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ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS: OVERVIEW OF THE CONVENTION IMPLEMENTATION

Background paper[1]

This background paper was prepared on the basis of the synthesis report submitted to the fifth session of the Meeting of the Parties to the Aarhus Convention (30 June – 1 July 2015, Maastricht, the Netherlands), relevant findings and reports of the Aarhus Convention Compliance Committee (hereinafter – the Committee) from the previous intersessional period up to now (2011-2015)[2]. The document outlines systemic issues with regard to access to justice relevant to the work of the Task Force.

Delegates are invited to consult this document in advance of the meeting in order to gain an overview of the status the implementation of article 9 of the Aarhus Convention and to discuss further needs to be addressed under auspices of the Task Force.

[1] The document was not formally edited.
[2] Available from http://www.unece.org/env/pp/cc.html

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I. INFORMATION FROM THE SYNTHESIS REPORT PRESENTED TO THE MEETING OF THE PARTIES AT ITS FIFTH SESSION[3]

1. Article 9 - General provisions

Parties provided very detailed lists of legislation covering the issue of access to justice, consisting of the Constitution, procedural administrative, civil and criminal codes, specific environmental laws and regulations, and rules regulating the functioning of the different State authorities. Parties with autonomous regions reported on the legislation of such entities as well, and Parties with federal systems reported on the state, provincial or regional-level legislation. Several Parties mentioned the direct application of Aarhus Convention provisions (e.g., Bulgaria, Croatia, Finland, Georgia, Latvia, Republic of Moldova and Ukraine), while other Parties noted the importance of developing national legislation to transpose provisions of the Aarhus Convention in their national legal systems.

Parties from the EU and Norway reported on their legislative framework concerning implementation of article 9 of the Aarhus Convention. Legislation of those Parties underwent only slight changes during the reporting period: neither the judiciary (except in Croatia and Romania), nor administrative institutions were subject to substantial changes. Parties made efforts to enact regulations to reduce court fees, speed up administrative and court proceedings, grant standing to environmental NGOs and initiate or improve free legal aid systems (e.g., Austria, Czech Republic, EU, Ireland, Latvia, Netherlands, Spain and United Kingdom). A few Parties made reference to national and EU case law concerning the enforcement of access to justice provisions.

In Eastern Europe, the Caucasus and Central Asia, Parties reported only slight progress in the implementation of article 9. Despite legal requirements for State authorities to directly apply the provisions of the Aarhus Convention it was mentioned that environmental NGOs suffered hardships in the realization of their right of access to courts. While access to administrative appeal in environmental cases was reported to be free of charge, its effectiveness was questioned.

In SEE, inadequate implementation of article 9 is reported by Parties. Some Parties reported on judicial reforms taking place (e.g., Albania and Serbia), which will improve access to justice in those countries. In addition, numerous awareness-raising activities, actively supported by Aarhus Centres, are taking place in the subregion targeting the general public, the judiciary, prosecutors and members of the legal profession.

Mediation was mentioned by Austria, the EU, Serbia and the United Kingdom as a possible remedy in cases where members of the public alleged their rights had been violated. In Austria, environmental mediation is a voluntary and structured procedure involving all those affected by a project, and its results have to be considered during EIA and later approval procedures. Kyrgyzstan mentioned the operation of mediation courts as an out-of-court procedure for the protection of rights and legal interests. In Norway, parties in dispute, except public authorities, may refer to the conciliation board which can settle various types of disputes.

Kazakhstan and Ukraine mentioned the possibility of addressing the prosecutor's office with a complaint regarding the violation of environmental legislation.

National reports cited a few cases that were or are under consideration of the Compliance Committee and relate to non-compliance with article 9 provisions, involving the following Parties: Armenia, Austria, Czech Republic, Denmark, Slovakia and United Kingdom.

2. Ensuring access to a review procedure (article 9, paragraph 1)

Almost all Parties reported that any member of the public whose rights to access to information have been violated has recourse to at least two forms of review procedure - administrative review or review by a court of law. In the majority of Parties the public can use an administrative review procedure to bring their complaint before the head of the authority or to a superior authority.

Most Parties from the EU and Norway also mentioned the operation of specialized bodies tasked with reviewing the compliance of the public authorities with legislation and administrative procedures regarding access to

[3] Document (ECE/MP.PP/2014/6; Category II) is available in English, French and Russian from http://www.unece.org/env/pp/aarhus/mop5_docs.html#/

information (e.g., in Austria, the Independent Administrative Tribunal; in Croatia, the Information Commissioner; in France, the Commission on Access to Administrative Documents; in Lithuania, the Administrative Dispute Commission; in Italy, the Commission for Access to Administrative Documents; in Slovenia, the Commissioner for Access to Public Information; in the United Kingdom, the Information Commissioner). The mandate to deal with violations of access to environmental information is given to separate bodies in Belgium (the Federal Appeal Commission for Access to Environmental Information), Denmark (the Environmental Board of Appeal), Ireland (the Commissioner for Environmental Information) and Norway (Appeals Board of Environmental Information).

Among the SEE countries, Montenegro made reference to the Agency for Protection of Personal Data and Access to Information and Serbia to a Commissioner for Information of Public Importance and Personal Data Protection in dealing with violations of the right to information.

The public can resort to Ombudsman institutions if their rights to information are violated in e.g. Albania, Armenia, Austria, Bosnia and Herzegovina, Denmark, Greece, Ireland, Italy, Kazakhstan, Kyrgyzstan, Lithuania, Norway and Sweden, but such bodies, as a rule, are not empowered to issue binding decisions. Austria reported on the work of its Ombudsmen for the Environment, set up as a regional body representing the cause of environmental protection in the federal provinces. The Ombudsmen's task is to ensure the protection of the environment in certain administrative procedures and therefore Ombudsmen have standing to lodge complaints with the administrative courts with regard to compliance with legal provisions that are relevant for the environment.

Access to administrative review is available free of charge as a rule (Denmark, Ireland and Hungary are exceptions, as reported in their NIRs). Unlike judicial decisions, decisions of administrative bodies empowered to consider cases of misconduct of public officials with regard to access to information or in the human rights field are not binding, but recommendatory in the majority of countries. Some procedures within administrative review bodies are reported to be prompt (from 10 to 30 days), whereas others have generated criticism on account of the excessive time taken for the consideration of cases (e.g., Austria).

In several reporting countries administrative review is obligatory before resorting to a court of law (e.g., Czech Republic, Poland, Slovakia and Slovenia), while in others persons can apply to the courts directly to protect their right to information.

All Parties reported that individuals or NGOs whose right to environmental information has been violated have access to a review procedure before a court. The majority of Parties failed to mention the range of costs associated with judicial proceedings that could be borne by the applicant, but the court fees were stated to be quite low. All the Parties indicated the binding nature of court decisions, while the possibilities to appeal such court decisions in different countries vary.

3. Challenging decisions, acts or omissions not complying with article 6 provisions (article 9, paragraph 2)

All the reporting Parties indicated that members of the public concerned have a right to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of article 6 and, where so provided under national law, of other relevant provisions of the Convention.

A number of Parties indicated that in order to have standing in court, as a rule, members of the public must show sufficient (legal) interest or impairment of rights by the challenged decision, act or omission (e.g., Armenia, Bosnia and Herzegovina, France, Hungary, Italy, Kyrgyzstan, Lithuania, Republic of Moldova and Romania). Legitimate interest, as defined by Italy, means a direct interest in the challenged administrative decision, but not that it is guaranteed as a legal right.

The legislation of Bulgaria and Serbia defines the public concerned for standing purposes as the public that is affected or likely to be affected by, or which has an interest in, the procedures for the approvals of plans, programmes, development proposals and the decision-making process on the granting or updating of permits according to the procedures established by law, or in the conditions set in the permits. This includes NGOs promoting environmental protection which are established in accordance with national legislation.

Only directly affected members of the public, whose rights were violated, are given standing in court concerning the decisions, acts of omissions of legal or physical persons in e.g. Austria, Azerbaijan, the Czech Republic, Georgia, Germany, the Netherlands and Slovakia. Prior participation in the decision-making that resulted in the

adoption of the challenged act or decision is deemed by a few Parties as mandatory for the member of the public to be able to challenge the act in the courts. In Slovakia, members of the public can also receive the status of Party to the proceedings (and thus standing) either by legal norms or by participation in administrative procedures (e.g., permitting, EIA procedures) preceding litigation. In Poland only NGOs that have received the status of party to the administrative proceedings can have standing in court concerning the legality of those proceedings and the final decision.

The obligation to demonstrate only sufficient (or legitimate) interest for persons and/or NGOs to be able to go to court was mentioned by Bulgaria, Denmark, Ireland, Norway, Poland and the United Kingdom. The latter explained in its national report that if the person has a direct personal interest in the outcome of the claim they will be regarded as having sufficient interest in the matter.

Standing might not be granted to NGOs if they are not able to demonstrate a sufficient interest in or impairment of their right by the challenged decision, act or omission. Such problems were reported by several Parties. For example, in the Czech Republic NGOs have to demonstrate impairment of their rights in court, while courts are reluctant to acknowledge such rights (right to a healthy environment, as a rule). In such cases NGOs can only address the court with their claim against the decision of the public authority if their rights to participate in the administrative procedure associated with this decision are claimed to be violated.

4. Challenging acts and omissions by private persons and public authorities that contravene environmental legislation (article 9, paragraph 3)

With respect to article 9, paragraph 3, wide standing with no obligation to show violation of rights or legal interest is given to environmental NGOs meeting certain national requirements by a few Parties(e.g., Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Lithuania, Montenegro, Romania and Spain). For example, in France NGOs have standing to challenge administrative decisions affecting the environment. Estonia mentioned that environmental NGOs contesting administrative acts or measures in the field of environment are assumed to have a legitimate interest in the matter, provided that the contested act or measures are related to the environment protection aims of the NGO or its sphere of activity. Germany made reference to the judgment of the Court of Justice of the European Union in the so-called Slovak Brown Bear case[4], which resulted in allowing the administrative courts permitting legal actions to recognize environmental organizations even outside the scope of the explicit provisions of national legislation, for example in fields such as air quality planning.

Some problems in accessing courts by members of the public are indicated by Parties in cases challenging certain types of decisions, such as development plans and screening decisions in EIA procedures (e.g., Czech Republic, Poland and Slovenia). To address these lacunae, a few Parties have recently adopted specific amendments to laws to give the public wider standing to challenge certain decisions (e.g., Austria and Sweden).

A few Parties listed the requirements in national legislation for environmental NGOs to have standing in judicial proceedings (e.g., Austria, Bulgaria, Finland, Denmark, Germany, Ireland, Italy, Poland, Slovenia and Sweden), including: a minimum age (time period during which the NGO has been in operation); a minimum number of members; obligatory registration or recognition of the NGO by the designated State authority; and the field and area of operation of the NGO. In Slovenia, NGOs need to obtain the status of entity operating in the field of environmental protection (or nature conservation) in the public interest in order to be a party to judicial or administrative proceedings.

In Latvia there are no special standing requirements for environmental NGOs to have access to judicial review procedures. In Belarus NGOs can apply to court only to protect the rights and legitimate interests of their members or to seek compensation for damage to the life, health or property of its members.

A few Parties mentioned the right of NGOs to initiate criminal proceedings related to environmental crimes (e.g., Bulgaria, France and Italy). Claims for damages could also be brought by NGOs in Bulgaria and Sweden. In Italy NGOs can intervene in such proceedings and courts tend to also grant NGOs standing to claim environmental damages in criminal proceedings, regardless of the absence of any clear legal provisions for this.

In Austria several sectoral laws grant communities standing to challenge decisions within EIA procedures or regarding nature protection.

[4] Case C-240/*09 Lesoochranárske zoskupenie VLK v. Ministerstvo životného prostredia Slovenskej republiky* [2011] ECR I-1255.

The majority of Parties also mentioned the possibility to seek administrative review of decisions, acts or omissions violating environmental norms or public participation rights from a variety of bodies, and only a few Parties oblige members of the public to exhaust administrative proceedings before applying to the courts (e.g., Hungary and Slovenia).

5. Providing effective and not prohibitively expensive remedies (article 9, paragraph 4)

Parties indicated in their national reports the possibility of obtaining different remedies in environmental judicial proceedings (civil or administrative), including injunctive relief as foreseen in the procedural norms of the countries (e.g., Armenia, Austria, Belarus, Croatia, France, Ireland, Italy, Kazakhstan, Latvia, Serbia, Slovakia, Spain and United Kingdom). However, the application of this remedy was not regarded as an effective or preferred option in several countries. In Ireland, interim relief, which is one among many public and private law remedies, is reported to be allowed in environmental and development planning cases. In Norway, claimants in environmental cases are exempted from the obligation to pay damages inflicted by the application of interim measures, but this exemption will not be applied if the applicant knew or should have known that his claim was ungrounded when it applied for such measures.

A few Parties reported that challenges to acts or decisions brought before the courts automatically suspend implementation of the challenged act or decision (e.g., Bulgaria and Germany), and some allow the parties to the proceedings to ask the court to suspend execution of such decisions during the consideration of the case in order to prevent irreparable damage to the environment. Legislation in Croatia, France, Poland and Slovakia give the courts the power to suspend enforcement of challenged decisions of administrative bodies. In Poland a plaintiff seeking suspension of execution of a building permit is required to pay a bond securing the claims of the investor/developer pending the outcome of the plaintiff's case.

A majority of the NIRs indicate that court procedures last on average one year per instance, and slightly longer for appeals or in higher courts, where the proceedings usually exceed the time limits prescribed by the relevant procedural code. A few Parties mentioned that some types of environmental cases are allowed to be considered using simplified or fast-track court procedures. For example, in Croatia environmental litigation is deemed urgent, and Hungary handles access to environmental information cases via a fast-track procedure.

The Aarhus Convention requires Parties to provide inexpensive legal remedies, and both judicial and administrative procedures must meet this requirement. While administrative remedies are reported by the majority of Parties to be free of charge to members of the public, judicial procedures result in a variety of expenses for the parties. Such expenses may include court fees, lawyers and expert fees, and the legal costs of the winning party. A few Parties indicated that environmental NGOs are exempted from court fees (e.g., Slovakia and Sweden). In Croatia and Sweden, cases concerning access to information, damage to the environment and challenges of permit are exempted from court fees. In Kyrgyzstan and the Republic of Moldova cases concerning protection of the public interest should be exempted as well, but judges do not always decide environmental cases as being in the public interest. A few Parties reported that their courts have the discretion to waive court fees for applicants instigating environmental litigation. For instance, in the Czech Republic courts used to regularly exempt NGOs from court fees; however, since 2010 this is no longer the case.

A few Parties indicated that judges have discretion to award fees to a winning party, although in practice in many cases each party bears its own costs of litigation (e.g., Armenia, Estonia, Ireland, Italy, Norway, Serbia and United Kingdom). No such discretionary powers are given to judges by law in Bulgaria, Kazakhstan and Tajikistan. Poland and Sweden report they have no rule concerning the obligation to pay the fees of the winning party.

Lawyer and expert fees reportedly constitute a substantial amount of the expenses involved in bringing cases, and thus pose an obstacle to access to courts for the public (e.g., Belarus, Bosnia and Herzegovina, Estonia, Italy and Netherlands).

The United Kingdom reported on the findings of the Compliance Committee on costs[5] which resulted in reforms of costs and funding in civil litigation(see also paragraphs. 224–226 below).
All the Parties indicated that court decisions on environmental cases are binding on the parties, prepared in writing and are announced publicly. Texts of such decisions are delivered to parties to the dispute and, as a rule, are available to the public either upon request or through the online databases of court decisions or dedicated

[5] The findings on communications ACCC/C/2008/23, ACCCC/2008/27 and ACCC/C/2008/33, adopted by the MOP through decision IV/9i (see ECE/MP.PP/2011/2/Add.1).

web pages (e.g., in Armenia, Austria, Estonia, France, Netherlands, Slovakia and Ukraine). Serbia reported that its National Judicial Reform Strategy foresees plans to make court decisions available in a public database.

6. Ensuring information is provided to the public on access to administrative and judicial review procedures (article 9, paragraph 5)

Parties said that they implemented the provisions of article 9, paragraph 5, by providing information on access to administrative or court procedures when responding to information requests by the public, as well as in the decisions of state authorities or the courts. Information could also be found on the web pages of the State authorities responsible for the provision of environmental information, specialized bodies considering complaints from the public or judicial bodies. A few Parties mentioned awareness-raising activities of Aarhus Centres and different NGOs, including information on remedies under article 9 of the Aarhus Convention.

Parties established assistance mechanisms for the public to remove or reduce financial and other barriers to access to justice. Free legal aid was reported to be available in the majority of the reporting Parties, mainly to citizens who were not able to afford litigation (e.g., Bulgaria, Croatia, Denmark, Finland, France, Germany, Italy, Kyrgyzstan, Latvia, Netherlands, Spain and United Kingdom). Serbia has prepared a draft law on free legal aid; Montenegro passed a legal aid law in2011. NGOs can receive free legal aid to bring environmental cases to court in Italy, the Netherlands and Spain.

Parties, in many cases with the aid of NGOs, identified the following obstacles to the implementation of article 9 of Aarhus Convention: unclear legislative rules on fees, standing and jurisdiction; too much discretion given to judges regarding the allocation of costs; no free State legal aid for NGOs to file environmental claims; a lack of the necessary financial resources for members of the public to bring cases to court; the long duration of proceedings; ineffective or inadequate injunctive relief; a lack of standing for NGOs in environmental cases; and a low awareness among judges, lawyers and the public of the public's environmental rights. The EU reported that, with regard to the implementation of article 9, paragraphs 2 and 4, the legal systems of the member States were examined by the Commission, in particular on the issues of standing, costs and the scope of review. As a result, the Commission has brought infringement actions against Austria, the Czech Republic, Germany, Ireland, Malta, Slovakia, Slovenia and the United Kingdom, and assessment of the implementation of article 9, paragraph3, by EU member States is ongoing.

An NGO from Iceland reported on legislative provisions and recent case law restricting access to courts for NGOs to challenge acts or omissions of the public authorities violating environmental legislation. In addition, members of the public can only obtain injunctive relief in cases related to environmental matters if they are deemed to be directly concerned. Moreover, in the case of an administrative review by the Environmental and Natural Resources Board of Appeal, only directly concerned individuals or certain NGOs have access to injunctive relief remedies. Financial barriers for the public in Iceland consist of the mandatory application of the loser pays principle to legal costs with no maximum limits, as well as the absence of State support for NGOs to facilitate their access to justice (e.g., direct financial support of NGOs, free legal aid system).

II. INFORMATION FROM THE REPORT BY THE COMMITTEE ON REVIEW OF COMPLIANCE TO THE MEETING OF THE PARTIES AT ITS FIFTH SESSION[6]

1. Label under national law not decisive with respect to access to justice

In the same vein as set out in the Committee's report to the fourth session, when examining access to justice with respect to different types of acts (for example, strategic environmental assessment statements, spatial plans or construction and exploitation permits), whether a decision should be challengeable under article 9 is determined by the legal functions and effects of that decision, not by its label under national law (ACCC/C/2011/58 (Bulgaria)).

2. Access to justice regarding tiered decision-making

If activities listed in annex I to the Convention are permitted by a number of tiered decisions, it may not be necessary to allow members of the public concerned to challenge each such decision separately in an

[6] Document (ECE/ MP.PP/2014/9, Category II) is available in English, French and Russian from http://www.unece.org/env/pp/aarhus/mop5_docs.html#/

independent court procedure. Accordingly, if one or more of the decisions have a preliminary character and are in some way integrated into a subsequent decision, a Party may remain in compliance with article 9, paragraph 2, of the Convention if the previous decision is subject to judicial review upon appeal of the final decision. Nevertheless, the system of judicial review as a whole must comply with the requirements of article 9, paragraph 4, of the Convention also with respect to each of the tiered decisions (ACCC/C/2011/58 (Bulgaria)).

3. Access to justice regarding EIA screening decisions or other determinations under article 6, paragraph 1 (b)

Article 9, paragraph 2, of the Convention requires Parties to provide the public with access to a review procedure to challenge the procedural and substantive legality of any decision, act or omission subject to the provisions of article 6. This necessarily also includes decisions and determinations subject to article 6, paragraph 1 (b). The Committee has found that the outcome of an EIA screening decision is a determination under article 6, paragraph 1 (b). These determinations are thus subject to the requirements of article 9, paragraph 2, of the Convention and members of the public concerned should have access to a review procedure under article 9, paragraph 2, to challenge the legality of the outcome of the EIA screening process (ACCC/C/2010/45 and ACCC/C/2011/60 (United Kingdom), ACCC/C/2010/50 (Czech Republic)).

4. Standing under article 9, paragraph 2

While Parties retain some discretion in defining the scope of the public entitled to standing, this determination must be consistent "with the objective of giving the public concerned wide access to justice within the scope of the Convention". Hence, in exercising their discretion, Parties may not interpret these criteria in a way that significantly narrows standing and runs counter to their general obligations under articles 1, 3 and 9 of the Convention (ACCC/C/2010/50 (Czech Republic), recalling its findings on ACCC/C/2005/11 (Belgium)[7]).

In defining standing under article 9, paragraph 2, the Convention provides guidance to the Parties on how to interpret the "sufficient interest" of NGOs. Hence, the interest of NGOs meeting the requirements of article 2, paragraph 5, of the Convention should be deemed sufficient and should be deemed to have rights capable of being impaired.

Moreover, the rights of such NGOs under article 9, paragraph 2, of the Convention are not limited to the EIA procedure only, but apply to all stages of the decision-making to permit an activity subject to article 6. A requirement that an NGO must have exercised its right to participate during the EIA procedure or other procedures prior to the decision/authorization in order to have standing to access review procedures regarding the final decisions permitting proposed activities, such as building permits, fails to comply with article 9, paragraph 2, of the Convention (ACCC/C/2010/50 (Czech Republic)).

The Committee has noted that if the courts systematically interpret the relevant legislation in such a way that the "rights" that have been "created, nullified or infringed" by the administrative procedure refer only to property rights and do not include any other possible rights or interests of the public relating to the environment (including those of tenants), this may hinder wide access to justice and run counter to the objectives of article 9, paragraph 2, of the Convention (ACCC/C/2010/50 (Czech Republic)).

5. Standing under article 9, paragraph 3

Article 9, paragraph 3, applies to a broad range of acts or omissions, while at the same time it allows more flexibility — as compared to article 9, paragraphs 1 and 2 — to the Parties in implementing it. The Convention allows Parties to set criteria for standing and access to environmental enforcement proceedings, but any such criteria should be consistent with the objectives of the Convention to ensure wide access to justice.

The Committee has considered the criteria for standing under article 9, paragraph 3, in a number of cases in this inter-sessional period (ACCC/C/2008/31 Germany), ACCC/C/2008/32 (EU, Part I), ACCC/C/2010/48 (Austria), ACCC/C/2010/50 (Czech Republic), ACCC/C/2011/58 (Bulgaria), ACCC/C/2011/63 (Austria)). In many of those findings, it recalled its earlier finding in communication ACCC/C/2005/11 (Belgium) where it had noted that:

[7] ECE/MP.PP/C.1/2006/4/Add.2

> The Parties may not take the clause "where they meet the criteria, if any, laid down in its national law" as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging act [sic] or omissions that contravene national law relating to the environment.
>
> Accordingly the phrase 'the criteria, if any, laid down in national law' indicates a self-restraint on the Parties not to set too strict criteria. Access to such procedures should thus be the presumption, not the exception.[8]

When evaluating whether a Party complies with article 9, paragraph 3, the Committee pays attention to the general picture, i.e., the extent to which national law effectively blocks access to justice for members of the public in general, including environmental NGOs, or if there are remedies available for them to actually challenge the act or omission in question. In this evaluation article 9, paragraph 3, should be read in conjunction with articles 1 and 3 of the Convention and in the light of the purpose reflected in the preamble, that "effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced" (ACCC/C/2010/48 (Austria)).

In one case, the Committee considered the situation of a standing requirement which requires the person seeking standing to be "directly and individually concerned", where to be "individually concerned" is interpreted to require that the legal situation of that person is affected because of a factual situation that differentiates him or her from all other persons.

Under this requirement, persons cannot be individually concerned if the decision or regulation takes effect by virtue of an objective legal or factual situation, which means that in effect no member of the public would ever able to challenge a decision or a regulation relating to environment or health issues. The Committee held that it was clear that such an interpretation was too strict to meet the criteria of article 9, paragraph 3, of the Convention (ACCC/C/2008/32 (EU, Part I)).

[8] Ibid., paras. 35 and 36.

III. CONSIDERATIONS AND FINDINGS OF THE COMMITTEE OF A SYSTEMIC NATURE WITH REGARD TO ACCESS TO JUSTICE

Issues /Communication	Consideration and evaluation by the Committee	Findings of the Committee
Standing of environmental NGOs in review procedures relating to public participation (art. 9, para. 2) **Standing to challenge acts and omissions of private persons and public authorities (art. 9, para. 3, in conjunction with para. 4)** *ACCC/C/2008/31* *(Document ECE/MP.PP/C.1/2014/8)*	**Standing of environmental NGOs in review procedures relating to public participation under article 6 (art. 9, para. 2)** The criterion in the law of the Party concerned that environmental NGOs must demonstrate that their objectives are affected by the challenged decision amounts to a "requirement under national law", as set out in article 2, paragraph 5, of the Convention. The criterion is sufficiently clear and does not seem to put an excessive burden on environmental NGOs, since this can be easily proven by the objectives stated in its by-laws. Moreover, NGOs have the possibility to (re-)formulate their objectives from time to time as they see fit. No information was submitted to the Committee to show that the authorities and courts of the Party concerned use this criterion in such a manner so as to effectively bar environmental NGOs from access to justice. Since the application of this requirement by the Party concerned does not seem to contravene the objective of giving the public concerned wide access to justice, the Party concerned does not fail to comply with article 9, paragraph 2, of the Convention in this respect. *(See paras. 72-73 of document ECE/MP.PP/C.1/2014/8)* The fact that the exact wording of any provision of the Convention has not been transposed into national legislation is in itself not sufficient to conclude that the Party concerned fails to comply with the Convention. *(See para. 75 of document ECE/MP.PP/C.1/2014/8)* […] review procedures according to article 9, paragraph 2, of the Convention should not be restricted to alleged violations of national law "serving the environment", "relating to the environment" or "promoting the protection of the environment", as there is no legal basis for such limitation in the Convention. When there is a clear contradiction between the provisions of national law and the requirements of the Convention, as in the present case, it is for the Party concerned to bring evidence to show that its courts	The Committee finds that: (a) By imposing a requirement that an environmental NGO, to be able to file an appeal under the EAA, must assert that the challenged decision contravenes a legal provision "serving the environment", the Party concerned fails to comply with article 9, paragraph 2, of the Convention in this respect. (b) By not ensuring the standing of environmental NGOs in many of its sectoral laws to challenge acts or omissions of public authorities or private persons which contravene provisions of national law relating to the environment, the Party concerned fails to comply with article 9, paragraph 3, of the Convention. *(See para. 102 of document ECE/MP.PP/C.1/2014/8)*

Issues /Communication	Consideration and evaluation by the Committee	Findings of the Committee
	interpret those provisions in conformity with the Convention (see para. 67). However, this has not been shown by the Party concerned with respect to the requirement of "serving the environment". For these reasons, the Committee finds that by imposing a requirement that an environmental NGO to be able to file an appeal under the EAA must assert that the challenged decision contravenes a legal provision "serving the environment" (*dem Umweltschutz dienen*), the Party concerned fails to comply with article 9, paragraph 2, of the Convention. *(See paras. 78-79 of document ECE/MP.PP/C.1/2014/8)* The possibility for national courts to evaluate whether the allegedly infringed provisions could be of any importance for the merits of the case, is not, in general, contrary to the requirements of article 9, paragraph 2, and to the objectives of the Convention. This possibility, as such, would not prevent environmental NGOs from challenging both substantive and procedural legality of the decisions. *(See para. 87 of document ECE/MP.PP/C.1/2014/8)* The Committee nevertheless raises a concern about the lack of clarity of the legal system of Party concerned as to whether a violation of the procedural rights prescribed under article 6 would be considered as a fundamental error of procedure to allow for fulfilment of the rights prescribed under article 9, paragraph 2, of the Convention. The Committee emphasizes that if German courts in practice were to deny review of the appeals and/or arguments of members of the public concerned, including environmental NGOs, regarding the procedural legality of decisions subject to article 6, this would amount to non-compliance with article 9, paragraph 2. *(See para. 90 of document ECE/MP.PP/C.1/2014/8)* **NGO standing to challenge acts and omissions of private persons and public authorities (art. 9, para. 3, in conjunction with para. 4)** […] in the absence of legislative guarantees for members of the public, including environmental NGOs, to have access to review procedures to challenge acts and omissions of private persons and public authorities in areas of national environmental law beyond the scope of the EAA,	

Issues /Communication	Consideration and evaluation by the Committee	Findings of the Committee
	the Federal Nature Conservation Act and the Environmental Damage Act, the Committee concludes that the conditions laid down by the Party concerned do not ensure standing to environmental NGOs to challenge acts or omissions that contravene national laws relating to the environment. *(See para. 99 of document ECE/MP.PP/C.1/2014/8)*	
Timeliness of review procedures relating to information requests (art. 9, para. 4) **Standing of members of the public, including NGOs (art. 9, paras. 2 and 3)** *ACCC/C/2010/48* *(Document ECE/MP.PP/C.1/2012/4)*	**Timeliness of review procedures relating to information requests (art. 9, para. 4)** The national legislation of the Party concerned requires that if the authority does not provide any answer to the request for information within two months and it further fails to provide official notification within the next six months, the information requester has to proceed with the devolution request and only after it has received a response to its devolution request, can it seek a review procedure. This means that, if the requester believes that its request was not properly addressed by the authorities, it may have to wait for longer than one year after its initial request for information until it can access a review procedure. Therefore, the Committee finds that the Party concerned fails to ensure access to a timely review procedure with respect to requests for information, as required by article 9, paragraph 4 of the Convention. *(See para. 59 of document ECE/MP.PP/C.1/2012/4)* **Locus standi for individuals to challenge decisions, acts and omissions (art. 9, paras. 2 and 3)** In the view of the Committee the standing criteria for individuals set by legislation of the Party concerned do not seem to run counter to the objectives of the Convention regarding wide access to justice. However, the definition of "neighbours" may be limiting the rights of "persons that temporarily stay in the vicinity of the project and do not have any in rem rights" (EIA Act, art. 19(1)1), such as tenants or individuals that work in the vicinity, unless they could claim that they "may be threatened or disturbed through the construction, the operation or the existence of a project" (EIA Act, art. 19(1)1). The information provided does not sufficiently substantiate the allegations, e.g., by reference to relevant case-law, to the extent that the Committee finds the Party not to comply with article 9, paragraphs 2 and 3, in these respects. Despite this, the Committee finds that the information before	The Committee finds that the Party concerned, by not ensuring access to a timely review procedure for access to requests for information, is not in compliance with article 9, paragraph 4, of the Convention. The Committee finds that the Party concerned, in not ensuring standing of environmental NGOs to challenge acts or omissions of a public authority or private person in many of its sectoral laws, is not in compliance with article 9, paragraph 3, of the Convention. *(See paras. 78-80 of document ECE/MP.PP/C.1/2012/4)*

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	it raises some concern as to how this provision of the EIA Act may be interpreted and applied. Therefore, the Committee encourages courts of the Party concerned to interpret and apply the provisions relating to locus standi for individuals in the light of the Convention's objectives. *(See para. 63 of document ECE/MP.PP/C.1/2012/4)* **Scope of reviewable claims sought by the individuals (art. 9, para. 2)** The Committee understands that the Party concerned allows individuals to challenge certain aspects of the substantive legality of decisions, acts or omissions subject to article 9, paragraph 2, of the Convention, when their rights relating to property or well-being have been violated, and that in such situations, individuals may also raise issues of general environmental concern. However, the Committee understands that it is up to the courts to consider whether they will in fact take up such more general environmental issues. […]However, the information provided does not sufficiently substantiate, e.g., by reference to recent case-law, that this indeed reflects the general court practice. *(See para. 66 of document ECE/MP.PP/C.1/2012/4)* **Locus standi for non-governmental organizations to challenge acts and omissions by public authorities (art. 9 para. 3)** In the view of the Committee, outside the scope of the EIA and IPPC procedures and environmental liability, the conditions laid down by the Party concerned in its national law are so strict that they effectively bar NGOs from challenging acts or omissions that contravene national laws relating to the environment. The fact that there is a possibility that the procedure laid down under the sectoral environmental laws may be consolidated in the framework of the EIA or IPPC procedure for the purposes of a large project or that environmental liability and civil law remedies may apply, under conditions, does not compensate for the failure to fulfil the requirements of article 9, paragraph 3, concerning other acts and omissions. *(See para. 73 of document ECE/MP.PP/C.1/2012/4)*	

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	Right to have acts and omissions of private persons reviewed (art. 9, para. 3) […] in principle members of the public can only bring claims against private persons under legislation of the Party concerned with respect to "nuisance from smell, noise, smoke, dust, vibrations or in other ways". […]From the information provided by the parties, it is not clear to the Committee, whether this would also be the case for claims under article 9, paragraph 3; namely, whether a member of the public that has obtained standing in a civil law/nuisance case for damages, may be in a position to argue in its submissions that the act or omission at issue also violates standards set by environmental law of the Party concerned. *(See para. 76 of document ECE/MP.PP/C.1/2012/4)*	
Standing of members of the public, including NGOs (art. 9, paras. 2 and 3) *ACCC/C/2010/50* *(Document ECE/MP.PP/C.1/2012/11)*	**Standing of individuals and NGOs to access review procedures relating to public participation under article 6 (art. 9, para. 2)** While law of the Party concerned may not be fully clear and consistent in all respects as regards standing of NGOs, the Committee notes that NGOs are not able to participate during the entire decision-making procedure, since for NGOs standing after the conclusion of the EIA stage is linked to the exercise of their rights during the EIA procedure or other procedures prior to the decision/authorization. The Committee finds that this feature of the legislation of the Party concerned limits the rights of NGOs to access review procedures regarding the final decisions permitting proposed activities, such as building permits. In this respect the Party concerned fails to comply with article 9, paragraph 2, of the Convention. *(See para. 78 of document ECE/MP.PP/C.1/2012/11)* **Scope of review in procedures relating to public participation under article 6 (art. 9, para. 2)** The situation as described by the parties indicates that under law of the Party concerned individuals may seek review of the procedural and limited substantive legality of decisions under article 6; and that NGOs may seek the review only of the procedural legality of such decisions. In the light of the limited right of review of NGOs, the Committee finds that the Party concerned fails to comply with article 9, paragraph 2, of the Convention.	The Committee finds that: […] (c) The rights of NGOs meeting the requirements of article 2, paragraph 5, to access review procedures regarding the final decisions permitting proposed activities, such as building permits, are too limited, to the extent that the Party concerned fails to comply with article 9, paragraph 2, of the Convention; (d) By limiting the right of NGOs meeting the requirements of article 2, paragraph 5, to seek review only of the procedural legality of decisions under article 6, the Party concerned fails to comply with article 9, paragraph 2 of the Convention; (e) To the extent that the EIA screening conclusions serve also as the determination required under article 6, paragraph 1 (b), members of the public should have access to a review procedure to challenge the legality of EIA screening conclusions. Since this is not the case under law, the Party concerned fails to comply with article 9, paragraph 2, of the Convention; (f) By not ensuring that members of the public are granted

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	(See para. 81 of document ECE/MP.PP/C.1/2012/11) The Committee thus finds that, to the extent that the EIA screening process and the relevant criteria serve also as the determination required under article 6, paragraph 1 (b), members of the public concerned shall have access to a review procedure to challenge the legality of the outcome of the EIA screening process. Since this is not the case under Czech law, the Committee finds that the Party concerned fails to comply with article 9, paragraph 2, of the Convention. *(See para. 82 of document ECE/MP.PP/C.1/2012/11)* **Review procedures with respect to acts and omissions of public authorities and private persons (art. 9, para. 3)** It is clear from the oral and written submissions of the parties, that if an operator exceeds some noise limits set by law, then no member of the public can be granted standing to challenge the act of the operator (private person) or the omission of the authority to enforce the law. In addition, it is evident that in cases of land-use planning, if an authority has issued a land-use plan in contravention of urban and land-planning standards or other environmental protection laws, a considerable portion of the public, including NGOs, cannot challenge this act of the authority. The Committee finds that such a situation is not in compliance with article 9, paragraph 3, of the Convention. *(See para. 85 of document ECE/MP.PP/C.1/2012/11)* The Committee notes in particular the jurisprudence that excludes members of the public, including NGOs, from challenging operating permits on the ground; that it is not mandatory for the public to participate in nuclear safety matters; and the ruling which specifically excludes NGOs on the ground that they do not have rights to life, privacy or a favourable environment that could be affected. If indeed standing to challenge nuclear operation permits is limited because public participation is limited, then there are serious concerns of non-compliance not only with article 9, paragraph 2, of the Convention, but also with article 6 of the Convention. *(See para. 86 of document ECE/MP.PP/C.1/2012/11)*	standing to challenge the act of an operator (private person) or the omission of the relevant authority to enforce the law when that operator exceeds some noise limits set by law, the Party concerned fails to comply with article 9, paragraph 3. Similarly, in cases of land-use planning, by not allowing members of the public to challenge an act, such as a land-use plan, issued by an authority in contravention of urban and land-planning standards or other environmental protection laws, the Party concerned fails to comply with article 9, paragraph 3, of the Convention. *(See para. 89 of document ECE/MP.PP/C.1/2012/11)*

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Fee rate to bring an appeal *ACCC/C/2011/57* *(Document ECE/MP.PP/C.1/2012/7)*	While the requirement for fair procedures applies equally to all persons, the Committee nevertheless considers that a criterion that distinguishes between individuals and legal persons — like the differentiated fee in the present case — is not in itself necessarily unfair. The Committee does not find that the Party concerned fails to comply with article 9, paragraph 4, on this ground. *(See para. 44 of document ECE/MP.PP/C.1/2012/7)*	The Committee finds that by introducing a fee of XXX for NGOs to appeal to NEAB, the Party concerned has failed to comply with the requirement in article 9, paragraph 4, of the Convention, that access to justice procedures not be prohibitively expensive. *(See para. 55 of document ECE/MP.PP/C.1/2012/7)*
Standing of members of the public, including NGOs (art. 9, paras. 2 and 3, in conjunction with art. 9, para. 4) *ACCC/C/2011/58* *(Document ECE/MP.PP/C.1/2013/4)*	**Access to justice with respect to Strategic Environmental Assessment statements** […] the fact that the SEA statement cannot be reviewed separately does not amount to non-compliance with the requirements of article 9, paragraphs 2 and 3, of the Convention, provided that members of the public can actually challenge the SEA statement together with the decision adopting the subsequent plan or programme (e.g., spatial plan). *(See para. 60 of document ECE/MP.PP/C.1/2013/4)* **Access to justice with respect to spatial plans** Based on the information received from the Party concerned and the communicant, the Committee understands that the General Spatial Plans provide a basis for the overall planning of spatial development of municipalities or their sections: they determine the general structure and the prevailing purpose of the spatial development of the area and provide the framework for the future development of the respective areas. On the basis of these characteristics, the Committee concludes that the General Spatial Plans do not have such legal functions or effects so as to qualify as "decisions on whether to permit a specific activity" in the sense of article 6, and thus are not subject to article 9, paragraph 2, of the Convention. *(See paras. 62-63 of document ECE/MP.PP/C.1/2013/4)* […] the SDA explicitly prevents any person from challenging the	The Committee finds that : (a) By barring all members of the public, including environmental organizations, from access to justice with respect to General Spatial Plans, the Party concerned fails to comply with article 9, paragraph 3, of the Convention; (b) By barring almost all members of the public, including all environmental organizations, from access to justice with respect to Detailed Spatial Plans, the Party concerned fails to comply with article 9, paragraph 3, of the Convention; (c) By not ensuring that all members of the public concerned having sufficient interest, in particular environmental organizations, have access to review procedures to challenge the final decisions permitting activities listed in annex I to the Convention, the Party concerned fails to comply with article 9, paragraph 2, in conjunction with article 9, paragraph 4, of the Convention. *(See para. 83 of document ECE/MP.PP/C.1/2013/4)*

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	General Spatial Plans in court (see para. 21 above). Such explicit provision can hardly be overcome by jurisprudence. Therefore, the Committee concludes that Bulgarian legislation effectively bars all members of the public, including environmental organizations, from challenging General Spatial Plans. As a result, members of the public, including environmental organizations, are also prevented from challenging the SEA statements for General Spatial Plans, as these statements are considered as "preliminary acts", which are not subject to judicial review in a separate procedure. Therefore, the Party concerned fails to comply with article 9, paragraph 3, of the Convention. *(See para. 66 of document ECE/MP.PP/C.1/2013/4)* […] members of public have no possibility to challenge the SEA statements for the Detailed Spatial Plans within the scope of an appeal challenging these plans: they can challenge neither the fact that an SEA statement was not issued prior to approval of the Detailed Spatial Plan nor the disrespect of conditions set out in the SEA statement. This situation constitutes non-compliance of the Party concerned with article 9, paragraph 3, of the Convention. *(See para. 70 of document ECE/MP.PP/C.1/2013/4)* **Access to justice with respect to construction and exploitation permits** […] since environmental organizations, as well as other members of the public concerned, do not have access to a review procedure before a court of law or another independent and impartial body established by law to challenge such final permits for annex I activities, when EIA decisions are missing, the Party concerned fails to comply with article 9, paragraph 2, of the Convention. *(See para. 79 of document ECE/MP.PP/C.1/2013/4)* […] there are situations where the EIA statements are issued and these are subject to appeal, but the subsequent/final decisions are not subject to appeal by members of the public concerned, including organizations, even if those decisions are not in conformity with the conditions and measures contained in the EIA decision. This means that even if all the	

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	environmental aspects of a proposed activity were covered by the EIA decision, there is no possibility for members of the public, including environmental organizations, to challenge the legality of a final permit that did not respect that EIA decision. Therefore, the Party concerned fails to comply with article 9, paragraph 2, in conjunction with paragraph 4, of the Convention. *(See para. 80 of document ECE/MP.PP/C.1/2013/4)* Since the SEA statements are not subject to judicial review, there is, in such cases, absolutely no possibility for the members of the public concerned to challenge any decision during the permitting process of such activities in court. This, according to the Committee, also constitutes failure by the Party concerned to comply with article 9, paragraph 2, of the Convention. *(See para. 81 of document ECE/MP.PP/C.1/2013/4)*	
Standing of NGOs (art. 9, paras. 2 and 3) **Timeliness (art. 9, para. 4)** *ACCC/C/2011/62* *(Document ECE/MP.PP/C.1/2013/14)*	**NGO standing to challenge decisions subject to article 6 — article 9, para. 2** In its decision of 1 April 2011, the Court of Cassation issued a reverse decision to the one of 30 October 2009 and decided that the communicant, an environmental NGO, did not have standing to pursue the review of decisions that fall within article 6. The Committee finds that while the wording of the national legislation does not run counter to article 9, paragraph 2, the decision of the Court of Cassation of 1 April 2011, by declaring that the environmental NGO did not have standing, failed to meet the standards set by the Convention. Thus the Party concerned failed to comply with article 9, paragraph 2, of the Convention. *(See para. 36 of document ECE/MP.PP/C.1/2013/14)* **NGO standing to challenge acts and omissions contravening national law relating to the environment — article 9, para. 3** The Committee […] has in general determined that, while Parties are not obliged to establish a system of popular action in their national laws, Parties may not take the clause "where they meet the criteria, if any, laid down in its national law", as an excuse for maintaining or introducing criteria that effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene	The Committee finds that while the wording of the legislation of the Party concerned does not run counter to article 9, paragraph 2, of the Convention, the decision of the Court of Cassation of 1 April 2011, by declaring that the environmental NGO did not have standing, failed to meet the standards set by the Convention. Thus the Party concerned failed to comply with article 9, paragraph 2, of the Convention. *(See para. 40 of document ECE/MP.PP/C.1/2013/14)*

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	national law relating to the environment. However, in the present case, the allegations of the communicant with respect to article 9, paragraph 3, of the Convention, were not substantiated. *(See para. 37 of document ECE/MP.PP/C.1/2013/14)* **Timely procedures — article 9, para. 4** […] the Committee considers that one year is not a particularly long time for a supreme court to deliver a decision in this case, and that the allegations were not sufficiently substantiated. Hence, the Committee does not find the Party concerned to be in non-compliance with article 9, paragraph 4, of the Convention, in this respect. *(See para. 38 of document ECE/MP.PP/C.1/2013/14)*	
National law relating to the environment (art. 9, para. 3) **Access to administrative or judicial proceedings and effective remedies (art. 9, paras. 3 and 4)** *ACCC/C/2011/63* *(Document ECE/MP.PP/C.1/2014/3)*	**National law relating to the environment (art. 9, para. 3)** Laws on the protection of wildlife species and/or trade in endangered species (including marketing in the domestic market, import and export) are also "laws relating to the environment", because they are not limited to the regulation of trade relations but include obligations on how the animals/species are to be treated and protected. In addition, to the extent the laws of the Parties relating to the environment apply to acts and omissions of a transboundary or extraterritorial character or effect, these acts and omissions are also subject to article 9, paragraph 3, of the Convention. *(See para. 55 of document ECE/MP.PP/C.1/2014/3)* **Access to administrative or judicial proceedings and effective remedies (art. 9, paras. 3 and 4)** Given the limited role of the institution of the Ombudsman, the Committee does not consider the possibility of bringing complaints to the Ombudsman as providing a means for challenging acts and omissions by private persons and public authorities which contravene provisions of national law relating to the environment, as required by article 9, paragraph 3, of the Convention. *(See para. 61 of document ECE/MP.PP/C.1/2014/3)* The Committee concludes that in certain cases members of the public, including environmental NGOs, have no means of access to administrative or judicial procedures to challenge acts and omissions of	The Committee finds that, because members of the public, including environmental NGOs, have in certain cases no means of access to administrative or judicial procedures to challenge acts and omissions of public authorities and private persons which contravene provisions of national laws, including administrative penal laws and criminal laws, relating to the environment, such as contraventions of laws relating to trade in wildlife, nature conservation and animal protection, the Party concerned fails to comply with article 9, paragraph 3, in conjunction with paragraph 4, of the Convention. *(See para. 65 of document ECE/MP.PP/C.1/2014/3)*

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	public authorities and private persons which contravene provisions of national law, including administrative penal law and criminal law, relating to the environment, such as contraventions of laws relating to trade in wildlife, nature conservation and animal protection. Whereas lack of access to criminal or administrative penal procedures as such does not amount to non-compliance, the lack of any administrative or judicial procedures to challenge acts and omissions contravening national law relating to the environment such as in this case amounts to non-compliance with article 9, paragraph 3, in conjunction with article 9, paragraph 4, of the Convention. *(See para. 63 of document ECE/MP.PP/C.1/2014/3)*	
Litigations costs for NGOs in cases of denial of the application for permission to apply for judicial review *ACCC/C/2012/77* *(Document ECE/MP.PP/C.1/2015/3)*	**The cost order** The Committee thus finds that neither the communicant's failure to apply for a PCO [protective costs order] nor to appeal the costs award or to seek renewal of its application for permission preclude the Committee's finding that the amount of 8,000 made the procedure prohibitively expensive in the circumstances of this case.*(See paras.74-75 of document ECE/MP.PP/C.1/2015/3)*	The Committee finds the Party concerned has failed to comply with article 9, paragraph 4, of the Convention since the cost order awarded against the communicant in this case made the procedure prohibitively expensive. *(See para. 81 of document ECE/MP.PP/C.1/2015/3)*