



# Access to justice in environmental matters

■ Conference, 2 June 2008, held in Brussels



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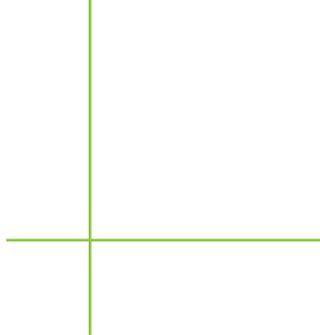
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## Conference on 'The Aarhus Convention: how are its access to justice provisions being implemented?'

*Organised by the European Commission Environment Directorate-General*

### **2 June 2008, Brussels, Belgium**

The present brochure reflects the main arguments presented at the conference on 'The Aarhus Convention: how are its access to justice provisions being implemented?' which was organised by the European Commission in Brussels on 2 June 2008.

The basic aim of the conference was to identify the state of play and the way forward with respect to the implementation of Article 9 (3), (4) and (5) of the Aarhus Convention in the EU Member States.

The Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters was signed in Aarhus (Denmark) in 1998.

The European Union became a Party to the Convention in May 2005. All Member States – except Ireland – are also Parties to the Aarhus Convention. With respect to access to justice at Member State level, the Commission adopted, in 2003, a proposal for a Directive on access to justice in environmental matters. The European Parliament delivered its opinion in its first reading on the proposal in March 2004. Given the fact that the proposal is still pending before the Council, the Commission organised this conference to discuss the future of access to justice in environmental matters, and namely, possible steps, actions and initiatives which could be considered as relevant to the implementation of the provisions of the access to justice pillar of the Aarhus Convention.



The presentations of the conference were recorded and are available at the following link:

<http://ec.europa.eu/environment/aarhus/conf2.htm>



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## Introduction

*Mrs Pia Bucella*

Pia Bucella welcomed the participants to the conference. In her opening remarks, she referred to Directive 2003/4/EC on public access to environmental information and Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment. She noted that even though both Directives have specific provisions on access to justice, further co-operation between Member States, stakeholders and the EU was needed to put in place the necessary legislation to implement the third pillar (access to justice) of the Convention effectively.

She told the gathering that monitoring and assessing implementation is crucial, and the European Commission is currently carrying out a stock-taking exercise of which this conference is a part. The top priority for the Commission is to promote awareness of the access to justice provisions of the Convention and to formulate EU legislation in this area, as well as to establish solid and efficient access to justice procedures, guaranteeing the procedural rights of civil society.



*Pia Bucella and Mr Grant Lawrence, chairman of the conference*

## The Aarhus Convention – how are its access to justice provisions being implemented?



*Miss Esther Pozo Vera*

Between February and August 2007, Esther Pozo Vera and her team carried out an independent legal study, on behalf of Milieu Ltd, on the implementation in the EU – with the exception of Romania and Bulgaria – of Article 9(3) of the Aarhus Convention which pertains to access to justice. The evaluation was based on four elements – legal standing, the effectiveness of remedies, the cost and length of procedures and transparency – which were ranked as good, satisfactory, could do better and unsatisfactory.

On the plus side, the majority of Member States – 20 of them – provide for both administrative and judicial review procedures, despite a wide variation in national systems, the survey revealed. The research also found that almost all EU countries have problems in at least one of the essential elements for the implementation of Article 9(3) and related provisions.

The study found that various countries grant different degrees of legal standing and possess a wide range of interpretations of legal standing. The broadest allow certain civil society organisations to bring legal proceedings even when they are not an affected party (in Portugal, Greece, France, Italy and Spain), while the narrowest only permit those parties directly affected to take action (in Austria, Belgium, Germany and Malta).

A barrier to access to justice in a number of Member States is the prohibitive cost of legal action which is a particularly acute problem in Hungary, Ireland, Italy, Latvia and the UK. While administrative reviews are generally fairly inexpensive, judicial procedures, such as court cases, tend to be costly, mainly due to the fees of lawyers and experts.

To address this and boost access to justice, almost all Member States have established legal aid schemes. Legal aid is easily accessible in Portugal, Slovakia and Spain. Pro bono assistance is available in France, Hungary, Italy, Spain and the UK. However, Cyprus, Greece and Ireland either have no or very limited legal aid schemes in place. In some countries – such as Finland, the Netherlands, Luxembourg, Malta and the UK – legal aid schemes do not cover NGOs.

Another potential problem is that irreversible damage could be caused before a verdict is reached. For this reason, an increasing number of countries are providing injunctive or interim measures. However, the effectiveness of these measures is hampered by the establishment of strict conditions for their application in Cyprus, Czech Republic, Spain and UK.

## Ensuring access to justice in England and Wales

*Miss Carol Hatton*

Carol Hatton, of the World Wide Fund for Nature, told participants about the Sullivan Working Group's findings for England and Wales. The Group investigated access to justice in environmental matters in current laws and practices and made recommendations, with a special focus on judicial review.

Hatton's presentation outlined the consequences of not effectively applying the Aarhus provisions on injunctions, timeliness and costs. The Group found that, for ordinary citizens, court procedures are prohibitively expensive and this leads to an access to justice deficit. As the head of the working group, Justice Sullivan put it: "For the ordinary citizen, neither wealthy nor impecunious, there can be no doubt that the Court's procedures are prohibitively expensive." Coupled with current delays in the administrative courts, this generates the risk of England and Wales being non-compliant with Aarhus. Nevertheless, judicial interpretation generally reflects Aarhus obligations.

The Group also conducted a comparative study with Germany, Hungary, Italy, the Netherlands and Spain. This revealed that, in other EU Member States, claimants are much less likely to be ordered to pay costs, the consequences of bearing the risk of paying costs are reduced because costs are likely to be significantly lower, and cross-undertakings in damages are either unknown or the exception rather than the rule.

The Group recommends, among other things, the use of protective cost orders to allay the expense of court proceedings for claimants; requirements to provide cross-undertaking in damages should be lifted to facilitate injunctions; cases must be heard promptly; and improvements in case management need to be made.



## National judges and the Convention

*Professor Luc Lavrysen*

Luc Lavrysen, a Belgian Constitutional Court judge, explored the question of how national judiciaries can help advance the implementation of the access to justice provisions of the Aarhus Convention.

He observed that awareness of the full potential of the Convention is relatively low among the legal profession. It needs to be made better aware, through effective campaigns, that Aarhus actually provides more extensive protection, in some ways, than the EU's own environmental laws. The key factor in improving the application of the Convention is ensuring that relevant information is disseminated to the appropriate legal stakeholders. Constitutional courts, such as those already found in Slovenia and Belgium, can play an active role in the enforcement of the Convention, he suggested.

Lavrysen noted that there is a wide range of interpretations of what constitutes 'standing' (AC Article 9(3)) in the different legal systems of the Member States. This problem, he advised, could be resolved through a reinterpretation of the national provisions on standing based on Article 9. This implies that a legislative intervention may be necessary because, in some cases, the courts may be reluctant to review their case law.

There are also problems with the costs and timeliness of legal procedures.

Although judges cannot make their own cases, they can play a crucial role in the implementation of the Convention by helping to facilitate its use in the courts, he recommended. To enable the judiciary to exercise its full potential in facilitating the use of the Convention, it should become an integral part of the training that judges and other judicial officers receive.



## How the provisions of the Aarhus Convention on access to justice are being implemented in Denmark

*Miss Jette Blendstrup Sørensen*

Jette Blendstrup Sørensen of the Danish Environmental Protection Agency considered how the access to justice provisions of the Aarhus Convention are being applied in Denmark. The Milieu-study generally gave the country a good assessment, she noted.

For judicial review, there are no specific rules for legal standing in environmental cases. However, case law allows NGOs with a legal interest to launch legal proceedings. For instance, Greenpeace was granted legal standing in a case concerning absence of a proper environmental impact assessment for the construction of the Øresund Bridge between Denmark and Sweden. Effective remedies regarding standing include launching appeals before administrative authorities, which may be granted suspensive effect or injunctive relief. There is also the possibility, Sørensen pointed out, of receiving injunctive relief before the courts, under certain conditions.

In Denmark, administrative and judicial court fees are relatively low and legal aid is available based on need and the nature of the case. In order to ensure transparency, administrative

and judicial reviews are published, except in some criminal cases. Denmark has established specific independent appeal boards for environmental cases, and this helps to boost speed and efficiency while reducing cost. Otherwise, general procedure rules apply to environmental cases, and individuals and NGOs can intervene in pending cases. In cases concerning administrative and judicial reviews, the notion of legal standing is still to be further developed.



## How the Convention is being implemented in Germany

*Mr Peter Hart*

Peter Hart, as the then Aarhus focal point for Germany, said that implementation of the Convention provisions for access to justice launched a major debate in Germany, particularly around the issue of access to the courts for environmental associations. The federal government carried out an intensive analysis before ratification and decided that Article 9(2) of the Convention, giving environmental NGOs access to legal proceedings, was not compatible with German law. The necessary amendments came into effect through the Environmental Appeals Act of 7 December 2006.

Hart explained that the German justice system is based on the right of protection of the individual. According to Article 19.4 of the Constitution, everybody has the right to seek justice if his or her rights are threatened. According to German administrative law, legal proceedings can only be initiated by the

person suffering the alleged injustice in their dealings with the authorities. The German administrative courts do not, therefore, admit cases based on general interest or review of an administrative decision. However, this limited access is balanced by a very strict supervision by courts which examine in detail all the circumstances and facts of the argument.

Transposing Article 9(1) of the Convention into German law posed no problem, since it guarantees a right to information that anyone can exercise. By contrast, Article 9(2) was more complicated. The federal government was able to maintain the existing system of individual protection by allowing access to the courts to individual plaintiffs only if their subjective rights have been violated, but went beyond this with an article that covers environmental associations' access to justice.

The Environmental Appeals Act now enables recognised German or foreign environmental organisations to take action in the administrative courts without having to demonstrate violation of a personal right, if they can show that:



## Situation of access to justice under the Aarhus Convention at national level

*Mr Pavel Černý*

- The decision in question violates statutory provisions that protect the environment, and the rights of individuals;
- Promotion of the objective of environmental protection, in accordance with the organisation's field of activity as defined in its by-laws, is affected by the decision; and
- It was entitled to express its opinion on this decision, or was denied an opportunity to do so.

This opportunity is not offered to all NGOs, but only those that fulfil five conditions: their main objective is to protect the environment; they have been active for at least three years; they operate efficiently; they are non-profit-making; and they are open to anyone sharing their objectives. So far, 18 associations have obtained recognition.

Finally, as regards funding (Convention Article 9(4)), German law already provides for legal aid to offer access to justice for those with limited means, and does not accept that the cost of proceedings is an obstacle to pursuing justice.

Pavel Černý of the NGO Environmental Law Service, who also represents Justice and Environment (a European network of environmental law organisations) in the Czech Republic, reviewed the situation surrounding the Aarhus Convention, and particularly access to justice in environmental matters, at the national level. The Convention has had a positive impact on public rights in countries where it has entered into force, but many EU Member States still do not satisfactorily meet Aarhus' access to justice criteria.

The access to justice provisions of the Convention have raised hopes and expectations, he explained. Nevertheless, there are serious deficiencies, Černý observed, in the implementation of Article 9 (on access to information and public



## Access to justice in Slovenia

*Miss Tina Divjak*

participation) in the vast majority of countries. Although the effectiveness of judicial procedures is a key aim of the Convention, inaction, strict and narrow criteria or prohibitive cost hinder access to justice in some countries.

Černý painted a picture in which the majority of Member States apply a strict interpretation of legal standing (impairments of rights and sufficient interest); allow a limited scope of procedures; generally do not review contested decisions in a timely manner; and there is often a lack of injunctive relief.

This is the case, despite the fact that the Convention's Compliance Committee has already stated, with respect to Article 9(3), that the Parties may not introduce or maintain "so strict criteria that they effectively bar all or almost all environmental organisations from challenging acts or omissions that contravene national law relating to the environment".

Nonetheless, there are positive examples. For instance, in Ireland, a port company was ordered by a court to finish the removal of the waste it had illegally deposited on a protected mudflat.

Tina Divjak, representing the Slovenian Environment Ministry, assessed her country's status vis-à-vis the access to justice provisions of the Aarhus Convention. In the run up to Slovenia's ratification of Aarhus in 2004, the country passed a series of enabling laws, including the 2004 Environmental Protection Act (EPA). In addition, the access to information provisions of the Convention's Article 9(1) have been well provided for in the 2003 Public Access to Information Act.

In terms of Article 9(2), the EPA provides legal standing for directly affected individuals, as well as certain NGOs which meet specific criteria. With regard to Article 9(3), the EPA enables members of the public to initiate legal action even in instances where they are not directly affected. However, no case law has yet been established taking advantage of this opportunity. Moreover, the Slovenian Environment Ministry introduced a new article to the EPA which outlines procedural rules for public participation in the preparation of new legislation.

Temporary injunctions may be issued on a case-by-case basis in compliance with Article 9(4). Procedures, which are not prohibitively expensive, usually take about one and a half years.

In the context of Article 9(5), Slovenia has a number of useful assistance mechanisms to further the implementation of the Convention. They include free legal aid, workshops and public debates.

## How are the access to justice provisions implemented in Czech national law?

*Mr Josef Souchop*

Josef Souchop, the official representative of the Czech Republic, explained how the Aarhus Convention's access to justice provisions are implemented in Czech national law. The Czech constitution (Article 1.2) states that the country adheres to international law and any treaty obligations. In addition, Article 36 of the Bill of Fundamental Rights and Freedoms covers access to justice. These include administrative procedures, administrative and civil law suits, and criminal prosecution.

Czech law requires plaintiffs to exhaust all administrative remedies before reverting to a judicial review. This, in the Czech view, is more practical and effective. Although Article 9(3) of the Convention has no specific act of transposition

into Czech law, members of the public have numerous ways open to them of challenging the 'acts and omissions' of public authorities and private persons.

In Aarhus-related case law, Czech courts are applying the rules of 'suspensive effect'.

Although it is necessary to further implement the Convention through legislative means, the role of the judiciary in applying the Convention's provision on access to justice is considerable.



## Reaction of the Association of European Administrative Judges (AEAJ) to the Milieu study

*Dr Werner Heermann*

Werner Heermann, vice-president of the Association of European Administrative Judges (AEAJ), gave his analysis of the Milieu report on the implementation in the EU of Article 9(3) of the Aarhus Convention.

An AEAJ working group found that, although all Member States had transposed the Convention into their national laws, a considerable number of actions were deemed inadmissible.



The group agreed with the Milieu report's descriptions of the divergent situations in the Member States. For more efficient application, there is a need for greater interaction between the different judicial systems of the Member States.

The group concluded that the access to administrative justice in environmental matters granted so far does not, in many parts of Europe, correspond with the spirit of the Convention and, in certain cases, restrictions have been imposed on administrative justice in environmental matters (Germany and Austria).

The group supports, with certain reservations, the proposed EU Directive on access to justice in environmental matters. It made a number of good practice recommendations in the areas of legal standing, costs, legal aid, interim relief, and notions of what constitutes environmental matters.

## NGO expectations of national administrations and legal systems

*Mr John Hontelez*

John Hontelez, the secretary-general of the European Environmental Bureau (EEB), dedicated his presentation to what NGOs expect, in terms of access to justice in environmental matters, from national authorities and legal systems.

Access to justice in environmental matters is crucial, he noted, in order to manage scarce resources better and protect humanity and nature against environmental hazards. The EEB, he maintained, is convinced that national legal systems are not sufficient because they do not take into consideration the transnational dimension of many environmental problems and do not reflect the need to grant citizens the minimum level of rights outlined in the Aarhus Convention.

The European Commission receives many complaints from citizens relating to non-compliance in environmental matters, Hontelez pointed out. This is due to two reasons: there is no natural interest group seeking enforcement and the environment cannot speak or protest for itself, while citizens and environmental NGOs in many countries are hindered from taking action by legal and financial obstacles.

The Milieu report and an EEB survey showed that most countries do have some kind of access to justice, but the widely varying scope of legal standing, the high costs of legal action, slow procedures and other factors reduce this access. The EU Directive on access to justice should be adopted without further delay, Hontelez insisted, and the 'subsidiarity' arguments put forward by some Member States should be rejected.

The mere existence of a Directive would help, particularly by positively influencing the courts' attitudes to access to justice in environmental matters, he argued. An EU Directive would also bring in a control mechanism by assigning roles to the Commission and possibly the European Court of Justice.

Enforcement of environmental legislation is a problem in numerous Member States, he added, and access to justice in many countries falls short of the Convention's requirements, especially when it comes to the scope of legal standing.



## Proposed Access to Justice Directive

*Miss Rebecca Harms MEP*

MEP Rebecca Harms spoke about the proposed Directive on access to justice in environmental matters. The draft legislation has been a long time in the pipeline because access to justice is a very sensitive issue for some Member States and lies on the outer limits of EU competence. For this reason, Harms was a little bit sceptical about what can be achieved over the next year or two.

A major point about the Directive is that it does not necessarily mean that volumes of litigation would rise exponentially, she assured the participants, because environmentalists tend to use the courts as an option of last resort.

Some argue that there is no need for an EU Directive on access to justice because Member States are already bound by the Aarhus Convention. But Directives exist for the other two pillars, Harms pointed out, and there is a big difference in the enforceability of international and European law.

In addition, the everyday reality of access to justice in different Member States is highly diverse. Given that enforcement of EU environmental law is greatly dependent on access to justice, that means there are bound to be variations in the degree of application of European legislation, she argued. A Directive would help to level the playing field and make enforcement cheaper.



## A view from the Council of Bars and Law Societies of Europe

*Mr Stephen Hockman QC*

Stephen Hockman, representative of the Council of Bars and Law Societies of Europe, which has over 700 000 members, explored the question of access to justice from a lawyer's point of view.

In his talk, he covered three aspects: the decision-making process, the review of environmental decisions, and legal costs. Regarding the decision-making process, Hockman considered the differences between access to justice in environmental cases and in other legal areas. While access to justice in other areas often means dealing with an event after it has occurred, in the environmental sphere, proceedings often start at a much earlier stage and often deal with possible or potential eventualities. This implies that environmental cases require a great deal of technical preparation which makes ongoing participation a crucial aspect of access to justice.

On the review of environmental decisions, Hockman observed that both Aarhus and the proposed EU Directive on access to justice in environmental matters contain provisions requiring the ability to review environmental decisions. In addition, the two instruments' positions on legal standing are absolutely admirable, he maintained, and would be supported by the vast majority of practising lawyers.



From his position as a British lawyer, Hockman found that, in addition to legal reviews, there should be the opportunity to review environmental decision-making in terms of its merits. There has been debate in the UK about whether there should be some kind of environmental tribunal which could review both the legality and the merit of decisions.

How can costs of environmental litigation be met? Often, costs can be quite high. When it comes to claimants' costs, in an ideal world, Hockman noted, there would need to be a system of very generous legal aid for those who have a legitimate grievance. But with the brewing economic crisis, available aid is likely to dwindle or stagnate. Another possibility is pro bono work, but this cannot address the problem by itself, he pointed out.

A third alternative is to exploit charitable funding, as happens in the USA. A fourth alternative is to tap commercial funding more, such as through litigation-driven firms. A fifth possibility is that the claimant's costs can be paid by the defendant if the claimant wins. To protect environmental claimants from bearing the burden of the defendants' costs in case they lose, 'protective costs orders' and other limitation mechanisms need to be strengthened.

## Application of the Convention in France

*Miss Nicole Cochet*

Nicole Cochet, the French government's official representative, welcomed the Commission's initiative in holding the conference, on the eve of the Third Conference of the Parties to the Aarhus Convention in Riga, which also marks the tenth anniversary of the Convention. The conference debate focused on the Milieu report and its conclusions on where we are now, and what to do next.

Without wishing to hold France up as an example, Cochet gave a summary of the way implementation is evolving at national level.

Regarding progress so far, she said there has been an increase in awareness of the issue, demonstrated for example by the Grenelle de l'environnement – a series of political meetings involving the social partners, NGOs and local groups. At judicial level, investment has taken place in training for judges and legal representatives, with the support of the Ecole Nationale de la Magistrature (ENM). France also provided financial support for a forthcoming workshop on access to justice to be organised under the French Presidency of the EU. The judgement in the case of the shipwrecked tanker, the *Erika*, holding the owners and operators responsible for the environmental damage, was a key ruling.

Turning to future steps, Cochet felt some progress has been made as regards collective actions, but there is still a long way to go, and difficult questions of legal aid to be resolved.

Finally, what must be done? The main question concerns the third Aarhus Directive. Governments that have ratified the Convention have international obligations to put its provisions into practice and apply its requirements. A procedure exists for doing this: the intergovernmental process, based on co-operation and support for implementation.

The proposal for a further Directive is justified by the fact that the other two pillars of the Convention are already covered, and there is a need to boost implementation in Member States. But it raises doubts about subsidiarity.

Member States are capable of fulfilling the Convention's objectives themselves and the intergovernmental process should be given time to work. Starting a new round of EU negotiations could be counterproductive.



## Closing speech – conclusions

*Mrs Pia Bucella*

Pia Bucella said it is clear that in the coming years, the role of stakeholders will be more important than ever in the field of access to justice. The conference was an important step in building closer co-operation between policy-makers and stakeholders in order to promote better access to justice in environmental issues.

One of the main conclusions was the need to examine possible future ways of adopting EU legislative acts, with a view to furthering the implementation of access to justice provisions in the Member States. The main aim is not to punish Member States, but to guarantee the individual and collective rights of civil society to access to justice in environmental matters.

She drew attention to the conclusions of the Milieu study and the EEB survey in Member States, which identified numerous problem areas. Pavel Černý, the representative of the Justice and Environment NGO, also emphasised the need to guarantee a common level of national enforcement measures to make environmental protection more efficient.

The importance of EU action was raised several times, and the Commission is planning to look closely at the possibility of either getting the Access to Justice Directive proposal adopted as is, or making necessary modifications. A common interpretation of the Convention provisions also needs to be adopted at EU level, which takes account of the interests of the public of today and the interests of future generations.

However, adopting legislation is only one part of the solution for access to justice. There are various other efforts and projects initiated by the EU that deserve attention. Pia Bucella welcomed the many initiatives, discussions, workshops and projects that have been launched to debate improvements in access to justice. The conference also highlighted the important contribution that can be made by judges. Their valuable experience will help to improve the application of environmental law. As Luc Lavrysen noted, a key factor in improving the application of the Aarhus Convention is ensuring that the relevant information is disseminated to the appropriate legal stakeholders.

The 2007 Commission Communication 'A Europe of results – applying Community law' stressed the political importance of the correct implementation of EU law, and highlighted the responsibilities of national courts and national judges in the execution of this task. In the context of access to justice, the need to reinforce co-operation between national judges and the Commission services is a vital step. This is to be done through training seminars and workshops.

One of the objectives is, therefore, to introduce training seminars in EU environmental law for national judges. The implementation of access to justice provisions relies on the three powers of state: the legislative, the executive and the judicial powers all have a vital role to play in the proper implementation of access to justice.

Mrs Bucella thanked all the participants for their contribution to furthering the proper implementation of the access to justice provisions of the Aarhus Convention.





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