Access to justice falling outside of the scope of EIA, IPPC/IED, access to information and ELD

1.1. Decisions, acts or omissions concerning specific activities falling within the scope of EU environmental legislation outside the scope of the EIA and IED Directives[1]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission and its content (in particular, the conditions to be fulfilled and any time-limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

Decisions, acts, and omissions falling within the scope of EU environmental legislation but outside the scope of the EIA and IED Directives may be challenged by means of two different legal avenues depending on which entity made the said decisions, acts or omissions.

Appeal against decisions made by ERA

The ERA is the competent authority which would be expected to make a good number of this sort of decisions or to issue regulations, orders or authorisations falling within the scope of EU environmental legislation. With regard to these types of decision taken by the ERA, an appeal procedure is provided for by Article 47 of Chapter 551.

This states that any aggrieved party may appeal against decisions of the ERA to the EPRT in accordance with the provisions of the Environment Protection Act and any regulations pursuant to it, and any person may appeal any decision of the Environment and Resources Authority only in relation to environmental assessments, access to environmental information and the prevention and remediation of environmental damage.

The above would indicate that any of the ERA's decisions made in accordance with the Environment Protection Act or any regulations pursuant to it could be appealed against by an aggrieved party such as the applicant who has been denied a nature permit or a third party who would have objected to the issue of the said nature permit by ERA. The second limb of this provision of law allows an appeal by any person in relation to the three spheres listed therein.

An appeal to the EPRT may be filed on any ground including:

1. that a material error as to the facts has been made;
2. that there was a material procedural error;
3. that an error of law has been made;
4. that there was some material illegality, unreasonableness, ineffective or insufficient consideration of adverse effects, or lack of proportionality

The lack of adherence to EU environmental legislation may be considered as a material procedural error or an error of law and can therefore be a ground for appeal under this provision.

It should be noted that the definition of a person under this law includes an association or body of persons, whether registered as a legal person or not. This concurs with the definition of a person under Chapter 549 of the Laws of Malta (the Environment Protection Act) which defines a "person" as a body or other association of persons, whether granted legal personality or not, and includes environmental voluntary organisations. Consequently, both individuals and associations who feel they have been affected by the decision may appeal. Appellants need not

prove an interest in that appeal in terms of the doctrine of juridical interest, but are required to submit reasoned grounds based on environmental considerations to justify their appeal.

With regard to the time limits involved in order to file this appeal, an appeal should be lodged before the EPRT within 30 days from the date of publication of the decision on the Department of Information website by the ERA. Appeals against decisions which do not need to be published are to be lodged before the EPRT within 30 days from the date of notification of the decision. At present, ERA decisions are not published on the website of the Department of Information. There is no official regular system of notification of decisions, orders or authorisations made by the ERA to interested third parties, so it is not clear when the period within which to appeal lapses. Presumably the 30-day period starts from the date on which the interested third party became aware of the decision.

An appeal against the decision of the EPRT may be made to the Court of Appeal only on a point of law. This appeal must be lodged within 20 days of the EPRT reading its decision in public.

Decisions taken by other entities

If the decision to be challenged emanates from an entity other than ERA, such as a ministry or a department of government, recourse may be had by filing an action for judicial review as described below. Such an action must be instituted within 6 months from the date of the decision which is to be challenged, or from when the person filing the action could have been aware of such a decision, whichever is the earlier.

The effectiveness of access to the national courts is questionable mainly because of the limited chances of obtaining interim relief (as explained elsewhere in this fact sheet) and because of the extremely long period of time within which the national courts reach their decisions. It is not uncommon for a case for judicial review to be decided upon after 6 to 7 years, after which period, the whole point of the lawsuit would have become a purely academic exercise. A case in point is the action for judicial review in relation to the extension of the building development zones in Malta. A lawsuit requesting judicial review was filed by a local eNGO[2] in 2007 and no judgment has been reached after 13 years. Bearing in mind that judgment is still pending before the court of first instance and that this may eventually be appealed against, the extraordinary length of time which has elapsed means that there is no real effective remedy.

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

An appeal for administrative review before the EPRT may be filed on a wide number of grounds as explained above. These cover both procedural and substantive legality of the decision which is to be challenged.

An action for judicial review of the legality of administrative action (including environmental decisions) may be filed before the First Hall of the Civil Court which is the court of first instance. Such an action is based on Article 469A of Chapter 12 of the Laws of Malta.

Administrative acts may be challenged where they are in violation of the Constitution, or when they emanate from a public authority that is not authorised to perform them, or when a public authority has failed to observe the principles of natural justice (i.e. ‘nemo iudex in causa propria’ and ‘audi alteram partem’) or mandatory procedural requirements in performing the administrative act or in its prior deliberations thereon, or when the administrative act constitutes an abuse of the public authority’s power in that it is done for improper purposes or on the basis of irrelevant considerations; or when the administrative act is otherwise contrary to law. An administrative act includes the issuing by a public authority of any order, licence, permit, warrant, decision, or a refusal of any demand from a claimant.

The court looks into the legality of the act or omission which is being challenged. The court may annul the challenged act or omission and order redress or a remedy, however it may not substitute its discretion for that of the authority which committed the act or omission.

During the course of the hearing of the action for judicial review before the First Hall of the Civil Court, a request for a preliminary reference may be made as per Article 267 of the Treaty on the Functioning of the EU (TFEU) requesting the European Court of Justice to rule on the conformity of the national provision with EU law. However, only a court of last instance is obliged to make the request if it deems it necessary. Consequently, the court of first

instance may turn down the request for a reference, in which case the preliminary reference may be requested during appeal procedures before the Court of Appeal.

Another possible mode of judicial review would be a lawsuit filed on the grounds of the alleged violation of one's fundamental human rights such as the right to a fair hearing within a reasonable time. The right to a fair hearing would be invoked to include applicability of the Aarhus Convention and other applicable EU norms on public participation requirements. The right to life could also be invoked to include the right to a safe and healthy environment, invoking the non-conformity of the measures sought to be challenged with Article 37 of the EU Charter of Fundamental Rights which requires a high level of environmental protection and improvement of the quality of the environment[3].

A person filing such an action must show a direct and personal juridical interest, in that the alleged or potential breach of human rights must be done "*in relation to him*"[4].

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

Redress by means of judicial review is only available when 'the mode of contestation or of obtaining redress, with respect to any particular administrative act before a court or tribunal is not provided for in any other law.' This means that if there is an alternative mode of redress, this must have been resorted to before filing an action for judicial review.

When filing a constitutional case, one should have exhausted alternative remedies. However, the Constitutional Court has discretion on this matter and may choose to retain jurisdiction if the alternative remedies are not accessible, adequate and effective[5].

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

Parties may only avail themselves of the action for judicial review if they have exhausted all other remedies. The other remedy which parties must have exhausted is that of appeal. The filing of an appeal is open to all persons aggrieved by a decision – not necessarily those who participated in the administrative procedure. Consequently, it may be stated that prior participation is not a necessary requisite.

Moreover, as there are instances when there is no public consultation phase during the course of an administrative procedure, then prior participation would not have been possible. This would not be a bar to filing an action for judicial review.

There may also be cases where no appeal procedure is available (as would be the case when the administrative decision being challenged is being taken by a public authority other than ERA and/or a minister) and consequently the action for judicial review would be the only remedy available. In this case, the issue of prior participation would not arise.

In order to have standing before the EPRT to challenge certain decisions of the PA, prior participation in the form of registration as an interested third party is at times required.

5) Are there some grounds/arguments precluded from the judicial review phase?

The grounds for judicial review are listed in the response to 2.2 above. They are wide-ranging – especially in view of the fact that an administrative act which is contrary to law may be challenged. This broad provision may be interpreted to mean that an administrative act which is contrary to European legislation may be challenged.

6) Fair, equitable - what meaning is given to equality of arms in the national jurisdiction?

Chapter 551 of the Laws of Malta states that the EPRT is to adhere to and apply the principles of good administrative behaviour and respect the parties' right to a fair hearing, including the principles of natural justice, namely: (i) *nemo judex in causa sua*, and (ii) audi et alteram partem. The EPRT is to ensure procedural equality between the parties to the proceedings. Each party is to be given an opportunity to present its case, whether in writing or orally, or both, without being placed at a disadvantage. These principles are enshrined in the Maltese Constitution and observed by the courts. There is a body of case-law relating to the equality of arms principle

which has been developed across different branches of law.

7) How is the notion of “timely” implemented by the national legislation?

When an appeal against a decision of the ERA is filed before the EPRT, there are no deadlines stipulated for the date within which the EPRT must reach its decision. Nor is there any indication as to when the EPRT must decide upon the application for suspension of the execution of the permit, authorisation or decision which is being challenged.

There is no time limit or deadline within which the courts of law must reach their decision – which is one of the greatest obstacles to effective access to justice.

Appellants whose appeals have languished before the EPRT or the national courts for an inordinate amount of time may opt to file a lawsuit claiming that their constitutional right to have their case decided within a reasonable amount of time has been breached. However, this involves further costs in terms of financial outlay and professional resources – costs which may not easily be borne by NGOs which are not provided with legal aid.

8) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

Injunctive relief may be obtained by filing of an application for a warrant of prohibitory injunction requesting the court to restrain a person from doing anything which might be prejudicial to the person requesting the warrant. The court shall not issue any such warrant unless it is satisfied that such a warrant is necessary in order to preserve a right of the person requesting the warrant, and that prima facie this person appears to possess such a right. The Maltese courts also place great importance on the irremediable nature of the action which is sought to be prevented – or that it cannot be compensated for in a pecuniary manner. This is a very high standard of proof to overcome – as theoretically every form of action and/or decision can be reversed.

The court must also be satisfied, after hearing the explanations given, that unless the warrant is issued the prejudice that would be caused to the person requesting the warrant would be disproportionate when compared with the actual doing of the thing to be restrained.

If the court accedes to the request for the issuance of a warrant of prohibitory injunction, the claimant must file a lawsuit within twenty day in furtherance of the claims made. In this case, the lawsuit would be the action requesting judicial review. There are no special sector rules which are applicable.

9) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive, and do these include express statutory reference to a requirement that costs should not be prohibitive?

The filing of an application for a warrant of prohibitory injunction in the Civil Courts costs 250 to 300 euros in Court Registry fees (depending on the number of parties which have to be notified)

The fees payable to the legal practitioners (lawyer and legal procurator) for drafting and filing the relevant application have to be added to this amount. Although there is an official tariff for these professional fees specified by law, this does not make reference to extra-judicial fees. These may be significant.

The application for a warrant of prohibitory injunction must be followed by the filing of a lawsuit for judicial review. The Court Registry fee for this ranges from 200 to 500 euros. There are further costs involved in the summoning of witnesses and for any expert witness summoned.

The court apportions the payment of costs, with the losing party usually being ordered to pay the costs. If there are several parties to the lawsuit, the payment of costs can be significant and run into several thousands of euros.

There is no statutory reference requiring costs not to be prohibitive. This is an obstacle which NGOs and individuals in Malta face when seeking access to environmental justice. Moreover, parties filing for the issue of a warrant of prohibitory injunction may be required to provide a guarantee or security to cover the costs in the event of them losing the case. Again, this poses an obstacle to NGOs and individuals who are parties in this sort of public interest litigation.

1.2. Decisions, acts or omissions concerning the administrative procedures to be followed to comply with national implementing legislation for the Strategic Environmental Assessment (SEA) Directive 2001/42/EC[6]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

The Strategic Environmental Assessment Regulations, 2010 (Legal Notice 497 of 2010, S.L. 549.61), streamline the SEA process in Malta.

According to the regulations, plan proponents in the public sector are responsible for carrying out a SEA of their plans and programmes and are legally referred to as “responsible authorities”. In their capacity as plan proponents, they determine whether an SEA is required for their own plans and programmes in accordance with the provisions of S.L. 549.61.

The regulations stipulate that the SEA Focal Point is the competent authority for the purposes of the regulations. The SEA Focal Point is composed of a chairperson and two other members. The competent authority may request the responsible authority to submit a detailed plan or programme description identifying the effects on the environment. The competent authority may then take a decision as to whether a SEA is required. This decision is final.

The regulations stipulate that they should not be construed as implying that the competent authority shall be responsible for the carrying out of any SEA and that any SEA which is required shall fall under the responsible authority.

There is no provision for administrative redress if any person wants to challenge an act or omission in the SEA process. A legal challenge requesting judicial review in accordance with Article 469A of the Civil Code may be filed before the First Hall of the Civil Court.

An action for judicial review may be filed to challenge administrative acts which are in violation of the Constitution, or which emanate from a public authority which is not authorised to perform them, or when a public authority has failed to observe the principles of natural justice or mandatory procedural requirements in performing the administrative act or in its prior deliberations thereon, or when the administrative act constitutes an abuse of the public authority’s power in that it is done for improper purposes or on the basis of irrelevant considerations; or when the administrative act is otherwise contrary to law. An administrative act includes the issuing by a public authority of any order, licence, permit, warrant, decision, or a refusal of any demand from a claimant. In the SEA scenario, an action for judicial review could be filed against the responsible authority (the proponent entity), the competent authority (the SEA Focal Point) and any other authorities which have been involved in the process.

An action for judicial review must be filed within six months of the decision or action being challenged or within six months from when the person could have become aware of it, whichever is the earlier.

In the scenario where the responsible authority does not provide information as to whether a SEA is going to be carried out or not, persons can challenge the omission to do so. There is no time limit prescribed by law within which the responsible authority must decide whether to carry out a SEA or not. Article 469A of the Civil Code states that the absence of a decision of a public authority following a claimant’s written demand served upon it shall, after two months from such service, constitute a refusal. In these circumstances, a person may first file a judicial protest calling upon the responsible authority to take a decision regarding the carrying out of a SEA. If there is no response within two months, that will be deemed to be a refusal and may be challenged within six months from the presumed refusal.

NGOs with an interest in upholding environmental objectives are considered to have sufficient interest to file actions for judicial review. Individuals are required to have a direct juridical interest.

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

When an action for judicial review is filed, the court looks into the procedural legality of the act or omission which is being challenged. The court may annul the challenged act or omission and order redress or a remedy, however it may not substitute its discretion for that of the authority which committed the act or omission.

During the course of the hearing of the action for judicial review before the First Hall of the Civil Court, a request for a preliminary reference may be made as per Article 267 of the Treaty on the Functioning of the EU (TFEU) requesting the European Court of Justice to rule on the conformity of the national provision with EU law. However only a court of last instance is obliged to make the request if it deems it necessary. Consequently the court of first instance may turn down the request for a reference, in which case the preliminary reference may be requested during appeal procedures before the Court of Appeal.

Another possible mode of judicial review would be a lawsuit filed on the grounds of the alleged breach of the Constitutional rights such as the right to a fair hearing within a reasonable time. The right to a fair hearing would be invoked to include applicability of the Aarhus Convention and other applicable EU norms on public participation requirements. The right to life would be invoked to include the right to a safe and healthy environment, invoking the non-conformity of the measures to be challenged with Article 37 of the EU Charter of Fundamental Rights, which requires a high level of environmental protection and improvement of the quality of the environment[7]. A person filing such an action must show a direct and personal juridical interest, in that the alleged or potential breach of human rights must be done "*in relation to him*"[8].

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

Redress by means of judicial review is only available when 'the mode of contestation or of obtaining redress, with respect to any particular administrative act before a court or tribunal is not provided for in any other law.'

When filing a constitutional case one should have exhausted alternative remedies. However the Constitutional Court has discretion on this matter and may choose to retain jurisdiction if the alternative remedies are not accessible, adequate and effective[9].

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

Persons and NGOs upholding environmental objectives are considered to have standing to file an action for judicial review and there is no set requirement for prior consultation during the administrative phase. Moreover, in cases where the responsible authority omits or refuses to carry out an SEA, there would have been no provision for previous participation.

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

Injunctive relief may be obtained by filing a warrant of prohibitory injunction requesting the court to restrain a person from doing anything which might be prejudicial to the person requesting the warrant.

The court shall not issue any such warrant unless it is satisfied that such warrant is necessary in order to preserve a right of the person requesting the warrant, and that prima facie this person appears to possess such a right.

The court must also be satisfied, after hearing the explanations given, that unless the warrant is issued the prejudice that would be caused to the person suing out the warrant would be disproportionate when compared with the actual doing of the thing to be restrained.

If the court accedes to the request for the issuance of a warrant of prohibitory injunction, the claimant must file a lawsuit within twenty days in furtherance of the claims made. In this case, the lawsuit would be the action requesting judicial review.

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

The filing of an application for a warrant of prohibitory injunction in the Civil Courts costs 250 to 300 euros in Court Registry fees (depending on the number of parties which have to be notified)

The fees payable to the legal practitioners (lawyer and legal procurator) for drafting and filing the relevant application have to be added to this amount. Although there is an official tariff for these professional fees specified by law, this does not make reference to extra-judicial fees. These may be significant.

The application for a warrant of prohibitory injunction must be followed by the filing of a lawsuit for judicial review. The Court Registry fee for this ranges from 200 to 500 euros. There are further costs involved in the summoning of witnesses and for any expert witness summoned.

The court apportions the payment of costs, with the losing party usually being ordered to pay the costs. If there are several parties to the lawsuit, the payment of costs can be significant and run into several thousands of euros.

There is no statutory reference requiring costs not to be prohibitive. This is an obstacle which NGOs and individuals in Malta face when seeking access to environmental justice.

1.3. Decisions, acts or omissions concerning the administrative procedures to be followed to comply with the public participation requirements of Article 7 of the Aarhus Convention in respect of plans and programmes not submitted to the procedures set out in the Strategic Environmental Assessment (SEA) Directive 2001/42/EC[10]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedures for adopting the decision, act or omission (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

The plans and programmes not necessarily subject to the procedures in the SEA but which are still subject to public consultation procedures include the following:

The National Strategy for the Environment - a strategic governance document which sets the policy framework for the preparation of plans, policies and programmes issued under the Environmental Protection Act (Chapter 549 of the Laws of Malta) or under any other Act for the protection and sustainable management of the environment, including land and sea resources. In preparing or reviewing the National Strategy for the Environment, the Minister for the Environment shall have regard to:

1. the environmental policies and the State of the Environment Report;
2. the current economic and financial policies;
3. the current social policies;
4. the policies of the Government;
5. the environmental issues and concerns of material relevance to the strategy;
6. the resources likely to be available in all relevant government entities for the implementation of the strategy; and
7. the European Union environmental acquis and other international environmental convention obligations to which Malta is a party.

The ERA prepares the National Strategy for the Environment after consulting with relevant entities, whether public or otherwise.

During the preparation or review of the National Strategy for the Environment, the Minister shall make known to the public the matters intended for consideration and shall provide adequate opportunities for individuals and

organisations to make representations. When the National Strategy for the Environment or a review thereof has been completed, the Minister shall publish the strategy together with a statement of the representations received and the responses made to those representations. Representations on the strategy are to be submitted within a specified period of not less than six weeks. At the conclusion of these consultation procedures, the National Strategy for the Environment shall be considered by the Cabinet of Ministers together with the position statement from the Environment Minister and the representations made with respect to the strategy or its review. The National Strategy for the Environment, or its revision, together with the Minister's position statement, is then to be laid before Parliament for its approval.

Public consultation is also carried out on any draft regulations issued by the Minister for the Environment under Chapter 549, as laid down in Article 55.

There is a similar public consultation procedure for the enactment of subsidiary plans and policies relating to the environment, provided for by Article 51 of the Environmental Protection Act. There is a six-week consultation period during the preparation of such plans and policies or when they are altered significantly.

The Plans and Programmes (Public Participation) Regulations (Subsidiary Legislation 549.41) provide for public participation in respect of the drawing up of certain plans and programmes relating to the environment. The Regulations state that the ERA is the competent authority to ensure that the public is given early and effective opportunities to participate in the preparation and modification or review of the plans or programmes required to be drawn up under certain provisions of:

- The Waste Management (Waste Batteries and Accumulators) Regulations S.L. 549.54.
- The Protection of Waters against Pollution caused by Nitrates from Agricultural Sources Regulations. S.L. 549.25
- The Ambient Air Quality Regulations. S.L 549.59

The ERA is to ensure that a public information and participation mechanism is in place as outlined by the Regulations to inform the public of the decisions taken and the reasons and considerations upon which those decisions are based, including information about the public participation process.

As regards the possibility for administrative review of the abovementioned procedures, Article 63 of Chapter 549 states that any aggrieved party may appeal against any decision of the Authority to the EPRT in accordance with the provisions of the EPRT Act and any regulations pursuant to it. Article 47 of Chapter 551 allows for appeals by any aggrieved party, and any person may appeal a decision of ERA insofar as environmental impact assessments, access to information and prevention and remedying of environmental damage are concerned. Such an appeal would not require proof of juridical interest.

An action for judicial review may be filed under Article 469A of Chapter 12.

With regard to the issue of standing, although notionally the requirement of a juridical interest still exists, this is no longer interpreted restrictively by the courts. Recent jurisprudence has seen eNGOs being assumed to have the necessary juridical interest and "locus standi". Following the decision of the Court of Appeal in the case instituted by the Ramblers of Malta eNGO[11], it is widely accepted that NGOs have legal standing. It is still not clear whether an individual would always be considered to possess the necessary juridical interest to pose such a challenge.

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

In judicial review procedures, administrative acts may be challenged where they are in violation of the Constitution, or when they emanate from a public authority that is not authorised to perform them, or when a public authority has failed to observe the principles of natural justice or mandatory procedural requirements in performing the administrative act or in its prior deliberations thereon, or when the administrative act constitutes an abuse of the public authority's power in that it is done for improper purposes or on the basis of irrelevant considerations; or when the administrative act is otherwise contrary to law (including EU law).

During the course of the hearing of the action for judicial review before the First Hall of the Civil Court, a request for a preliminary reference may be made as per Article 267 of the Treaty on the Functioning of the EU (TFEU) requesting the European Court of Justice to rule on the conformity of the national provision with EU law. However,

only a court of last instance is obliged to make the request if it deems it necessary. Consequently, the court of first instance may turn down the request for a reference, in which case the preliminary reference may be requested during appeal procedures before the Court of Appeal.

Another possible mode of judicial review would be a lawsuit filed on the grounds of the alleged breach of the Constitutional rights such as the right to a fair hearing within a reasonable time. The right to a fair hearing would be invoked to include applicability of the Aarhus Convention and other applicable EU norms on public participation requirements. The right to life would be invoked to include the right to a safe and healthy environment, invoking the non-conformity of the measures to be challenged with Article 37 of the EU Charter of Fundamental Rights, which requires a high level of environmental protection and improvement of the quality of the environment[12]. A person filing such an action must show direct and personal juridical interest, in that the alleged or potential breach of human rights must be done "*in relation to him*"[13].

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

Redress by means of judicial review is only available when the mode of contestation or of obtaining redress, with respect to any particular administrative act before a court or tribunal is not provided for in any other law.

When filing a constitutional case one should have exhausted alternative remedies. However the Constitutional Court has discretion on this matter and may choose to retain jurisdiction if the alternative remedies are not accessible, adequate and effective[14].

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

Although there is no form of administrative review procedure statutorily available to challenge acts or omissions of authorities during the processes laid down in the Environmental Protection Act or the Plans and Programmes (Public Participation) Regulations, there is provision for public consultation and participation as described above.

As parties may only avail themselves of the action for judicial review if they have exhausted all other remedies, it may be argued that the lack of participation during the public consultation phase would exclude the possibility of judicial review.

However, judicial review may also be sought in cases where the responsible authority refuses to carry out a public consultation exercise or because of procedural irregularities pertaining to the public consultation exercise. In these cases, it is presumed that that judicial review would still be possible.

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

There are no express statutory provisions or mechanisms for obtaining injunctive relief during the process laid down in the Environmental Protection Act or the Plans and Programmes (Public Participation) Regulations. There is only the general national provision for filing for the issue of a warrant of prohibitory injunction and, according to Chapter 551, one may request suspension of the appealed decision before the EPRT pending the outcome of the case as discussed in other parts of this factsheet.

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

The filing of an application for a warrant of prohibitory injunction in the Civil Courts costs 250 to 300 euros in Court Registry fees (depending on the number of parties which have to be notified).

The fees payable to the legal practitioners (lawyer and legal procurator) for drafting and filing the relevant application have to be added to this amount. Although there is an official tariff for these professional fees specified by law, this does not make reference to extra-judicial fees. These may be significant.

The application for a warrant of prohibitory injunction must be followed by the filing of a lawsuit. The Court Registry fee for this ranges from 200 to 500 euros. Legal and technical counsel also has to be paid. There are further costs

involved in the summoning of witnesses and for any expert witness summoned. If witnesses or parties cannot be notified in the usual fashion, this would require the publication of the notification requests in local newspapers and the Government Gazette, which are further costs to be borne by the plaintiffs.

The court apportions the payment of costs, with the losing party usually being ordered to pay the costs. If there are several parties to the lawsuit, the payment of costs can be significant and run into several thousands of euros.

There is no statutory reference requiring costs not to be prohibitive. This is an obstacle which NGOs and individuals in Malta face when seeking access to environmental justice. Moreover parties filing for the issue of a warrant of prohibitory injunction may be required to provide a guarantee or security to cover the costs in the event of them losing the case. Again, this poses an obstacle to NGOs and individuals who are parties to this sort of public interest litigation.

1.4. Decisions, acts or omissions also concerning plans and programmes required to be prepared under EU environmental legislation[15]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the content of the plan (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

The following are all examples of national legislation required by EU Directives and which require the drawing up of plans and programmes:

- The Assessment and Management of Environmental Noise Regulations (S.L. 549.37) – require the drawing up of an action plan.
- The Flora, Fauna and Natural Habitats Protection Regulations (S.L. 549.77) – provide for the drawing up of management plans and appropriate action for the conservation of protected habitats and species.
- The Ambient Air Quality Regulations (S.L. 549.59) – provide for the drawing up of an Air Quality Action Plan
- The Waste Regulations (S.L. 549.63) – provide for the drawing up of Waste Management Plans.
- The Water Policy Framework Regulations (S.L. 549.100) – provide for the drawing up of Water Catchment Management Plans.

All the above regulations include provisions allowing for information dissemination and public participation procedures during the drawing up of the relevant plans.

The only form of administrative review which can be envisaged in this case is an appeal against a decision of the competent authority (ERA) made in the course of the public consultation exercise or the preparatory exercise leading to the publication of the plan and not of the contents of the plan itself.

Article 63 of Chapter 549 states that any aggrieved party may appeal against any decision of the Authority to the EPRT in accordance with the provisions of the EPRT Act and any regulations pursuant to it. Article 47 of Chapter 551 allows for appeals by any aggrieved party, and also specifies that any person may appeal any decision of the Environment and Resources Authority only in relation to environment assessments, access to environmental information and the prevention and remediation of environmental damage.

An appeal to the EPRT may be filed on any ground including:

1. that a material error as to the facts has been made;
2. that there was a material procedural error;
3. that an error of law has been made;
4. that there was some material illegality, unreasonableness, ineffective or insufficient consideration of adverse effects, or lack of proportionality.

According to law, an appeal should be lodged before the EPRT within thirty days from the date of publication of the decision on the Department of Information website. In cases regarding appeals against decisions which do not need to be published, the appeal shall be lodged before the EPRT within thirty days from the date of notification of the decision. It is not clear when this time period starts when there is no provision for publication or notification of the decision. Any persons, including NGOs, have standing without the need to prove juridical interest. There is an

appeal against the decision of the EPRT to the Court of Appeal which must be filed within 20 days of the date of the decision from the EPRT.

There is no form of judicial review procedure possible for the contents of the published plan which has the same status as a legislative act.

2) Does the form in which the plan or programme is adopted make a difference in terms of legal standing (see also Section 2.5 below)?

As the plan or programme constitutes an instrument having the force of law there is no judicial avenue to challenge its contents.

3) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

The scope of possible administrative review of the preparatory exercise leading to the enactment of plans and programmes is described above. There is no possibility of judicial review of the published plan or programme.

4) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

Judicial review is not applicable.

5) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

Judicial review is not applicable.

6) Are there some grounds/arguments precluded from the judicial review phase?

Judicial review is not applicable.

7) Fair, equitable - what meaning is given to equality of arms in the national jurisdiction?

8) How is the notion of “timely” implemented by the national legislation?

9) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

10) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

1.5. Executive regulations and/or generally applicable legally binding normative instruments used to implement EU environmental legislation and related EU regulatory acts[16]

1) What are the applicable national statutory rules on standing for both individuals and NGOs wishing to obtain a) an administrative review and b) a legal challenge before a national court in respect of the procedure for adopting or the content of the decision, act or omission of the national regulatory act (in particular, the conditions to be fulfilled and any time limits that apply to the submission of a challenge)? How effective is the level of access to national courts in light of the CJEU case law and any related national case law?

If the executive regulations or legally binding normative instruments take the form of legislation there is no possibility of administrative review or judicial review according to Article 469A of Chapter 12 of the Laws of Malta, as these remedies are reserved for administrative acts as defined therein.

Such executive regulation/legislation could possibly be challenged by filing an action alleging breach of fundamental human rights, or in terms of Article 46 of the Constitution. In this case, both individuals and NGOs

filing the action would have to prove that the alleged breach was being done in relation to them.

2) What is the scope of the administrative review (if applicable) and the judicial review (if applicable)? Does it cover both procedural and substantive legality?

The Constitutional Court deciding on an action regarding an alleged breach of human rights would consider both the procedural and substantive legality of the claim.

3) Before filing a court action, is there a requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures?

When filing a constitutional case, one should have exhausted alternative remedies. However the Constitutional Court has discretion on this matter and may choose to retain jurisdiction if the alternative remedies are not accessible, adequate and effective.

4) In order to have standing before the national courts is it necessary to participate in the public consultation phase of the administrative procedure – to make comments, participate at hearing, etc.?

When filing a Constitutional case, one would have ideally exhausted all other remedies. However, when claiming a breach of human rights, the issue of prior participation does not arise.

5) Is injunctive relief available? If yes what are the procedural requirements in order to be eligible for this? Are there special rules applicable to each sector apart from the general national provisions?

Injunctive relief may be applied for by filing an application for a warrant of prohibitory injunction in the Civil Courts. This costs 250 to 300 euros in Court Registry fees (depending on the number of parties which have to be notified).

The fees payable to the legal practitioners (lawyer and legal procurator) for drafting and filing the relative application have to be added to this amount. Although there is an official tariff for these professional fees specified by law, this does not make reference to extra-judicial fees. These may be significant.

The application for a warrant of prohibitory injunction must be followed by the filing of a lawsuit. The Court Registry fee for this ranges from 200 to 500 euros. Legal and technical counsel also has to be paid. There are further costs involved in the summoning of witnesses and for any expert witness summoned. If witnesses or parties cannot be notified in the usual fashion, this would require the publication of the notification requests in local newspapers and the Government Gazette, which are further costs to be borne by the plaintiffs.

6) What are the cost rules to bring a challenge on access to justice in these areas? What are the possible consequences if one loses a case before court? What are the safeguards against the costs being prohibitive and do these include express statutory reference to a requirement that costs should not be prohibitive?

The costs involved are indicated above. The court apportions the payment of costs, with the losing party usually being ordered to pay the costs. If there are several parties to the lawsuit, the payment of costs can be significant and run into several thousands of euros.

There is no statutory reference requiring costs not to be prohibitive. This is an obstacle which NGOs and individuals in Malta face when seeking access to environmental justice. Moreover, parties filing for the issue of a warrant of prohibitory injunction may be required to provide a guarantee or security to cover the costs in the event of them losing the case. Again, this poses an obstacle to NGOs and individuals who are parties to this sort of public interest litigation.

7) Is it possible to bring a legal challenge before a national court concerning any related EU regulatory act with a view to a validity reference under Article 267 TFEU, and if so how[17]?

There is no legal procedure providing for such a challenge. A party may request a preliminary reference to the CJEU at any stage of the proceedings in line with Article 267 of the TFEU, which is applicable in Malta under Chapter 460. The procedure is also regulated by Article 21 of the Court Practice and Procedure and Good Order Regulations (S.L 12.09).

[1] This category of case reflects recent case-law of the CJEU such as *Protect C-664/15, the Slovak brown bear Case C-240/09, see as described under the Commission Notice C/2017/2616 on access to justice in environmental matters*

[2] FLIMKIEN GHAL AMBJENT AHJAR ET vs CIANTAR CHRISTOPHER DR. ENG. PRO ET NOE ET 75/2007.

[3] In *Cecil Herbert Jones vs Attorney General* (Application no. 95/2018) decided on 15 February 2019, the First Hall of the Civil Court acting in its Constitutional jurisdiction stated that the Charter of Fundamental Rights is based on the principle of direct effect and national courts are obliged to interpret national measures in conformity with the Charter whenever they come within the scope of EU law. The judgment was not appealed.

[4] Article 46(1) of the Constitution of Malta.

[5] These principles were enunciated in *Ryan Briffa –v- Attorney General* decided on 14 March 2014.

[6] The SEA Directive relates to plans and programmes. These are also covered by Article 7 and Article 9(3) of the Aarhus Convention.

[7] In *Cecil Herbert Jones vs Attorney General* (Application no. 95/2018) decided on 15 February 2019, the First Hall of the Civil Court acting in its Constitutional jurisdiction stated that the Charter of Fundamental Rights is based on the principle of direct effect and national courts are obliged to interpret national measures in conformity with the Charter whenever they come within the scope of EU law. The judgment was not appealed.

[8] Article 46(1) of the Constitution of Malta.

[9] These principles were enunciated in *Ryan Briffa –v- Attorney General* decided on 14 March 2014.

[10] See findings under ACCC/C/2010/54 for an example of a plan not submitted to SEA but subject to the public participation requirements of Article 7 of the Aarhus Convention.

[11] 228/2010, Is-Socjeta' The Ramblers' Association of Malta vs. L-Awtorita' ta' Malta dwar l-Ambjent u-Ippjanar [First Hall, Civil Court] 6 March 2012 (Ramblers case, Court of First Instance). The case was appealed in Is-Socjeta' The Ramblers' Association of Malta vs L-Awtorita' ta' Malta dwar l-Ambjent u l-Ippjanar et [Court of Appeal Civil, Superior] 27 May 2016. (Ramblers case, Court of Appeal)

[12] In *Cecil Herbert Jones vs Attorney General* (Application no. 95/2018) decided on 15 February 2019, the First Hall of the Civil Court acting in its Constitutional jurisdiction stated that the Charter of Fundamental Rights is based on the principle of direct effect and national courts are obliged to interpret national measures in conformity with the Charter whenever they come within the scope of EU law. The judgment was not appealed.

[13] Article 46(1) of the Constitution of Malta.

[14] These principles were enunciated in *Ryan Briffa –v- Attorney General* decided on 14 March, 2014.

[15] These fall within the scope of both Article 7 and Article 9(3) of the Aarhus Convention. See also relevant case-law of the Court of Justice of the European Union such as Case C-237/97, Janecek and cases such as Boxus and Solvay C-128/09-C-131/09 and C-182/10, as referred to under the Commission Notice C/2017/2616 on access to justice in environmental matters.

[16] Such acts come within the scope of Article 8 and Article 9(3) of the Aarhus Convention. An example of such an act concerns the decision of the national administration that featured in Case C-281/16, *Vereniging Hoekschewaards Landschap*, ECLI:EU:C:2017:774

[17] For an example of such a preliminary reference see Case C-281/16, *Vereniging Hoekschewaards Landschap*, ECLI:EU:C:2017:774

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