

Cefic views on access to justice: compensation for damage to health

In the recent legislative proposal on the Industrial Emissions Directive (IED), the European Commission proposed to include a specific provision on compensation.

Article 79a of the legislative proposal amending the Industrial Emissions Directive requires Member States to ensure that NGOs promoting the protection of human health or the environment are allowed to represent individuals affected and bring collective actions for compensation without having to prove the causality link between the damage and the IED permit violation.

A similar provision is considered by the Commission services for inclusion in the REACH regulation. This paper synthesises our position on the issue, complementing [last year's position on access to justice](#).

What is the issue for the chemical sector?

In our view, a standalone provision on compensation in REACH is likely to foster more litigation, without leading to fair justice. The 3 main reasons for this are:

- 1. The lack of procedural safeguards against abuse, and in particular of adequate 'gating' or filtering system to ensure only truly non-profit making entities can sue on behalf of a group.**
 - The usual standing conditions for environmental NGOs to request the review of administrative decisions under the Aarhus rules are insufficient in the context of private damage claims, as they do not consider risks linked to litigation funding and fee shifting.
 - Such gating system is necessary to prevent a situation where entities can initiate collective actions for purely commercial reasons or to enrich intermediaries (e.g. law firms/funders). In the US, the class action system is captured for private gain: intermediaries, law firms and funders make a profit by investing in certain actions, and as they pay, they can mislead claimants/actual victims into unsuitable procedures.
 - Other safeguards include the loser pays principle, the prohibition of punitive damages, and the constitution of claimants by 'opt-in', requiring explicit consent to join the action.
- 2. The burden of proof would be generically shifted in favour of the (group) of claimants, creating considerable settlement pressure, even for unmeritorious claims.**
 - Requiring a defendant to show that "the violation did not cause or contribute to the damage" means proving a negative. This is in practice a very difficult and almost an impossible task. In the context of damage to health, it means that a defendant would then need to enter into the private lives of the claimants to look for other factors that could have caused the damage beyond reasonable doubt.
 - Health damage that is actually unrelated to company specific violations could be classified as environmental health damage until proven differently. This, combined with the introduction of a collective redress system, would considerably facilitate the constitution of the group/class and the settlement pressure, without regard to the merits of the claim.

3. **Third party litigation funding is booming but remains largely unregulated at EU level.** Whilst the Directive on Representative Actions¹ recognises the risks of third party litigation funding and imposes minimum requirements, there is a need for a more transversal regulation at EU level, as proposed by the European Parliament in its own-initiative report on responsible private funding of litigation of 13 September 2022².

Is a provision on compensation required by the Aarhus Convention?

- No, the Aarhus Convention **does not require Parties to introduce a collective redress procedure** to implement the right of the public to access environmental justice.
- Art. 9(3) of the Aarhus Convention merely requires Parties to the convention to 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 provisions of its national law relating to the environment. Hence it does not require a procedural mechanism whereby multiple claims are bundled in a single proceeding in front of a judicial authority.
- **Neither does the Aarhus Convention require Parties to shift the burden of proof.**
- Art. 9(4) of the Convention asks the Parties to ensure adequate and effective remedies, that are fair, equitable, timely and not prohibitively expensive, but does not mention the need to introduce rules on evidence or on compensatory claims specifically.
- Furthermore, there is **no evidence that the current existing remedies in front of national judges are ineffective for the purposes of enforcing such right.** The [study](#) published by the British Institute of International and Comparative Law in February 2023 does not show that a generic adaptation of the burden of proof for all potential compensation claims arising from an IED breach – as proposed by the Commission - is needed and desirable in the interest of justice.
- To end with, the 2020 Communication on improving access to justice in environmental matters in the EU and its Member State did not ask the co-legislators to agree to provisions introducing collective redress procedures and generic adapting to the rules on evidence in national civil law. Rather, it asked the co-legislators to agree to access to justice provisions consolidating the jurisprudence of the EU Courts on Article 9(3) of the Convention in relation to the review of decisions, acts and omissions by public authorities of the Member States³.

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About Cefic
Cefic, the European Chemical Industry Council, founded in 1972, is the voice of large, medium and small chemical companies across Europe, which provide 1.2 million jobs and account for 15% of world chemicals production.

¹ Directive (EU) 2020/1828 of 25 November 2020 on representative actions for the protection of the collective interests of consumers, available [here](#).

² European Parliament resolution of 13 September 2022 with recommendations to the Commission on Responsible private funding of litigation, available [here](#).

³ The 2020 Communication from the Commission on "Improving access to justice in environmental matters in the EU and its Member refers to the [Commission Notice](#) on access to justice in environmental matters released in 2017. That Notice does not address environmental litigation between private parties. Even in the context of compensation and state liability, the Notice does not report any difficulty nor precedent in the case-law pointing to the need to adapt the burden of proof or to introduce collective redress procedures.