Economic Commission for Europe

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Access to Information, Public Participation
in Decision-making and Access to Justice
in Environmental Matters

Task Force on Access to Justice

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Item 2 of the provisional agenda
Access to justice in cases
on the right to environmental information

Information paper N4 revised

QUESTIONNAIRE
Access to justice in cases on the right to environmental information

At its sixth session[1], the Meeting of the Parties to the Aarhus Convention set out the mandate of the Task Force on Access to Justice to promote the exchange of information, experiences, challenges and good practices relating to the implementation of the third pillar of the Convention with special attention to information cases. Available information sources such Aarhus Convention national implementation reports and e-justice initiatives provide very basic overall description of existing framework but do not go in the details about its elements such as scope of review, time limits, remedies, costs and etc.

To overcome the information gaps, the Aarhus Convention Task Force on Access to Justice will carry out a survey to collect more detailed information, examples legislation provisions and case law relevant to access to justice in cases on the right to environmental information. The survey could be an important contribution to identifying good practices, addressing key challenges, populating the jurisprudence database and fostering capacity-building efforts to support work in this area. The survey outcomes will lay the ground for advancing the implementation of article 9, para. 1, of the Aarhus Convention and contribute to the monitoring of SDG 16 targets 16.3 and 16.10.

A draft questionnaire was discussed at the eleventh meeting of the Task Force on Access to Justice in Geneva in Geneva on 27-28 February 2018[2] and thereafter revised by the secretariat in consultation with the Chair in the light of the discussion at the meeting and further comments received.

The present questionnaire is distributed to a selection of institutions specialized on information cases in a representative number of Parties from different subregions. In addition, representatives of judiciary, judicial training institutions, other review bodies, non-governmental organizations and stakeholders are welcome to contribute with input on any issue in the questionnaire.

The outcomes of the survey will be synthesized with information from the national implementation reports to a report which will be discussed at the next meeting of the Aarhus Convention Task Force on Access to Justice in Geneva in 2019 and further reported to the subsequent meeting of the Working Group of the Parties to the Aarhus Convention.

Those who want to take part in the survey are kindly invited to complete and return the questionnaire to the following email address: **aarhus.survey@unece.org** with the subject line "11TFAJ survey from [name of country, organization]" for processing **before 1 October 2018**. Kindly be informed that the completed questionnaires will be posted on the website of the twelfth meeting of the Task Force.

[1] See para. 14(a) (i) of decision VI/3 of the Meeting of the Parties adopted at its sixth session (Budva, Montenegro, 11–13 September 2017) available from http://www.unece.org/env/pp/aarhus/mop6_docs.html
[2] More information is available from http://www.unece.org/env/pp/aarhus/tfaj11.html

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Questions concerning access to justice in cases on the right to environmental information:

1. Please indicate *time limits* for public authorities holding environmental information to respond to requests for environmental information. Is there a requirement for the issuance of a *refusal in writing and stating reasons* for the decision? How is the applicant *informed* about the possibilities to appeal the decision?

The reply to this questionnaire reflects the practice of the European Commission. In case of environmental information reflected in documents held by EU institutions, they have to apply a common legal framework, i.e. Regulation (EC) n. 1049/2001 of 30 May 2001 as complemented and amended by Regulation (EC) n. 1367/2006 of 6 September 2006. Moreover, the Commission adopted Decisions[3] amending its Rules of Procedure as regards detailed rules for the application of Regulation (EC) n.1367/2006. The Decision of 30 April 2008 deals partially with access to environmental information. It is worth recalling that the Member States of the EU have to apply Directive 2003/4/EC, adopted to ensure that laws of Member States are fully consistent with the Aarhus Convention.

According to Article 7 of Regulation n. 1049/2001, an application for access to documents has to be handled promptly. An acknowledgment of receipt has to be sent to the applicant. Within 15 working days from the registration of the application, the institution has either to grant access to the requested documents or, in a written reply, state the reason for the total or partial refusal and inform the applicant of his or her right to make a confirmatory application asking the institution to reconsider its position. In exceptional cases, such as applications relating to a very long document or to a very large number of documents, the time-limit may be extended by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given.

EU law complies with Article 9(1), second sub-paragraph of the Aarhus Convention which states: '*Where a Party provides for such a review by a court of law, it shall ensure that such a person also has access to an expeditious procedure established by the law that is free of charge or inexpensive for reconsideration by a public authority or review by an independent and impartial body other than a court of law'.* , Within the European Commission, the initial reply is ensured by the Directorate-General or Service competent for the matter of the requested documents. In case of total or partial refusal, the applicant may submit a confirmatory application to the Secretary-General of the Commission, which has to be treated in accordance with Article 8 of Regulation n. 1049/2001. The same deadlines and similar rules as for an initial application have to be applied.

[3] Decision of 13 December 2007, published in OJ L 13 of 16.01.2008, page 24 and Decision of 30 April 2008, published in OJ L 140 of 30.05.2008, page 22.

In the framework of its review, the Secretariat-General of the Commission conducts a fresh review of the reply given by the Directorate-General concerned at the initial stage. The confirmatory decision contains a section dealing with available means of judicial and non-judicial redress. It provides that the applicant may either bring proceedings before the General Court or file a complaint with the European Ombudsman under the conditions specified respectively in Articles 263 and 228 of the Treaty on the Functioning of the European Union.

In compliance with Article 17(1) of Regulation n. 1049/2001, each year the Commission (as other institutions) publishes a report which provides an overview of how it applied the access-to-documents rules in the previous year. The report is based on statistical data summarised in an annex. The statistics reflect the number of applications received in the previous year and the replies provided to them. They do not reflect the number of documents requested or (partially) disclosed, which were far more numerous. Generally the report contains an analysis of the applications (proportion per Directorate General/Service; profile of applicants; type of access provided (full/partial/refusal)), the main exceptions invoked at initial stage and at confirmatory level, complaints to the European Ombudsman and judicial review with the summary of the main ongoing and closed cases. The last report available (COM(2017) 738 final of 6 December 2017) provides an overview of the treatment of applications for access to documents in 2016.

2. What are the *time limits to appeal* a decision on access to environmental information? What are the most frequently used grounds for appeal? Are there any issues concerning *who has standing* in such cases? To *what body and in which form* is the appeal made; recourse for review within the public authority or to the higher authority; Information Commissioner, Ombudsman or any other independent and impartial body; or directly to court of law? If appeal to the review body other than a court of law is available in any form, does that request suspend the time limits to appeal to the court? Is there a requirement of *exhaustion* of administrative review procedures prior to bringing the case to court?

Some information about this question was provided in the previous reply.

Regulation (EC) n.1049/2001 envisages the exhaustion of the administrative review before the initiation of any legal or administrative redress mechanism. In other words, before going to the General Court or the European Ombudsman, a confirmatory decision by the Secretary-General of the Commission, taken by delegation on behalf of the European Commission, has to be adopted. Only this decision is the final act allowing access to the review provided for in Article 9(1) first sub-paragraph of the Aarhus Convention.

Failure by the institution to reply within the prescribed time-limit is considered as a negative reply and entitles the applicant to institute court proceedings against the institution or make a complaint to the Ombudsman. However, if an explicit confirmatory decision is adopted following an implicit refusal, only the explicit refusal is taken into account.

The confirmatory procedure is free of charge.

There are no issues concerning legal standing. In fact, any person who considers that his or her request for access to documents or environmental information has been ignored, wrongfully refused, whether in full or in part, inadequately answered or otherwise not dealt with the rules of Regulation has access to the review procedures enshrined in the first and second sub-paragraphs of Article 9(1) of the Aarhus Convention.

As mentioned, the annual report published by the Commission contains statistics about the most frequently used exceptions for refusal invoked at the initial stage and at confirmatory stage by the Commission. As an example in 2016 : '*At confirmatory stage, the most frequently invoked, main ground for confirming a (full or partial) refusal of access was the protection of privacy and the integrity of the individual, representing a 45% increase in comparison to the previous year (28.3% in 2016, in comparison to 15.6% in 2015). In the second place was the exception protecting the decision-making process (22.3%, compared to 16.4% in 2015). The exception protecting the purpose of inspections, investigations and audits was invoked considerably less frequently (20.3% in 2016, compared to 37.7% in 2015), putting it in the third place. The fourth and the fifth rank were occupied, respectively, by the exceptions protecting commercial interests (15.9%, compared to 13.1% in 2015), and court proceedings and legal advice (5.6%, compared to 4.9% in 2015)'.*

There are no statistics regarding the grounds relied on by applicants to contest initial or confirmatory decisions.

3. If appeal is made to an independent body mentioned above, how is the *independence and impartiality* of that body ensured?

In the framework of its review, the Secretariat-General of the Commission conducts *'a fresh review of the reply given by the Directorate-General concerned at the initial stage'*. It does not intervene in any way in the instruction and the content of the initial reply which reflects only the position of the Directorate-General or Service responsible for the subject matter covered by the requested documents.

4. What *costs (fees, charges)* are connected to review before the court of law or other review bodies in these cases?

In the EU legal system, against final decisions on access to environmental information two alternative means can be used:

- bring an action before the General Court under the conditions of Article 263 of the Treaty on the Functioning of the European Union (TFEU); or
- file a complaint with the European Ombudsman under the conditions specified respectively in Article 228 TFEU.

However, the remedies differ in several respects:

- an action to the General Court is a judicial review, subject to the mandatory representation by a lawyer, to be brought within a specific deadline and with the application of the principle '*the loser pays'*; deadline is 2 months from the notification of the decision (see Article 263 (6) TFUE) plus 10 days of time on account of distance (so-called *'délai de distance'* that is provided for in Article 60 of the Rules of Procedure of General Court);

- a complaint to the European Ombudsman concerns an instance of alleged maladministration in the activities of the EU institutions (or bodies), which can be presented by the applicant. Complaints to the European Ombudsman are free of charge. In accordance with Article 2(4) of the Ombudsman's Statute, a complaint *'shall be made within two years of the date on which the facts on which it is based came to the attention of the person lodging the complaint'.*

For the decision of the General Court the principle of *res judicata* applies and in compliance with Article 266 TFEU it is up for the institution (or body) whose act has been declared void to take the necessary measures to comply with the judgment. For the decision of the European Ombudsman - which can concerns only maladministration in dealing with the request for access to documents or environmental information – the relevant institution (or body) is not obliged to follow the approach suggested by the European Ombudsman, even if usually the institution (or body) does so.

Decisions of the General Court may be subject to a right of appeal to the Court of Justice on points of law only.

The General Court does not require plaintiffs to pay 'court fees' to bring a judicial action. The most important costs to be borne by the applicant are lawyer's fees (notably for drafting written pleadings and, if held, for providing representation at the hearing). These costs vary depending on the number, experience and expertise of the lawyers engaged.

5. What is the average time needed for the court of law or another independent and impartial body to decide an information case, i.e. from the introduction of the appeal to the notification of the decision? If the national rules of appeal require administrative reconsideration before the appeal is submitted to the court of law or another review body, that time should also be also separately specified.

The average length of an access to documents case is 20 months (see the 'Statistiques judiciaires', published on the Court's website: https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-04/ra_2017_fr.pdf, at page 221, as regards 'autres recours directs').

6. Are decisions of courts and other review bodies in information cases in writing, publicly available, binding and final? If the appeal is successful, how is the independent body's/court's *decision enforced*; by ordering the public authority to disclose the information; by disclosing the information directly; by suing the public authority if they persist in refusing to disclose the information or by any other means?

The decisions of the General Court and of the Court of Justice are in writing, publicly available and binding. As already mentioned, the former may be subject to an appeal to the Court only on points of law. The General Court may annul the decision of the institution about the request for access to documents or environmental information, but in compliance with Article 266 TFEU it is up for the institution (or body) whose act has been declared void to take the necessary measures to comply with the judgment.

The European Ombudsman may issue recommendations, proposals for a solution, suggestions and decisions, which are not legally binding. In principle, they are all published and publicly available on the Ombudsman's website. Where the institution concerned decides not to follow the Ombudsman's recommendation, the Ombudsman may bring the issue to the attention of the European Parliament by means of a special report.

7. Can disciplinary, administrative or criminal *sanctions be exercised* against the public officials if disclosure of environmental information is refused unlawfully? Would it be possible for the applicant or other members of the public to be a party to such proceedings?

Where in handling a request the official shows serious misconduct (‘*faute grave’*) on his/her part, he/she can be subject to disciplinary sanctions. This is a general principle which can be applied also when an official is handling a request for environmental information.

8. Do you have any experience of situations/cases where individuals or ENGOs asking for environmental information have been *penalized, persecuted or harassed* in any way for their involvement?

No.

9. Do you have any experience of *misuse or abuse* of the right to environmental information and the consequences thereof?

Repetitive requests: Following a full or partial refusal of access to documents, the applicant can file a new request for the same documents at a later stage. The request has to be treated as a new initial request, provided that there have been relevant changes in the legal or factual circumstances warranting wider access since the first decision (initial or confirmatory) was adopted. In the absence of such circumstances, the Commission should confirm its previous decision with reference to the fact that those circumstances have not changed. Only the latter assessment may be subject to means of review or redress. If there are new facts justifying the re-assessment of the case, the service concerned will adopt a new initial decision. The aim of this approach is to avoid circumvention of the legal deadlines for filing a confirmatory application or a judicial review.

Wide-scope initial requests: The Commission often receives requests for access to documents, lodged under Regulation n. 1049/2001, which have such a wide temporal or material scope that their detailed treatment could substantially impair the normal functioning of the relevant Commission services. Regulation n. 1049/2001, as interpreted by the EU courts, provides for specific procedures for handling such wide-scope requests, in particular the possibility to find a fair solution as envisaged in Article 6(3) of Regulation n. 1049/2001.

10. In your view, what are the *main barriers* in your legal system concerning access to justice for the members of the public in cases on the right to environmental information?

Within the European Commission the administrative phase (including the administrative review) and, where exploited, the complaint to the European Ombudsman are totally free of charge. No problems of legal standing occur before the General Court and the cost are reasonable. Moreover, the principle of *'the loser pays'* applies.

11. Does your legal system provide with any *innovative approaches* concerning administrative and judicial review procedures in cases on the right to environmental information, for example concerning the requirement for the procedure to be expeditious, the use of alternative dispute resolutions (ADRs), costs, remedies, means for execution of review decisions on disclosure or use of e-justice initiatives?

ADRs do not exist for this topic. . However, the administrative phase (including the administrative review) is expeditious. Compared with other jurisdictions, the judicial phase is also relatively quick. Continued efforts have been carried out by EU courts to reduce the time for a decision.

In February 2018, the European Ombudsman introduced a new fast-track procedure to deal with access to documents complaints. The new approach allows the European Ombudsman to take a decision within two months of receiving the complaint. The European Ombudsman aims to decide whether it is justified to open an inquiry within 5 working days and to decide on the case within 40 working days of receiving the complaint, although some complex cases might take longer.

12. Can you please provide us with a short description of particularly important or innovative information cases, as well as cases which illustrate the main barriers concerning access to justice in these matters.

The Commission would like to highlight that the Court of Justice in its judgment of 6 October 2015 in Case C-71/14, *East Sussex*, gave important indications about the nature of the costs which public authorities may charge when supplying any environmental information. Moreover, in points 52 to 60, the Court also provides an important interpretation in relation to the access-to-justice provisions set out in Article 6(2) of Directive 2003/4/EC. However, this applies only to EU Member States and not to the EU institutions or bodies (which are subject to different access-to-information legal instruments).

The Court points out that, where the directive does not determine the extent of the (administrative and) judicial review required by its provisions, in the absence of further details in EU law, it is for the legal system of the Member States to determine the standard of review, subject to the principles of equivalence and effectiveness. As regards the latter principle, in this case the principle requires that the protection of the rights of persons making requests for information pursuant to Directive 2003/4 must not be made subject to conditions that may make it impossible in practice or excessively difficult to exercise those rights. According to English administrative law (applicable to the case at national level) the judicial review is confined to the question of whether the decision

taken by the public authority concerned was irrational, illegal or unfair, with very limited scope for reviewing factual conclusions reached by that the authority. Judicial review that is limited as regards the assessment of certain questions of fact is compatible with EU law, on condition that it enables the court hearing the application for annulment of such decision to apply effectively the relevant principles and rules of EU law when reviewing the lawfulness of the decision. The question whether a cost factor concerns the 'supplying' of the information requested and can be taken into consideration in the calculation of a charge imposed and the question of whether the total amount of a charge is reasonable are questions of EU law. They must be amenable to (administrative and) judicial review.

In this way, the Court has defined the intensity of scrutiny which national courts must exercise when applying EU law, irrespective of what national law envisages.