



European Environmental Bureau (EEB)

Access to Justice in Environmental Matters Comments on the Working Document

31 May 2002

These comments are made in response to the Working Document issued by DG Environment on the 11th April 2002.

General:

The EEB welcomes the Commission's efforts to develop a directive on access to justice in environmental matters. The EEB has campaigned for improvements to access to justice in EU environmental matters for many years and considers access to justice to be one of the essential elements for an effective environmental policy. A proposal on access to justice is thus long overdue. To be worthwhile however this new directive must lower the barriers to access to justice for citizens and their organisations. The specific comments (numbers relate to paragraphs in the Working Document) suggest improvements to the working document which are intended to lead to a more useful and effective directive.

Definitions

3.1 Environmental proceedings

Since one of the principal purposes of the proposed directive is to implement the third pillar of the Aarhus Convention and in particular Article 9.3, it would be desirable to follow the Aarhus definitions. Aarhus does not define 'environmental proceedings'. Rather, Article 9.3 concerns access to justice 'to challenge acts and omissions ... which contravene provisions of ... law *relating to the environment*' (emphasis added). The definition in the working document of proceedings 'in environmental matters' appears narrower. The Aarhus approach should be followed.

Second sentence: Not only must the court or other decisions have binding effect, as the Working Document provides. Aarhus also requires that the proceedings be, among other things, 'timely and not prohibitively expensive' and that decisions be 'given or recorded in writing' and 'publicly accessible'. It would appropriate to include these requirements explicitly in the new directive.

3.2. Administrative acts and omissions

The meaning of ‘having ... external effect’ is not clear.

3.3 Public authority

The proposed definition omits a significant part of the definition of public authority found in article 2.2 of the Aarhus Convention. The omitted parts concern the privatised, commercialised or otherwise delegated responsibilities of public authorities and address a widespread and important trend in the member states. The definition needs to be made complete.

3.5. The public concerned

The public concerned is a definition more relevant to the second than the third pillar and thus of doubtful appropriateness to this directive.

3.6 Recognised non-governmental organisation

Special requirements of recognition raise numerous questions and may very well backfire by placing additional unintended hurdles in the way of access to justice. Notably, the Aarhus Convention does not follow this approach.

The phrase ‘recognised by the competent authority’ should be deleted. Recognition by the competent authority is not a good test since that leaves the role of an NGO in the hands of the competent authority involved in the controversy at issue. A more objective test would be preferable such as ‘formed or established in accordance with national requirements, if any’.

3.7 Citizens’grouping

This is a category not found in the Aarhus Convention. We understand this provision as an attempt to include access to justice also for informal local organisations. We have concerns about the some of the restrictions in the provision, however.

It seems unnecessary to limit the provision to citizens’ groups whose objective is the protection of the environment. Neighborhood associations or groups for the promotion of human health or local wellbeing might also be included.

The provision on the requisite number of members should add the phrase, ‘if any’ to make clear that a numerical restriction is not being imposed. A better approach would be to eliminate the reference to numbers altogether.

Rather than restricting the group to residents of the ‘municipality’, it would be better to refer to an entity like "community", or "region" or "one or more municipalities".

3.9. Statute

See comments above concerning ‘recognised’ NGO’s.

.4. Scope of the future proposal

4.1. Law relating to the environment.

What is going to be the meaning of “relevant law relating to the environment”? Does “relevant” refer to the type/form of the legislation (law, regulation, ordinance ...)? or is it a reference to geographical scope or some other aspect?

The Aarhus definition of ‘environmental information’ (art. 2.3) includes more elements than are set out in 4.1. second paragraph (b). The definition in the directive should include the same elements as the Aarhus definition.

4.2. Community and national environmental law.

The opt out mechanism for legislation of national origin will be difficult and complicated to work with as distinguishing the origin of legislation could lead to disputes. In any case if this provision is include, a Member State which opts out should be required to inform other member states and the Commission about it and the public, as well.

5.3. Request for action

The provision should make clear that actions may be brought not only ‘if ... a person has contravened provisions of law relating to the environment’ but if a person may have contravened such provisions. The determination whether a law has been violated is precisely the question which a court or other tribunal is being asked to determine.

I do not understand/agree on first paragraph “If a third natural or legal person has contravened provisions of law relating to the environment or does not respect the conditions of a permit based on law, members of the public which have legal standing shall also give notice to this natural or legal person, where it can be identified....”

Sixty days is, in some cases, excessively long. ‘As soon as possible and at the latest within sixty days’ would be preferable. Provision should also be made that failure by the competent authority to inform the member of the public within sixty days shall be considered to affirm the person’s right to proceed.

6. Legal standing

6.1 The public concerned

See comment above on the definitions.

6.2. Citizens’ groupings

See comments above on the definition of this term.

In the event of transboundary cases, the provision should extend to impairments of law which may have or have occurred as stated above in the comment to 5.3

6.5. Criteria for recognising environmental NGOs

See comments above concerning the inadvisability of defining ‘recognised’ NGO’s.

Non-governmental organisations are by their very nature fluid and subject to change. A requirement that an organisation have existed for a certain number of years is likely to operate as a barrier to access to justice. New groups arise to deal with a particular problem but old groups merge or change their names and the recognition requirements should not form a new barrier to access to justice.

6.6 Procedural aspects with respect to recognition of NGOs

The working document includes quite a lot of text regarding “recognition” and very little is said about article 9.3 of the Aarhus Convention requirements regarding interim relief and effectiveness and costs. Inclusion of more descriptive possibilities here of how to avoid these barriers would be helpful.

There could be a conflict of interest if the competent authority is the same that is the one authorising an organisation to sue. It would be preferable to give the courts the power to decide any questions of recognition.

7. Interim relief

This is an important element of the system and recognised in the Aarhus Convention (article 9.4). It is relevant for cases where speed is important and other cases as well.