The assignment from the Commission
According to the contract, the study “is intended to form part of a wider set of studies involving individual experts from specific Member States. The aim is to mainly focus on the current factual situation in a representative sample of Member States. (...).

As regards the factual situation, a lot of factual information on Member States legal systems is already available via the EU-wide Milieu study from 2007. However, DG Environment lacks a study on any key post-2007 developments, in particular on how (if at all) MS have adapted their systems to the Treaty and case-law developments that have occurred since 2007. The most important information relates to entitlement. This is because the Commission has already had to look at the conditions of access for purposes of Directive 2003/35/EC and these conditions of access would be similar for any conditions of access applicable to legislation used to give effect to Article 9(3) of the Aarhus Convention.

It is envisaged that the following Member States would be covered: Portugal, Latvia, Italy, France, Sweden, Cyprus, Netherlands, Ireland, Spain, Slovakia, Germany, Poland, Denmark, Hungary, Czech Republic, Ireland, Belgium.

Apart from addressing the Member State concerned, the present study will also involve contribution (by finalising, reviewing and providing input as necessary) to the preparation of a synthesis report covering all of the Member States studied.”.

Aim of the study
The aim of the study is to analyze the implementation of Article 9.3 of the Aarhus Convention on access to justice in selected member states of the European Union. It also covers the implementation of Article 9.4 on the effectiveness of the review procedure to the extent that it relates to situations where Article 9.3 is applicable. Furthermore, the aim is to evaluate the influence (if any) of the recent developments in the case law of the Court of Justice of the European Union (CJEU) on the national legal order (e.g. cases C-237/07 Janecek, C-427/07 Irish costs, C-75/08 Mellor, C-263/09 DLV, C-115/09 Trianel, C-240/09 Slovak Brown Bear, C-128/09 Boxus, etc.). The scope of this study does not extend to rules that are applicable to the already existing mechanisms under EU legislation on access to justice (2003/4/EC, 2003/35/EC, 2004/35/EC, 2010/75, etc.) except in so far as these also clarify the conditions for access to justice generally or there is an overlap with the different regimes.

This questionnaire pertains to all types of EU environmental legislation and the possibilities for the public concerned to challenge acts and omissions by public authorities which contravene provisions of national law relating to the environment. It also solicits
information about the possibility of challenging acts and omissions by private persons in similar situations.

Method to be applied

When answering the questions, please consider that this study seeks to draw a **general picture of access to justice** covering all instances of appeals – administrative and judicial – until the final decision is delivered in a given case. Please, try to answer all the issues raised in the bullet points, but do it by summarizing without getting too extensive or detailed. Furthermore, you do not need to keep strictly to every bullet point. It is preferable that you choose to answer them more freely, writing full paragraphs in a continuous manner. However, please confine your responses to the headlines in order to enhance the comparability of the questionnaire.

One of the main questions this study seeks to answer is whether the system in place in your country has been changed since the findings of the Milieu study 2007 and, if so, to what extent. If there is any part of the Milieu study that can be used to respond to the following questions, you may incorporate that text into the relevant sections of the questionnaire, updating as necessary.

It is not intended that you shall conduct interviews or collect comprehensive data or statistics. You have been chosen to undertake this study due to your comprehensive knowledge of the national legal systems on a general level. In most cases, this will suffice to give the relevant answers to the questions. You can also find some additional information in the previous studies that have been undertaken recent years on the implementation of the Aarhus Convention in the Member States of the union.¹

Finally, the overall aim of the study is to capture the essence of the access to justice in environmental matters and the implementation of Articles 9.3 and 9.4 of the Aarhus Convention in your country, irrespective of the legal system (civil law, common law, etc.). Therefore, some questions might be of less relevance in your country. In that case, please give a short answer on the reasons of irrelevance.

### A. Environmental legislation, administration and courts

**Environmental legislation**

- Some basic information on environmental rights according to the constitution, the most important pieces of environmental legislation at different levels (constitution, federal and state legislation).

¹ See attached Existing Study Chart 2012. The implementation reports to the Aarhus Convention and the studies conducted by the Task Force on Access to Justice in 2010 and 2011 can be found on the website of the UNECE, [http://www.unece.org/env/pp/a.to.j.html](http://www.unece.org/env/pp/a.to.j.html); Report 2011-03-09 by Ms. Yaffa Epstein: Access to justice: remedies, Memo 2011-01-31 by the Chair; On costs in the environmental procedure and Report by Ms. Yaffa Epstein to the fourth Meeting of the Parties 2011-06-29-2011-07-01: Approaches to access. Ideas and practices for facilitating access to justice in environmental matters in the areas of the loser pays principle, legal aid and criteria for injunctions.
System for decision-making and administrative appeal

- General outline of the system for decision-making in the environmental area at different levels, including the means of administrative appeal (appeals within the different levels of administration/Government).
- Other relevant institutions of appeal, such as specialized administrative bodies/tribunals.
- Other independent or administrative organs/bodies apart from the above that can contribute to access to justice as a complementary system (the Parliamentary Ombudsman, prosecutors, etc.).

The role of the courts

- General outline of the system for access to the courts, the different instances, scope of the trial (on the merits, judicial review, legality control in a more narrow sense), the possible outcome of the trial (cassatory/reformatory procedure).
- Which courts can hear environmental cases (constitutional, administrative, general, criminal, special bodies/tribunals that are considered as courts according to Article 6 of the European Convention on Human Rights) and what kinds of claims can be brought to the different courts?
- How does the judicial procedure before the courts relate to the administrative appeal? Must the possibilities of administrative appeal be exhausted before going to court, or might the different means of review be employed concurrently?

The Milieu study 2007

Milieu-study

This study covered 25 member states of the Union, all but Bulgaria and Romania. The national report from your country can be found in the link above. Please read the report and answer the following questions:

- Does the report correctly reflect the legal situation in your country at that time? What are the strong and weak parts of the report?
- Have there been any relevant changes to the access to justice provisions in your country since the findings of the Milieu study or are there any such proposals pending?
B. Standing

Standing for the public concerned

Article 9.3 of the Aarhus Convention requires that each Party ensures that members of the public, meeting criteria (if any) laid down in its national law, have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

This section of the questionnaire is divided between 1) some general questions on underlying philosophy on standing, 2) standing for individuals, 3) standing for groups and – finally – 4) standing for the environmental NGOs. This division is however not given by nature and might be complicated to use for some legal systems, especially for the third category (“groups”). Therefore, if it is more systematic to merge that category into the second or fourth category, feel free to do so.

General questions

- Do the courts decide on standing merely as a preliminary procedural requirement for the trial? If there is a preliminary procedure for standing in court (permission, leave for appeal), does the court consider both the standing issue and the merits (substantial and/or procedural legality, chances of success) in the complaint/action?
- Are the standing rules generally applicable throughout the administrative area of law, or are there specific standing rules for environmental cases?
- Do national rules for judicial review, including rules on evidence, enable judges to address both the substantial and procedural legality of challenged administrative decisions?
- Are standing rules consistent throughout your country or are there national/regional/local variations?
- Do the requirements for standing change according to the type of remedy requested (e.g. actions for annulment/performance/damages)?
- Does actio popularis exist in your legal system?
- Are standing criteria for environmental cases that concern union law the same as for environmental cases that do not? How do standing rules relate to the locus standi rules set up by Article 11 of the EIA Directive (2011/92/EU) and Article 25 of the IED Directive (2010/75/EU)? Have the courts used arguments about the direct effect of union law or CJEU case law, or the principle of effective judicial protection to widen the scope of standing since signing or ratifying the Aarhus Convention?

Standing for individuals

The public concerned is defined in Article 2.1 of the Aarhus Convention as “public affected or likely to be affected by, or having an interest in, the environmental decision-
making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.”

- Give a general overview of how the standing criteria for individuals from the public concerned are applied in environmental cases in your legal order. Does the individual have to show a specific interest in the decision at stake, or does it suffice that s/he lives in the vicinity of the (proposed) activity? Does your legal system follow an interest-based or a right-based model of standing?
- To what extent do existing national access to justice provisions satisfy the entitlement of individuals to standing on the basis of potential health concerns, as has been supported by the Court of Justice in its ruling in the Janecek case (C-237/07)?
- Environmental proceedings can involve multiple people and stakeholders. Does your system allow for “third party intervention” in the administrative appeal or judicial review of environmental decisions?

**Standing for groups**

- To what extent can organizations represent individuals in an environmental complaint?
- Does your legal system allow for multi-party litigation in environmental cases, e.g. class or group actions on behalf of the interests of a large group of the public concerned?
- Are there ways other than multi-party litigation available in your legal system to establish the administrative rights and duties of the public or for the defence of “diffuse interests” in the environmental area?

**Standing for environmental NGOs (e-NGOs)**

- Give a general overview of the standing criteria for NGOs in environmental cases in your country.
- Have there been any changes in the jurisprudence of the national courts as a result of CJEU’s recent judgements concerning NGO standing (e.g. DLV, Trianel, Slovak Brown Bear)?
- To what extent do existing national access to justice provisions satisfy the entitlement of NGOs to bring legal challenges to administrative environmental decision making, as the CJEU supported in its ruling in the Slovak case (C-240/09)?
- Is there any “geographical scope” applied in the standing criteria for e-NGOs in your legal system? Does the system favour local, regional or national organisations?
- Do the legislation and the case law in your country provide similar standing rights to “foreign” e-NGOs as to national ones?
C. The effectiveness of the judicial review

Procedural remedies

Article 9.4 of the Aarhus Convention requires that access to justice procedures provide adequate and effective remedies, including injunctive relief. To be effective, procedures must provide a means for actually stopping an environmentally harmful activity or administrative decision. Without the ability to obtain injunctive relief, serious and irreversible damage may occur before the legal dispute is decided. Even in legal systems that provide for suspensive effect, injunctions are important because there are often exceptions to automatic suspensions, such as go-ahead orders.

- Does an administrative appeal or application for judicial review in your system have automatic “suspensive effect” on the appealed decision? If so, can the party who benefits from the decision ask for a “go-ahead decision” from the deciding authority or by the appeal body/court?
- If an appeal does not have suspensive effect, under which conditions can the appellant obtain injunctive relief? Are the criteria clearly defined in the legislation or case law? How much discretion does the administration or judge have? Are the criteria, process or standard for injunctive relief different in a dispute against an administrative decision than in a lawsuit involving a private party’s activities that impact the environment?
- Is there a requirement in law (legislative acts) in your national legal order – in the general system for administrative and judicial procedure or specifically in environmental legislation – that environmental procedures should be timely?
- Furthermore, is there a general or specific environmental requirement in the national legal order that the administrative/judicial procedures should be effective?
- Are there specific safeguards that ensure that frivolous applications are not considered?
- Are there any examples of alternative dispute resolutions (ADR) in your country?
- Do you know of any reported examples where due to the lack of effectiveness of the national system of environmental review procedures, there have been undue delays for the litigants on either side (including businesses, investors, public concerned, NGOs, etc.)?
- Do you know of any reported cases where due to reluctance to award injunctive relief as appropriate, the environment has suffered considerable damages, despite the fact that there was a positive outcome for the environment in the final judgment?

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2 In this survey, “injunctive relief” means the temporary stopping of a contested decision or action during an administrative or judicial procedure—in some countries, injunctive relief is sometimes also referred to as a suspension, stay, interim measure or delay.

3 “Suspensive effect” means that filing a procedure automatically suspends the contested decision, activity, or permitted action.
D. Costs in the environmental procedure

Loser pays principle, court fees, costs for expert witnesses, etc.

Article 9.4 of the Aarhus Convention requires that procedures for obtaining access to justice must not be prohibitively expensive. Costs in the environmental procedure may consist of court fees, attorney/lawyer fees, costs for the administration, witness fees, and various other types of expenses. In some legal systems, all parties bear their own costs. In others, the loser of an administrative or judicial procedure must pay all, or a proportion of, the winner’s litigation costs (the loser pays principle). When the costs of the environmental procedure cannot be calculated from the start, there may be an inability to control or even predict exposure to risk, and thus an unreasonable deterrence of public interest environmental litigation.

- Does your legal system primarily or partly use court fees which vary according to “the value of the case” (“Streitwert”) to cover the costs of the environmental procedure? If so, give a basic description of the system and the costs involved in common environmental cases.
- Is there a legal requirement in your national legal order – in the general system of administrative and judicial procedures or specifically in environmental legislation – that the costs related to environmental procedures should not be prohibitively expensive?
- Does your legal system utilize the loser pays principle or shift litigation costs to the loser in any circumstances? Is this based on a specific rule of law or is it only based on judicial discretion and jurisprudence of the courts?
- Describe any laws, rules, customs, judicial discretion, etc. that limit the losing party’s liability for costs. Is the loser pays principle applied differently in disputes in which an administrative body is a party? Does the principle apply differently in public interest environmental disputes?
- How does your legal system deal with experts’ and witness’ fees in the environmental procedure?
- Does the appellant in an environmental case have to pay a bond (also called security or cross-undertaking in damages) in order to obtain an injunction of the appealed decision? If so, what criteria are used when the courts decide on the amount of such a bond?
- Does the environmental procedure in your country entail uncertainty about the monetary amount for which the losing party may be liable? Are there any means in the legislation or case law – such as protective cost orders – to reduce such uncertainty?
- Are there any other costs related to the environmental procedure that are relevant for the willingness from the public concerned to use their access to justice rights? Are there any specific environmental or general provisions that ensure that the system of access to justice is efficient and cost-effective vis-à-vis all interested parties?
- Can the system of review in environmental matters be considered prohibitively expensive? Are there known cases, where despite procedural guarantees costs were high and prohibitively expensive?
• If costs are considered to be prohibitively expensive in your legal system, is there a chilling effect on litigation, based on experience or cases?
• If there are specific rules in the national legal order to mitigate costs in the procedure, are these applicable to all instances of appeals (including administrative, specialized organs, tribunals) until the final decision?

Legal aid and other methods of public and private funding
One way in which many countries address the requirement for not prohibitively expensive procedures is to provide legal aid or some other method of funding to those wishing to take legal action. Besides direct payment to a litigant or the litigant’s attorney for attorney fees, funding methods may include a requirement for attorneys to perform a certain number of pro bono hours, law school clinics that provide free services, and direct public funding of NGOs or public interest attorneys. Legal aid, etc. is also important in creating a market for attorneys with experience in public interest matters.

• Is legal aid either directly or indirectly (i.e., through publicly funded lawyers) available in your country in environmental cases, and, if so, under which criteria?
• Can environmental NGOs receive public funding? If so, is this widely used?
• Is pro bono assistance available to individuals/NGOs?
• Are there many lawyers in your country who focus on environmental public interest litigation? Can public interest lawyers receive public funding? If so, is this widely used?
• Are there any law school clinics that focus on representing the public in environmental cases in your country? If so, what are the experiences from that practice?
• Are there any other measures in your national legal system that could be or are used to mitigate potentially high costs of environmental proceedings?

E. Examples

Introduction and general questions
These examples were selected in order to illustrate how the key issues concerning standing, effectiveness and costs in the environmental procedure are dealt with in concrete situations in the studied countries. In some of the examples, there is a clear link to union law in the environmental area, whereas in others there is no or little such association. We think it is fruitful to use this wider scope, as it will help us to illuminate any problems in the boundary between national law and union law and thus get a fuller picture of the situations in the member states.

Please read the examples and answer the following questions for all of them:

• Give a short description of the decision-making procedure and how the decision/activity can be appealed within the administration and/or brought to court.
• Evaluate the possibilities open for the public concerned to challenge by legal means the decision and the effectiveness of that procedure (effective remedies, timeliness, costs) in comparison with the requirements of Article 9.3 and 9.4 of the Aarhus Convention.


2. Complaints concerning an on-going waste deposit (landfill) in breach of national legislation.

3. A decision to undertake an infrastructural construction project which might have an effect on a Natura 2000 area.

4. A clear cutting operation (forestry) which threatens a protected nature reserve or a protected species.

5. The competent authority has failed to establish an air quality action plan for a municipality in breach of EU air quality norms, or an action plan has been adopted but will not sufficiently reduce the risk of exceeding air quality limits.

6. In an area with highly permeable soil, the competent authority has issued building permits for a number of holiday homes, all of which rely on individual systems to dispose of their waste-water. Following the discovery of E-coli or cryptosporidium in a local groundwater, some citizens/NGOs are concerned that the competent authority (1) has not attached sufficiently strict conditions with regard to individual waste-water systems to comply with EU water and/or waste legislation; (2) is not ensuring that individual systems are maintained so as to avoid contamination of the drinking water source; (3) has either no or no adequate remedial action plan or (4) has failed to recognise the vulnerability of the drinking water catchment.

7. The competent authority makes a derogation allowing the killing of individuals of a species of wild bird protected under the Wild Birds Directive (EC Directive 79/409/EEC) or of a species of large carnivore protected by the Habitats Directive (EC Directive 92/43/EC). There are allegations that the derogations in the Nature Directives are unlawful in the light of the case law of the CJEU.

F. Concluding remarks
• What are the main problems in your legal system when it comes to the implementation of Article 9.3 and 9.4 of the Aarhus Convention and how can these be addressed?

• Is the national system of administrative appeal/judicial review in the environmental area based on a clear set of rules that ensure legal certainty for all potential litigants in terms of predictability and transparency of rules related to access to justice?

• How would your country have to change its national system in order to conform with the requirements of the proposed Access to Justice Directive of 2003 (COM(2003)624 final of 24 October 2003)?

• Are there any additional observations that you wish to make about the current access to justice provisions in your legal order?

List of references