

# Aarhus Convention Compliance Committee

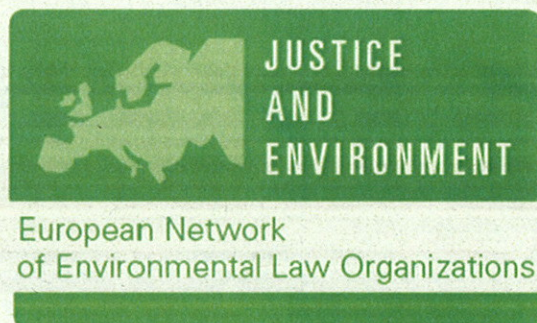
## COMMUNICATION

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pursuant to decision I/7 of the MOP1 to the Aarhus Convention

**Name of Communicant:** Justice and Environment, European Network of Environmental Law Organizations

**Name of Party Concerned:** European Union





**I. Information on correspondent submitting the communication**

Full name of submitting organization or person(s): Justice and Environment, European Network of Environmental Law Organisations

Permanent address: Udolní 33, Brno, 602 00, Czech Republic

Address for correspondence on this matter, if different from permanent address: Garay u. 29-31. I. em. 1., 1076, Budapest, Hungary

Telephone: (36-1) 322 8462

Fax: (36-1) 413 0300

E-mail: [info@justiceandenvironment.org](mailto:info@justiceandenvironment.org)

The contact person authorized to represent the organization in connection with this communication:

Name: dr. Csaba Kiss

Title/Position: Coordinator

**II. Party concerned**

Name of the State Party concerned by the communication: European Union

(On 25 June 1998 the Community signed the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The Community approved the Aarhus Convention on 17 February 2005.)

### III. Facts of the communication

#### 1. History of the EU legislative procedure concerning access to justice in environmental matters

- In 2003 the European Community enacted Aarhus-inspired legislation for environmental impact assessment (EIA), integrated pollution prevention and control (IPPC) and access to information<sup>1</sup>;
- In the same year the Commission adopted a Proposal on Access to Justice in Environmental Matters<sup>2</sup>;
- Soon after this, in 2004 the European Parliament<sup>3</sup> and also the European Economic and Social Committee<sup>4</sup> issued their opinion on the Proposal, respectively, in which they raised a line of suggestions in order to make the legal text more effective and better implementing the Aarhus Convention. The Committee could only partly accept these comments;
- In 2005 the European Community ratified the Aarhus Convention by a Council Decision 2005/370/EC, without a general access to justice instrument in place, but acknowledging the primacy of the international law in the system of the EU law<sup>5</sup>;
- According to a roadmap, issued by the Commission<sup>6</sup>, the Council had its last meeting dealing with Access to Justice Directive Proposal in 2005;
- In 2006 the EU has issued the Regulation on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies<sup>7</sup>;
- Between 2006 and 2012 no significant official steps were taken in the matter of the access to justice Proposal. During this period, however, the Commission launched two major comparative country studies on access to justice in the Member States<sup>8</sup>;
- In 2012 a Commission Communication on "Improving the delivery of the benefits from EU environment measures: building confidence through better knowledge and responsiveness"<sup>9</sup> *inter alia* referred to access to justice and established: "Having noted the lack of progress with the 2003 proposal, the Communication observes that the wider context has changed, in particular the Court of Justice has confirmed recently that national courts must interpret access

<sup>1</sup> See 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) and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC (OJ L 156, 25.6.2003, p. 17)

<sup>2</sup> COM(2003) 624 final – 2003/246/COD, issued on 24th of October, 2003.

<sup>3</sup> <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-2004-0189+0+DOC+PDF+V0//EN>

<sup>4</sup> <http://eescopinions.eesc.europa.eu/eescopiniondocument.aspx?language=en&docnr=667&year=2004>

<sup>5</sup> See the standpoint of the Aarhus Compliance Committee on this in ACCC/C/2005/17

<sup>6</sup> „Commission initiative on Access to justice in environmental matters at Member State level in the field of EU environmental policy”, 2013, see:

[http://ec.europa.eu/smart-regulation/impact/planned\\_ia/docs/2013\\_env\\_013\\_access\\_to\\_justice\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2013_env_013_access_to_justice_en.pdf)

<sup>7</sup> COM(2003) 624 final – 2003/246/COD 16 Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (OJ L 264, 25.9.2006, p. 13)

<sup>8</sup> <http://ec.europa.eu/environment/aarhus/pdf/conf/milieu.pdf>; and

[http://ec.europa.eu/environment/aarhus/access\\_studies.htm](http://ec.europa.eu/environment/aarhus/access_studies.htm)

<sup>9</sup> (COM/2012/95)

to justice rules in a way which is compliant with the Aarhus Convention. National courts and economic as well as environmental interests face uncertainty in addressing this challenge."

- Also in 2012 came into light the European Parliament Resolution on the review of the 6th Environment Action Programme<sup>10</sup> which in its Paragraph 68 calls even more directly for a directive on access to justice: "Underlines that the 7th EAP should provide for the full implementation of the Aarhus Convention, in particular regarding access to justice; stresses, in this connection, the urgent need to adopt the directive on access to justice; calls on the Council to respect its obligations resulting from the Aarhus Convention and to adopt a common position on the corresponding Commission proposal before the end of 2012;"
- In 2013 an other European Parliament Resolution<sup>11</sup> in its Paragraphs 29-30 and 42 called again for a directive on access to justice: "Regrets that the procedure for adopting the proposal for a directive on public access to justice in environmental matters has been halted at first reading; calls, therefore, on the co-legislators to reconsider their positions with a view to breaking the deadlock;"
- Also in 2013 the European Commission has issued an Initiative on Access to justice in environmental matters at Member State level in the field of EU environmental policy (hereinafter: Initiative)<sup>12</sup> that was "an indicative roadmap of the legislative procedure without prejudging the final decision of the Commission on whether this initiative will be pursued or on its final content and structure."
- Finally, on 21th of May, 2014 the Proposal was officially withdrawn as obsolete.

From the short history of the failed directive on access to justice in environmental matters we can conclude that on one hand, several EU bodies have acknowledged the necessity of a directive for a full transposition of the Aarhus Convention, while after 8 years of the last substantial steps taken in this matter there is not yet a determined deadline for accepting an Union level legislation not even a definite declaration of the start of a procedure that would lead to such a legislation.

## 2. Lack of transposing the third pillar of the Convention, especially Article 9(3)-(5) in relation to matters into the EU law other than the internal procedures of the Union

In the declaration attached to the ratification document deposited at the Aarhus Secretariat<sup>13</sup> the EU also has acknowledged that the EU level implementation of the third pillar was still missing, but expressed its view furthermore that until such a legislative action could be taken, the implementation of the Article 9(3) at Member State level will serve as a performance of the EU obligations ensuing from the Convention.

- Contrary to these expectations, the two major studies ordered by the Commission have established that there are plenty of insufficiencies in the implementation of Article 9 across the Member States, and there is also a lack of coherence between them in respect to the laws and practices concerning access to justice. The same can be concluded from the cases of CJEU and the cases of the Aarhus Compliance Committee itself, too.

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<sup>10</sup> European Parliament resolution of 20 April 2012 on the review of the 6th Environment Action Programme and the setting of priorities for the 7th Environment Action Programme – A better environment for a better life (2011/2194(INI))

<sup>11</sup> European Parliament resolution of 12 March 2013 on improving the delivery of benefits from EU environment measures: building confidence through better knowledge and responsiveness (2012/2104(INI))

<sup>12</sup> [http://ec.europa.eu/smart-regulation/impact/planned\\_ia/docs/2013\\_env\\_013\\_access\\_to\\_justice\\_en.pdf](http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/2013_env_013_access_to_justice_en.pdf)

<sup>13</sup> Quoted in the Milieu Report, Point 1.1

The latest relevant EU documents, such as the 7<sup>th</sup> EAP and the Initiative prospect a fuller regime of access to justice in environmental matters on the EU level not earlier than 2020<sup>14</sup>, while they offer as the major tools of implementation the court practice on EU and national level and also raise that non-binding, amicable alternative dispute resolution tools possibly implemented in the future might also contribute to a proper level of implementation.

- However, court practice that depends on the sporadic cases that are brought to the courts and has no possibility to draw a system of rules of a certain field of law would not qualify as implementation of the responsibility of transposing an international legal requirement into the tissue of the law of a Party to a convention. The relationship between the court practice and the basic laws is rather the opposite: a uniform or at least harmonized set of rules of environmental access to justice would be necessary to bring about predictable legal interpretation at the courts and to make possible the development of a more systematic European level case law (see a more detailed analysis of the relevant CJEU cases at the end of this point);
- Also, non-binding, amicable alternative dispute resolution tools such as brochures of best practices, internet networks or capacity building programs as planned in several relevant EU documents might not be accepted either in the practice of international law as a proper transposition of an international law into the legal system of a Party;
- A binding European level legal act is also necessary because not all the EU Member States are in the same time Parties to the Aarhus Convention. At the time being only Ireland falls into this category, but the number of such countries might grow with the extension of the Union. The Committee has already established in an earlier case that the EU as a Party to the Convention has the responsibility to ensure the coherent application of the Convention all over the EU and to monitor that its member States, including Ireland are implementing EU law properly.<sup>15</sup>

Apart from these clear international legal arguments of formal implementation of its responsibilities, the European Union can be criticised because of such substantial issues, too, such as the lack of coherence and effectiveness of the European environmental law concerning access to justice.

- Both studies ordered by the Commission have established that there is a great deal of uncertainty in a row of important elements of access to justice in environmental matters in almost all of the EU Member States and this situation negatively influences the unity of the European market, a basic value of the European Union;
- We can add that without a European Union level access to justice tool, members and organisations in the Member States fail to have direct access to the European legal fora alleging that the national access to justice rules and their implementation infringe the EU environmental law – this weakens the legal situation of those who wish to raise their voices for the environment across the EU, quite contrary to the original goals of the EU accession to the Aarhus Convention.

As the official explanation attached by the Commission to the 2003 Proposal established quite properly, the signature of the Aarhus Convention imposes on the Community the obligation of aligning its legislation as a condition to adhere to the Convention. The Community will only be able to fulfil these obligations if it is able to grant the required access to justice in a harmonised way throughout the European Community.

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<sup>14</sup> See Point 6. of the Initiative where it refers to the EAP7 in this relation.

<sup>15</sup> See the same argument in ACCC/C/2010/54, Para. 76; similar concerns were expressed in the Kazokiskes case, too (ACCC/C/2005/17)

- Without a properly detailed EU level access to justice directive substantial features of access to justice, such as a minimum level of standing for individuals and environmental associations, an adequate scope of judicial review, not prohibitively high costs of legal remedies and effectiveness of the remedies, such as avoiding delays and backlogs and also including injunctive relief in national systems cannot be uniformly ensured.

Although they have a line of progressive elements, the decisions of CJEU concerning standing are still based on the rather restrictive concept that only those are entitled to bring challenges against decisions, acts or omissions of public authorities who have some kinds of direct interest in the outcome of the cases. As the EU environmental consultation paper issued in access to justice matters<sup>16</sup> phrases: "this creates an obstacle to challenges related to environment law because it can often be difficult to demonstrate that the decision, act or omission sought to be challenged directly touches the plaintiff. The Aarhus Convention tries to overcome this through provisions on standing that are set out in Article 9(2) and 9(3). These give a particular recognition of the role of environmental associations in environmental protection."

- The most progressive CJEU cases, such as the Case C-72/95, *Kraaijeveld*<sup>17</sup>, Case C-263/08, *Djurgarden*<sup>18</sup>, Case C-115/09, *Trianel*<sup>19</sup> are dealing with public participation in EIA cases where the width and content of standing of environmental NGOs and local communities usually do not raise problems anyway. The EIA is the most open environmental administrative procedure, unfortunately not yet representing a general standard for all the rest of the environmental procedures;
- Another frequently quoted case, the C-237/07, *Janecek*<sup>20</sup> deals again only with the persons directly concerned (i.e. living in the affected areas) so it is not overcoming the usual difficulties of standing in environmental cases. Case C-240/09, the Slovak Brown Bears case<sup>21</sup> in connection with standing uses the phrase "to the fullest extent possible, is consistent with the objectives laid down in Article 9(3) of the Aarhus Convention" which is a phrase that still allows less than a full implementation of the provision;
- Cases C-128/09, *Boxus* and C-182/10 *Solvay*<sup>22</sup> are very progressively handling an unfortunately widespread governmental tactic to avoid public participation, i.e. bringing decisions on significant individual investments not in an administrative legal procedure where a certain level of access to justice is open for a limited number of persons, but rather transposing the case into a general decision-making procedure of legislative nature. While such occurrences are also frequently discussed by the Compliance Committee under Article 6, 7 and 8 of the Convention, the indirect relevance to the implementation of Article 9 might make it necessary to address them in an overall access to environmental justice Directive. Yet, it is just one of the issues within the broad set of problems concerning access to justice in environmental matters, whereas we have to underline again that the court practice in itself cannot give the legal community a coherent system of interpretation of all the relevant issues of access to justice;

<sup>16</sup> <http://ec.europa.eu/environment/consultations/pdf/access.pdf#page=16&zoom=auto,-82,840>

<sup>17</sup> Case C-72/95 ECR 1996

<sup>18</sup> Case C-263/08. ECR [2009] Page I-09967 (*Djurgarden*-ruling)

<sup>19</sup> *Trianel*-case, C-115/09. ECR [2011] - European Court Reports 2011 Page I-03673

<sup>20</sup> Case C-237/07 ECR 2008

<sup>21</sup> Case C-240/09 *Lesoochránárske zoskupenie* [2011] European Court Reports 2011 Page I-01255 31  
Directive 92/43/EEC

<sup>22</sup> Joined cases C-128/09 to C-131/09, C-134/09 and C-135/09. ECR reports - not yet reported and *Solvay* and *Others* C-182/10. ECR [2012], not yet reported

- In connection with the costs of bringing a legal challenge cases in C-427/07, *Commission v Ireland*<sup>23</sup>, C-260/11, *Edwards*<sup>24</sup> and C-530/11, *Commission v UK*<sup>25</sup> the CJEU offered a detailed explanation of the requirement “not prohibitively expensive” that should be a part of the proper implementation of the third pillar of environmental democracy, too, although its certain subjective elements might allow decisions of broad discretion. In our opinion, a more detailed explanation would be needed in connection with costs, *inter alia* with the use of experiences of the two comparative studies mentioned earlier. For instance in such cases the presumption should be the benevolent attitude of the plaintiff acting in public interest and that could only be removed once the opposite was proven beyond reasonable doubt – this general presumption is still missing from the most progressive sentences, too, while this might be deducted from the legislative goals of public participation summarized in the Preamble of the Aarhus Convention and reflected in many national level general legal documents, including constitutions, environmental plans and basic environmental laws;
- Cases such C-72/12, *Altrip*<sup>26</sup> highlight the scope of the review, i.e. they determine whether the plaintiff should be allowed to invoke only procedural defects or be allowed to raise issues of substantive legality as well. Taking into consideration the wide range of restrictions the members of public face when strives for access to justice concerning various parts of the decision-making procedures of environmental significance, these cases deal again only with a smaller part of the problem;
- Finally, legal practice of CJEU about adequate and effective remedies worth further scrutiny for the drafters and legislators of a necessary and possible Access to Environmental Justice Directive. Matters such as revocation of administrative consents; injunctive relief; the relationship of prevention and remedy of environmental harms as opposite to their mere compensation appear in decisions such as Case C-201/02, *Wells*<sup>27</sup>, (11) C-416/10, *Križan*<sup>28</sup> and Case C-420/11, *Leth*<sup>29</sup>. In our opinion, however, decisions that consider prevention, remediation and compensation as even solutions are not in harmony with the basic principles of environmental protection, first of all with the principle of prevention and the precautionary principle. Moreover, compensation for lost natural and economic (public health etc.) values is not always fully possible. However, the principles of *equivalence* and *effectiveness* used in the practice of CJEU can be proper standards in the implementation of the substantial issues of access to justice.

Summarizing our opinion on the tenet that the general rulings in the CJEU practice concerning access to justice in environmental matters could be a satisfying substitution of a detailed Directive is that the court practice is not general enough within the topic (mostly restricted to access to justice in EIA cases) and still holds (and can hold in the future, too) some views not in full harmony with the will of

<sup>23</sup> Case C-427/07. ECR [2009] Page I-06277

<sup>24</sup> Case C-260/11: Reference for a preliminary ruling from Supreme Court of the United Kingdom— Regina on the application of David Edwards, Lilian Pallikaropoulos v Environment Agency, First Secretary of State, Secretary of State for Environment, Food and Rural Affairs in OJ C 226, 30.7.2011, p. 16–16

<sup>25</sup> Case C-530/11: Action brought on 18 October 2011 — European Commission v United Kingdom of Great Britain and Northern Ireland in OJ C 39, 11.2.2012, p. 7–8

<sup>26</sup> *Altrip* C-72/12 Case: Reference for a preliminary ruling from the Bundesverwaltungsgericht (Federal Administrative Court) Leipzig (Germany) lodged on 13 February 2012 — Gemeinde Altrip (Municipality of Altrip)

<sup>27</sup> Case C-201/02. European Court Reports 2004 Page I-00723

<sup>28</sup> *Križan and Others* C-416/10. ECR - not yet reported

<sup>29</sup> Case C-420/11: Reference for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 10 August 2011 — Jutta Leth v Republic of Austria, Land Niederösterreich OJ C 319, 29.10.2011, p. 10–10; 2013 ECR - not yet reported

the legislators of the Aarhus Convention, while the progressive elements of the European level court practice are covering only smaller parts of the system of effective access to justice in environmental matters. Keeping this in mind, naturally, the practice of the EU court shall form an important basis for the drafting of the Directive in several aspects.

### 3. Improper implementation of Article 9 in the available *draft Directive* on Access to Justice in Environmental Matters

Being aware that one cannot raise issues of proper implementation of the Convention in connection with a disapproved Proposal on the Directive on access to justice in environmental matters, with a view of preventing weak and inefficient implementation of the Convention by the time EU takes measures in that effect, however, the complainants would like to raise a couple of the most obvious shortcomings of the Proposal. Taking them into consideration could prevent also a series of further complaints to the AACC.

- Based upon the overall surveys of access to environmental justice in EU countries initiated by the Commission and performed by international experts led by Milieu Consult and later Professor Darbö, also the survey performed by independent civil networks such as the Environment&Justice<sup>30</sup>, we can undoubtedly establish that in some countries introduction of the text of the original Proposal would have resulted in retrogression, especially in connection with the central element of access to justice in the Aarhus system, namely the rights of participation of environmental NGOs, for instance in connection with the definition of „qualified entity“.
- The text of the Proposal did not contain the usual legal warning against this retrogressive effect either;
- The Proposal did not design a coherent system together with the implementation of the Article 9 (3), it failed to have a uniform reference of Article 9 (4)-(5) to any kinds of access to justice cases in environmental matters and it did not contain the proper implementation of Articles 1-3 which should have formed an inalienable part of the full transposition of the third pillar;
- The too narrow definition of environmental authorities in the Draft contradicted not only the definition in the Aarhus Convention but was also different from the Regulation, Recital (7) in the Preamble and Art. 2(1)c.)<sup>31</sup>;
- There was a too narrow definition of interested public, too, that would allow quite restrictive country implementation (this allegation was especially reinforced by the findings of the Milieu and the Darbö studies);
- A too narrow definition of environmental law contradicted again not only the definition in the Aarhus Convention but also the Regulation, Art. 2(1)f.);
- The Draft purposefully focuses only on acts and omissions by public authorities, the other part of Art. 9(3), i. e. actions against private persons was left to be regulated by the MSs that might recreate the same problems of lack of coherence as we have described above in connection with the omission of the whole Proposal.

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<sup>30</sup> See the J&E Comparative study on access to justice:

[http://www.justiceandenvironment.org/files/file/2010/05/JE-Aarhus-AtJ\\_Report\\_10-05-24.pdf](http://www.justiceandenvironment.org/files/file/2010/05/JE-Aarhus-AtJ_Report_10-05-24.pdf)

<sup>31</sup> The European Parliament was at the same opinion.

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A5-20040189+0+DOC+PDF+V0//EN>



Apart from warning the Party to the convention about the above mentioned risks of improper implementation of the access to justice pillar of the Aarhus Convention, we ask the Compliance Committee to summarize and offer to the attention of the Party all the relevant arguments that was made in its previous findings in connection with access to justice *inter alia*<sup>32</sup>:

- The minimum requirement under Art. 9(3) is that for at least some acts and omissions by Member State institutions, the Party concerned must ensure that members of the public have access to administrative or judicial review procedures. In other words, the term in Article 9(3) “where they meet the criteria, if any, laid down in its national law” cannot be used as an excuse for introducing or maintaining such strict criteria that they effectively bar all or almost all environmental organizations or other members of the public from challenging acts or omissions that contravene national law relating to the environment. The same phrase is interpreted even more positively is that access to a review procedure is the presumption and not the exception.<sup>33</sup>
- The so called Plaumann test developed in older decisions of the EU Courts might not be held in the mirror of the Aarhus Convention. This test sounded that even if someone might suffer a personal damage linked to the alleged harmful effects of an activity, once the circumstances do not distinguish her individually from others, i.e. the possible damage could affect any person residing in the area in question many others in the same way, no member of the public is ever able to challenge a decision or a regulation in such case before the ECJ. According to earlier decisions of the Committee, by using the Plaumann test, unless fully compensated for by adequate administrative review procedures, the Party concerned would fail to comply with article 9, paragraph 3, of the Convention.<sup>34</sup>
- In the Lithuanian Kazokiskes case the Committee noted that the public concerned should be provided with effective remedies, including injunctive relief, because that is essential for effective access to justice, otherwise the European Community fails to comply with article 9, paragraph 4, of the Convention. This failure has raised the issue of a noncompliance with article 3, paragraph 1, too<sup>35</sup>.

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<sup>32</sup> With a special attention to the C/70 Czech Republic case, par. 66: “The Committee, while noting the complexity of decision-making in a multi-level government structure such as the one between the EU and its member States, encourages the EU in designing a common framework for its member States to implement the Convention, to ensure the compatibility of that framework with the Convention and to fulfil its responsibility to monitor that its member States, including the Czech Republic, in implementing EU law, properly meet the obligations resting on them by virtue of the EU being a party to the Convention”

<sup>33</sup> ACCC/C/2008/32, Para. 74 and 77

<sup>34</sup> ACCC/C/2008/32, Para 85

<sup>35</sup> ACCC/C/2005/17, Para 59

#### **IV. Nature of alleged non-compliance**

The communication relates to a general failure to implement, or to implement correctly the provisions of Article 9, as well as the related provisions of Article 2 and 3 of the Convention by the Party concerned.

##### **1. Article 2, definitions**

Without having identical or at least comparable definitions across the Member States, there is no hope for a coherent Europe wide implementation of the Convention. In the Milieu and Darpö reports there are findings that show that the terms "public authority", "environmental decision", "the public" and "the public concerned" are not consequentially used in the European national environmental laws relevant from access to justice viewpoints. In many cases, these terms are poorly defined even within one country. The preferred procedural legal position of the NGOs that is involved in the definition of "the public concerned" is not ensured in the majority of the EU countries.

##### **2. Article 3, general provisions**

Formally speaking, the most obvious failure of the European Union as a Party to the Aarhus Convention that it failed to take any legislative or regulatory and almost any of other measures to achieve compatibility with the provisions of the access to justice provisions of the Convention. Naturally, on this legal background we cannot speak about proper enforcement measures either and not at all about maintenance of a clear, transparent and consistent framework to implement the Convention.

Ensuing from all of these, capacity building activities, such as ensuring assistance and guidance to the public in seeking access to justice and also promoting education in substantial and procedural side of environmental protection on the European level have not taken place either. Similarly, the EU as a Party cannot allege that it has supported Europe wide the appropriate recognition and support of associations and other organisations or groups working in the field of environmental protection. Although, as we could see from the two reports, in many Member States there are serious problems with the possibilities of the NGOs to gain access to legal remedies in environmental cases.

It is well documented that thousands of environmental activists in the world are penalized, persecuted or harassed for their involvement in environmentally significant development projects. These cases happen not first of all on the territory of EU but our region is not totally exempt from them – yet, there are no attempts to develop a European net of protection. Similarly, as the literature frequently raises, even the plans of the EU in connection with future regulations on access to justice in environmental matters are totally in lack of guarantees against discrimination according to citizenship, nationality or domicile.

##### **3. Article 9(3), access to justice in environmental matters other than access to information and participation**

As we have seen from the reports ordered by the EU Commission, there is no coherence amongst the EU countries concerning the proper broadness of the criteria according to which members of the public might have access to administrative or judicial procedures in environmental matters. There are quite different solutions in providing access to administrative and/or judicial remedies also in connection with the omissions of the authorities. Seemingly the Commission considers the acts or omissions of private persons that contravene the provisions of any national laws relating to the environment as falling outside the scope of the European level environmental access to justice laws when they might be created sometimes in the future.

Legal solutions for ensuring standing, as a major issue in access to justice are widely different across the EU countries, ranging from *actio popularis* to strict requirements of having direct and legitimate interests or rights concerned in the case.

For those who could have access to justice, the remedies might be far from adequate and effective at all, primarily out of the failure of implementing the relevant requirements of the Convention. While the judicial remedies have no suspending effect on the implementation of the administrative decisions in environmental matters in most of the EU countries, injunctive relief is rather an exemption than a rule in the practice of the courts in the Member States. Fairness and equity cannot be found amongst the special requirements of legal remedies in environmental matters, because of the overall value neutrality of the European environmental procedural and public participation laws. The strong interrelationship between basic human rights and environmental protection, as well as the honour for those who spend their time and energy on public interest environmental cases are mostly overlooked in these respects. Timeliness is also a major concern in the court proceedings in many EU Member States, while the costs of the legal remedies, because of the court fees, the legal consultation expenses and the expenses of the expert opinions (no serious environmental legal disputes can be solved without a good lawyer and a group of highly experienced experts) and also the widely accepted *loser pays* principle prevent many concerned members, groups and organisations from starting cases against the polluters or the administrative bodies which neglect their responsibilities.

#### **V. Provisions of the Convention relevant for the communication**

List as precisely as possible the provisions (articles, paragraphs, subparagraphs) of the Convention that the Party concerned is alleged to not comply with:

Article 2, Paragraph 1, 2, 3, 4 and 5

Article 3, Paragraph 1, 2, 3, 4, 8 and 9

Article 9, Paragraph 3 and 4

## **VI. Use of domestic remedies or other international procedures**

Owing to the mounting difficulties described in the case ACCC/54 we haven't initiated the only kind of legal remedy that in principle could have been available, namely a complaint to the European Court of Justice.

## **VII. Confidentiality**

No confidentiality is requested

## **VIII. Supporting documentation (copies, not originals)**

All the supporting documentation are available in English via Internet – we have footnoted them.

## **IX. Summary**

Although the European Community (Union) reformed its legislation in the harmony of the first two pillars (access to information and access to participation) of the Aarhus Convention and has issued its ratification document to the Aarhus Secretariat almost a decade ago, after the failed legislative proposal in 2003-2004 no attempt has been made to enact the third pillar (access to justice) of the Convention. There is no serious prospect that the EU will be able and willing to accommodate the European environmental law to the detailed access to justice requirements of the Convention in the foreseeable future. Both the Commission and the European Parliament have acknowledged in several documents that without accepting a new access to justice directive no full and proper implementation of the Aarhus Convention can be imagined.

Contrary to these statements, partly already in the depository document and later in other official documents the EU has argued also in effect that its implementation of the Aarhus Convention can be acceptable even without a directive on access to justice in environmental matters.

- First, it alleged that the direct applicability of international law ratified by EU and its priority above the rest of the European laws shall qualify as full implementation. In the mirror of practical data about the lack of coherence in the European wide practice of the third pillar we think that this formal argument is unacceptable.
- Second, the EU alleged that the full implementation of the Convention on the level of Member States shall qualify as fulfilment of the responsibilities of the EU in this respect. In connection with this argument we refer again to the ample factual materials about the improper and quite different implementation of the access to justice provisions in the Member States.
- The third argument raised in the defence of the European Union Party is that the progressive court practice on the EU and the national level shall perform the implementation of the third



pillar. After having a short overview of these practices, the complainants are convinced that on one hand the court decisions are not fully consequential and on the other hand they could not be able to create a coherent system of implementation with all important elements of the legal requirements of access to justice in environmental matters.

- The fourth argument is that several amicable, organisatory measures, such as trainings of officials and judges or collection and dissemination of materials on best practices in access to justice would substitute the hard law measures on the European level. We acknowledge that such capacity building measures, if they happen would be indispensable elements of the implementation of the Aarhus Convention, but we doubt that they can be accepted as full implementation of a legal text that requires concrete measures that are mandatory for the legal subjects.

In connection with the access to justice pillar the Aarhus Convention contains numerous, quite stringent requirements, starting with the definitions of the authorities, the other role players and the cases that belong under the category "environmental". Taking into consideration that the definitions largely determine the scope of any relevant legislation the wide range of variations amongst the definitions in that field the several Member States have introduced in itself leads to a scattered regulation of access to justice in Europe. The substantial elements of a well operating access to justice system, such as a minimum level of standing for individuals and environmental associations, an adequate scope of judicial review, not prohibitively high costs of legal remedies and effectiveness of the remedies, such as avoiding delays and backlogs and also including injunctive relief in national systems should have been uniformly ensured by a directive setting these standards. Since the EU as a Party to the Aarhus Convention failed to ensure the fulfilment of these requirements, it has failed to implement the access to justice provisions of the Convention.

The complainants do understand the difficulties mounting ahead the EU Commission when drafting a new access to justice directive, because of the very scattered legal solutions deeply rooted in the legal culture and infrastructure of the Member States. However, we are convinced that it would be possible to determine the minimum results the different legal systems of the Member States should achieve in respect to access to justice in environmental matters with setting a detailed list of requirements concerning the content of definitions, the general provisions, the minimum level of access to justice in environmental matters such as access to procedural and substantial issues of all relevant decisions and omissions of the administrative bodies and also private entities, together with the general requirements of fair and effective features of access to justice for the members and associations of the public.

We are also convinced that the European legislators fully accept the principle of public participation i.e. "Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided." (Principle 10 of the Rio Declaration). All that is needed now is a Europe wide, consequential, coherent application of the values reflected in this principle.



X. Signature

The communication should be signed and dated. If the communication is submitted by an organization, a person authorized to sign on behalf of that organization must sign it.

Signed in Tartu, on 16 December 2014, by Siim Vahtrus, Chairman of Justice and Environment

