



HOW FAR HAS THE EU APPLIED THE AARHUS CONVENTION?

EUROPEAN ENVIRONMENTAL BUREAU (EEB)

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Fundación Biodiversidad



The European Environmental Bureau (EEB)

The European Environmental Bureau is a federation of over 145 environmental citizens' organisations based in all 27 EU Member States and most candidate and potential candidate countries as well as in a few neighbouring countries. These organisations range from local and national, to European and international.

EEB's aim is to protect and improve Europe's environment and enable its citizens to play a part in achieving that goal, by promoting environmental policy integration and sustainable policies, particularly at EU level. Our office in Brussels was established in 1974 to provide a focal point for our members to monitor and respond to the EU's emerging environmental policy.

We have an information service, run working groups of EEB members, produce position papers on topics that are, or should be, on the EU agenda, and represent our members in discussions with the Commission, the European Parliament and the Council. We closely co-ordinate EU-oriented activities with our members nationally and also track the EU enlargement process and some pan-European issues, such as follow-up to the Aarhus Convention.

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on the basis of surveys submitted
by the participants listed in Annex 1



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INTRODUCTION

This booklet reports on initial experiences across Europe with the Aarhus Convention, the most important international legal instrument providing for citizens' rights on access to environmental information, public participation and access to justice in environmental matters.

The Convention applies across the EU, at national level. It also applies at EU level, to the EU institutions. Member States have adopted legislation at national level to implement the Aarhus Convention. In addition to these national efforts, the EU has adopted two Directives and proposed a third to implement the Aarhus Convention's terms and requirements. It has also adopted a regulation applying the Convention to its own institutions and bodies.

The two Directives have been in effect in Member States since 2005. To examine how the new Directives are working, EEB initiated an EU-wide investigation into the initial experiences. We asked our members to report on the implementation and application of the rights guaranteed by the Aarhus Convention and the EU Directives which follow from it. These reports form the basis of this booklet.

This booklet begins with a brief introduction to the Aarhus Convention and EEB's long involvement in promoting the rights found in the Convention. The booklet then describes the investigation into initial experiences led by EEB, together with the Justice & Environment Network.

Each of the Convention's three pillars is then examined: access to information, public participation and access to justice. We then make recommendations for further action, addressed to Member States, the European Commission and environmental organisations. A separate section describes the new EU Regulation which recently entered into effect together with recommendations for further action to address its shortcomings.

EEB gratefully acknowledges the support of the Fundación Biodiversidad (Spain) for its work in this area and particularly for its support in preparing, publishing and distributing this booklet, in English and Spanish. We thank the European Commission for its general support for EEB's work. We also wish to thank all the survey participants. Without their work and reports, this overview would not have been possible. A list of the survey participants appears at the end of this publication.

John Hontelez

Secretary General

European Environmental Bureau (EEB)

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SUMMARY

The Aarhus Convention is widely regarded as the most important international legal instrument on the right of access to information, public participation, and access to justice in environmental matters. The Convention now applies across the European Union and to the institutions of the EU itself.

The EU has taken several steps to implement and apply the Convention. These include adopting two Directives, one on access to environmental information, and one on public participation. These Directives were adopted in 2003, apply to all 27 Member States, and were meant to be transposed by 2005. The European Commission has also proposed a Directive on access to justice, but progress on this proposal has stalled in the Environment Council. Collectively, the three (proposed) Directives are known as the 'Aarhus Directives'. In 2006, the EU also adopted a Regulation to apply the provisions of the Aarhus Convention to its own institutions and bodies. This Regulation has applied since June 2007 and its provisions are also reviewed here.

The European Environmental Bureau (EEB) has long played an active and leading role in efforts to protect and promote the rights provided by the Aarhus Convention. EEB decided to investigate the initial experiences of the Aarhus Directives in Member States. To do this, EEB launched a survey of experiences and needs regarding the rights the Aarhus Convention and Directives are meant to promote. The results of this survey were presented and discussed in Brussels at an EEB seminar in June 2007. The survey results also form the basis of this booklet.

The survey revealed that transposing and implementing the Directive on access to environmental information has gone well, but there were some continuing practical difficulties. By contrast, transposition and implementation of the Directive on public participation has been slower, less complete and far less effective. The survey also identified a need for the Directive on access to justice and, at the same time, concern about the rollback of the rights of citizens and organisations to bring environmental cases to court.

The survey also concludes with various recommendations:-

1. More awareness-raising among the public and more training for public authorities is needed
2. Swift, independent and low-cost mechanisms (eg Information Commissioners or Tribunals) to deal with the denial of requests are needed
3. Efforts to develop registers and post information on websites should be promoted
4. Information on opportunities to participate should be made more citizen-friendly
5. Practical barriers to access to justice at Member State level should be removed
6. The proposal for an EU Directive on Access to Justice should proceed

THE AARHUS CONVENTION

In the mid-1990s, representatives of over 40 countries came together under the auspices of the UN Economic Commission for Europe (UN ECE) for negotiations on an international agreement on citizens' environmental rights. The negotiations were exceptional in that representatives of environmental citizens' organisations (ECOs) played a full and active role in them. In June 1998, the agreement, the Convention on Access to Information, Public Participation in Decision-making & Access to Justice in Environmental Matters, was signed, at the Fourth Environment for Europe Ministerial Conference, in Aarhus in Denmark, thus giving the Convention its (shorter) common name.

Thirty-five countries and the European Community signed the Convention at Aarhus and more have subsequently signed. Since then, most of the signatories have ratified the Convention and together with several states that acceded to the Convention later, the number of parties has now reached 41. This includes the European Community (which ratified in 2005) and all the EU Member States save Ireland.

The Aarhus Convention entered into force in 2001 once the required 16 ratifications had been achieved. At that time, only a few EU Member States had completed ratification. Today, however, all EU countries but Ireland, and the Community, have now ratified the Convention. For an overview of the status of ratification by year, see www.unece.org/env/pp/.

The Convention is generally described as having three pillars.

The first is access to environmental information. The Convention provides broad rights of access. Any person, without restriction by nationality or place of residence, is entitled to request environmental information held by public authorities. Environmental information is broadly defined. Access to requested information may only be denied on the basis of one of a specified list of exceptions and these are to be narrowly interpreted. The Convention also requires public authorities to help people with requests, for instance by making practical arrangements for obtaining information or by passing a request to the authority thought to hold the information if the first authority approached does not hold it. The Convention also encourages the active supply of information.

The second pillar covers public participation. The 'public concerned' is to be given the right to participate in environmental decision-making by an early, informed and effective opportunity to submit its views before decisions have been taken. The Convention covers decision-making on projects, such as licensing polluting facilities, most fully. The Convention also applies to decision-making on programmes and encourages parties to the Convention to provide public participation opportunities in developing policies.

The third pillar covers access to justice. It provides for the review, by a court or other similar body, of decisions concerning the first two pillars, access to environmental information and public participation in environmental decision-making. It also provides a basis to review acts and omissions by public authorities or private persons that breach national environmental law. The Convention requires review procedures to be 'fair, equitable, timely and not prohibitively expensive' and to provide 'adequate and effective remedies'.

For a fuller description of the Aarhus Convention, its origins, provisions, and current information on countries that have signed and ratified the Convention, see www.unece.org/env/pp/.

EEB involvement

EEB has a long history of promoting access to information, public participation and access to justice. The Bureau was closely involved in the process leading up to the Aarhus Convention and in its negotiation. Since the Convention was signed, EEB has closely followed its further development and implementation, at international, European and national levels.

Environmental citizens' organisations (ECOs) have formed the European ECO-Forum, a coalition to coordinate and structure their activities in connection with the Convention. EEB helped organise ECO-Forum and has played a leading role in its activities. EEB hosts the ECO-Forum secretariat and maintains list servers on various Aarhus issues including access to justice, electronic information tools, and the compliance mechanism. ECO-Forum helps coordinate participation and input into the ongoing Aarhus Convention negotiations: preparation for Meetings of the Parties, the various Task Forces, Protocol negotiations, etc. It also publishes a newsletter, 'Participate', and maintains a website. For more information on the European ECO-Forum and its activities, see www.participate.org.

EEB, with its national member organisations, has pressed for the full and rapid ratification of the Convention in Member States and at EU level. Through workshops, information services, lobbying and other activities, EEB has encouraged the Convention's implementation. In close cooperation with EEB, Stichting Natuur & Milieu (Netherlands), one of EEB's leading national members, has led a series of activities on access to environmental information, directly contributing to the review and revision of the EU 1990 Directive and its replacement by a new Directive implementing the Aarhus Convention's first pillar. Similarly, EEB has lobbied to ensure the EU Directive implementing the Convention's second pillar fully reflects the Convention's requirements. EEB has actively contributed to developing the Commission's proposal for a Directive on access to justice and has consistently lobbied the Council to advance its work on the proposal, for instance by including this as a demand in its Ten Tests for the Presidency, since the proposal's launch.

At EU level, EEB has led efforts to strengthen the 'Aarhus Regulation' (1367/2006) which applies the Convention to EU institutions and bodies. EEB has also been engaged in improving the EU's Access to Documents Regulation so it fully reflects the Convention's requirements. First adopted in 2001, the Regulation is now under review. The Regulation and EEB's position on its review are discussed separately below.

EU Aarhus Implementation

The EU has taken the following steps to implement the Aarhus Convention:-

- adoption of Directive 2003/4 on public access to environmental information
- adoption of Directive 2003/35 on public participation
- adoption of Regulation 1367/2006 applying the Convention to EU institutions and bodies
- adoption of Decision 2005/370/EC on ratification of the Convention and deposit of its instrument of ratification

In 2003, the Commission also presented a proposal for a Directive on Access to Justice, COM(2003) 624. The European Parliament has supported the proposal but in the Council of Ministers a large coalition of countries has so far prevented this Directive's adoption.

The EU's decision on ratification followed adoption of the Directives on the Convention's first two pillars, access to environmental information and public participation. The decision anticipated adoption of two pending proposals to complete implementation. At the time of the decision on ratification, the Commission's proposals for a Directive on the third pillar, access to justice, and for a regulation applying the Convention to EU institutions and bodies, had yet to be adopted. The Regulation has since been adopted, in 2006, but the Access to Justice Directive has not. It does not seem likely that this Directive will be adopted any time soon, thus raising doubts whether complete ratification will ensue.

EEB SURVEY: HOW IS THE AARHUS CONVENTION WORKING IN EU MEMBER STATES?

To answer this question, EEB recently conducted a survey on implementation and experiences in the 27 Member States. In early 2007, EEB invited its members to take part in the survey, either directly or through the participation of independent environmental institutes and researchers with expertise in Aarhus-related issues. Interest in the Aarhus Convention among EEB organisations in EU countries is high and there was widespread willingness to take part in the survey.

The survey's objective was to provide an initial assessment of the impact of the EU's Aarhus legislation in Member States. The survey investigated the transposition, implementation and enforcement of the EU Directives implementing the first two pillars of the Convention (access to environmental information and public participation in decision-making in environmental matters). The survey also examined the potential impact of the proposed EU Directive to implement the third pillar of the Convention (access to justice in environmental matters).

The survey was conducted as a 'quick scan' of how the Convention is currently working at national level in the EU. The questions were designed to be the basis for gathering information over quite a short time. In some cases and countries, the information was not readily available (eg on responses to access to information requests) or more time might be needed to complete the picture. The survey's aim was to collect a set of initial impressions of how the Convention is working.

The survey questions:-

The survey asked the following questions on the first two pillars, access to information and public participation:-

Transposition

1. Have the first and second pillar Directives been introduced into national law on time (Directive 2003-4 and 2003-35)?
2. If not, what is the current status of transposition? (Is, for instance, a proposed law currently under consideration by the national parliament?)
3. Has the European Commission taken any action regarding late or incorrect transposition?
4. Have environmental organisations been involved in preparing for transposition?
5. Have other stakeholders been consulted? Eg local governments, business interests, etc

Implementation

1. Have the Directives been properly implemented?
2. Are there any studies analysing the implementation? (For instance, by the environment ministry itself or by someone working for an environmental group or at a university or research institute)
3. What efforts have been/are being made to inform the public of the new Directives?
4. What use is being made of the opportunities the new Directives provide?
 - a. Is there an increase of environmental information requests?
 - b. Does the public concerned participate in EIA and IPPC permitting proceedings?
 - c. Is there any system in place to register information requests, for instance by national or local authorities?
 - d. Is it possible to draw some preliminary conclusions about the use of the new Directives?
5. Is it possible to make an early assessment of the effect of the new provisions?

Enforcement

1. Have complaints been made to the European Commission about transposition?
2. Have complaints been made to the European Commission about application?
3. Have cases been brought before national administrative or judicial bodies concerning refusal of
 - a. access to information
 - b. problems with public participation?
4. What have been the results of any cases brought?
5. Do Access to Justice provisions provide for
 - a. adequate, fair, and effective remedies
 - b. injunctive relief
 - c. equitable, timely and not prohibitively expensive legal redress?
6. Do you consider your country to be in compliance with the:-
 - a. first pillar of the Aarhus Convention? If not, please state why not
 - b. second pillar of the Aarhus Convention? If not, please state why not

The survey asked the following questions about the third pillar and the proposed Access to Justice Directive:-

1. Would the proposed Directive, if adopted as proposed, improve access to justice?
2. Or is there a risk the Directive could lead to a rollback of existing rights?
3. Would the proposed Directive neither improve nor worsen the existing situation?
4. How, specifically, would the proposed Directive improve or worsen the existing situation?
5. Are there specific changes that should be made to improve the existing access to justice situation that are not currently part of the Commission's proposed Directive? Please specify

6. Have studies been made of access to justice in environmental matters in your Member State?

Please list them

7. Do you consider your country to be in compliance with the third pillar of the Aarhus Convention? If not, please state why not

Individual responses to the survey can be found on EEB's home page: - http://www.eeb.org/activities/transparency/Aarhus_survey.htm

EEB Seminar

On 6 June 2007, EEB held a seminar on the Aarhus EU legislation. Jeremy Wates, Secretary to the Aarhus Convention, gave a key-note speech on progress in implementing the Convention, the various ongoing activities under the Convention, and the inter-linkages with EU Directives and other steps towards the EU's applying the Convention. Following this presentation, Ralph Hallo presented the survey's initial result. By the time of the seminar, we had received reports on two-thirds (18 out of 27) of the Member States. We have since received several additional reports. The reports vary in length and detail but provide enough information for an overview of the status of implementation and application of the Convention in Member States. Pia Bucella, Director of DG Environment's Communication, Legal Affairs & Civil Protection Directorate, responsible for Aarhus implementation, gave an initial response on the Commission's behalf. The seminar then held separate discussions of EU implementation of the Convention's three pillars, including a round-table wrap-up discussion. These discussions are summarised below. The seminar concluded with a panel discussion on the next steps to improve compliance with the Convention at national level and the EU Aarhus Regulation and review of the Access to Documents Regulation.

Overall Survey Conclusions

The survey comes to the following preliminary conclusions about EU laws and Member States' compliance with the Convention's three pillars:-

- With the first pillar, the answer to the compliance question is clearly affirmative as far as transposition is concerned. Unfortunately, in practice there continue to be difficulties in applying the first pillar's requirements
- With the second pillar, the answer to the question of compliance is 'No, not really'
- For the third pillar, the view the survey gives is that without the Directive on Access to Justice, a significant number of EU countries cannot be seen as complying with the Convention's requirements

Environmental citizens' organisations (ECOs) and citizens have also used national courts and proceedings to secure the rights granted by these two Directives. Again, the picture is more favourable where access to information is concerned. Cases brought to gain access to environmental information have been 'successful' more often than those brought to secure participation in permit and other proceedings, such as EIA reviews. But success in information cases is relative, since the court-ordered release of information frequently occurs too late for the information still to be of use.

ACCESS TO ENVIRONMENTAL INFORMATION: THE FIRST PILLAR OF THE AARHUS CONVENTION

Survey responses

The survey showed that, overall, Member States are considered to have properly transposed Directive 2003/4 on public access to environmental information into national law.

There have been some delays, particularly at regional level in federal states:-

- In Austria, transposition was completed on time at federal level; implementation at regional level was a year or more late
- In Germany, transposition into federal law took place precisely on the deadline but transposition by several of the 16 federal states has been delayed. Two federal states transposed two years late, in March 2007; one still has to enact the necessary legislation. Given the German federal states' extensive competences in environmental matters, these delays have been significant and have forced applicants to rely on the direct effect of the Directive's provisions
- In Spain, the Directive was transposed 17 months late, but seemingly no specific regional or local measures have been taken
- Portugal was nearly a year-and-a-half late in transposing the Directive
- Ireland exceeded the deadline for transposition by over two years
- Romania, one of the newest member states, still has not transposed the directive
- Hungary transposed nearly a year late. Poland and Greece delayed by a year
- France completed transposition in two steps, the second over a year after the deadline
- Other countries, including Italy, completed transposition with only a few months' delay
- In the Netherlands, transposition occurred at the deadline
- In Cyprus and Slovenia, transposition occurred well before the deadline
- Estonia anticipated the Directive's requirements by adopting a Public Information Act which came into force at the start of 2001

Although the survey responses consistently report that ECOs consider the Directive to have been properly implemented (Austria, Czech Republic, Denmark, Ireland, Portugal, Slovenia and Sweden), questions were raised about the adequacy of implementation in some cases:-

- In Germany, the Directive is considered to have been properly implemented at federal level but implementation by the 16 separate states is less satisfactory. There are differences among the federal states in the costs regulations and definitions of public authorities required to provide

access to environmental information. There are concerns that the costs provisions might discourage some citizens from exercising their access to information rights and that the definition of public authority is not in all cases broad enough to comply with the Directive

- French law does not expressly provide for release of information in part when only a portion of the requested document is covered by an exception
- Hungary, perhaps owing to the haste with which the transposing law was prepared, to forestall further action by the Commission, has not achieved full and complete implementation. The shortcomings concern provisions to deal with over-general requests, requests for information to be provided in a particular form, practical arrangements and help from officials with requests, and exceptions and measures regarding the quality of environmental information
- In Poland, the scope of authorities covered seems too limited, there is no explicit provision requiring a restrictive interpretation of the exceptions and no provision requiring a balancing of interests for or against disclosure
- In Spain, there are still severe problems with public authorities failing to respond to requests at all. This absence of a response leaves requesters uncertain about when and on what grounds, if any, their request was refused, with corresponding problems in appealing

The survey reports that several complaints have been made to the Commission about late transposition and non-compatibility of national law with the Information Directive's requirements. In Germany, for example, UfU (Independent Institute for Environmental Concerns), complained about late transposition by the German federal states on 1 August 2005. The Commission has launched various enquiries (Hungary) and in some cases infringement proceedings (against Austria, Germany and Spain). This has generally brought the desired results as far as transposition of Directive 2003/4 is concerned. The Commission is also proceeding with a case against Ireland, in response to Ireland's delayed transposition.

Various issues concerning application have also arisen and could give rise to complaints about application being made to the Commission:-

- Spanish ECOs are currently preparing a general complaint about costs, citing several cases where authorities have demanded excessive payment for documents
- In Sweden, the issue of costs for mapping data and other information with commercial value has arisen
- In the Czech Republic, the interpretation of the scope of 'environmental information' has been an issue, in part because there is also a general act on access to information with different procedural provisions and exceptions. There have also been problems getting prompt replies to requests
- In France, reports of inspection and site visits to industrial facilities are not accessible once a procedure opens against the facility

- Exceptions can be extensively or arbitrarily interpreted, particularly with sensitive topics (eg GMOs or nuclear energy)
- Inspection is made difficult by limited opening hours, underlining the usefulness of electronic information wherever possible. In Cyprus, with the exception of general reports and regulations, specific reports and documents are only available for inspection at the Environment Service's central office in Nicosia. This office is only open during working hours, inspection is by appointment only and no copies may be made. This breaches the Directive's requirements

Considerable use in practice was reported, in the majority of Member States, although it is not clear that this can be solely attributed to the new Directive:-

- In Austria, the new Directive has had a positive impact and requests have increased
- In the Czech Republic, the impression is that access to information rights are being widely used by ECOs and individuals
- In Estonia, active use of the new opportunities followed ratification of the Aarhus Convention in 2001. But in practice there are difficulties receiving timely or proper (clear) responses
- In France, there has been a large increase in the number of requests for environmental information although this is not attributed to the new Directive
- In Germany, good use can be made of opportunities provided by Directive 2003/4. The new Directive usefully extends the definition of environmental information further than in the previous Environmental Information Act of 1994. It also requires swifter replies to requests for environmental information and requires authorities to give active support to citizens in connection with their requests. No study has been made in Germany to check if requests have increased. If there has indeed been no increase in requests, this could also reflect the new law's lack of publicity. The new Directive has generated a considerable response in terms of legal publications. Measured in terms of actual application, the response is lower. Most citizens do not know about their rights. Those wishing to exercise their access to information rights may be discouraged by bureaucratic hurdles. Among these are the difficulty of estimating what an information request may cost
- In Hungary, where existing laws already provide a good legal foundation for information requests, the new Directive's impact has been minor
- In Italy, no increase in requests has been observed. The Directive remains unknown to most citizens and local authorities. Requests that are made are based on the general provisions in the 1990 Law on Access to Public Administration Acts which pre-dates both the Aarhus Convention and the new Directive and its requirements
- In Poland, no statistics are available but it seems that requests are at about the same level as before the Directive's transposition
- In Slovenia, the 2003 Public Access to Information Act led to many requests for information, not limited to environmental information. Subsequently, ministries and other public authorities

increasingly posted documents and information on websites. This has led to a corresponding decrease in requests

- In Spain, the volume of environmental information requests was already high and the new laws do not seem to have increased it
- In Sweden, with its long tradition of transparency in public administration, the Directive appears not to have changed the situation much and no increase in environmental information requests has been detected

Consultation with ECOs and other stakeholders has occurred in several countries and has contributed to effective implementation:-

- In Austria, there were workshops and public consultations on the draft law, at least at federal level
- In the Czech Republic, ECOs received and commented on draft legislation to implement both the Information and Public Participation Directives
- In Estonia, ECOs were involved in a project preparing for the Directive's transposition
- In Germany, stakeholders, including ECOs, took part in hearings at federal level as part of the formal legislative procedure. There was also some consultation with NGO representatives on an early draft of the law
- In Hungary, the Ministry of Environment commissioned EMLA, the Environmental Management & Law Association, to prepare a study including a model law before transposition. But the study was not taken into account in the actual transposition
- In Ireland, the multi-stakeholder Sustainable Development advisory body submitted two consultative documents, for the Information and Public Participation Directives
- In Poland, as part of the Environment Ministry's standard practice, the draft law was subject to public consultation before being presented to Parliament. Public consultation included publication on the Ministry's website with an invitation to comment and the draft's distribution to selected entities, including ECOs, regional authorities and business representatives
- In Slovenia, there was both a public consultation on the draft Environmental Protection Act (transposing the two Directives) and meetings between ECOs and the Environment Ministry. The Ministry is also reported to have met industry representatives
- Spain's Environment Ministry held several meetings with ECOs to discuss draft texts of laws transposing both the Access to Information and Public Participation Directives. ECOs felt the texts improved as a result
- Sweden held a public consultation on proposed changes to national law to implement both the Access to Information and Public Participation Directives. The consultation period was long enough to allow stakeholders to comment on (and suggest changes to) the proposals
- There was apparently no consultation in Italy or Portugal for either Directive

Efforts to raise awareness of the Information Directive and the opportunities it provides were however limited or at times non-existent. This includes informing the public of access to information rights and efforts to inform and train officials in their public information duties. The list below has some positive examples, but their overall impact has not been enough to bring the Directive adequately to public attention:-

- In Austria, the Environment Ministry has supported conferences and other activities
- In Cyprus, the President issued instructions requiring all departments to give access in a specific room and to designate a specific official to inform the public. There are also plans for seminars to tell lawyers, media, and others of the rights and obligations stemming from the Convention
- In Estonia, the Ministry of Environment ran a project to transpose the Directive in which ECOs were highly involved. Rights arising from the Convention, rather than the Directives themselves, have also been the subject of information activity
- The French Environment Ministry financed a France Nature Environnement (FNE) brochure on using the Convention which was distributed to NGOs and is posted on the FNE website
- In Hungary, there were no government efforts to raise public awareness of either Directive
- In Italy, the government did not properly inform citizens or public authorities and no awareness-raising campaign has been launched
- In Ireland, the Government has done nothing to highlight the Convention, which is perhaps unsurprising given Ireland's delay in ratifying it. But the Government has issued a detailed guidance document on the transposing regulations. The guidance and regulations are posted on the Environment Ministry's website
- In Portugal, the Government has yet to sponsor any awareness-raising efforts
- In Germany, the Federal Ministry of Environment website includes information on access to information and public participation rights. The Ministry and Federal Environmental Agency have also given financial support to various projects aimed at increasing awareness and understanding of the new laws
- In Poland, the Environment Ministry is running a major training project targeting officials at various levels. The project will last a year, publish a guidance manual, some 60 training sessions and will reach 3,000 officials
- In Slovenia, initiatives were taken to raise awareness of the 2003 Act on Public Access to Information (applying to government information generally, not only to environmental information). The Government financed several NGO campaigns, workshops and debates. The public was consequently well-informed of its rights before the Information Directive was transposed in 2004
- In Spain, information is posted on the Environment Ministry's website and the Ministry published an article in the Ministry's monthly publication
- In Sweden, an information brochure on the Aarhus Convention, and the Directives implementing it, are available on the Government's website

ECOs in Ireland, the Netherlands, Spain and elsewhere have therefore made their own efforts to publicise rights to information (and participation):-

- In Germany, UfU (the Independent Institute for Environmental Concerns) launched a website on the Convention, www.aarhus-konvention.de, and another on environmental information rights, www.umweltinformationsrecht.de
- In Hungary, EMLA provides legal advice, on request, about use of the Directive (and use of the Public Participation Directive). Other NGOs also give advice as does the Ministry of Environment's Green Points Network with some 30 offices around the country

Apparently, systematic registration of requests is generally also not happening:-

- France, Germany, Greece, Poland, Portugal, Spain and Sweden all reported there was no system for registering requests
- In Italy, no system is in place at national or local level
- In the Czech Republic, the general Freedom of Information Act requires annual reporting by each public authority, including data on the number of requests, refusals and appeals. But there is no such requirement in the specific laws on access to environmental information
- In Denmark, the Ministry of Environment has set up a monitoring committee of which EEB member Danmarks Naturfredningsforening, the country's largest ECO, is a member. But this is no substitute for setting up a system to register information requests, which Denmark seems to lack
- In the Netherlands, registers of environmental information at local and provincial level are often incomplete or not yet operational

It is therefore impossible to collect statistics on the number of requests, the refusal rate, reasons for refusal, response time, etc. The survey identifies this area as ripe for improvement.

In contrast, in some Member States, registration is occurring:-

- Estonia has set up a system to register requests and documents (with electronic access)
- Hungary registers requests electronically
- Romania has registers and lists of available environmental data at national level. Local and regional environmental authorities and the Ministry of Environment apparently have designated information officers, although training and resources are not always available
- Slovenia has set up a register of requests, at least at national level
- In Spain, Madrid and other regional authorities have set up an 'environmental information service'
- In Belgium, a system to register requests is being developed

Some Member States have set up a mechanism specifically to deal with the refusal of requests for access to information:-

- In Estonia, one may complain to the Public Information Inspectorate, an administrative body, about refusal of access to documents
- In France, the Commission on Access to Administrative Documents (CADA) hears appeals of refusals of requests for access to documents. But CADA appears to rely primarily on France's 1978 general law on access to information, whose decisions are not binding or enforceable. There is no specialised independent authority handling access to environmental information
- In Hungary, there is a special ombudsman for data protection and freedom of information. Each year, public bodies must report refusals of information requests to the ombudsman
- Ireland has an Information Commissioner (also the Ombudsman). Plans exist for the same person to perform the functions of Environmental Information Commissioner. But concerns have arisen about a proposed charge of ?150 for appeals. This seems to conflict with the Directive's requirement (Article 6.1) that appeals procedures for refusals should be ?either free of charge or inexpensive?
- Portugal has a Commission on Access to Administrative Documentation to which complaints about denial of access to information can be made
- Slovenia has appointed an Information Commissioner to hear appeals for denial of information under its general Access to Documents law. The Commissioner's decisions are published and a record of decisions in specific areas, including the environment, is kept

Fortunately, court cases challenging refusal seem to have a good chance of success:-

- In Austria, any failure to reply can only be challenged in court after a six-month delay
- In the Czech Republic, judicial review is slow and ineffective. Any decision that a refusal was unlawful does not guarantee that the applicant gets the information. But many cases have been brought, challenging, eg excessive use of the commercial confidentiality exception and high charges for releasing information
- In Germany, a few cases have been brought
- In Hungary, many cases have been brought (not under the Directive but under existing laws). Exceptions for information of a 'decision-making nature' are often at issue. Most court cases have resulted in judgments supporting the total or partial release of the information requested
- In Spain, there have been many cases at administrative and several at judicial level

It often takes too long to get a ruling. By the time the information is received, it is no longer useful:-

- In Spain, court proceedings can take years (one study found six years was the minimum time to reach a final decision). Often, even where cases win, “since there was no precautionary stop of the works, the project is already built and the damage done.”
- The same is true in Hungary
- In the Czech Republic, judicial review is slow and ineffective. Any ruling that a refusal was unlawful does not guarantee that the applicant gets the information

Seminar presentations

Emilia Liaska, a senior investigator in the Greek Ombudsman's office, began the discussion. Access to information is key to good governance and democratic accountability. Greece was late ratifying the Aarhus Convention and transposing the Access to Information Directive. Complaints are growing about failure to transpose, but the Ministry has not noted them. The Ombudsman has told the authorities they must handle requests for information under the new Directive. But there is no system for logging requests. A typical request concerns drinking water quality. Refusals cited protection of intellectual property. The deadline to respond to a request is mandatory. Failure to do so is seen as an implied refusal of the request, triggering the right of review. Refusals without reason are also unlawful.

Issues raised in the discussion

- The need to tell local and regional authorities of the Directive. Ireland transposed it silently. In Cyprus, the Directive is little-known and civil servants are unaware of it. The Directive's relationship to other, existing, national laws on administrative procedures is poorly understood
- The need to inform citizens of their rights and how to exercise them
- The need to provide guidance and training to public authorities in responding to requests and setting up registers. The desirability of involving citizens in preparing guidance material
- The need to help local authorities make information available electronically. Some authorities do not offer electronic access, just on-the-spot document inspection (sometimes with no option to make photocopies)
- The intellectual property exception has been abused, denying access to reports prepared by third party consultants for public authorities. The issue also arises with geographical survey data (although the dispute usually concerns the cost of access to the information). It is important to see copies and copyright as different issues. But it is legitimate that intellectual property rights are not violated and confidential information is not disclosed to competitors, eg information on the chemical composition of pesticides. This can be handled by making a 'second

text' available (possible under Dutch law), summarising the data without exposing confidential details. In the GMO debate, the question is not competition but what the citizen may know. The same is true of other scientific advances or technical processes. Aarhus protects the individual's right to know and the right to a clean and healthy environment. Copyright protects owners' interests. Copyright can be waived. Manufacturers, such as pesticide makers, are seeking to balance the rights and interests concerned. One country may release what another will not. This creates disequilibrium. The Directive does not distinguish between classes of users, whether public or not

- What has been the experience with ombudsmen? In Hungary, there is a data protection ombudsman but no specific environment ombudsman. In Ireland, the ombudsman is also the Access to Information Commissioner. Ombudsmen cannot overrule decisions by other public bodies, and are confined to making recommendations, which curbs their effectiveness. An independent commission (or tribunal) for appeals against access to information cases would be more effective. It would be faster, cheaper, and, if it had binding powers, more effective. A court should also be able to scrutinise (*in camera*) the information at issue. Given ombudsmen's limited powers, what is really needed is the Access to Justice Directive

Recommendations

- (1) Establish independent Information Commissioner's offices
- (2) Need to do much more awareness raising, in line with Article 3.5 (and 3.3) and Aarhus
- (3) Develop registers and focal points
- (4) Disseminate information to the public on access to information rights
- (5) Accelerate decision-making by judicial and non-judicial bodies and increase effectiveness of decision-making in access to information cases

PUBLIC PARTICIPATION: THE SECOND PILLAR OF THE AARHUS CONVENTION

Survey responses

The survey showed that the situation regarding Directive 2003/35 on public participation is much less positive than that for Directive 2003/4 on access to environmental information.

There have many major delays in transposing the Public Participation Directive into national law:-

- In Austria, implementation at regional level was over a year late, although it was completed on time at federal level
- In the Czech Republic, partial transposition occurred nearly a year late. A further amendment to Czech law (to define 'public concerned') is under consideration
- In Spain, the Directive was transposed at national level over a year late. At regional level, transposition has not happened and although the regions are required to comply with national transposition, the autonomous regions have their own regulations which have not been expressly adapted to the new Directive's requirements
- In Germany, the delay lasted 18 months. Implementation is now virtually complete except for concerns that the timeframes for public participation are insufficient for effective participation
- Over two years after the deadline, Ireland and Italy have still not transposed the Directive. Ireland claims existing regulations adequately meet the Directive's requirements. But a recent court ruling rejects this and states that Directive 2003/35 has yet to be implemented in Ireland
- In Cyprus the Directive has not been directly transposed. Instead, five existing laws have been identified which contain provisions for public consultation. Citizens must thus research these separate laws and try to see which provisions apply to the decision-making process involved
- France has also not transposed the Directive though existing texts largely express the Directive's requirements
- Romania, one of the newest Member States, has still not transposed the Directive

Elsewhere, transposition has been less difficult:-

- In Estonia and Poland, the Directive was transposed on time
- In Hungary, existing laws were already in line with the Directive's requirements and no significant change was required. Hungary transposed by reconfirming and rationalising existing laws on public participation elements of the EIA and IPPC Directives
- In Portugal, existing laws were similar to the Directive. The 1995 Popular Action Law gave the right to participate and be heard in public decision-making processes on decisions that might

affect an undefined number of people (ie environmental situations). There is no need to demonstrate a qualified interest in the matter to participate. But the feeling remains that compliance is a formality and that in practice little account is taken of citizens' views

- In Greece, earlier laws had brought many of the Directive's requirements into national law two years before the deadline. The remaining items were transposed about a year late
- The Slovenian report considers Slovenia generally to be in compliance
- In Sweden, compliance is progressing with the extension of the scope of public participation rights to proceedings under more than just the environmental code. But recent legislative changes, under the guise of 'better regulation', have led to a reduction in the number of cases under the environmental code subject to public participation rules

As with the Information Directive, the Commission has launched infringement proceedings (against the Czech Republic, Ireland and Italy). Surprisingly, it did not take any proceedings against Germany for its delayed transposition. UfU and BUND have complained to the Commission based primarily on German law's 'subjective affectedness' requirement, discussed below. Poland has been asked to clarify some questions on its EIA legislation, including public participation and rights of ECOs in the procedure. Generally, getting Member States to transpose and comply with Directive 2003/35 has been harder with the Public Participation Directive than it was with the Information Directive.

There seems to have been less consultation with ECOs than there was with the Information Directive:-

- Estonia involved ECOs (along with other interests) in preparing transposing legislation, though not in the early stages. Many comments made were, however, taken into account
- In Hungary, the Ministry of Environment held a meeting with EIA experts and other NGOs

Perhaps as a result, there have also been serious deficiencies and gaps in how the Public Participation Directive has been taken up into national law and practice:-

- In Austria, there is no provision for participating in EIA procedures at the screening stage
- In Belgium, a new law on EIA has a workable system for early public participation. But for spatial planning, public participation is only anticipated after a 'preliminary' decision has been taken. Thereafter, public participation is window-dressing and ineffective
- In the Czech Republic, EIA screening decisions are not being adequately justified and there is no direct legal tool (review procedure) to challenge this
- In Estonia, public communication on plan and programme proposals is inadequate (information is posted on websites when some rural areas have limited or no internet access), the public rarely gets a chance to comment while all options remain open (the early participation

requirement is not expressly covered), results of public participation are often ignored ('Aarhus Bluff'), and timeframes often too short (two weeks). Specific provisions on access to justice are also absent but the Convention has been directly applied in this respect

- In Poland, the law fails to grant a right to participate in IPPC permitting procedures and access to a review procedure to challenge the terms and conditions of an IPPC permit to the entire public concerned
- In Spain, there is formal compliance, but there are doubts about its application in practice
- In Ireland, while consultations occur over some decisions, some feel it is rather a charade
- In France, too, there is a strong sense that public participation procedures often have no impact on decision-making and just provide cover for the authorities. Recent examples include the Cambior project where many participants objected to the project. As a result the independent commissioner led the hearing, giving a reasoned, negative view, following which the authority simply authorised the project. The Bordeaux railway building plans followed a similar course

Many reports said the main difficulty in implementing this Directive was the restrictive way Member States define criteria for identifying 'the public concerned', those who may participate in environmental processes like licensing or approval procedures for installations such as power stations or landfills:-

- In Germany, *ad hoc* groups may be excluded from public participation
- In the Czech Republic, Hungary and other countries, participation rights extend only to individuals or registered organisations, excluding informal groups
- Challenges to this restrictive interpretation, eg in Spain, have been unsuccessful

The Directive says that the public concerned must be given the opportunity to participate in environmental decision-making procedures at an early stage and when all options remain open:-

- In Germany, the public lacks this opportunity at two crucial, early stages in the proceedings. First, in EIA and other procedures, the public concerned is not involved in scoping although important choices are made at this stage. Second, there is no provision for public comment on the draft decision

Other issues include the high cost of public participation and insufficient time to prepare for participation. In many cases, a six-week period to submit comments, a common timeframe, is insufficient, particularly if technical expertise must be arranged:-

- In Austria, the cost of arranging the necessary technical expertise (expert opinions or independent testing) for licensing proceedings or in connection with an EIA can exceed the resources of environmental or local organisations

- In Germany, the six-week period for public comment is often too short to allow well-developed comments and objections to be made. The period is too brief for the complexity of some planning processes or proposed projects. Nor is proper account taken of the fact that citizens, and often the organisations that represent them, must prepare their comments in their spare time. Unless they are experts in the particular environmental processes or issues concerned, citizens also need time to acquaint themselves with the issues. Any failure to raise a particular point or objection also has serious consequences. If they do not raise it during the six-week comment period, citizens are legally banned from raising a point at a subsequent legal review. So an inflexible, relatively short comment period may mean that one of the Directive's central goals, ensuring effective public participation, is not met
- Spain reports that if the necessary information were made available earlier (and also if more information were available), it would stimulate public participation. The information is generally only available during the time frame of the procedure for public comment. EIA and IPPC national legislation set consultation time frames of 30 natural days. The General Administrative Act, applicable whenever no specific term is established, sets a minimum time frame of 20 days for comment. This means, in practice, that citizens have just 20 or 30 days, depending on the issue, to learn that a project/license/authorisation/proposal/etc. is open for consultation, to obtain the related information available, and to prepare their comments. Under these circumstances, it might be said that it is miraculous that public participation takes place at all.

The difficulty in preparing comments within a fixed, short period is compounded by practical obstacles. Public authority opening hours make it hard for working people to exercise their right to inspect documents. Thus, while documents may be available, in practice only someone willing and able to take time off work may be able to view them:-

- In transposing the Directive, part of a parallel legislative process on the Act on Acceleration of Infrastructure Planning procedures (*Infrastrukturplanungsbeschleunigungsgesetz*), Germany dispensed with the requirement that public authorities pass documents to the person asking for them. People are now required to visit the public authority itself to obtain the information. This puts an unnecessary burden on participation. It would also be useful to have an updated overview of the relevant documents available throughout the decision-making process and not just during the time for public comments. ECOs fear they will no longer be able to meet the federal administrative court's high standard for public comments on plans and projects

Citizens and ECOs seem to be making great use of existing opportunities for public participation, despite a growing sense that participation is a formality. But there appears to have been little or no awareness-raising of the opportunities for public participation which the Directive is meant to provide:-

- In Austria, ECOs are not participating in EIA or IPPC procedures, due, inter alia, to the cost
- In the Czech Republic, ECOs regularly attempt to use rights granted by the Aarhus Convention and the Directives in development consent procedures. This occurs more frequently in EIA than IPPC proceedings, which are often more technically complex. Environmental lawyers for the organisations refer to the Public Participation Directive systematically particularly in court proceedings. The most frequent problems are failure to tell the public concerned that the procedure is to start, refusal to provide copies of relevant documents, short deadlines for submitting comments and little or no response to comments submitted
- In Cyprus, notices of EIA proceedings or IPPC permitting are published in obscure newspapers, if at all, contributing to the sense that public participation is unwanted
- French NGOs have been participating in EIA and IPPC permitting proceedings for years. But the impact of participation varies between proceedings and authorities. Some doubt whether the opinions given in public participation proceedings receive serious consideration. A recurrent problem is how notice of the opportunity to participate is given. Announcements are often buried in local newspapers and only the most careful reader can spot them
- In Germany, the public had previously already participated as far as they were able in EIA and IPPC permitting procedures. No increase has yet been seen. Indeed, the Directive may have driven a move in the opposite direction. In reply to the Directive, the German Government-drafted Act on the Acceleration of Infrastructural Proceedings reduced public participation
- A similar development has been observed in the Netherlands
- In Slovenia, public authorities see the Directive just as an instrument for consultation, rather than as a mechanism for fuller active public involvement
- In Romania, the public has to date rarely had an opportunity for timely comment nor does it receive responses to its comments, underlining the need for the Directive's implementation
- In Spain, formal compliance has not translated into consistent implementation in practice. Citizens remain unaware of their rights and often do not exercise them
- But in Ireland the Environment Ministry has prepared and distributed a detailed public participation guidelines document
- In Poland, major progress has been made in assuring compliance with the public participation provisions of EU environmental law. Local residents and ECOs often participate in proceedings where the right to participate exists. The Environment Ministry has also run EIA and IPPC training projects for officials which highlight public participation

Use of the courts:-

- In Austria, ECOs' standing is limited and citizens' public participation and access to justice rights are essentially non-existent. The lack of interim relief in, eg, federal road and rail projects, makes remedies ineffective
- In Belgium, it takes c. five years to get a decision from the Council of State. A faster process is unavailable unless personal damage can be shown, which ECOs generally cannot do

- In the Czech Republic, there are difficulties over the inconsistent way courts handle impairment of individuals' and organisations' rights. ECOs must satisfy the requirement that they may only object to a decision's unlawfulness if they can demonstrate that their procedural rights were violated in a way which might result in an unlawful decision. This approach focuses on procedural issues and not substantive questions of environmental protection. There is a further difficulty with the EIA process, which concludes in an 'opinion' which serves only as a basis for subsequent development consent. But opinions are, in the Czech courts' view, not reviewable. Injunctive relief, though theoretically available, cannot generally be obtained in actions brought by organisations. As a result, several cases were won long after the project being challenged had been built
- In Denmark, a court sought a new public hearing on an EIA about a road project in a protected nature area after a challenge to deficiencies in how the first hearing was run. Remedies are generally considered adequate. But injunctive relief is virtually impossible to get. Timely court rulings are rare. On average, administrative court decisions take 18 months to two years. The introduction of a DKK 500 fee for each complaint has apparently not reduced the cases filed
- In France, remedies for inadequacies in public participation are not seen as adequate or effective. Even in an administrative procedure, it often takes over a year to get a decision and suspending the public authority's decision requires a hard-to-obtain emergency procedure
- In Germany, ECOs are effectively denied access to justice by the requirement to assert 'subjective affectedness'. Even approved organisations (which can demonstrate they have been active for at least three years) get access to justice only by referring to individual rights. *Ad hoc* groups have no right of action, even at administrative court level
- In Hungary, several pre-2004 cases considered how far NGOs had standing in non-EIA or non-IPPC cases. In 2004, the highest court broadened the scope of standing to every procedure in which the competent environmental authority took part. Other cases have established that non-membership NGOs' standing is equal to that of membership organisations and ruled that deficiencies in the public commenting procedure in an EIA process amounted to a substantive breach of law leading to the EIA decision's annulment
- In Ireland, the courts tested and rejected the Government's claim that existing regulations adequately transposed the Directive. Attempts to test how far the Directive has direct effect are continuing
- The Bird Watchers' Association, one of the largest Slovenian nature conservation organisations, launched an important case about the EIA for a wind power electricity generating plant. This NGO does not have official status as an organisation for the public interest and so is denied access to the courts, for reasons described below. This case is pending. Another was brought to the Constitutional Court by Umanotera, the Slovenian Foundation for Sustainable Development, to review the constitutionality of a government resolution on national development projects. Umanotera claimed breach of EIA rules and the constitution but the court dismissed the case, claiming not to have jurisdiction over resolutions

Implementing the right to appeal against decisions after public participation has also raised problems:-

- In Sweden, ECOs have had access to justice since 1999 for some decisions under the environmental code. In implementing the EIA Directive and the Aarhus Convention, the Government's initial interpretation of the scope of the right of appeal according to the existing rule was shown to be too generous. Following the highest court's ruling in an appeal brought by Sweden's largest ECO, EEB member SSNC, it was clear that the rule in the environmental code did not cover the possibility of appealing against some types of decision under the environmental code which according to the EIA Directive and Convention should be covered. After criticism from various sources (environmental law scholars, the Swedish Environmental Protection Agency and ECOs), the Government revised its proposal and extended the right of appeal. These changes are now in effect. But debate continues on whether rules implementing access to justice in other laws go far enough (eg adequately covering planning law decisions). SSNC has also launched an appeal on this point
- New possibilities to appeal against permits issued under laws other than the environmental code are being used in Sweden. Knowledge that these decisions can be challenged is expected to lead to more careful decision-making by the authorities

Seminar presentations

Franziska Mischek, from UfU (Germany), opened the discussion. Public participation in environmental decision-making is nothing new but its acceptance is still a problem. In Germany, for instance, implementation of the Directive's Article 3.7 restricts public participation opportunities to ECOs which have been registered for three years.

There has been a marked trend towards restricting the opportunity for public participation by accelerating decision-making, eg in planning issues. For instance, deadlines for submitting objections to infrastructure projects have been halved. Since participating in the process preceding a decision is generally a prerequisite for that decision's later judicial challenge, restrictions on public participation also effectively restrict access to justice. Is public participation increasingly becoming a mere formality? If authorities simply see public participation as a set of requirements to be met instead of an opportunity to seek the views of the public and the ECOs which represent them, citizens will also increasingly be discouraged from making an effort to participate in public proceedings. This would not be in line with the intentions of the EU Directive or the Aarhus Convention.

Thomas Alge of Justice & Environment Network (J&E), described the work of the network. It is quite a recent development and currently has members in ten countries, mainly in Central Europe, not all of them EU members (Austria, Hungary, Czech Republic, Slovakia, Slovenia,

Croatia, Macedonia, Romania, Estonia and the Netherlands). J&E has run case studies and analyses of public participation and Aarhus implementation in the countries where it operates. One focus has been transport (infrastructure) projects. J&E identifies several key difficulties. The cost of technical expertise is high and deadlines for public participation often too short. Not all the necessary documents are available, and getting them can be expensive. Sometimes there are too many documents and analysing them can be overwhelming. Comments from the public participation process are often not reflected in the decision and the reasons why the public authority disagreed with the comments not clearly expressed. At times, taking account of comments from the public participation process seems a mere formality. To echo Franziska Mischek's point, restrictions on the public permitted to participate also effectively cut off public participation and corresponding access to justice rights. Standing to sue can, in practical terms, also be limited by formalities, such as (even nominal) fees for bringing a case. Standing can legally be limited by criteria few organisations can meet. In particular, the interpretation of 'public concerned' needs careful attention. In practice, groups like neighbourhood associations are often excluded. The type of issue groups may raise is also limited. Nuisance issues, for instance, may be raised but non-compliance with EU laws may not. There are other, generally inadequate, processes for the latter. Injunctive relief is generally not available, so deficiencies in the public participation process can be brought to a court's attention but the underlying decision-making process cannot be halted to allow deficiencies to be remedied.

Issues raised in the discussion

- Is there a difference between consultation and participation? In law, consultation is the right to be heard, based on adequate prior notice and information. Participation implies more of a role in decision-making, perhaps even everything but voting. The Aarhus Convention's public participation articles clearly mean consultation. But the Convention's Article 6 would not prevent parties from giving the provisions a fuller sweep, even including voting. The example was given of Swiss decision-making by referendum. Properly understood, public participation is something of a joint venture with the authority concerned. See the Convention's recitals for support for this claim
- The current trend towards more Internet consultations is welcome but also raises concern. Such consultations are no substitute for direct dialogue between citizens and decision-makers. Anonymous submissions to Internet consultations are also an unwelcome development and should be forbidden. Anonymous submissions are by definition stripped of information about the makers and their possible interest in the decision
- Another trend is to use public-private partnerships to avoid public participation requirements. But it is unclear when such partnerships would not have to meet the Directive's requirements
- What experience is there with public participation in the context of the IPPC Directive?

- Are there any good practices of developers/project backers responding thoroughly to public comments? Yes, there is the Swedish example of how the Roads Authority responds to comments
- Earlier speakers' concerns that public participation threatens to turn into a marketing exercise were echoed. Public participation is also not easy and more capacity-building would be useful. It is essential that participation begins early enough in the process
- Systemic assessment, perhaps through an independent monitoring body, would be useful

Recommendations

- (1) Create public participation monitoring committees in all countries and at EU level
- (2) Invest in awareness-raising for citizens and training in effective use of public participation rights
- (3) Give priority to training and capacity-building for officials and citizens
- (4) Establish safeguards to ensure public authorities take substantive account of public comments when making decisions
- (5) Require information to be released within reasonable timeframes to give the public long enough to become informed and to prepare and participate effectively. Current deadlines barely fulfil these conditions
- (6) Require more proactive measures to inform public, eg electronically, of opportunities to participate
- (7) Make notice procedures more citizen-friendly
- (8) Assert *ad hoc* groups' right to participate
- (9) Courts and administrative authorities should directly apply the Aarhus Convention and Directives where national law conflicts with or does not fully implement them

ACCESS TO JUSTICE: THE THIRD PILLAR OF THE AARHUS CONVENTION

Survey responses

The survey also investigated the views held by environmental citizens' organisations (ECOs) on the need for the proposed Directive on Access to Justice in Environmental Matters. The Commission's proposal is stalled in the Environment Council where most Member States have claimed that the Directive is simply not needed. The survey shows that ECOs have a different opinion.

The survey shows strong support for a Directive and a marked view that the proposed Directive would improve access to justice (Austria, Belgium, Cyprus, the Czech Republic, Germany, Hungary, Ireland, Italy, Romania and Slovenia). Several reports state clearly that the mere existence of a Directive would help, particularly by positively influencing the courts' attitude to access to justice in environmental matters. Actions on matters (eg noise, land-use planning) not necessarily covered by environmental law could also have better chances based on the definition of environmental law in the proposed Directive. The proposed Directive could lead to the requirement to introduce capacity-building elements into national procedural laws, such as fee-waivers for NGO plaintiffs.

- In some Member States, eg Portugal, the law already allows any citizen or NGO to bring an action to court to defend an environmental interest
- Hungary is already considered substantially to comply with the Aarhus Convention's access to justice requirements. The key shortcoming identified concerns the current system of high expert fees in judicial procedures in environmental matters

Among the most oft-mentioned specific changes that the proposed Directive could bring to improve access to justice are reducing the costs of legal proceedings and recognising ECOs' right to bring cases to challenge non-compliance with EU environmental law at national level.

- In France, professional legal representation is required before the higher courts. The costs of representation can be prohibitive, which the proposed Directive aims to address
- In the UK, the risk of bearing one's opponent's legal costs acts as a major deterrent to legal action
- In Slovenia, the possibilities of the public and ECOs challenging public authorities' violations of environmental law are slim. The difficulty lies in the narrow standing rules. The law allows ECOs to participate in administrative or judicial procedures if they qualify as an ECO acting in

the public interest. But an annual financial audit is required to obtain this status. In practice, this requirement is a major obstacle. The audit is expensive and is a burden companies do not face. Slovenian law requires annual financial audits only for businesses with over 50 employees. No Slovenian ECO employs over 50 people. As a result of this and other restrictions in the law, only about ten nature conservation groups, and no environmental protection organisation, have obtained the necessary status. In practice, this means there is currently no access to justice for ECOs

- In Sweden, the Directive would improve access to justice for organisations since the current environmental code excludes ECOs without voting members (WWF and Greenpeace, for instance) from access to justice
- In Ireland, the proposed Directive would broaden standing rights and would allow challenges to both procedure and substance. This is not currently the case in, eg the judicial review of a Planning Board decision, where only the procedures may be examined
- In Poland, the proposed Directive would improve access to justice for ECOs where it is not currently granted: in environmental proceedings where existing laws do not require public participation

However, effective access to justice requires more than the proposed Directive in its current form. Access to justice would benefit from development of the Convention's Articles 9.4 and 9.5, ie setting timeframes and practical measures to overcome financial and other barriers.

- But the proposed Directive would do little to reduce the time it often takes to get a decision
- Nor would it help address the issue of funding cases where the cost of the necessary technical expertise is high

It is recognised that the solutions to some barriers to the courts, eg the lack of human and financial resources, are not exclusively legal in nature.

The survey also asked whether there was any concern that a weak Directive could lead to a roll-back of existing rights. The responses showed that in some countries this risk exists:-

- In Estonia, the courts have directly applied the Convention's access to justice requirements, in the absence of Estonian laws. ECOs have been granted broad standing with none of the limiting criteria found in the proposed Directive (legal entity, three years' activity, annual report, organisational structure). Introduction of these criteria would most harm smaller, local, and newer ECOs, precisely those often best suited to protect environmental interests in specific local situations. While the proposed Directive allows countries to be laxer in establishing such criteria, it is to be expected that Estonia, like other EU countries, would opt for a precise 1:1 transposition

- In Hungary, this risk is present as a fortunate result of the current situation where access to justice in environmental matters is quite well developed and there are no major procedural obstacles to NGOs and the public bringing suits
- In Poland, the proposed Directive includes formal requirements for access to justice not found in Polish law. Although the proposed Directive provides only for minimum requirements, there is a risk of triggering the introduction of these additional requirements into national law. The risk is present given recent tendencies in Polish environmental law to limit the rights of the public and ECOs and to go no further in national environmental provisions than required by EU law
- In Spain, rollback is already evident. Much regional environmental law already provided for open legal standing and there have been recent favourable court decisions, but some criteria in the proposed Directive were seized on by the Spanish legislator to restrict standing. For instance, standing has been restricted to NGOs which meet requirements such as having been legally established at least two years before an action is brought and actively pursuing the aims provided in its bylaws; requiring bylaws expressly to include protection of the environment in general or a particular element of it, and requiring activity pursuant to an NGO's bylaws to take place in a territory affected by the challenged act or omission
- In Sweden and the Netherlands, where access to justice is in some respects broader than the Directive would require, there is concern that opponents of access to justice for ECOs might urge changes to eliminate access to justice rights that exceed the Directive. This is part of a more general trend in countries towards 1:1 implementation. This risk could be addressed by the terms of the Directive itself, but given the Council's reluctance to advance on the Directive it is unlikely that the Directive's terms will exceed existing provisions in Member States with more extensive national provisions.

Others did not view rollback as a concern (Austria, Belgium, Germany and Italy):-

- Slovenia has yet to reach the level of access to justice the proposed Directive demands, so the risk of rollback is absent

Specific concerns about the Directive as proposed include the criteria for recognising groups entitled to access to justice. For instance, imposing geographical criteria might mean that national groups were unable to act at local or regional level. Accounting requirements might introduce new administrative burdens on ECOs, beyond what national authorities now require. The concept of recognition itself could be abused by authorities to block access to courts.

The survey responses concluded that compliance with the Aarhus Convention's third pillar remains to be achieved in most countries. Existing barriers mean the public and ECOs in particular have limited scope to challenge the procedural or substantive legality of many environmen-

tally-relevant decisions. Review by courts, to the extent it is possible, is often ineffective due to the time it takes them to reach a decision and the difficulty of obtaining the effect of suspension. The cost of proceedings is another major factor blocking individuals and NGOs from taking legal action.

Seminar presentations

Pavel Cerny of the Environmental Law Service in the Czech Republic, and J&E began with a presentation. The proposed Directive would be a useful and positive development to give access to justice a general legal basis in EU law. This could change courts' interpretations of the rights of citizens and their organisations to bring lawsuits. Even if such a legal basis in EU law did not require changes in national legal systems, it could have a positive impact by influencing countries to change their own procedural rules to be less restrictive in access to national courts. For citizens and ECOs, the existence of such a legal basis in EU law might provide an argument to use with national governments and parliaments to urge them to make greater access to justice possible, eg by reducing cost barriers. On the down side, the proposal's definition of 'qualified entities' which had access rights, is a problem. The criteria included in the proposal might have the effect of reducing access to justice in some cases and countries. It would be better to replace 'qualified entities' with 'public concerned'. On balance, the Access to Justice Directive would bring improvements. It is an opportunity, with risks, and ECOs should support it, on condition there were some improvements to the proposal.

Issues raised in the discussion

- Some participants agreed it was reasonable to anticipate that the proposal would be used to limit, and not extend, access to justice in their countries
- In other EU countries, the Directive would be a useful corrective to current interpretations of national law that restricted access to justice, particularly where public participation is concerned
- The Access to Justice Directive would bring improvement. An example of an improvement found in the proposal is the provision for interim relief. Its normative effect would also be felt. But this would not necessarily be positive. Comparison was made to the Environmental Liability Directive. It introduced a permit compliance defence not found in some national systems and now under pressure to accept the defence
- There was a question whether, given countries' declared reluctance to support access to justice, the Directive would require a series of infringement proceedings against countries to move them forward. The EU's declaration on ratification was recalled

- Another question concerned the direct effect of the Convention's Article 9.3 and whether, if such an effect existed, a Directive was required. But the question of direct effect may not be the real issue. That was whether a person in an EU country could invoke the access to justice provision
- The EU is clearly competent to act on the third pillar Directive. Ratification is, in effect, a promise of implementation to all other Parties, both current and potential

Recommendations

- (1) Adopt the proposed Directive, after eliminating objectionable criteria for 'qualified entities'
- (2) The internal review procedures envisaged by the proposed Directive should also meet criteria for environmental proceedings established under the proposal's Article 10, such as not being prohibitively expensive, etc
- (3) Remove practical barriers at national level to access to justice
- (4) Make suspensive relief easier to obtain

CONCLUSIONS AND RECOMMENDATIONS FOR FURTHER ACTION

While formal implementation of the Information Directive seems satisfactory, the survey shows that with the Public Participation Directive, it is tardy and incomplete. In both cases, difficulties with practical application are also clear. With the third pillar of the Aarhus Convention, the survey reveals there is a demand for an Access to Justice Directive.

Member States are to:-

- Open up access to justice to facilitate better enforcement of EU environmental law
- Reduce the time taken to obtain judicial and quasi-judicial decisions and take measures to reduce the cost of proceedings
- Unblock discussions on the proposed EU Access to Justice Directive
- Reduce costs of public participation
- Help authorities provide for public participation through training and other support to officials

European Commission is to:-

- Ensure early assessment of the Public Participation Directive's implementation
- Address Commission's capacity constraints in monitoring and stimulating implementation
- Provide guidance on copyright questions and other issues arising in several Member States
- Resist pressure to withdraw its proposal on access to justice

European Parliament should:-

- Insist on progress on the proposed EU Directive on Access to Justice
- Closely monitor progress on EU Aarhus implementation, with particular attention to the Public Participation Directive

ECOs are advised to:-

- Demand improved practical arrangements for (eg) opening hours and electronic access instead of cost and inconvenience of photocopying
- Support initiatives to reduce barriers (lack of and cost of expertise) to public participation
- Approach national environment minister to demand active support for the EU Directive on Access to Justice, and urge the EU Presidency to re-launch the debate in the Environmental Council
- Use arguments based on the Convention and Directives in national legal disputes

THE EU AARHUS REGULATION

The European Community's signature of the Aarhus Convention in 1998 obliged the EU also to take measures to apply the Convention's provisions to EU institutions and bodies.

The first opportunity to apply the Convention's requirements to these institutions and bodies, at least as far as the first pillar on access to information is concerned, arose during adoption of the EU's first binding legal instrument on access to documents, Regulation 1049/2001 on Public Access to European Parliament, Council and Commission Documents. But this Regulation is an instrument of general application and does not specifically concern environmental information.

What is more, as originally proposed in 2000, Regulation 1049/2001 was roundly criticised by journalists, legal transparency experts and others, including EEB. This last focused on the proposed Regulation's failure to take account of the Convention's requirements. Parliament responded to criticism of the original proposal with amendments reinforcing the proposal in important ways. The Regulation ultimately incorporated many of them. But the effort to strengthen the Regulation's general rules left little room for attention to the Convention's specific requirements. Instead, the Regulation said it was "without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law [eg, the Convention] or acts of the institutions implementing them" (Art. 2.6), and the Convention's EU-level implementation was deferred.

Regulation 1049/2001 took effect towards the end of 2001, at least for the three main EU institutions to which it applies (Commission, Parliament and Council). During 2002, the Commission, particularly DG Environment, produced a proposal to apply the three pillars of the Aarhus Convention to all EU institutions and bodies, not just the three key EU institutions covered by the Regulation. In October 2003, over five years after signing the Convention, the Commission issued its proposal for a Regulation to apply the Convention to EU institutions and bodies, (COM (2003) 622 final).

In September 2006, the EU adopted Regulation 1367/2006 on the Convention's application to institutions and bodies. The Regulation applies from 28 June 2007. Thus, almost nine years to the day after signing the Convention, the EU finally incorporated its provisions into law for its own institutions and bodies.

The provisions of Regulation 1367/2006 are most detailed for the first pillar, access to environmental information. This Regulation represents a partial repair of the shortcomings of the general rules of Regulation 1049/2001. Environmental information is defined accurately to track the Convention's definition. The Regulation also defines environmental law broadly enough to

encompass EU environmentally-related laws whether adopted under the EU Treaty's environmental, internal market or other legal basis. Regulation 1367/2006 applies to all Community institutions and bodies "except when acting in a judicial or legislative capacity". On access to environmental information, the exception applies only to bodies when acting in a judicial capacity (Art. 2.1(c)). This is an improvement on the scope of general Regulation 1049/2001, which applies only to the Commission, Parliament and Council and not to their subsidiary bodies or EU agencies.

In line with the Convention, Regulation 1367/2006 also broadens the scope to apply the right of access to environmental information to "any natural or legal person", where Regulation 1049/2001 limits the right of access to documents to EU citizens or residents.

Both Regulations contain provisions on the electronic availability of documents and require registers. Regulation 1367/2006 requires environmental information held by EU institutions and bodies to be progressively made available in electronic databases. The Regulation also specifies the environmental information to be made available including "steps taken in proceedings for infringements of Community law from the stage of the reasoned opinion." (Art. 4.2(c)).

Where EU institutions or bodies do not hold the information requested, they shall "as promptly as possible" and "within 15 days" tell the applicant which body they believe holds the information or make an onward transfer themselves. This provision tracks a Convention requirement and is not expressly found in Regulation 1049/2001.

Regulation 1367/2006 is most problematic when applying exceptions to requests for access to environmental information. The Regulation chooses to refer to the general rules of Regulation 1049/2001 despite discrepancies between Regulation 1049/2001 and the Convention. Regulation 1049/2001 makes an exception for the "financial, monetary or economic policy of the Community or a Member State." This exception is not found in the Convention. Regulation 1049/2001 also protects commercial interests more broadly than does the Convention. Regulation 1049/2001 also contains an exception for "court proceedings and legal advice" whereas the corresponding exception in the Convention is to protect "the course of justice" and the Convention contains no exception at all for "legal advice". Regulation 1049/2001 also makes no provision that the exceptions be interpreted restrictively, as the Convention expressly provides.

Regulation 1049/2001 also allows Member States to veto a document's release. Regulation 1367/2006 leaves this provision intact, although it is in apparent conflict with the Convention. Cost provisions and practical arrangements are not explicitly handled in Regulation 1367/2006. These are left to Regulation 1049/2001, or the rules of procedure of the various EU institutions and bodies.

The Aarhus Convention's second pillar, on public participation, is reflected in summary in Article 9 of Regulation 1367/2006. This deals with public participation in plans and programmes relating to the environment, but is silent on policies. Overall, the provisions reflect the Convention's demands for early and effective information on, and opportunities for, public participation although conformity with the Convention could in some respects be more precise.

Regulation 1367/2006 also addresses access to justice, the Convention's third pillar. It introduces a procedure for internal review of administrative acts (and omissions) by EU institutions or bodies. Internal review procedures are, however, open only to qualifying NGOs according to criteria listed in Article 11 of Regulation 1367/2006. No specific provision is made for internal review by individuals. The Convention's third pillar does, however, seem to require the right of review also to be open to individuals. In comparison with Regulation 1049/2001, the deadlines for internal review are longer, 12 or even 18 weeks compared with 15 working days. The Convention requires review to be 'timely'. Regulation 1367/2006 also allows NGOs to institute proceedings before the European Court of Justice (ECJ) on completing the internal review process. But there is doubt whether Regulation 1367/2006's access to justice provisions will genuinely provide access to the ECJ, even for NGOs.

While Regulation 1367/2006 has just begun to apply and its reach and impact remain to be tested, the Commission has recently launched a review of Regulation 1049/2001. This review is itself several years late, as the Regulation asked the Commission to report on its implementation by January 2004, followed within a reasonable period by revision proposals. Earlier this year, the Commission presented a Green Paper on the review of Regulation 1049/2001 and launched a public consultation. EEB's response to the Green Paper can be found on our website:- <http://www.eeb.org/activities/transparency/EEB-position-access-to-documents-240707.pdf>

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ANNEX 2

Useful websites

European Eco-Forum	www.participate.org
European Environmental Bureau (EEB)	www.eeb.org
Justice & Environment Network	www.justiceandenvironment.org
UN ECE Aarhus Convention site	www.unece.org/env/pp/
DG Environment Aarhus page	http://ec.europa.eu/environment/aarhus/index.htm
The Aarhus Convention Clearinghouse	http://aarhusclearinghouse.unece.org/
Access Initiative	www.emla.hu/taieurope
Ecosphere	www.ecosphere.be
ClientEarth	www.clientearth.org

Legal Instruments

The Aarhus Convention: <http://www.unece.org/env/pp/treatytext.htm>

Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC, OJ L 41, 14.2.2003, p. 26:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0004:EN:HTML>.

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<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003L0035:EN:HTML>.

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http://ec.europa.eu/environment/aarhus/pdf/dec_2005_370_en.pdf

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http://eur-lex.europa.eu/LexUriServ/site/en/oj/2006/l_264/l_26420060925en00130019.pdf.

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Selected Reading

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Justice & Environment Network Aarhus 2006 Project:
www.justiceandenvironment.org/je-international/aarhus/.

Aarhus Compliance Committee report on the interpretation of Article 9.3 of the Aarhus Convention,
<http://www.unece.org/env/documents/2006/pp/ece.mp.pp.c.1.2006.4.add.2.e.pdf>, particularly paragraphs 16, 34-37

'Justice & Environment Annual Work Plan 2006 International Research Topics', J&E:
<http://justiceandenvironment.org/je-international/>

'Environmental Democracy - An Assessment of Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters in Selected European Countries', Ewing, Kiss, Poltimae and Struminska:
http://www.emla.hu/img_upload/0aa155da39c21509c55c587879f86484/TAI.pdf

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