

EEB COMMENTS TO:

Second Working Document on Access to Justice in Environmental Matters, produced by DG Environment on 22.07.2002

DATE OF SUBMISSION OF OUR COMMENTS: 30.09.2002

1. PART I: INTRODUCTION

In April 2002 the Commission services sent out a first Working Document outlining the basic ideas on a Commission proposal for a Directive on Access to Justice in Environmental Matters. From 6-8 May 2002 first consultations were held on the basis of this working document with the following stakeholders:

- ? Meeting with representatives of the Member States, 6 May 2002;
- ? Meeting with representatives of European industrial and professional federations and associations, 7 May 2002;
- ? Meeting with representatives of the Accession Countries, 7 May 2002;
- ? Meeting with representatives of environmental NGOs and consumer associations, 8 May 2002;
- ? Meeting with representatives of the European association of local and regional authorities and of the European regions, 8 May 2002.

By 12 June 2002 DG ENV had received written comments from the following stakeholders.

- ? Austrian Federal Ministry of Agriculture, Forests, Environment and Water Management
- ? Danish Environmental Protection Agency
- ? Österreichische Bundesarbeitskammer
- ? Wirtschaftskammer Österreich
- ? Cefic
- ? European Environmental Bureau
- ? Ökobüro - Koordinationsstelle österreichischer Umweltorganisationen
- ? The Law Society of England and Wales
- ? Unabhängiges Institut für Umweltfragen (Berlin)
- ? Inter-Environnement Wallonie (IEW)

? E-LAW U.S.

In general, the Working Document was well received and DG Environment has taken into consideration the comments made. The Second Working Document gives absolutely no indication of how comments on the first Working Document have been dealt with. As the insertion of the EEB's comments in this document show, it is possible with the aid of generally available software, to show changes. It also possible to add explanations for why changes have or have not been made. On the basis of the first Working Document and the comments made, this second Working Document has been prepared.

2. PART II: DRAFT PROVISIONS FOR A DIRECTIVE ON ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS

Objective: to contribute to the enforcement by the public of legislation Community and member state law relating to the environment and to reduce existing enforcement deficiencies, in order to contribute to the protection of the right of every person to a clean and healthy environment and to ensure a high level of environmental protection. The provisions further aim at contributing to the implementation of the United Nations/Economic Commission for Europe Convention on access to information, public participation in decision making and access to justice in environmental matters of 1998.

The provisions shall be without prejudice to other Community or member state provisions on access to justice.

Explanation: The objective should make clear that it is enforcement by individual citizens and their organisations which the directive is intended to promote.

Community and member state law clarifies that the directive derives from Community law and extends to member state law implementing measures.

The word 'law' replaces the word 'legislation' in keeping with the phrasing of the Aarhus Convention (see, e.g. article 9.3) and because the word 'legislation' can be interpreted to exclude regulations or other administrative measures which have not been enacted by a Parliament or other legislative body. Since administrative measures can also have the force of law, it should be clear that the directive also applies to their enforcement.

The directive is intended to implement the third pillar of the Aarhus Convention and it would be appropriate to reflect the objective of the Convention in the provision on the objective of the directive.

Definitions:

“Environmental proceedings”: judicial or administrative proceedings in environmental matters (other

~~than proceedings in criminal matters~~) before a court or another independent and impartial body established by law, which are concluded by a binding decision.

Explanation: The definition of environmental proceedings continues to diverge from the approach taken in article 9.3 of the Aarhus Convention. See EEB comment to the first Working Document.

This definition is also dramatically different from the version in the first Working Document. There the definition applied to the ‘review of acts and omissions of public authorities or other legal and natural persons’. The present definition appears not to comply with the requirements of Aarhus.

“Administrative action”: any administrative measure under legislation relating to the environment by a public authority, having legally binding and external effect. Administrative actions shall include plans or programmes covered by Directive 2001/42/EC¹ or by legislation relating to the environment.

“Administrative omission”: any failure of a public authority to act despite a legal obligation for acting under legislation relating to the environment.

“Public authority”: government or public administration at national, regional or local level; this definition does not include public prosecutors as well as persons, bodies, administrations or institutions acting in a judicial or legislative capacity.

“The public”: one or more natural or legal persons and their associations, organisations or groupings.

“The public concerned”: the public affected or likely to be affected by, or having an interest in, a contravention of legislation relating to the environment.

Explanation: The ‘public concerned’ is a definition primarily relevant to the second pillar, on public participation. Nevertheless, if the definition is to be used in this directive it should be complete and follow the Aarhus phrasing (art. 2.5). Failure to include the phrase ‘or having an interest in’ threatens to have the, presumably unintended, effect of rolling back existing rights in some member states.

“Qualified entity”: any association, organisation or grouping promoting environmental protection that has been recognised according to Article 7.

“Legislation relating to the environment”: legislation that has as its objective the protection or the improvement of the environment including human health and the protection or the rational use of natural resources, in particular in the following areas:

- (a) water protection
- (b) noise protection
- (c) soil protection
- (d) country planning and land use

¹ Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment OJ L 197, 27.6.2001, p. 30.

- (e) nature conservation and biological diversity
- (f) waste management
- (g) chemicals, including biocides and pesticides
- (h) biotechnology
- (i) air pollution and atmospheric pollution
- (j) other emissions, discharges and releases into the environment.

Explanation: This list omits certain elements found in article 2.3 of Aarhus. It should be supplemented to reflect all elements mentioned in article 2.3.

~~Member States may exclude legislation relating to the environment of exclusively national origin from the present definition.~~

Explanation: All member states have signed and ratified (or are in the process of ratifying) the Aarhus Convention .

Review of actions and omissions:

Members of the public as well as other bodies who have legal standing according to Article 4 shall have access to environmental proceedings in order to challenge the procedural and substantive legality of ~~administrative actions~~ or omissions by private persons and public authorities in breach of ~~legislation law~~ relating to the environment.

Explanation: The language of article 9.3 of the Aarhus Convention is substituted so that it is clear that both private persons and public authorities may be the object of an action. The provision would otherwise not be in compliance with the Aarhus requirements.

Legal standing:

The following members of the public shall be entitled to have access to environmental proceedings:

- a) Within the framework of national legislation, members of the public concerned
 - who have a sufficient interest; or ~~alternatively~~
 - ~~who maintain the infringement of a right where the administrative procedural law of a Member State requires this as a precondition.~~

Explanation: Addition of this requirement would be a step backward in some member states.

- ~~b) Qualified entities, without having to maintain the infringement of a sufficient interest or of a right, under the condition that~~

- ~~– they are recognised according to article 7 in the Member State where they intend to lodge a request for action or institute environmental proceedings.~~
 - ~~– the matter of review falls within the scope of the statutory activities of the qualified entity.~~
 - ~~– the matter of review falls within the geographical area of activities of the qualified entity.~~
 - **Explanation:** The Aarhus Convention makes no mention of ‘qualified entities’ and as indicated in the EEB’s previous comments the introduction of such a category seems undesirable.
- c) According to national legislation or practice, municipal and regional administrative bodies shall have the possibility to institute proceedings in the general interest of the environment.

Request for action:

1. Members of the public and other bodies who have legal standing under Article 4 and who consider that a public authority or private person is or may be in breach of legislation relating to the environment may lodge a request for action within a reasonable time frame with this public authority before having access to environmental proceedings.

Explanation: As noted above, Aarhus article 9.3 applies to private persons and public authorities. The proposal should be re-worded wherever necessary to reflect this.

2. The public authority referred to in paragraph 1 shall consider any such request for action unless the request is clearly unsubstantiated. It shall inform the member of the public or other body who lodged the request, as soon as possible and at the latest within sixty days, of its decision on the measures to be taken to ensure compliance with legislation relating to the environment or of its refusal of the request for action. It shall state the reasons of its decision.
3. Where the said public authority is unable, despite due diligence, to take a decision on a request for action within the period mentioned in paragraph 2, it shall inform the member of the public who lodged the request as soon as possible, at the latest within the period mentioned in paragraph 2, of the reasons for not being able to take the decision and of the time when it intends to decide on the request. It shall take such decision within a reasonable time frame, having regard to the nature, extent and gravity of the breach of legislation relating to the environment, within a period not exceeding four months, from the receipt of the request; it shall without delay inform the member of the public or other body of the decision on the request once it has been taken.
4. Where a decision on a request for action has not been taken by the public authority within the time limits mentioned in paragraphs 2 and 3, or members of the public or other bodies who lodged the request consider the decision to be insufficient to ensure compliance with legislation relating to the environment, they shall be entitled to institute environmental proceedings challenging the decision or the failure to decide.
5. The time limits to institute environmental proceedings shall be suspended while the above mentioned time periods are running.

Qualified entities:

- ~~1. Entities which have applied for recognition according to Article 7 and which fulfil the criteria of recognition set out under national law according to paragraph 2 of this Article shall be recognised.~~
- ~~2. The right to be recognised shall be given~~
 - ~~a) to international, national, regional and local associations, organisations or groupings whose primary statutory purpose is to protect the environment and;~~
 - ~~b) which guarantee provide, by their organisational structure, for the adequate pursuit of their statutory objectives and~~
 - ~~c) which allow any person to join who supports the objectives of the association and~~
 - ~~d) which are acting on a non profit basis in the general interest of the environment and~~
 - ~~e) which have been actively pursuing environmental protection according to their statutes for a certain period of time which is to be fixed by the Member States but shall not exceed three years.~~
- ~~3. A local association or grouping that has no legal personality in addition shall have to fulfil the following criteria:~~
 - ~~a) It actively pursues the protection of the environment at local level.~~
 - ~~b) It is composed of residents of the municipality or of municipalities in the immediate neighbourhood. The number of members is to be determined by the Member States taking into account the density of population and local circumstances.~~
 - ~~c) It is capable of proving that the breach of legislation relating to the environment has or is likely to have adverse effects on the local environment of its municipality.~~
- ~~4. Paragraph 2 e) shall not apply to local associations or groupings as referred to in paragraph 3 of this Article.~~
- ~~5. An international, national, regional or local qualified entity from one Member State that intends to institute environmental proceedings in another Member State shall have to fulfil the criteria for recognition of the Member State where it intends to lodge a request for action or to institute environmental proceedings. Such action shall only be possible where an action or omission in breach of legislation relating to the environment affects or is likely to affect the environment in the geographical area of activities of the qualified entity.~~

Procedure of recognition:

- ~~1. An expeditious recognition of qualified entities where they meet the criteria set out in Article 6 shall be ensured by way of:~~
 - ~~a) ad hoc recognition on a case by case basis or~~
 - ~~b) advanced recognition.~~

- ~~2. Member States shall set out the competent authority for recognition; such authority may include the authority that has received a request for action, a court or another independent and impartial body.~~
- ~~3. Where a Member State opts for advanced recognition it shall also ensure that access to an expeditious ad hoc recognition is available.~~
- ~~4. Where a request for recognition has been rejected this decision can be reviewed before a court or another independent and impartial body established by law.~~
- ~~5. The detailed arrangements for the recognition procedure shall be set out at national level.~~
- ~~6.1. The time limits for instituting a request for action or the time limits to institute environmental proceedings shall be suspended during the time that an application for recognition has been filed and a final decision on the recognition of a qualified entity has not yet been taken.~~

Explanation: As previously stated, the introduction of the notion of qualified entities is problematic and threatens to raise, rather than lower barriers for access to justice. The concern about a possible flood of actions is exaggerated, as experience in many countries over many years has shown. The investment of time, money and energy in legal action is something citizens and their organisations do not lightly undertake. Actions are, in general, well-motivated and necessitated by real concerns. The court systems of the member states already possess adequate instruments to handle the exceptional case of nuisance or frivolous proceedings.

Interim relief:

1. The necessary measures to ensure that access to justice according to Article 3 include effective interim relief, within the framework of national legislation.
2. The rules on legal standing referred to in Article 4 shall also apply to interim relief.
3. Article 5 shall not apply to interim relief.

Costs and effectiveness:

Review procedures according to Article 3 and Article 8 shall provide for adequate and effective remedies, including injunctive relief, and shall be fair, equitable, timely and not prohibitively expensive. Decisions taken by virtue of the present provisions shall be issued in writing. Decisions of courts, and of other review bodies shall be publicly accessible.

New: In order to further the effectiveness of the provisions of this directive, the member states shall ensure that information is provided to the public on access to administrative and judicial review procedures and shall consider the establishment of appropriate mechanisms to remove or reduce financial or other barriers to access to justice.

Explanation: This provision tracks article 9.5 of the Aarhus Convention and should also appear in the directive.-

ANNEX I

The national reports referred to in Article 10 (1) shall include a list on requests for action and environmental proceedings instituted by qualified entities and other municipal and regional administrative bodies containing the following information and data:

- (a) Particulars of the parties and any other authority involved.
- (b) The type of review procedure (request for action; procedure before a court or independent and impartial body).
- (c) The form of relief (action for annulment, injunction, interim relief etc).
- (d) The subject matter and the reasoning of the procedure.
- (e) The duration of the procedure.
- (f) The costs of the procedure.
- (g) The outcome of the procedure.

The report shall also indicate the relation of cases brought in the general interest of the environment compared to the total number of judicial or administrative cases.