022)0232: Amendments adopted by the European Parliament on 8 June 2022 on the proposal for a regulation of the European Parliament and of the Council Amending Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement' (8.6.2022) (COM(2021)0555 – C9-0321/2021 – 2021/0200(COD)), amendment 42.
[107] European Parliament,' P9_TA(2022)0233: Amendments adopted by the European Parliament on 8 June 2022 on the proposal for a regulation of the European Parliament and of the Council Amending Regulations (EU) 2018/841 as regards the scope, simplifying the compliance rules, setting out the targets of the Member States for 2030 and committing to the collective achievement of climate neutrality by 2035 in the land use, forestry and agriculture sector, and (EU) 2018/1999 as regards improvement in monitoring, reporting, tracking of progress and review' (8.6.2022) (COM(2021)0554 – C9-0320/2021 – 2021/0201(COD)), amendment 75.
[108] F Hafen and R Didi, 'Legal challenges by NGOs, citizens key to climate battle' (Social Europe 22.12.2022).
[109] Ibid.
[110] Ibid.
[111] European Parliament, 'P9_TA(2020)0253: Amendments adopted by the European Parliament on 8 October 2020 on the proposal for a regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) (COM(2020)0080 – COM(2020)0563 – C9-0077/2020 – 2020/0036(COD))', amendment 92. See also Bechtel (n 84).
[112] Bechtel (n 84).
[113] Council of the European Union, 'Proposal for a Regulation of the European Parliament and of the Council establishing the framework for achieving climate neutrality and amending Regulation (EU) 2018/1999 (European Climate Law) - Preparation for the trilogue' [15.4.2021] ST 7772 2021 INIT, 141.
[114] S Oberthür et. al., 'Towards an EU Climate Governance Framework to Deliver on the European Green Deal', Policy Report, GreenDeal-NET (February 2023), 32.
[115] See 2022/0347 (COD) 'Ambient air quality and cleaner air for Europe. Recast'.
[116] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on ambient air quality and cleaner air for Europe (recast)' (2022) COM(2022)0542 final, 68.
[117] European Parliament, 'T9-0318/2023: 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

inclusion of a provision on access to justice concerning decisions, acts or omissions regarding Air Quality Plans and Short Term Action Plans by the Member States. For the purposes of comparison, the Commission's suggestion is listed below in Table 1 alongside the previously suggested access to justice provision for the Governance Regulation.

Again, it is apparent that both proposals reflect Article 9(2) rather than Article 9(3) of the Aarhus Convention, although environmental plans fall within the scope of application of the latter. They are similar to access to justice provisions currently found in the Industrial Emissions Directive and the Environmental Impact Assessment Directive implementing Article 9(2).[118] The extension of the presumed standing of ENGOs, as suggested in these proposals, would appear justified given the objectives of the Aarhus Convention.[119] In the same vein, it is not in line with its textual or historical interpretation[120], although Article 9(2) allows its application to 'other relevant provisions' of the Convention if the Parties so wish.[121] However, when the Convention was drafted, it appears the Parties deliberately kept the wording of Article 9(3) more ambiguous to avoid the legislative changes needed to comply with it.[122] This may shed light on the Council's resistance to approving the access to justice provisions proposed.

cleaner air for Europe (recast) (COM(2022)0542 – C9-0364/2022 – 2022/0347(COD))(1)', amendments 168-170.

[118] See Article 25 of the Industrial Emissions Directive (2010/75/EU) and Article 11 of the Environmental Impact Assessment Directive (2011/92/EU).

[119] Danthinne, Eliantonio, Peeters (n 103), 412, 420.

[120] Ibid.

[121] United Nations Economic Commission for Europe (n 75), 193.

[122] Danthinne, Eliantonio, Peeters (n 103), 413 and J Jendroska, 'Aarhus Convention and Community Law: The Interplay' (2005) 2 Journal for European Environmental and Planning Law 12, 19.

Table 1: Access-to-Justice proposals in Governance Regulation and Air Quality Directive

Governance Regulation (EP proposal 2020)	Air Quality Directive (COM proposal 2022)
Access to justice (proposed Article 11 a)	Access to justice (proposed Article 27)
1. Member States shall ensure that, in accordance with their national laws, members of the public concerned who have a sufficient interest or who claim the impairment of a right where administrative procedural law of a Member State requires such a right to be a precondition have access to a review procedure before a court of law or other independent and impartial body established by law with a view to challenging the substantive or procedural legality of decisions, acts or omissions subject to Article 10 of Regulation (EU) 2018/1999.	1. Member States shall ensure that, in accordance with their national legal system, members of the public concerned have access to a review procedure before a court of law, or another independent and impartial body established by law, to challenge the substantive or procedural legality of all decisions, acts or omissions concerning air quality plans referred to in Article 19, and short term action plans referred to in Article 20, of the Member State, provided that any of the following conditions is met: (a) the members of the public understood as one or more natural or legal persons and, in accordance with national law or practice, their associations, organisations or groups, have a sufficient interest; (b) where the applicable law of the Member State requires this as a precondition, the members of the public maintain the impairment of a right. Member States shall determine what constitutes a sufficient interest and impairment of a right consistently with the objective of giving the public concerned wide access to justice. The interest of any non-governmental organisation which is a member of the public concerned shall be deemed sufficient for the purposes of the first paragraph, point (a). Such organisations shall also be deemed to have rights capable of being impaired for the purposes of the first paragraph, point (b).
2. Member States shall determine the stage at which decisions, acts or omissions may be challenged.	2. To have standing to participate in the review procedure shall not be conditional on the role that the member of the public concerned played during a participatory phase of the decision-making procedures related to Article 19 or 20.
3. Member States shall determine what constitutes a sufficient interest and impairment of a right, consistent with the objective of giving the public concerned wide access to justice. To that end, non-governmental organisation covered by the definition in Article 2(62a) shall be deemed as having a sufficient interest or having rights capable of being impaired for the purpose of paragraph 1 of this Article.	3. The review procedure shall be fair, equitable, timely and not prohibitively expensive, and shall provide adequate and effective redress mechanisms, including injunctive relief as appropriate.

4. This Article shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law. Any such procedure shall be fair, equitable, timely and not prohibitively expensive.	4. This Article does not prevent Member States from requiring a preliminary review procedure before an administrative authority and does not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.
5. Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures.	5. Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures referred to in this Article.

Overall, a more a unified approach by the EU legislators to the application of the sectoral approach is needed to avoid inconsistencies and confusion.[123] Hence, any proposed access to justice provisions should be streamlined with one another to the extent possible. They should also be drafted in line with the requirements and objectives of the Aarhus Convention, aiming for wide access to justice. It is also important to remember that the Convention only sets minimum standards.[124] This means that the EU is entitled to pursue wider access to justice with a view to ensuring uniform and effective application of EU law[125], in line with the principle of national procedural autonomy.[126] However, considering past efforts to harmonise access to justice in EU environmental and climate issues, the political feasibility of future initiatives remains uncertain.

[123] Bechtel (n 97).
[124] Kelleher (n 41), 118.
[125] Similarly, Danthinne, Eliantonio, Peeters (n 103), 418.
[126] See e.g. C-115/09, Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen, ECLI:EU:C:2011:289, para 43. In practise, the leeway of the Member States regarding the procedural rules to be applied is limited (see e.g. M Bobek, 'The effects of EU law in the national legal systems' in C Barnand and S Peers (eds), European Union Law (Oxford University Press 2023), 155-156).

5. Conclusions

This report has shown that there are barriers to access to justice related to ensuring compliance with the provisions of the Governance Regulation regarding National Energy and Climate Plans. Many of the barriers identified are similar to barriers to access to justice in EU environmental matters in general. In addition, some may relate to the justiciability of plans or the ambiguous nature of the provisions of the Governance Regulation.

At the EU level, much will depend on how the revised Aarhus Regulation is applied. Recourse to the internal review procedure should also be available under the EU's procedural climate governance framework to bring legal challenges against the Commission for failure to effectively carry out its role in the NECP process. However, the extent to which acts or omissions of the Commission regarding NECPs may fall within the Regulation's scope of application is uncertain.

At the Member State level, reliance on the Aarhus Convention and the case law of the CJEU alone appears to result in inconsistencies in access to justice. Although in principle access to justice regarding NECPs and other environmental plans should already be provided for, this is not guaranteed. Hence, legislative action appears needed to ensure effective access to justice. This should also promote compliance with the Governance Regulation and thus indirectly support the EU's transition to climate neutrality.

The potential access to justice provision of the Governance Regulation could be inspired by existing access to justice provisions in EU environmental law. However, these provisions are varied in style, and it is therefore difficult to identify a particular model to be followed. Existing provisions or proposals also exhibit diffusion between Articles 9(2) and 9(3) of the Aarhus Convention, which is justified if it does not result in narrower access to justice than what the Aarhus Convention requires. Overall, however, the aim should be to streamline any proposed access to justice provisions proposed. It was also noted that the EU is able to pursue wider access to justice than required by the Aarhus Convention, although past harmonisation suggests poor political feasibility in this regard.

The closest point of comparison for a potential access to justice provision on NECPs is probably the currently pending proposal for the revision of the Air Quality Directive. Because environmental plans fall within the scope of application of Article 9(3) of the Aarhus Convention, any NECP-focused provision should allow the review of both the substantive and procedural legality of acts or omissions related to the NECPs. The EU legislators should ensure that contested provisions are sufficiently clear and precise, outlining explicit expectations for Member States.

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About the project

4i-TRACTION – innovation, investment, infrastructure and sector integration:
TRAnsformative policies for a ClimaTe-neutral European UnION

To achieve climate neutrality by 2050, EU policy will have to be reoriented – from incremental towards structural change. As expressed in the European Green Deal, the challenge is to initiate the necessary transformation to climate neutrality in the coming years, while enhancing competitiveness, productivity, employment.

To mobilise the creative, financial and political resources, the EU also needs a governance framework that facilitates cross-sectoral policy integration and that allows citizens, public and private stakeholders to participate in the process and to own the results. The 4i-TRACTION project analyses how this can be done.

Project partners

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