

RESULTS OF THE CONSULTATION OF INTERESTED PARTIES IN RELATION TO THE PREPARATION OF PROPOSAL FOR A REGULATION CONCERNING THE APPLICATION OF THE AARHUS CONVENTION TO COMMUNITY INSTITUTIONS

In autumn 2002, the Commission services organised a series of meetings with experts from Member States and the EEA (25 October 2002), from candidate countries for accession (4 November a.m.), regional and local authorities (4 November p.m.), non-governmental organisations (28 October p.m.) and representatives of economic operators (28 October a.m.), see list of invitees below. For the purpose of these consultations, a working document outlining the objective and possible options for the content of the legislative instrument had been prepared and sent to the invited parties. The working document is enclosed. Following these meetings, further written comments were received.

General questions raised related to the approach of covering the three pillars of the Århus Convention with one legal instrument. The interested parties consulted overall welcomed the wide definition of public authorities to be covered by the legal instrument, not being limited to those Community institutions and bodies listed in Article 7 EC Treaty.

Access to information

The comments on access to information made reference to the links between Regulation 1049/2001/EC and the envisaged legal instrument. Some experts questioned the need to have a separate legal instrument as opposed to a modification of Regulation 1049/2001/EC. Others stressed that it was important to have the same standards as those provided for Member States level under the new Directive on public access to environmental information. More detailed comments concerned in particular the exceptions provided for in the working document, and their relation to the exceptions under Regulation 1049/2001/EC.

Public participation

A number of comments were made with respect to the definition of 'plans and programmes'. Some interested parties questioned whether this definition was operational enough, without however having specific alternative suggestions. Some wished to see additional clarification concerning the inclusion of plans and programmes prepared in other sectors likely to have environmental effects. Further comments were made concerning the need to clarify to what extent plans and programmes were covered which were subsequently adopted or endorsed by a legal instrument. Comments were also made concerning the overall coverage of the public participation provisions: Some interested parties expressed an opinion in favour of public participation at European level in important decisions on the financing of projects and the need to consider some 'step-wise' participation in decision-making on product approvals (chemicals, pesticides), in particular on GMOs (one group of interested parties). Other comments related to the modalities and timing of public participation.

Access to justice

Interested Parties stressed that the requirements should be formulated in parallel to those being proposed at Member State level, which have already been subject to a

consultation process. Further clarification was required concerning the relation of the access to justice provisions foreseen in the Community instrument and Article 230 EC Treaty.

One group of interested parties in particular considered it was not justified to limit access to justice to 'qualified entities', arguing that admitting an 'actio popularis' was not likely to have the effect of over-burdening European courts. They also questioned the necessity of providing for an internal review procedure as a requirement prior to addressing the European Courts. Comments from local and regional authorities mainly referred to their role in the application of the planned instrument, considering that they should have the possibility to be recognised as 'qualified entities'.

At present, the proposal is under finalisation within the Commission. In this process, the comments received in the course of the consultations with interested parties are being taken into due consideration.

ANNEX:

LIST OF DISTRIBUTION OF THE WORKING DOCUMENTS AND OF INVITATIONS TO THE MEETINGS

- Member States, European Economic Area (Iceland, Norway and Liechtenstein) and Accession countries (Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Malta, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia and Turkey) Permanent Representations;
- Regional and local authorities: Council of European Municipalities and Regions (CEMR), Assembly of European Regions (AER), Centre européen des Entreprises à Participation Publique et des Entreprises d'Intérêt Economique Général (CEEP), Environment platform for regional offices (EPRO network);
- Environmental NGOs, consumer associations and trade unions: Bureau Européen des Unions de Consommateurs (BEUC), Birdlife international, Climate Network Europe, Friends of the Earth, Greenpeace International, International Friends of Nature, Transport and Environment, World Wildlife Fund (WWF), European Trade Confederation (ETUC)
- Economic Operators: Union of Industrial and Employers' Confederations of Europe (UNICE), European Chemical Industry Council (CEFIC), European Association of Craft, Small and Medium-Sized enterprises (UEAPME), European Water Pollution Control Association (EWPCA), Confederation of the food and drink industries of the European Union (CIAA), European Association of BioIndustries (EuropaBio), European Federation of waste management and environmental services (FEAD), Committee of Agricultural Organisations in the European Union & General Committee for Agricultural Cooperation in the European Union (COPA/COGECA), European Property Federation, BTOPENWORLD (UK Internet service provider).

WORKING DOCUMENT

concerning the application of the provisions of the Aarhus Convention to EC institutions

I. Justification for the Proposal

1. General considerations

In June 1998, the European Community, together with the fifteen Member States, signed the UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The Convention entered into force in October 2001. It is of considerable importance for countries in Central and Eastern Europe and for the newly independent States from the former Soviet Union, numerous of which ratified it and are progressively opening their environmental administrative procedures to the requirements of the Convention. Generally, the Convention is considered to allow the public to become more involved in environmental matters and to actively contribute to better preservation and protection of the environment.

The signing of the Aarhus Convention obliges the European Community to align its legislation to the requirements of the Convention. As regards the legislation directed to the Member States, the Commission made proposals for a directive on access to information in environmental matters¹ and for a directive on public participation in the drawing up of plans and programmes relating to the environment and amending Directives 85/337/EEC and 96/61/EC². Both proposals are likely to be adopted by the end of 2002. A proposal for a directive on access to justice in environmental matters is being prepared at present and will probably be proposed by the Commission at the end of 2002.

As regards the application of the Aarhus Convention to the Community level, a number of legislative texts were adopted or are under preparation. On access to information, Regulation 1049/2001 grants public access to documents held by the Commission, the European Parliament and the Council. Furthermore, the Commission is preparing at present a document which will lay down internal minimum standards for the consultation of interested parties. As regards access to justice, Article 230 EC Treaty is of relevance which grants natural or legal persons, under certain circumstances, access the Court of Justice.

However, these legal provisions do not yet allow the Community to adhere to the Aarhus Convention, as the provisions of that Convention are, in part, more detailed than the existing EC provisions. For this reason, measures are necessary in order to completely adapt the provisions which apply to the Community institutions to the requirements of the Aarhus Convention.

It is therefore envisaged to propose a legislative instrument in order to apply the three pillars of the Aarhus Convention, access to information, participation in decision-making and access to justice in environmental matters, to the European Community bodies, taking, of course, due account of the provisions which already exist in this area.

¹ OJ 2000, no. C 337E p.156.

² OJ 2001, no. C 154E p.123.

2. Environmental objectives to be achieved

This legislative initiative contributes to the pursuit of the environmental objectives outlined in Article 174(1) of the EC Treaty. Access to environmental information and public participation in decision-making helps to achieve these aims, improves the quality of decisions and creates ownership for the final result. Effective judicial mechanisms need to be accessible so that the legitimate interests of the public are protected and the law is enforced. First and foremost, measures are to be taken in order to allow the Community to adhere to the Aarhus Convention. In this context, it needs to be remembered that Community legislation as regards access to information on the environment as well as participation in environmental decision-making was, to a large extent, at the source of the international negotiations which finally led to the elaboration of the Aarhus Convention. Indeed, in 1985, the Community had adopted Directive 85/337 on the assessment of the effects of certain public and private projects on the environment³. This Directive provided for the public to be informed of the application for development consent for a project which was covered by the Directive and required that the "public concerned" had the right to express an opinion on the project, before a decision on the application was taken. Furthermore, in 1990, the Community had adopted Directive 90/313 on the free access to information on the environment⁴ which granted every person the free right of access to information on the environment which was held by public authorities.

Both directives which were successively implemented by the EC Member States, served as a model at international level and their basic philosophy was taken over by the Aarhus Convention. Under these circumstances, it seems appropriate for the European Community to adhere to the Aarhus Convention which was expressly opened for accession by regional economic organisations in order to demonstrate to the other Contracting Parties and signatory States - in particular in Eastern Europe - that the European Community as such also fully adheres to the principles of the Aarhus Convention.

Furthermore, the initiative would contribute to the integration of environmental requirements within all facets of Community policy. Article 6 EC Treaty provides that the environmental requirements must be integrated into all Community policies. The application by the Community institutions of the different principles of the Aarhus Convention which are on the point of becoming mandatory for all EC Member States and, within short, for the accession countries, will demonstrate that the Community institutions, as regards the EC area of responsibility for the environment, intends to follow the same provisions as Member States. This will not only ensure greater coherence between policies and measures between the national and the Community level, but will also constitute a recognition that environmental problems frequently need to be approached at a level which goes beyond the pure national level.

Finally, the adoption of the present legislative instrument will demonstrate all over Europe and at a global level that the European Community is determined to assume its responsibility in environmental matters. Indeed, the European Community will be the first international organisation which will have adopted legally binding rules as regards access to information on the environment, participation in environmental

³ Directive 85/337, OJ 1985, no.L 175 p.40; amended by Directive 97/11, OJ 1997, no.L 73 p.5.

⁴ Directive 90/313, OJ 1990, no.L 156 p.56.

decision-making and access to justice in environmental matters. In view of the increasing number of environmental problems that will, in future, have to be addressed at a pan-European or even global level, the influence of the European Community and of its Member States in this international environmental concerto cannot be but strengthened.

II. Choice and justification of the legal base and instrument

The legal instrument aims at improving the protection of the environment, by making the public further participate in issues of concern for the environment. The most appropriate legal basis for the instrument is therefore Article 175 (1) EC Treaty.

As an accession to the Aarhus Convention will only be possible, one there are legally binding measures introduced that apply to the European Community as such, the appropriate legal instrument is a regulation. The choice of a directive is excluded, as a directive is addressed to Member States, whereas in the present case, it would be the Community bodies which must be the addressees of the legal instrument. A decision is excluded, as the legal instrument is necessary to deal with an indefinite number of future situations and not, as it is typical for a decision, with a specific, single case.

III. Subsidiarity and Proportionality

1. Objectives of the proposed action in relation to the obligations of the Community

Article 1 of the Treaty on European Union lays down that within the European Union, "decisions are taken as openly as possible and as closely as possible to the citizen". A democratic, open society is called to associate citizens in its decision-making process and to ensure that its political and administrative action is as transparent as possible. These principles were recently repeated and underlined by the Commission's White Paper on European Governance⁵ which stated that the first two principles of good governance were openness ("The Institutions should work in a more open manner") and participation ("Improved participation is likely to create more confidence in the end result and in the Institutions which deliver policies"). The principles of the Aarhus Convention are nothing else than the application of good governance to the environmental sector.

Under the EC Treaty, the Community is obliged to aim at a high level of environmental protection (Article 175 EC Treaty). Improved access to information and participation in decision-making can clarify for citizens that it their environment which is affected, positively and negatively, by activities of political bodies and that they can contribute, by increased transparency and active participation, to a better environment, within the Community and beyond.

2. What is the Community dimension of the problem?

In a globalising world, decisions which affect the environment are no longer exclusively taken at national level. More and more, they also have a Community dimension. This very principle has led to the elaboration of a Community

⁵ COM(2001) 428 of 25 July 2001

environmental policy which has, over the last fifteen years, increased in institutional and political importance. As more and more discussions on environmental issues have to take place at Community level, it is necessary to ensure that the basic principles, underlying any environmental action, are also applied to the Community level.

3. What is the most effective solution, comparing the means of the Member States and the Community?

The envisaged measures are complementary to measures which have been proposed or are on the point of being proposed for the level of Member States.

4. What would be the cost of inaction of the Community?

It does not appear that the adoption of this instrument would cause any significant financial expense.

The main cost of inaction for the Community would be a considerable lack of credibility. Indeed, the signing of the Aarhus Convention by the Community, next to the Member States, implies that the Community does not leave the legal and practical implementation of the Aarhus principles to the Member States alone. Furthermore, the above-mentioned White Paper on European Governance puts the information and participation of the citizens in the centre of concern and passionately pleads for an improvement of the present situation. It would be inconsistent with this approach if in the first case, where the Community is called to apply the abstract concepts of the White Paper in a concrete case, the Community would not take action.

5. Which instrument does the Community have available in order to meet the objectives?

As regards the legally binding instruments, the only instrument available is a regulation (see II. above).

A non-binding instrument, such as internal guidelines or codes of conduct, would not be an acceptable instrument, as they would not allow the Community to adhere to the Aarhus Convention. The Court of Justice has, in a consistent line of case-law, stated that Member States may not recur to non-binding legal instruments in order to transpose Community environmental legislation which is likely to create rights and obligations for persons, into national law, because this would not ensure sufficient legal certainty for individuals. The same principles must apply to the Community adhering to the Aarhus Convention which also contains provisions that might create rights and obligations for persons.

6. Proportionality

The legislative instrument intends to ensure that the provisions of the Aarhus Convention are applied by all Community bodies. Therefore, it does not go beyond what is necessary to allow the Community to honour its commitments assumed by the signing of the Convention and does thus not go beyond of what is necessary to adhere to the Aarhus Convention.

Public authorities covered by the Aarhus Convention

The Aarhus Convention addresses the relationship between individuals and their associations on one hand, and public authorities on the other hand. The notion of ‘public authority’ is defined in Article 2 (2) of the Convention, in a very broad way. It includes, next to government at all levels, also ‘*natural or legal persons performing administrative functions, ..., including specific duties, activities or services in relation to the environment*’, as well as ‘*any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, ...*’. The basic idea is that wherever public authority is exercised – parliaments and courts are exempted – there should be the rights under the Convention for individuals and their organisations.

According to (d) ‘*public authorities*’ also means ‘*the institutions of any regional economic integration organisation referred to in Article 17 which is a Party to the Convention.*’ It follows from the broad concept used in the rest of the definition that, for the Community, this has also to be interpreted in a broad sense, and cannot be limited to the Community institutions mentioned in Article 7 of the EC Treaty. Otherwise, different standards between the Member State and the Community level would apply.

For this reason, the present Community instrument will not be limited to the Community institutions as set out in Article 7 of the EC Treaty, but include ‘Community bodies’ in the meaning of ‘any public body within the Community created under Community law and performing public [administrative] functions’.

I. Access to environmental information

The section of the legislative instrument which relates to access to information on the environment will contain a general reference to the provisions of EP Regulation 1049/2001, in the sense that this Regulation will apply to any request for access to information held by Community bodies. In conformity with Article 2(6) of Regulation 1049/2001, its provisions are completed by the specific provisions which are considered necessary in order to completely align Community legislation to the provisions of the Aarhus Convention. Furthermore, an attempt will be made to align, where possible, the wording of the future legislative instrument to the wording of the upcoming EP and Council directive on access to information on the environment which is, at present, being negotiated in the conciliation procedure.

There are though a number of differences between the wording of Regulation 1049/2001 and the Aarhus Convention. While many of these differences do not appear to play a significant role in daily practice, in legal terms these differences are considerable. They might on the one hand expose the Community to the criticism of complying with the requirements of the Aarhus Convention at best in practice, but not in law. Anyway, the difference would not allow the Community to adhere to the Aarhus Convention as regards access to information related to the environment.

The differences between the provisions of the Aarhus Convention and Regulation 1049/2001 which will be addressed by the future legislative instrument will in particular concern the following matters:

- a right of access will be granted to any natural or legal person, regardless of its nationality or residency;
- a right of access to information on the environment will be granted, not only a right of access to documents;
- the right of access will be granted against all Community bodies which perform public functions (including thus, for instance, the European Environmental Agency, the Economic and Social Committee and the Committee of the Regions);
- applications need not exclusively be made in writing;
- access to information in all cases, where a Member State, as the author of the information, objects, will not systematically be refused.

II. Public participation in the preparation by Community bodies of plans and programmes relating to the environment

The relevant Aarhus provisions on public participation are Articles 6, 7 and 8. While both Article 6 dealing with specific projects and Article 7, first part, on plans and programmes are formulated in a legally binding way, Article 7, fourth sentence, in relation to public participation in the preparation of policies relating to the environment is a “best endeavour clause”. Article 8 on public participation during the preparation, by public authorities, of legislation (normative acts)⁶. is equally formulated as soft law.

In line with the approach taken for the Member States level, it is suggested that the proposed Regulation would take up those parts of the Convention which are formulated as *legally binding requirements*. In relation to *policies* in the broader sense and *legislation* which would not be covered by the Community instrument as such, there are other initiatives and commitment at Community level which are of relevance, in particular the proposed *general principles and minimum standards for consultation of interested parties by the Commission*.

Also, the EP and Council Decision N° 1600/2002/EC laying down the Sixth Community Environmental Action Programme, takes up the “*extensive dialogue with stakeholders, raising environmental awareness and public participation*” and refers to the need to ratify the Aarhus Convention, and to “*developing general rules and principles for good environmental governance in dialogue processes*”.

While the 6th EAP itself is established by a legally binding decision, the commitments to public participation still require further, operational, measures to put the legally binding requirements of the Convention into practice. The analysis in relation to the Aarhus requirements has led to the following proposed line of action:

⁶ This would not include bodies or institutions when acting in a (judicial or) legislative capacity

(1) Public participation in decisions on specific activities (Article 6 of the Aarhus Convention)

a) Aarhus Convention requirements

Article 6(1)(a) requires Parties to apply the public participation provisions of this Article with respect to “*decisions on whether to permit proposed activities listed in Annex I*”. The activities listed are projects covered at Community level by Council Directives 85/337/EEC on environmental impact assessment (*‘EIA Directive’*) and 96/61/EC on integrated pollution prevention and control (*‘IPPC Directive’*). According to Article 6 (1)(b), the provisions on public participation shall also apply in relation to “*activities not listed in Annex I which may have a significant effect on the environment*”.

This potentially applies to both ‘EIA-type’ activities, but also to decisions on the placing on the market of certain substances and products, such as authorisations under legislation on GMOs, chemicals, pesticides, biocides and ozone-depleting substances.

In relation to Article 6(1)(a), as part of the proposed Directive on public participation, it is, inter alia, proposed to amend Directives 85/337/EEC and 96/61/EC, to bring them in line with the public participation – and access to justice – provisions of the Aarhus Convention.⁷ As concerns Article 6(1)(b), for the activities under Annex II of the EIA Directive, the screening of the significant environmental effect on the environment – and hence the decision on whether to submit these projects to public participation – is left to the Member States. According to our analysis, Community legislation on chemicals, pesticides and biocides does *not* provide for public participation in the authorisation procedure at MS level. On the deliberate release of GMOs, *EP and Council Directive 2001/18/EC* contains rules on information to be provided to the public, with the possibility for the public to comment (see below).

b) Approach for the Community level

Decisions to **authorise** the different projects listed in Annex I of the Aarhus Convention are not taken at *Community level*; thus this provision does a priori not apply. It has been considered whether to apply the Aarhus Convention to decisions taken at EU level concerning the financing of projects ‘*which may have a significant effect on the environment*’, in application of the Structural, Rural Development or Cohesion Funds Regulations, or financing decisions of the European Investment Bank. Decisions relating to the financing of a project are often crucial for it to go ahead. However, a number of reasons speak against such possibility, beginning with the wording of the Aarhus Convention, being “*decisions on whether to permit*”. Furthermore, as the Aarhus requirements apply to projects that ‘*may have a significant effect on the environment*’, there is a risk of having double participation of the public, both in the financing decision at Community level, and in relation to the project

⁷ Proposal for a Directive of the European Parliament and of the Council providing for public participation in respect of the drawing up of certain plans and programmes at Community level and amending Council Directives 85/337/EEC and 96/61/EC (note 2 above)

authorisation at Member States level (which would always be the case for projects covered by the EIA and IPPC Directives).

For these considerations, it is suggested that Community instrument to be proposed should *not* require public participation in decisions at Community level on the financing of environmentally significant projects. (In practice, this could/would however take place, for instance, when applying environmental impact assessment to projects financed of the European Investment Bank).

Concerning decisions relating to substances/product authorisations, Community legislation on chemicals, pesticides and biocides, provides that those are granted at national level. Decisions taken at Community level ('Comitology') do not, as a rule, concern a specific approval, but are rather of a regulatory nature, applying to an indefinite number of cases (such as adding substances to the Annexes). Decisions are taken at Community level (e.g. essential uses, critical uses, HCFCs) under *Regulation 2037/2000/EC on ozone-depleting substances*, do not appear to be aimed at by Article 6(1)(b) of the Convention. Indeed, while the decision in principle of environmental relevance is already taken in the Council Regulation itself (phase-out of ozone-depleting substances, subject to essential/critical uses), remaining EC decisions mainly deal with dividing up the allowed uses between economic operators.

On *genetically modified organisms*, *Council Directive 2001/18/EC* provides for decisions on their deliberate release into the environment to be taken by the Commission ('Comitology'). Information of the public is provided for under Article 24 in particular, requiring the Commission to make available to the public information about the planned release, and enabling the public to comment. While the provisions in Directive 2001/18 appear to be not fully in line with the requirements of Article 6 of the Aarhus Convention, it should however be noted that work on public participation in relation to GMOs is underway in the Convention framework. A specific task force was set up in the framework of the Aarhus Convention, in order to look for an appropriate solution. As this group has not yet finalised its work, it is proposed, at the present stage of procedure, that the outcome of work on GMOs under the Aarhus Convention should be awaited. This would imply that public participation in relation to GMO-related decisions would at present not be covered by the Community instrument being elaborated.

Beyond the fields outlined above, certain measures taken at Community level, in particular by the Commission, may have a significant effect on the environment. For these cases it is foreseen to provide for public participation along the lines applicable in relation to "plans and programmes relating to the environment" outlined below.

(2) Plans and programmes relating to the environment

a) Aarhus Convention requirements

Article 7 of the Aarhus Convention obliges Parties "to make appropriate practical and/or other provisions for the public to participate during the preparation of plans

and programmes relating to the environment, within a transparent and fair framework, having provided the necessary information to the public...”

The notion ‘*plans and programmes relating to the environment*’ is not defined in the Convention, neither is ‘*policies*’. As to the modalities, the reference to article 6, paragraphs 3, 4 and 8 requires to include “reasonable timeframes”, to provide for *early* public participation and to take *due account* of the outcome of public participation in the decision. Concerning the ‘beneficiaries’, “*the public which may participate shall be identified by the relevant public authority, taking into account the objectives of this Convention.*”

b) Approach for the Community level

In relation to ‘plans and programmes relating to the environment’, the approach of establishing a list of plans and programmes covered by the instrument is not considered operational, and would only reflect the present situation. On the other extreme, merely taking over the wording of the Aarhus Convention (‘*plans and programmes relating to the environment prepared by a Community body*’) would not provide for sufficient guidance to the Community administration concerned or to the public and bears the risk of leading to an inhomogeneous application. Hence, the approach proposed is to establish a definition and/or a set of criteria on the basis of which the relevant ‘Community bodies’ responsible for the preparation of plans and programmes can determine those to be made subject to public participation. It is proposed that this be established reflecting as closely as possible the requirements for the Member States. In addition, and here also in parallel to the situation for the Member States level, plans and programmes drawn up specifically to reach environmental objectives would also need to be included.

In contrast to the situation at the Member States level, however, it is not envisaged that only those plans or programmes are listed which “*set the framework for future development consent of projects*”. This is considered inappropriate for the Community level where the link to the project level is, as a rule, not a direct one.

It is proposed that the definition of “plans and programmes relating to the environment” relates those to the contribution to the Community’s environmental policy objectives. In order to provide a more operational criterion for the selection of such plans and programmes, it is proposed to make a link to the Decision on the 6th Environmental Action Programme. A possible wording for such a definition could be:

‘Plans and programmes relating to the environment’ shall mean plans and programmes,

- which are subject to preparation and/or adoption by a Community body;
- which are required by legislative, regulatory or administrative provisions⁸;

- and which contribute to, or are likely to have a significant effect on, the achievement of the objectives of Community environmental policy, as laid down in Decision N° 1600/2002/EC of the European Parliament and of the Council laying down the Sixth Community Environment Action Programme⁹, and in any subsequent general

⁸ first two indents parallel to SEA Directive

⁹ of 22 July 2002, JO L 242 of 10.09.2002, p.1-15

environmental action programme. General environmental action programmes shall also be considered as 'plans and programmes relating to the environment'. [This definition shall not include financial or budget plans and programmes of a Community body.]”

This definition reflects the spirit of the Aarhus Convention. Linking up the definition to the 6th Environmental Action Programme provides sufficient guidance for identifying the plans and programmes concerned. It provides the possibility for specific exceptions. Thus, financial or budget plans or programmes of a Community body shall not be included, as they do not normally have a significant direct effect on the environment.

As a general point, it is worth reminding that, in line with the Aarhus Convention, the definition of “Community body” does not include “*Community bodies when and to the extent to which they act in a judicial or legislative capacity*”. Applied to those plans and programmes relating to the environment, which are prepared by the Commission and then endorsed/adopted by a legislative act, this means that the public participation requirements would be relevant for the stage *preceding* the legislative proposal. Once the Commission has made its proposal, the participation is ensured through the parliamentary process.

As concerns the *the public entitled to participate*, it is suggested to follow the approach of the Aarhus Convention according to which the relevant public authority shall identify the public which may participate, “*taking into account the objectives of the Convention.*” To fill in this latter requirement, the Community instrument will clarify that this includes in any case “*the public concerned*”, and with such relevant non-governmental organisations. Given that the plans and programmes prepared by a Community body will as a rule have a Community dimension, it will further be specified that the non-governmental organisations are those that are operating at European level.

III. Access to Justice in environmental matters

(1) Access to information on the environment

The Aarhus Convention provides for possibilities for persons and qualified entities to initiate judicial procedures where the right of access to information on the environment or participation in decision-making has not been granted, in contrary to the relevant legal provisions. As regards access to information on the environment held by Community bodies, Regulation 1049/2001 already provides for provisions for judicial review where the provisions of that Regulation are not respected. As the present instrument slightly enlarges the field of applications of that Regulation, it is foreseen that the provisions on judicial review - Article 8 - of that Regulation also apply where access to information on the environment was refused under the present instrument.

Where other bodies than the Council, the Commission or the European Parliament are concerned, the provisions of Regulation 1049/2001 do not apply. For that reason, the request for confirmatory application will have to be addressed to the Community body that has not granted access to information on the environment. Against the decision of

that body, judicial review may then be sought for under Article 230 of the EC Treaty, addressed to the Court of First Instance.

(2) Access to Justice as regards Participation in decision-making

The Aarhus Convention provides that members of the public concerned may seek judicial review to challenge the legality of decisions subject to the public participation provisions under Article 6 of the Convention and “of other relevant provisions of the Convention”. Our analysis has shown that, at Community level, no authorisation of projects of the type listed in Annex I to the Aarhus Convention takes place, and there is hence no scope of access to justice at this respect¹⁰. However, it is considered to grant access to justice when participation rights relating to the preparation of “measures, plans and programmes” are not respected at Community level.

However, there is a specific aspect in Community decision-making which needs to be addressed specifically. Indeed, Community measures or decisions on plans and programmes typically affect everybody in the Community. Therefore, allowing to have the procedural and substantive elements of a Community measure to be checked by judicial review would in practice mean that a right of everybody to accede to the European Courts would be introduced. Such an extension of the right of action would not only considerably affect the balance of judicial review that was set up by the EC Treaty, it would also create a system of *actio popularis* which is foreign to almost all legal orders of Member States. It is felt that the introduction of a general right of action for everybody would have to be introduced by a Treaty amendment and not by a – necessarily limited – piece of secondary legislation.

For this reason, the present proposal limits the right of judicial review against the non-respect of participation rights in the decision-making process to recognised Community environmental organisations. These organisations would have to fulfill a number of criteria in order to be able to be recognised by the Commission.

(3) Access to Justice as regards other environmental matters

It was already stated that a general right of access to justice in environmental matters for every natural and legal person does not appear, at the present state of law within the European Community and, more particularly, with regard to access to the European Courts to be reasonable option. Indeed, it is clear that the system of access to the courts as set up under the EC Treaty would be seriously affected, if there were a general right given to everybody to raise the question of breach of environmental legislation. It is submitted that such a far-reaching change of the present system would require an amendment of the EC Treaty and could not be introduced by secondary legislation.

Furthermore, the Aarhus Convention provides that the Contracting Parties should also consider to introduce legislation which gives private persons the possibility to take

¹⁰ [For the Member States level, this is provided for under the proposed Directive on public participation, as concerns decision-making on projects covered by the EIA and IPPC Directives](#)

legal action against other private persons which is in breach of requirements of environmental legislation. The Commission considers that, as regards the national level, it should be up to Member States to introduce such a private right of standing against other private persons and has not, in its proposal for access to justice in environmental matters, proposed to introduce such a right. Indeed, as the proposal for that directive is based on Article 175 EC Treaty, it allows any Member State which considers to follow the option of the Aarhus Convention, to introduce such a possibility at national level.

In conformity with this approach, it seems appropriate not to introduce such a right at Community level, all the more, as the different private persons, against whom such a judicial action could be taken, would be persons which are constituted under national law. For this reason, the introduction of such a right would interfere with the judicial system of Member States which in view of the repartition of responsibilities within the EC, does not appear to be an appropriate solution.

For these reasons, it seems appropriate, in transposing the provisions of the Aarhus Convention to the Community level, to limit the right of legal standing to qualified entities (environmental organisations) only and to allow such an action only to be introduced against Community bodies which are in breach of requirements of Community environmental law. Where such Community law requires public participation, as under the present instrument, the qualified entity shall also be able to institute legal proceedings on the basis of an alleged claim that its rights for participation in environmental matters have been impaired. Furthermore, it is appropriate to require that, prior to any judicial action, the Community body that is considered to be in breach of its obligations under Community environmental law, is first to be addressed with a request to review its position. It would then be only on the decision on this request for review that the qualified entity would be allowed to bring a judicial action in conformity with Article 230 (4) and (5) EC Treaty to review the substantive and procedural legality of that decision.

In order to allow qualified entities to benefit from such a possibility, they should be recognised according to the conditions laid down in the legislative instrument, and the subject matter under review falls within the scope of activity of the qualified entity. As the subject matter is, anyway, Community environmental law, this means that the right under the legislative instrument is reserved to qualified entities which are active at Community level.

The question remains which actions and omissions should be open for review. A number of clarifications need to be made in this regard. First, the Aarhus Convention expressly excludes measures which are taken in a legislative or judicial capacity from its field of application. It is suggested to follow, in this regard, the Aarhus Convention. Indeed, directives and regulations have a general character and constitute a form of legislation. This is also true where the European Parliament and the Council enable the Commission to adopt directives or regulations by virtue of Article 202 EC Treaty. Therefore, the legislative instrument should not include a possibility to review directives or regulations.

Measures which the Commission takes in a para-judicial capacity under Articles 81 et ss. EC Treaty or Article 226 EC Treaty shall not either be included. It might be argued whether such measures, the procedures of which are very formalised, do not constitute pre-judicial action. In any way, they constitute inquiry procedures, the process of which would be seriously impinged, if judicial review against them were admitted. As regards procedures under Article 226, the introduction of judicial review would, in

substance, constitute an amendment of Article 226 EC Treaty itself; and the different procedures under Articles 81 et ss. are, generally, open to those who are affected by the decisions.

Plans and programmes also are adopted at Community level. Where they relate to the achievement of policies, the introduction of a possibility to challenge the adoption of such plans and programmes would grant a "watchdog-function" over Community policy. In parallel to the proposals that are being made for plans and programmes at national level, this does not seem to be appropriate. In contrast to that, where there is a clear relation to the future development consent of projects and the plan or programme sets out the framework for future projects, it may be sufficiently concrete and focussed in order to justify the judicial review.

Where Community bodies take financial decisions, for instance in the context of its regional policies, these decisions assist measures that are taken at national level and concern decisions on projects. Therefore it does not seem appropriate to provide for judicial review for financing decisions.

PART 1

Objective: to contribute to the implementation of the Aarhus Convention, in particular by:

- (a) guaranteeing the right of public access to environmental information held by or for Community bodies and by setting out the basic terms and conditions of;
- (b) providing for public participation in respect of the preparation by Community bodies of plans and programmes relating to the environment;
- (c) granting access to justice in environmental matters at Community level.

Beneficiaries¹¹: As a principle, the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.

- (a) '*the public*' shall mean one or more natural or legal persons and their associations, organisations or groups.
- (b) '*Community body*' shall mean any public body within the Community created under Community law and performing public functions.

This definition does not include Community bodies when and to the extent to which they act in a judicial or legislative capacity.

- (c) '*Qualified entity*' shall mean any association or organisation promoting environmental protection that has been recognised according to the provisions laid down [in Article ...].
- (d) '*Environmental information*' shall mean any information in written, visual, aural, electronic or any other material form on:
 - i. the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - ii. factors, such as substances, all forms of energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in point (i);
 - iii. measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in points (i) and (ii) as well as measures or activities designed to protect those elements;

¹¹ cf. EP and Council Regulation N° 1049/2001 regarding public access to European Parliament, Council and Commission documents

- iv. reports on the implementation of environmental legislation;
 - v. cost-benefit and all other financial and / or economic analyses and assumptions used within the framework of the measures and activities referred to in point (iii); and
 - vi. the state of human health and safety, conditions of human life, cultural sites and built structures in as much as they are or may be affected by the state of the elements of the environment referred to in point (i) or, through those elements, by any of the matters referred to in points (ii) and (iii).
- (e) "*Information held by a Community body*" means environmental information in its possession and which has been produced or received by that Community body.
- (f) '*Plans and programmes relating to the environment*' shall mean plans and programmes¹²,
- which are subject to preparation and/or adoption by a Community body,
 - which are required by legislative, regulatory or administrative provisions¹³,
 - and which contribute to, or are likely to have significant effects on, the achievement of the objectives of Community environmental policy, as laid down in Decision N° 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, and in any subsequent general environmental action programme. General environmental action programmes shall also be considered as 'plans and programmes relating to the environment'. This definition shall not include financial or budget plans and programmes or internal work-programmes of a Community body, or plans and programmes which are adopted by way of a directive or a regulation.
- (g) '*Law relating to the environment*' shall mean
- any Community environmental provision which 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 areas such as:
- water protection
 - noise protection
 - soil protection
 - air pollution and atmospheric pollution
 - country planning and land use
 - nature conservation and biological diversity
 - waste management
 - chemicals, including biocides and pesticides
 - biotechnology

¹² to be decided whether 'plans and programmes' also to be defined, e.g. "*a strategic set of measures, actions, priorities and, the case given, timetables*"

¹³ first two indents from SEA Directive

other emissions and releases into the environment

(h) '*Administrative action*' shall mean:

any executive decision under law relating to the environment by a Community body having binding and external effect. Measures by a Community body shall include plans and programmes relating to the environment as defined under litera (f) above.

This definition shall not include:

- administrative actions taken by a Community body acting in a judicial or legislative capacity
- actions taken by a Community body in its capacity as an administrative review body or acting under Articles 226, 81, 82 and 87 EC Treaty.

(i) '*Administrative omission*' shall mean:

any failure of a Community body to take an administrative action under law relating to the environment, despite a legal obligation to do so.

PART 2
ACCESS TO ENVIRONMENTAL INFORMATION

Application of Regulation 1049/2001:

Unless otherwise provided, Articles 4 to 16 of Regulation 1049/2001/EC on access to documents held by the Commission, Council and European Parliament shall apply, *mutatis mutandis*, to any request for access to environmental information held by or for Community bodies.

Scope:

1. This instrument shall apply to all environmental information held by a Community body, that is to say, environmental information drawn up or received by it and in its possession in written, visual, aural, electronic or any other material form.
2. Environmental information shall be made accessible to the public either following an application in accordance with article 6 of this Regulation or directly in electronic form through a register.

Applications:

If the Community body that is seized by a request for access to environmental information does not hold the information itself, it shall, if possible, inform the applicant of the place where the information can be accessed through telecommunication networks, or of the Community body or public authority in the sense of Directive ----/----/EC [=draft on public access to environmental information] to which it believes it is possible to apply for the information requested, or transfer the request to that body or authority and inform the applicant accordingly.

Access to environmental information upon request:

Applications for access to environmental information that is contained in sensitive documents within the meaning of Article 9, first paragraph of Regulation 1049/2001, shall be treated according to that article.

Refusal to give access to sensitive documents that contain environmental information can only be based on the grounds listed in article 10 of this Regulation.

Collection and dissemination of environmental information:

1. Community bodies shall organise the environmental information which is relevant to their functions and which is held by or for them, with a view to its active and systematic dissemination to the public, in particular by means of computer telecommunication and/or electronic technology in accordance with Articles 11, 12 and 13 of Regulation 1049/2001/EC. To this end, they shall place the environmental information they hold, on these databases. The databases have to be provided with search aids and other forms of software designed to assist the public to locate the information.

The information made available by means of computer telecommunication and/or electronic technology need not include information collected before the entry into force of this instrument unless it is already available in electronic form.

2. The environmental information to be made available and disseminated shall be updated as appropriate. In addition to the documents listed in Article 12 second and third paragraphs and in Article 13 first and second paragraphs of Regulation 1049/2001/EC, the data bases or registers shall include the following:
 - (a) progress reports on the implementation of:
 - international treaties, conventions or agreements, and of Community, national, regional or local legislation, on the environment or relating to it,
 - policies, plans and programmes relating to the environment, when prepared or held in electronic form by the Community bodies;
 - (b) the annual reports on the state of the environment as indicated in no. 3;
 - (c) Significant international documents on environmental issues, as appropriate;
 - (d) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;
 - (e) authorisations with a significant impact on the environment and environmental agreements or a reference to the place where such information can be requested or accessed.
 - (f) environmental impact studies and risk assessments concerning the environmental elements or a reference to the place where such information can be requested or accessed.
3. The Commission shall publish and disseminate an annual report on the state of the environment, including information on the quality of, and pressures on, the environment
4. In the event of an imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all environmental information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a Community body is disseminated immediately and without delay to members of the public who might be affected.
5. Community bodies can satisfy the requirements of this Article by creating links to Internet sites where the information can be found.

Quality of the environmental information:

1. Community bodies shall, so far as is within their power, ensure that any information made available upon request or disseminated, or reports published, in accordance with this instrument are up to date, clear and comprehensible and scientifically sound.
2. To make citizens' rights under this instrument effective, each Community body shall ensure that the practical arrangements for exercising the right of access to environmental information are effective. These arrangements shall include the

designation of information officers and the establishment and maintenance of facilities for the examination of the information requested.

Refusal of requests for environmental information and decision not to actively disseminate environmental information¹⁴:

1. Without prejudice to paragraph 3 of this provision, Community bodies shall refuse access to environmental information and shall decide not to actively disseminate environmental information, where disclosure of the information would undermine the protection of
 - the public interest as regards international relations, defence or public security,
 - the confidentiality of commercial interests where this confidentiality is provided by law,
 - to intellectual property rights
 - to court proceedings and
 - Article 4, third paragraph of Regulation 1049/2001, relating to internal documents.
2. Without prejudice to paragraph 4 of this provision, Community bodies shall refuse access to environmental information contained in internal documents
3. Without prejudice to paragraph 4 of this provision, Community bodies shall refuse access to environmental information where the request is formulated in too general a manner and the applicant has not reformulated his request in a sufficiently precise manner.
4. Requests for access to environmental information may not be refused where the request relates to information on emissions, discharges or other releases into the environment.
5. The above-mentioned grounds for refusal to give access or for decision not to actively disseminate environmental information shall be interpreted in a restrictive way. In every particular case, the public interest served by disclosure shall be weighed against the interest served by refusal. Access to the requested environmental information shall be granted if there is an overriding public interest in disclosure.
6. If only parts of the requested information is covered by any of the exceptions, the remaining parts of the information shall be released or disseminated.

¹⁴ Not all grounds for refusal of Regulation 1049/2001 can be included in this Regulation. Part of the grounds for refusal of Regulation 1049/2001 do not relate to the environment and part of the grounds for refusal are not foreseen in the Aarhus Convention. Where the Aarhus Convention would allow grounds for refusal going beyond those provided for by Regulation 1049/2001, it is decided for practical reasons to include only the grounds for refusal as foreseen in the Regulation, so that both instruments are aligned and that Commission, European Parliament and Council when acting on the basis of this new instrument comply with the obligations of Regulation 1049/2001 at the same time. This is necessary, because in almost all cases, the concept „environmental information“ of the new instrument is covered by the concept „document“ of Regulation 1049/2001.

Processing of initial applications addressed to other Community bodies

An application for access to environmental information addressed to other Community bodies that the Commission, the European Parliament or the Council shall be handled according to the provisions of Article 7 of Regulation 1049/2001. As regards the procedure, the delays and the other procedural and administrative provisions, Article 8 of Regulation 1049/2001 shall apply *mutatis mutandis*.

Refusal by other Community bodies:

Where access to information on the environment is addressed to another Community body than the Commission, the European Parliament or the Council and where this request is refused by the Community body, applicants may make a confirmatory application that shall be addressed to that body. As regards the procedure, the delays and the other procedural and administrative provisions concerning this procedure, Article 8 of Regulation 1049/2001 shall apply *mutatis mutandis*.

Against the confirmatory decision by this other Community body, the applicant may appeal to the Court of First Instance, in conformity with Article 230 EC Treaty.

Treatment of sensitive documents

1. In case other Community bodies than the Commission, the European Parliament or the Council have established rules concerning sensitive information, applications for access to such information shall be handled by those persons who have, according to these rules, a right to acquaint themselves with this information.
2. Community bodies deciding to refuse access to sensitive information shall give the reasons for this decision in a manner which does not harm the interests of article [XX] (= the article relating to the grounds for refusal)
3. Article 9, paragraphs 5 and 6 of Regulation 1049/2001 shall apply *mutatis mutandis*.

Charges:

1. Community bodies may make a charge for supplying any environmental information but such a charge may not exceed a reasonable amount. No additional charge shall be made for consulting the requested information *in situ*.
2. Community bodies intending to make such a charge for supplying information shall publicise and make available to applicants a schedule of charges which may be levied, indicating the circumstances in which they may be levied or waived and when the supply of information is conditional on the advance payment of such a charge.

PART 3

PUBLIC PARTICIPATION

Principle:

1. Community bodies shall provide early and effective opportunities to the public to participate in the preparation, modification, or review of, according to the case, measures, plans or programmes relating to the environment, in accordance with the following provisions.

In particular, where the Commission prepares a proposal for a plan or programme relating to the environment to be submitted to other Community bodies for decision, it shall, for this preparatory stage, provide for public participation in accordance with the following provisions.

2. Community bodies shall identify the public entitled to participate for the purposes of paragraph 1. This shall include the public affected or likely to be affected by, or having an interest in, the measure, plan or programme relating to the environment under preparation, including relevant non-governmental organisations

Consultation:

1. When preparing a measure, a plan or programme relating to the environment, or for its modification or review, Community bodies shall inform the public thereof, whether by public notices or other appropriate means such as electronic media.
2. The information to be made available to the public, shall include, where available, the draft proposal, and the environmental information or assessment relevant to the measure, plan or programme under preparation. The Community body preparing the measure, plan or programme shall inform the public about the practical modalities for participating in decision-making. In particular, the public shall be informed on the administrative entity of the Community body from which relevant information can be obtained, to which comments or questions may be submitted, and on the time schedule for transmittal of comments and questions.
3. Community bodies shall provide for practical arrangements to enable the public to express comments and opinions at an early stage before decisions on the measure, plan and programme are made. According to the nature of the measure, plan or programme, the public shall be given the possibility to comment at different stages of the preparation of the measure, plan or programme.
4. The public participation procedures shall include reasonable timeframes for the different phases, allowing sufficient time for informing the public and for the public to prepare and participate effectively during the environmental decision-making. As a rule, a delay of six weeks, from the notice concerning the preparation of a measure or a plan or programme relating to the environment, shall be provided for comments. The delay might be shortened in case of urgency, or where the public already had the occasion to comment on the plan or programme in question.

Consideration:

1. In making the decisions on the measure, the plans and programme, Community bodies shall take due account of the outcome of public participation.
2. Community bodies shall provide information to the public about the outcome of the public participation. They shall inform the public of the plan or programme decided upon, including its text, and of the reasons and considerations upon which the decision is based.

PART 4
ACCESS TO JUSTICE

Request for internal review:

1. Any qualified entity that considers an administrative action or an omission by a Community body to be in breach of European law relating to the environment may lodge a request for internal review with said body. Such a request must be filed within a time limit not exceeding four weeks after publication of measure, or, in the case of an alleged omission, within four months after the date when action was required by law. It shall specify the alleged breach of law relating to the environment as well as the measure sought for.
2. The Community body with whom the request has been lodged shall consider any such request unless the request is clearly unsubstantiated. It shall issue, as soon as possible but not later than eight weeks, a decision in writing on the measure to be taken to ensure compliance with law relating to the environment, or on its refusal with regard to a request for action. The decision shall be addressed to the qualified entity that has lodged the request and include a statement of the reasons for the decision.
3. Where the Community body is unable, despite due diligence, to take a decision on a request for action within the period mentioned in no. 2, it shall inform the qualified entity who lodged the request as soon as possible, at the latest within the period mentioned under no. 2, of the reasons for not being able to take the decision and when it intends to decide on the request. The Community body shall take such decision within a reasonable time frame, having regard to the nature, extent and gravity of the breach of law relating to the environment, within a period not exceeding four months from the receipt of the request; it shall immediately inform the qualified entity of its decision on the request once it has been taken.

Proceedings before the Court of Justice:

Where the qualified entity which lodged the request according to Article XX considers a decision by the Community body in response to that request insufficient to ensure compliance with law relating to the environment it shall be entitled to institute a legal proceeding with the Court of Justice in accordance with article 230 (4) and (5) of the EC Treaty to review the substantive and procedural legality of the said decision.

The qualified entity may also institute such legal proceeding on the basis of an alleged claim that its rights for participation in environmental matters have been impaired.

Legal standing:

A qualified entity shall be entitled to lodge a request for internal review without having to prove the impairment of a sufficient interest, or of an individual right, or according to the precedent article institute legal proceeding before the Court of Justice under the condition that

- it is recognised according to [Article XY]
- the subject matter under review falls within the scope of its activities.

The Commission shall take the necessary measures to ensure that qualified entities which have applied for recognition and which fulfil the criteria set out in [Article X] are recognised.

Procedure for recognition of qualified entities:

The Commission shall take the necessary measures to ensure an expeditious recognition of a qualified entity where it meets the criteria set out under [...].

Where a qualified entity no longer satisfies the criteria set out [under Article X] the recognition may be cancelled. A minimum one-month notice must be given to the qualified entity concerned stating the reasons for the intended cancellation.

Criteria for recognition:

In order to be recognised, the qualified entity shall comply with the following characteristics:

- (a) it must be an independent and non-profit-making legal person primarily active in the field of environmental protection and enhancement;
- (b) it must be active at Community level, either singly or in the form of several co-ordinated associations with a structure (membership base) and activities covering at least three EU Member states;
- (c) it must have been legally constituted for more than two years and have been actively pursuing environmental protection according to its statutes for that period;
- (d) it must have had its annual statement of accounts for the two preceding years certified by a registered auditor.
- (e)