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European Centre on Sustainable Policies for Human and Environmental Rights

The Aarhus Regulation: New Opportunities for Citizens in the EU and Beyond?

Report of the ECOSPHERE Forum held in Brussels, 27 October 2006
with the support of the Brussels Capital Region



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The Aarhus Regulation: New Opportunities for Citizens in the EU and Beyond?

On 25 September 2006, the Official Journal of the European Union published EC Regulation No. 1367/2006 on the application of the provisions of the Aarhus Convention on Access to information, Public Participation in Decision-making and Access to Justice in Environmental Matters to EC institutions and bodies. This 'Aarhus' Regulation, which deals with the application of procedural rights guaranteed by the 1998 Aarhus Convention within the EU's institutional framework, became directly applicable on 28 June 2007. It contains provisions on public access to environmental information held by European Community institutions and bodies, as well as requiring the European Commission and other Community bodies to actively collect and disseminate such information. It organizes a new public participation procedure which shall apply whenever Community institutions and bodies prepare, modify or review plans and programmes likely to have significant effects on the environment. Finally, it provides for a special internal review procedure whereby NGOs meeting certain criteria can request the Commission or any other Community body to reconsider any administrative act it has adopted pursuant to EU environmental law, or to adopt such an act where it was legally required to do so but failed to act.

The controversial aspects of the issues of public participation, transparency and accountability, whose institutional, legal and political implications go far beyond environment policy, sparked off a heated debate during the legislative process, eventually leading to a conciliation procedure between the European Parliament and the Council prior to the final adoption of the Aarhus Regulation.

Does the Regulation actually create new rights and opportunities for citizens and civil society organisations and, if so, how can they be exercised effectively?

In order to address these questions, the European Centre on Sustainable Policies for Human and Environmental Rights (ECOSPHERE) organised a public Forum in Brussels on 27 October 2006, chaired by Dr. Ludwig Krämer, Professor of European environmental law at the University of Bremen and University College London. Experts and practitioners from NGOs, several European universities and the legal profession discussed the provisions of Regulation No. 1367/2006 and analyzed their implications for EU environmental policy.

This report of the Forum was compiled by Armelle Gouritin, Member of ECOSPHERE, with the help of the speakers.

It is structured according to the three 'pillars' of the Aarhus Convention and contains either the full text or a summary of each contribution. For ease of reference, the relevant provisions of the Aarhus Regulation are reproduced in full at the beginning of each section.

The full text of Regulation No. 1367/2006 in all official languages of the EU can be accessed at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:264:0013:0019:EN:PDF>

**Opening speech by Evelyne Huytebroeck,
Minister of Environment and Energy of the Brussels Capital Region**

As the Brussels Minister in charge of environmental affairs, I sit with my colleagues in the European Environment Council. In that context, I had the difficult task of participating in the negotiations that led to the adoption of Regulation 1367/2006 aimed at implementing the provisions of the Aarhus Convention to the European institutions.

The objective of this seminar is to be able to provide some answers to the following question: does this new regulation create new rights or new opportunities for citizens, and if so, can they be exercised effectively?

So I will put on my "politician's" hat, and throw you immediately, not into the burning issue, but certainly into the debate.

I expect you are aware that I am a member of the Belgian ECOLO party: the question of the transposition of the Aarhus Convention is particularly close to my heart. The adventures involved in transposing this Convention into Belgian national or Brussels law would, in themselves, require a special seminar, but that is not the subject that concerns us today. You should be aware, however, that as the Brussels Environment Minister, I am currently working on the correction in Brussels law of the errors in the transposition of the directives in the Aarhus package.

While the three pillars of the Aarhus Convention are fundamental questions for the party that I represent – and have been for a long time – they are also fundamental for Belgium as a member of the Council.

As you know, Belgium abstained from the Council vote that adopted the Regulation.

Indeed, according to Belgium, several provisions of this Regulation ignored the obligation imposed on the institutions by Article 300(7) of the EC Treaty to respect international agreements entered into by the Community. However, it appears that certain provisions of the Regulation are not in accordance with the provisions of the Aarhus Convention, which is precisely what the Regulation is intended to implement.

Likewise, Belgium considers that Title II of the Regulation does not transpose the Aarhus Convention scrupulously, and ignores some of its provisions. Indeed, the system for exceptions concerning requests for environmental information, as provided by the Regulation, establishes a special rule for interpreting the exceptions provided for in this Regulation, as well as a new specific exception relating to the protection of the environment. This provision entails that exceptions to the right of access to information will be allowed, even when they go beyond those authorised by the Convention. In this regard, the Regulation does not guarantee the legal certainty which citizens requesting environmental information are entitled to expect.

Finally, Belgium considers that the provisions of Title IV of the Regulation on the procedure for internal review and access to justice, as adopted by the Council when amending the Commission's initial proposal, are also in contradiction with the Aarhus Convention: these provisions have the effect of unduly restricting citizens' access to redress, which the institutions are bound to guarantee under Article 9 of the Convention.

So you will see that Belgium's objections about the Regulation are both legal and political. The law which it was difficult to establish in Aarhus serves a political objective which I value greatly: therefore, it was not acceptable to diminish these provisions during the adoption of the Regulation.

I am convinced that the presentations and debates in this forum will fuel the questions that I have just raised, as well as other issues connected with the adoption of this regulation.

I would like to thank ECOSPHERE once again for having taken the initiative of organising this reflection on a subject which is, in my opinion, particularly important, as it concerns issues of citizens' environmental rights.

Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (excerpt)

TITLE II ACCESS TO ENVIRONMENTAL INFORMATION

Article 3

Application of Regulation (EC) No 1049/2001

Regulation (EC) No 1049/2001 shall apply to any request by an applicant for access to environmental information held by Community institutions and bodies 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.

For the purposes of this Regulation, the word "institution" in Regulation (EC) No 1049/2001 shall be read as "Community institution or body".

Article 4

Collection and dissemination of environmental information

1. Community institutions and bodies shall organise the environmental information which is relevant to their functions and which is held by 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(1) and (2), and 12 of Regulation (EC) No 1049/2001. They shall make this environmental information progressively available in electronic databases that are easily accessible to the public through public telecommunication networks. To that end, they shall place the environmental information that they hold on databases and equip these with search aids and other forms of software designed to assist the public in locating the information they require.

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 Regulation unless it is already available in electronic form. Community institutions and bodies shall as far as possible indicate where information collected before entry into force of this Regulation which is not available in electronic form is located.

Community institutions and bodies shall make all reasonable efforts to maintain environmental information held by them in forms or formats that are readily reproducible and accessible by computer telecommunications or by other electronic means.

2. The environmental information to be made available and disseminated shall be updated as appropriate. In addition to the documents listed in Article 12(2) and (3) and in Article 13(1) and (2) of Regulation (EC) No 1049/2001, the databases or registers shall include the following:

(a) texts of international treaties, conventions or agreements, and of Community legislation on the environment or relating to it, and of policies, plans and programmes relating to the environment;

(b) progress reports on the implementation of the items referred to under (a) where prepared or held in electronic form by Community institutions or bodies;

(c) steps taken in proceedings for infringements of Community law from the stage of the reasoned opinion pursuant to Article 226(1) of the Treaty;

(d) reports on the state of the environment as referred to in paragraph 4;

(e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment;

(f) 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;

(g) environmental impact studies and risk assessments concerning environmental elements, or a reference to the place where such information can be requested or accessed.

3. In appropriate cases, Community institutions and bodies may satisfy the requirements of paragraphs 1 and 2 by creating links to Internet sites where the information can be found.

4. The Commission shall ensure that, at regular intervals not exceeding four years, a report on the state of the environment, including information on the quality of, and pressures on, the environment is published and disseminated.

Article 5

Quality of the environmental information

1. Community institutions and bodies shall, insofar as is within their power, ensure that any information that is compiled by them, or on their behalf, is up-to-date, accurate and comparable.

2. Community institutions and bodies shall, upon request, inform the applicant of the place where information on the measurement procedures, including methods of analysis, sampling and pre-treatment of samples, used in compiling the information can be found, if it is available.

Alternatively, they may refer them to the standardised procedure that was used.

Article 6

Application of exceptions concerning requests for access to environmental information

1. As regards Article 4(2), first and third indents, of Regulation (EC) No 1049/2001, with the exception of investigations, in particular those concerning possible infringements of Community law, an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment. As regards the other exceptions set out in Article 4 of Regulation (EC) No 1049/2001, the grounds for refusal shall be interpreted in a restrictive way, taking into account the public interest served by disclosure and whether the information requested relates to emissions into the environment.

2. In addition to the exceptions set out in Article 4 of Regulation (EC) No 1049/2001, Community institutions and bodies may refuse access to environmental information where disclosure of the information would adversely affect the protection of the environment to which the information relates, such as the breeding sites of rare species.

Article 7

Requests for access to environmental information which is not held by a Community institution or body

Where a Community institution or body receives a request for access to environmental information and where this information is not held by that Community institution or body, it shall, as promptly as possible, but within 15 working days at the latest, inform the applicant of the Community institution or body or the public authority within the meaning of Directive 2003/4/EC to which it believes it is possible to apply for the information requested or transfer the request to the relevant Community institution or body or the public authority and inform the applicant accordingly.

Article 8

Cooperation

In the event of an imminent threat to human health, life or the environment, whether caused by human activities or due to natural causes, Community institutions and bodies shall, upon request of public authorities within the meaning of Directive 2003/4/EC, collaborate with and assist those public authorities in order to enable the latter to disseminate immediately and without delay to the public that might be affected all environmental information which could enable it to take measures to prevent or mitigate harm arising from the threat, to the extent that this information is held by or on behalf of Community institutions and bodies and/or those public authorities.

The first subparagraph shall apply without prejudice to any specific obligation laid down by Community legislation, in particular by Decision No 2119/98/EC and by Decision No 1786/2002/EC.

Access to environmental information held by EU institutions and bodies

Presentation by Ralph Hallo, Stichting Natuur en Milieu (Netherlands), former President, European Environmental Bureau, Member of ECOSPHERE (Summary)

- Mr Hallo began by giving context and chronology elements which can be summarized as follows:
 - Specific rules for access to environmental information precede general rules
 - ✓ Directive 90/313/EEC
 - Applicable to EU Member States
 - ✓ Aarhus Convention (1998)
 - Applicable across Europe
 - Including EU member states
 - AND the EU institutions
 - EU reluctant steps toward transparency
 - ✓ Declarations and Treaty Protocols
 - Article 255
 - ✓ Regulation 1049/2001
 - Access to documents (general rules)
 - Applicable to 3 main EU institutions
 - Regulation 1049
 - ✓ Ignores Aarhus
 - Lobby efforts to connect to Aarhus unsuccessful
 - ✓ Rescue clause
 - Article 2.6: This Regulation shall be without prejudice to rights of public access to documents held by the institutions which might follow from instruments of international law ...
 - Compare Regulation 1049 with Directive 2003/4
 - ✓ Review and revision after Aarhus
 - Implements instead of ignores Aarhus
 - Improves on Aarhus
 - ✓ Conclusion: Repair of 1049 necessary
 - Opportunity to repair 1049
 - Aarhus implementation at EU level
- Mr Hallo then concentrated on the Aarhus Regulation (Regulation 1367/2006)

As for the Regulation's general features, the Regulation was adopted more than 5 years after 1049, is a partial repair of 1049, and won't enter into force until 9 years after European Community signed Aarhus

- The Regulation's scope
 - ✓ Defines environmental information
 - Tracks Aarhus definition
 - ✓ Defines environmental law
 - ✓ All Community institutions and bodies are covered
 - 1049 covered only 3 main institutions
 - Commission, Parliament, Council
 - Except 'when acting in a judicial ... capacity'
 - As far as access to information is concerned
 - ✓ More Improvements to scope: Any natural or legal person
 - 1049 limited to citizen or resident of EU
 - Non-residents may have same rights under 1049
 - ✓ Comparable provisions :
 - Electronic availability of documents
 - Both require registers
 - 1367 'progressively made available'
 - Adds to list of documents required by 1049
 - Onward transfer
 - Aarhus 'as promptly as possible'
 - 1367 'within 15 days at the latest'
 - ✓ Exceptions
 - Problem area
 - 1049 relied on
 - Doesn't match up well with Aarhus
 - Restrictive interpretation of exceptions
 - See recital 15
 - Compare article 6.1
 - ✓ Exceptions under Regulation 1049 not found in Aarhus:
 - 'Financial, monetary or economic policy of the Community or a Member State'
 - Commercial interests protected more broadly
 - 'Court proceedings and legal advice'
 - Aarhus protects the 'course of justice'
 - Aarhus has no sweeping exception for 'legal advice'
- Mr Hallo then went through the consultation and veto issues:
 - ✓ 1049 requires consultation with third party
 - Article 4.4
 - ✓ Aarhus protects voluntary supply and whistleblower
 - ✓ 1049 allows member state to veto release
 - Article 4.5
 - ✓ 1367 leaves member state veto intact

- As for costs provisions and practical arrangements, the following was stressed:
 - ✓ Not dealt with in 1367
 - ✓ Covered by 1049 (article 10) presumably
 - ✓ See also the Institutions' Rules of Procedure
 - Need to ensure that these rules are also in line with Aarhus

- The review procedures were described as follows:
 - ✓ Article 10 only applies to NGOs
 - No internal review for individual applicants
 - How many applicants will be individuals?
 - Doesn't Aarhus require the same right of review for all applicants?
 - Is denial of access an administrative act open to internal review?

 - ✓ Time limits for internal review much longer than 1049
 - 12 or even 18 weeks
 - Compared to 15 working days
 - Aarhus requires 'timely'

- Mr. Hallo finished his presentation by mentioning some concrete cases:
 - Recent EEB information requests
 - ✓ List of participants in Expert Group
 - Medical Devices
 - Mercury policy: dental amalgam
 - Commission released names of organisations
 - Commission withheld identities of participants
 - Reason: privacy, protection of personal data

 - ✓ Written submissions by third parties
 - DG Enterprise
 - Development of ecolabel criteria
 - Paper and shampoos
 - Request denied?

 - ✓ Complaints and infringement proceedings
 - 'Steps taken ... from the stage of the reasoned opinion'
 - Article 4.2(c)
 - Correspondence between Member State and Commission?

Thanks to the questions raised after this presentation, the following points have been highlighted:

- It has been highlighted that under Regulation 1049 no sanction can be taken if an Institution does not respect the 15 working days requirement, making it almost impossible to enforce this provision.

- As for the Convention's direct effect, it must be reminded on the one hand that the Convention was ratified by the EU on February 2005 while the Regulation is to come into effect on June 2007. The Convention is thus already applicable to the Community. It belongs to Community law.
On the other hand, the principle established by the ECJ as for direct effect is as follows: When a measure is precise and unconditional, it does have direct effect. As such, Community Institutions and Bodies have to apply, respect this measure.
- Finally, concerning the expert committees or groups, the possibility to know the names of the experts has been pointed out.
It has then been recalled that the 2 sorts of working groups have to be differentiated.
As for the Council's working groups on environmental law, it is not possible to get the names.
As for the Commission's working groups, experts are appointed on an ad-hoc basis and, as to whether or not names can be provided, there is not yet a consolidated policy of the Commission.
The underlying problematic is whether or not this matter is of public legitimate interest. What is to be known is whether the experts are competent, and what is their quality: are they public officials? Are they enterprises representatives? Are they officially public officials acting in fact as industries' representative?

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TITLE III PUBLIC PARTICIPATION CONCERNING PLANS AND PROGRAMMES RELATING TO THE ENVIRONMENT

Article 9

1. Community institutions and bodies shall provide, through appropriate practical and/or other provisions, early and effective opportunities for the public to participate during the preparation, modification or review of plans or programmes relating to the environment when all options are still open. In particular, where the Commission prepares a proposal for such a plan or programme which is submitted to other Community institutions or bodies for decision, it shall provide for public participation at that preparatory stage.

2. Community institutions and bodies shall identify the public affected or likely to be affected by, or having an interest in, a plan or programme of the type referred to in paragraph 1, taking into account the objectives of this Regulation.

3. Community institutions and bodies shall ensure that the public referred to in paragraph 2 is informed, whether by public notices or other appropriate means, such as electronic media where available, of:

(a) the draft proposal, where available;

(b) the environmental information or assessment relevant to the plan or programme under preparation, where available; and

(c) practical arrangements for participation, including:

(i) the administrative entity from which the relevant information may be obtained,

(ii) the administrative entity to which comments, opinions or questions may be submitted, and

(iii) reasonable time-frames allowing sufficient time for the public to be informed and to prepare and participate effectively in the environmental decision-making process.

4. A time limit of at least eight weeks shall be set for receiving comments. Where meetings or hearings are organised, prior notice of at least four weeks shall be given. Time limits may be shortened in urgent cases or where the public has already had the opportunity to comment on the plan or programme in question.

5. In taking a decision on a plan or programme relating to the environment, Community institutions and bodies shall take due account of the outcome of the public participation. Community institutions and bodies shall inform the public of that plan or programme, including its text, and of the reasons and considerations upon which the decision is based, including information on public participation.

Public participation in EU-level administrative procedures

Presentation by Dr. Jerzy Jendroska, Professor of EU law, University of Opole (Poland), Member of the Aarhus Convention Compliance Committee, Member of ECOSPHERE (Summary)

Dr. Jendroska's presentation aimed at giving a brief overview of the provisions adopted in the light of the Aarhus Convention and the "Public Participation" Directive (2003/35/EC).

- The scope of the participation pillar covers the following:
 - Decisions on individual projects „which may have a significant effect on the environment” – art 6
 - GMO decisions – art 6 bis
 - Plans/programs „relating to environment” – art 7
 - Plans and program relating to the environment which require public participation under Article 7 of the Convention include both
 - Plans and programs which may have significant negative effect on the environment (those which usually would require strategic environmental assessment)
Examples: water management plans, transport programs, land use plans, structural plans
 - Those which are aiming to help protect the environment.
Examples: national environmental policy, regional and local environmental programs, environmental education programs
 - Policies „relating to environment” – art 7
 - Normative acts/legally binding rules „that may have a significant effect on the environment” – art 8
- The scope does not cover the following:
 - Specific activities (projects)
 - Policies
 - Normative acts
 - Plans and programmes excluded :
 - Types
 - ✓ Financial or budget plans („have no significant direct effect” – according to Commission)
 - ✓ Internal plans
 - ✓ Emergency plans
 - Scheme modelled after SEA
 - Relation to Aarhus convention
- Further information on public participation concerning plans and programs is necessary. The framework is as follows:

- Obligation to identify the public which may participate
 - Reasonable time-frames allowing sufficient time for
 - Informing the public
 - For public to prepare and participate effectively
 - Early in decision-making
 - When all options are open
 - When public participation can be effective
- As for the procedural aspect, Article 7 of the Aarhus Convention is drafted in a somewhat convoluted form. Its part related to plans and programs heavily refers to provisions of Article 6. Nevertheless, the obligations are quite clear. The following points have been developed:

- The procedural steps are:
 - Identification of the public,
This obligation may be fulfilled either by:
 - ✓ General obligation in the law requiring any public authorities preparing plans or programs relating to the environment to identify the public which would be most concerned by the subject matter of the plan or program
 - ✓ Clearly indicating in the relevant piece of legislation which envisages adoption of given plan or program what groups of the public should be specifically approached and encouraged to participate

Example:

The Regulations concerning programs for reducing water pollution from agriculture in Poland require consulting the following:

- Users of given waters
- Users of given area of land
- Organizations of farmers
- Environmental organizations

- Notification,
- Commenting
- Taking into account of the outcome of public participation and
- Informing on the final plan/programme

- Dr. Jendroska then gave further information on the notification requirements:
 - Means
 - Time-frames
 - ✓ Reasonable

Bad practice

The law in Poland used to provide the same 21-days period for commenting on all plans and programs. This was considered to be in breach of the Convention and therefore the law was changed and now in each case authority preparing plan or program has to in each case specify ‘reasonable time-

frames” but it has to be „at least 21-days period for commenting”

Good practice

EU Water Framework Directive in relation to water management plans provides 6 months commenting period

- ✓ At least 8 weeks for commenting
 - ✓ 4 weeks notice on hearing
 - ✓ Shorter timeframes for consecutive opportunities
 - No mention of „adequate, timely and effective manner”
- Dr. Jendroska then concluded by considering this pillar of the Aarhus Regulation as a step forward in providing public participation, though there are some doubts as to conformity with the Aarhus Convention considering some details. This initiative has to be considered, according to Dr. Jendroska, in the broader context of general initiatives for governance and communication.

Public participation: What lessons can we learn from national procedures?

Presentation by Dr. Maria Eduarda Gonçalves, Professor of law, Higher Institute for Labour and Business Sciences (ISCTE), Lisbon, Member of the Scientific Council of ECOSPHERE (Summary)

- Dr. Gonçalves began by analysing the Aarhus Convention. Her analysis can be summarized as follows:
 - One underlying assumption of the Aarhus Convention is that *environmental issues* are **best handled** with the *participation* of all concerned citizens at the relevant level.
 - The Aarhus Convention is the first treaty devoted wholly to public participation.
 - Dr. Gonçalves then went on exposing the ‘public participation’ underlying issues:
 - ✓ Dr. Gonçalves then exposed some arguments for public participation that have been advanced by scholars:
 - **A normative argument: regulation is not a value-neutral endeavour - participation is consequently important for moral and ideological motives.**
 - **A epistemic argument:** the task of regulators is often hampered by uncertainties and asymmetries of information -there is, therefore, a need to support decision on sources of knowledge external to traditional regulatory structures with a view to reduce the margin of political error.
 - **An instrumental argument: participation constitutes an indispensable tool for the viability of regulatory processes**, due, in particular, to decreasing levels of trust by citizens in political and administrative institutions.
 - The presentation then focused on the Aarhus Convention and more precisely on how public participation is justified: the Aarhus Convention does not commit itself to any particular rationale for participation, and the recitals recognise diverse motivations including:
 - ✓ To enhance the quality and the implementation of decisions
 - ✓ Public awareness of environmental issues
 - ✓ To strengthen public support for decisions on the environment
 - ✓ To strengthen democracy and human rights
 - ✓ The clearest strong link seems to be with the **improvement of environmental protection** (*output legitimacy*)

- ✓ There is, however, a **concern with effectiveness of public participation:** procedural details; duty to take into account the results of consultation in the final decision (article 6) (*input legitimacy*)
- Dr. Gonçalves then analyzed public participation at the EU level:
 - Between “good” and “democratic” decisions**
 - ✓ The legal barriers to basing decisions on factors that do not fit within scientific and technical analysis remain powerful:
 - EIA directives f. e. conceived on the basis of a set of assumptions on the authoritative role of scientists and experts; the separation between expertise and the public;
 - Food law reinforced the use of scientific expertise though subject to principles of openness and transparency.
 - ✓ The EC resistance to put in place a legally binding instrument on consultation:

“Such an over legalistic approach would be incompatible with the need for timely delivery of policy and with the expectations of the citizens that the European institutions *should deliver on substance* rather than concentrating on procedures” (Minimum standards on consultation, COM (2002) 174).
 - EU: ambiguities and contradictions**
 - ✓ White Paper on Governance, 2001: better and ‘faster’ regulation; ... the need to speed-up the decision-making process ...
 - ✓ The EC governance project: a rhetoric of openness
 - ✓ The EC approach of drawing lines between risk assessment and risk management explicitly recognizes the ultimately political nature of risk decisions
 - ✓ Food risk management should consider “other factors regarded as legitimate” (other than technical and economic) (art 7, Reg. 178/2002)
 - ✓ “Increasingly ... the interplay between policy-makers, experts, interested parties and the public at large is a crucial part of policy-making, and attention has to be focused not just on policy outcome but also on the *process* followed.” (Communication on the Collection and Use of Expertise (COM (2002) 713 final)
- As for the national level, the following has been pointed out:
 - ✓ Public participation encompasses a group of **procedures** designed to consult, involve, and inform the public to allow those affected by a decision to have an input into that decision (surveys, public debates, public hearings, focus groups, citizen panels, consensus conference, etc.)
 - ✓ “Input” is key here in differentiating participation from other communication strategies, from those that elicit input in the form of opinions to those that elicit judgments and decisions from which actual policy might be derived
 - ✓ There is a general lack of empirical consideration of the quality of these methods
 - ✓ Given that the quality of the *output of any participation* exercise is difficult to determine, scholars suggest the need to consider which aspects of *the*

process are desirable and then measure the presence or quality of these process aspects

- ✓ Implementing EC environmental law and public participation
 - While **laws tend to predominantly similar** national features (political culture, administrative tradition, civic culture, economic development) shape the way they are implemented
 - **Implementation is primarily a State** responsibility
 - The opportunities for the public to participate find their place primarily at the level of **implementation** of principles and rules
 - Concerns have been voiced in this context with so-called “implementation gap”
- ✓ Comparing Western, Southern and Central-East European countries
 - Implementation at a preliminary stage in East-Central European countries: focus on information collection and dissemination, legislative provision for public participation
 - West European countries quite advanced with regard to access to information and to a lesser degree on public participation
 - Southern European countries (Portugal, Spain): implementation of European environmental law swings between non-compliance to over-compliance. External (EC) and internal (civil society, NGO) pressures combine to further public involvement.
 - **A major driving force of implementation** has been the preparation and adoption of legislative measures to bring EC legislation in line with the Aarhus Convention.
- ✓ EU “adaptation” pressures
 - **The EU ‘semi-pluralist’ policy-making processes** have had a differential impact on member states’ policy-making processes as a matter of **institutional ‘fit’** “ with *greater disruption* to the more ‘statist’ systems of France or Britain than to the ‘corporatist’ systems of Germany or Italy.
 - Europeanization has affected not only the traditional ways in which **state actors** formulate and implement policy but also the traditional routes by which **societal actors gain access and exercise influence in policy-making**.
- As a conclusion, Dr. Gonçalves figured out what lessons from national procedures can be learnt by the EU as follows: **no simple or automatic transferability of experiences** due to the special political and institutional features of the EC. In addressing **public participation procedures at the EU level**, a series of topics would need to be considered, namely:
 - ✓ The legal definition/implementation split
 - ✓ The actual decision-making structures (comitology)
 - ✓ The central role of expertise
 - ✓ The scope of public consultation/participation
 - ✓ What ‘publics’? Which procedures?

Thanks to the questions raised after those presentations, the following points have been highlighted:

- With respect to the centrality of risk assessment, it has been wondered to what extent industries provide with expertise and pressure. It has then been noted that the “traditional” divide between experts and public with no specific knowledge is not that simple: indeed, it is more and more recognized that on the one hand, some NGOs provide with some expertise. Hence, among experts themselves, they have different backgrounds and employers. On the other hand, some participants who do not have the specific knowledge complete the assessment with other issues such as ethics for example.
- As for the definition of plans and programs, it has been pointed out that the definition will be given according to the content of the text, but this does not lead to certainty. Indeed, the differences between States and legal cultures may have some consequences.
- Finally, regarding the notions of “public concern” and “public should be identified”, it has been stressed that this identification can take place through pre established lists and on a case by case basis. What is also crucial here is the fact that an active approach must be chosen. Indeed, the public must be addressed and stimulated in order to get it actively involved.

Product-related decision-making and Aarhus

Presentation by Dr. Marc Pallemmaerts, Senior Fellow, Institute for European Environmental Policy, Brussels/London, Professor of European and international environmental law, Université Libre de Bruxelles and Vrije Universiteit Brussel, President of ECOSPHERE (Summary)

How are products addressed in the Aarhus Convention?

How would the Regulation 1367/2006 apply to product-related decision-making and information?

1. The Aarhus framework

Different approach under the 3 pillars

A. Access to information

- Information concerning impact of products: environmental information as defined in art. 2 (3). Products are “factors including substances affecting or likely to affect the elements of the environment”
- Decisions on placing on the market: “administrative measures”
- Information held by public authorities (including EU institutions and bodies)
- Confidentiality of commercial/industrial information is protected by law, there is a strong presumption in favour of disclosure of information on “emissions” (not defined)
- Active collection/dissemination of environmental information, special provision on product information
Art. 3 (8) “develop mechanisms (...) to ensure sufficient product information is made available to the public in a manner which enables consumers to make informed environmental choices”

B. Public participation (PP)

- “Specific activities” (art.6): in the context of permitting procedures there is a mandatory PP. Annex I: only site-specific activities (projects)
- Hence, there are PP requirements/procedures in art. 6 based on procedures for site-specific environmental permits.
- However, Annex I is not exhaustive:
Art. 6 (1) (b): activities not listed in Annex I which may have significant effect on environment. “Activities” are not defined: there is nothing to prevent Parties from interpreting as included placing on the market of certain products.
This was much debated during the Convention negotiation. As for example the deliberate release of GMOs: as a first step this was initially left at discretion of the Parties. As a second step, the **Almaty amendment was adopted in 2005**.
 - This amendment introduced a new art. 6 bis and an Annex I bis according to which PP has to take place in decisions on deliberate release and placing on the market of GMOs: “early and effective information and PP prior to making decisions on...”
 - The “modalities” laid down in Annex I bis

- Art. 6 (11) amended: the rest of article 6 no longer applies and there is a clear distinction between GMOs and “other activities”
- Obligation to make public the summary of the notification and the assessment Report “without prejudice to applicable legislation on confidentiality”
- Non confidential information includes environmental risk assessment,
- PP allows the public to submit “comments, information analysis and opinions”
- “Endeavour to ensure (...) due account taken of outcome of PP procedure”.
- This obligation is weaker than under art. 6.
- The text of the decision must be publicly available

C. Access to justice

- No specific reference to product-related matters, but
- Art. 9 (2): review applies only within the scope of art. 6 (not 6bis)
- Art. 9 (3) “national law relating to the environment”: product-related acts or omissions covered to the extent covered by national law.

2. Applicability of the Aarhus Regulation 1367/2006

A. Access to environmental product information held by EU institutions or bodies...

- ... Is guaranteed in principle: definition of environmental information in the Regulation is consistent with the Convention
- ... But is subject to the **exceptions** laid down in art. 4 Regulation 1049/2001, these exceptions being subject to special rules of interpretation (art. 6 Regulation 1367/2006)
 - Art. 4 (2) 1st indent: “...Shall refuse access to a document where disclosure would undermine the protection of commercial interests”, unless there is an overriding public interest in disclosure
 - Art. 6 (1) “... Shall be deemed to exist where the information requested relates to **emissions** into the environment”. The interpretation of “emissions” will be a key element.
 - If requests for access to information concerning products causing environmental emissions are to be judged **only** under the terms of Regulation 1049/2001 and 1367/2006, there is a strong case for disclosure.

But Community law contains specific provisions on confidentiality of certain information on chemical products and substances:

E.g. **Directive 91/414/EEC** art 14 and **Directive 98/8/EC** art. 19 “full justification required”: the information submitted by the applicant for authorization to competent authorities are treated as confidential information upon request. If the information is accepted to be confidential, there is an obligation not to disclose imposed upon Member States and the Commission. And there is a positive list of non confidential information which however includes only the *summary* results of (eco)toxicological tests.

E.g. **REACH Regulation** Title XI: increasingly detailed provisions on confidentiality

- Referring to Regulation 1049/2001 re information held by the European Chemicals Agency (ECHA) (registration dossiers)
 - Art. 115 list of confidential information “shall be deemed to undermine...”
 - Art. 116 list of public information (electronic access), but for some information confidentiality may be claimed if the justification is accepted as valid by the Agency
 - Regulation 1367/2006 certainly applies to ECHA but the REACH Regulation’s provisions on access to information would presumably be regarded as **lex specialis** vis-à-vis Regulation 1367/2006.
- Hence, confidentiality would prevail under Community law but this does not imply that Community law is fully consistent with the Convention.

B. Public participation

Regulation 1367/2006 only provides for PP re **plans and programs** relating to the environment.

The definition lies in art. 2 (1) (e). It would include, for example, the Community rolling action plan on substance evaluation (Title VI of REACH).

Under the Aarhus Regulation ECHA has the obligation to “provide early and effective opportunities for the public to participate” (REACH only provides for publication after adoption).

C. Access to review procedures

- New procedure (art. 10): request for internal review of **administrative acts** (or omissions).
- The definition lies in art. 2: acts adopted under environmental law, and measure of individual scope (this latter qualification was added during the legislative process, it was not present within the Commission proposal).
- The request can be formulated by the NGOs meeting the art. 11 criteria.
- Certain Community measures with respect to products are subject to review if the legal basis of the decision can be found in the Community **environmental law** regardless of the legal basis in the Treaties. “Environmental law” depends on the objectives of the legislation and is not limited to legislation based on art. 175. These measures comprise administrative acts concerning the application of Community law to individual cases/situations regardless of the addressee. This is the case e.g.
 - Of certain Commission decisions (comitology-based or not) under the chemical Directives and Regulations (including also future ECHA and Commission decisions under REACH),
 - Of authorizations for placing on the market of substances under REACH Title VII,
 - Of certain Commission decisions under for example Directive 91/414/EEC, Art. 8 (4): Community decision to extend the authorization granted by Member States for “temporary use” of a plant protection product not complying with the provisions of the Directive, and similar provisions in Directive 98/8/EC

Thanks to the questions raised after this presentation, the following points have been highlighted:

- As regards comitology, it has been stressed that the Aarhus Regulation is not aimed at redefining the composition of expert committees and that the public participation procedure it institutes will not address the lack of transparency of existing committees.
- On the other hand, the listing of active substances which may be included in plant protection products or biocides under Directives 91/414/EEC and 98/8/EC would not fall within the scope of the internal review procedure created by the Aarhus Regulation since these lists are in the form of Annexes to a Directive, which can not be considered as an administrative act as defined in the Regulation.
- Finally, it has been asked whether or not REACH, with the appeal procedure it creates, is in line with the Aarhus Regulation.
This appeal procedure concerns administrative decisions taken by ECHA but is open only to persons who are “directly and individually concerned”, ie not to NGOs according to the established case law of the ECJ.
Hence, the REACH Regulation itself does not seem to be in line with the Aarhus Convention. However, the same decisions may be subject to internal review under the general provisions of the Aarhus Regulation, which would apply concurrently with those of REACH.

Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies (excerpt)

TITLE IV INTERNAL REVIEW AND ACCESS TO JUSTICE

Article 10

Request for internal review of administrative acts

1. Any non-governmental organisation which meets the criteria set out in Article 11 is entitled to make a request for internal review to the Community institution or body that has adopted an administrative act under environmental law or, in case of an alleged administrative omission, should have adopted such an act.

Such a request must be made in writing and within a time limit not exceeding six weeks after the administrative act was adopted, notified or published, whichever is the latest, or, in the case of an alleged omission, six weeks after the date when the administrative act was required. The request shall state the grounds for the review.

2. The Community institution or body referred to in paragraph 1 shall consider any such request, unless it is clearly unsubstantiated. The Community institution or body shall state its reasons in a written reply as soon as possible, but no later than 12 weeks after receipt of the request.

3. Where the Community institution or body is unable, despite exercising due diligence, to act in accordance with paragraph 2, it shall inform the non-governmental organisation which made the request as soon as possible and at the latest within the period mentioned in that paragraph, of the reasons for its failure to act and when it intends to do so.

In any event, the Community institution or body shall act within 18 weeks from receipt of the request.

Article 11

Criteria for entitlement at Community level

1. A non-governmental organisation shall be entitled to make a request for internal review in accordance with Article 10, provided that:

- (a) it is an independent non-profit-making legal person in accordance with a Member State's national law or practice;
- (b) it has the primary stated objective of promoting environmental protection in the context of environmental law;
- (c) it has existed for more than two years and is actively pursuing the objective referred to under (b);
- (d) the subject matter in respect of which the request for internal review is made is covered by its objective and activities.

2. The Commission shall adopt the provisions which are necessary to ensure transparent and consistent application of the criteria mentioned in paragraph 1.

Article 12

Proceedings before the Court of Justice

1. The non-governmental organisation which made the request for internal review pursuant to Article 10 may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.

2. Where the Community institution or body fails to act in accordance with Article 10(2) or (3) the non-governmental organisation may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty.

Access to justice at the level of the EU: progress or stagnation?

Presentation by Dr. Jonas Ebbesson, Professor of environmental law, University of Stockholm, Member of the Aarhus Convention Compliance Committee (Summary)

Dr. Ebbesson pointed out that his presentation was meant to express his personal opinion.

- Under article 230(4) EC, the plaintiff has to demonstrate that he is directly and individually concerned by the Community Institution's decision challenged. The European Court of Justice interpreted these two notions in a way which makes it almost impossible for individuals and NGOs to bring a case before the ECJ to challenge the Community Institution's decision relating to the environment. If the ECJ finds a Community measure does not comply with EC law, it can barely call for necessary measures to be taken. It was against this background that the Aarhus Regulation was adopted and is to be analysed.

- The Aarhus Regulation

Regarding access to information and public participation, the Regulation is intended to provide for a review system in order to meet the requirements of the Aarhus Convention on access to justice.

Certain qualified entities may trigger the internal review within 6 weeks after the decision. The internal review must take place within 12 weeks.

If the reply resulting from the internal review is not in line with the plaintiff's request, the plaintiff should be able to bring the case before the ECJ, although it is not fully clear whether the Aarhus regulation will provide for that.

As for "environmental law", the scope seems to be large as the decision challenged does not have to be adopted under the environmental EC chapter, but here too the limits are not fully clear.

A crucial issue is whether a negative reply from the Community institution will be considered a decision, which is possible to bring to the European Court of Justice. In this respect, the ECJ has previously looked beyond the formal title of the act and rather considered its legal effects. Thus, there is some possibility that the Court would do that with regard to replies under this regulation too, although it is not yet clear.

The criteria of "qualified entity" require that to ask for internal review, the Ngo in question must be independent, have as a primary objective the protection of the environment, and exist since at least 2 years. According to Dr. Ebbesson, these criteria should not be too difficult to meet. Moreover, it should be noted that contrary to the Commission proposal, there is no requirement in the regulation for qualified entities that they are active at the Community level. This is, according to Dr. Ebbesson, an improvement.

Dr. Ebbesson then pointed out that access to justice remains quite difficult for individuals. Indeed, it remains for individual almost impossible to challenge a decision which is not directly addressed to them. Without meeting the criteria for qualified entity under the

regulation they do not have access to internal review and, hence, it does not improve their case with regard to the ECJ either.

Dr. Ebbesson then mentioned a recent case that was handled by the Compliance Committee involving Belgium.

- Progress or stagnation?

The internal review system set up by the Aarhus Regulation is, according to Dr. Ebbesson, a constructive way to partly implement the Aarhus Convention, *provided that* it really makes it possible for NGOs to challenge the replies given to requests for internal reviews. If so, by creating the chapter on access to justice, some entities will be enabled to go to the ECJ; if not, the regulation is a failure in this respect.

Moreover, the regulation fails to provide any means for individuals to challenge Community acts and omissions. This, according to Dr. Ebbesson, remains an essential issue.

Finally, an issue not dealt with by the Regulation is the fact that the procedures before the ECJ are very costly, which makes it impossible for some NGOs and individuals to use the procedures provided for by the Regulation. The Aarhus Convention, on the other hand, clearly sets out that the remedies should not be prohibitively expensive.

Hence, for NGOs, the Regulation can be considered as resulting in some progress, but only if the NGOs will be given standing to challenge the replies for requests before the ECJ. For individuals, the regulation does not make any change whatsoever.

Access to justice at the level of the EU: a practitioner's perspective

Presentation by Laure Levi, Member of the Brussels Bar, CMS De Backer Avocats; Research Associate, Institute for European Studies, Université Libre de Bruxelles (Summary)

- Ms. Levi began by presenting the “Paraquat case” since it can be considered as an illustration of how difficult the access to EC Court is for associations.

The *Paraquat* case was opened by six applicants, associations under national law which, generally speaking, aim at the protection of environment and of workers' health.

The purpose of the appeal was the annulment of a directive (directive 2003/112) which included ‘Paraquat’ as an active substance.

The Commission submitted a plea of inadmissibility notably on the fact that the applicants would not have no *locus standi*. More specifically, the Commission denied that the applicants are directly and individually concerned by the directive.

The Court did not follow the applicants' arguments to rebut the plea of inadmissibility and considered the following:

1° The directive affects the applicants in their objective capacities as entities active in the protection of the environment or workers' health in the same manner as any other person.

2° The fact that a person participates, in a way or in another, in a process, leading to the adoption of a Community act does not distinguish him individually in relation to the act in question unless the relevant Community legislation has laid down specific procedural guarantees for such a person.

3° The fact that national law considers applicants to be directly individually concerned by acts which adversely affects the interests which they defends is irrelevant for the purposes of *locus standi* before the EC Court.

4° The admissibility of an action for annulment before the Community Court does not depend on whether there is a remedy before national Court enabling the validity of the act being challenged to be examined.

5° The mere fact that an applicant is affected by an act in a manner opposite to that in which a person entitled to bring an action for annulment of that act is affected is not sufficient to confer standing on that applicant.

6° The principles governing the hierarchy of norms preclude secondary legislation from conferring standing on individuals who do not meet the requirement of the 4th paragraph of Article 230. *A fortiori* the same hold true for the statement of reasons of a proposal for a secondary legislation.

Even if the applicants were acknowledged as qualified entities for the purposes of the Aarhus Regulation proposal, it is clear that they have not put forward any reason why that

status would lead to the conclusion that they are individually concerned by the contested act.

Hence, the *Paraquat* case is an illustration of how the EC Court interprets the individual concern.

Moreover, that case law is still useful for those who are not granted procedural rights under Regulation No 1367/2006 and will not be the addressees of decisions of a Community institution or body.

- Ms. Levi then gave a brief overview of the relevant rules regarding access to justice.

On the one hand, under article **230 (action for annulment) and 232 (action for failure to act) of the EC Treaty** any natural or legal persons may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of a direct and individual concern to the former.

- Under the “*Plaumann* formula” (case 25/62 [1963] ECR 95), in order for a measure to be of individual concern to the persons to whom it applies, it must affect their legal position because of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as a person to whom it is addressed.

Even though one could perceive some signs of relaxation of that formula in *Extramet* (case 358/89, [1991] ECR I-2501) and *Codorniu* (case 309/89 [1994] ECR I-1853), the European Court of Justice reasserted the restrictive nature of the *Plaumann* formula in the *Greenpeace* case (case T-585/93, [1995] ECR II-2205 and on appeal case C-321/95 P [1998] ECR I-1651): “*standing cannot derive from a concern for the protection of the environment*”.

- In the *Union de Pequeños Agricultores (UPA)* case (case C-50/00 P [2002] ECR I-6677) the European Court of Justice stated that the absence of remedy on national level does not give *locus standi* before the EC Courts, it remains the responsibility of Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection (a.o. preliminary ruling for validity).

On the other hand, under **Regulation No 1367/2006** it establishes access to justice provisions in relation to acts and omissions by Community bodies and institutions which contravene environmental law.

The relevant rules can be summarized as follows:

- There is a limitation of legal standing to environmental organization which meets a number of conditions (article 11) : the ‘qualified entities’.
- The legal scheme is based upon the mechanism of internal review in order not to interfere with the right to access to justice under articles 230 and 232 of the EC Treaty (individual and direct concern).

- The qualified entity shall have access to review proceedings before the Court of Justice to challenge the substantive and procedural legality of a ‘decision’ (written reply) of the Community institution or body.
- The ‘decision’ is :
 - The rejection of the request for internal review or
 - The silence further to such a request in the period of 12 weeks or possibly 18 weeks or
 - The decision is insufficient to ensure compliance with the environmental law concerned.
- As for the *locus standi* (the applicant) two hypotheses may occur:
 - The appellant is a qualified entity challenging an administrative act/omission:
The decision (or failure) is addressed to the qualified entity further to the internal review. Therefore, no problem arises as for the *locus standi* (Analogy with the regulation on access to document (Regulation No 1049/2001) and *WWF UK* case (T-105/95 [1997] ECR II-313)
 - The appellant is not a qualified entity and/or is challenging an act which is not an administrative act/omission:
The decision (or failure) is not addressed to that person as that person was not entitled to file an internal review. Therefore, the requirement of direct and individual concern must be fulfilled to challenge the act (situation ‘*paraquat*’ as the regulation was not adopted).
- Ms. Levi then highlighted three special cases: the so called closed classes, cases in which the applicant has specific rights and the case in which the applicant has participated in one way or another in the procedure leading to the adoption of the contested act

As for the last special case, the principle can be explained as follows: the fact that a person participates in one way or another in the process leading to the adoption of a community act does not distinguish that person individually in relation to the act in question unless the relevant community legislation has laid down specific procedural guarantees for such a person (case T-60/96, *Merck and others v. Commission* [1997] ECR II- 849, para 73; *Paraquat* case).

The applicant must have a formal « right » to participate in the procedure (whether this right is organized in a formal regulation or derives from general principles of law - examples : competition rules, antidumping).

- Finally, Ms. Levi made clear who the defendant can be.

Under articles 230 and 232 of the EC Treaty the defendant can be the European Commission, the Council, the European Parliament, the European Central Bank, the Court of Auditors and institutions.

Under the Regulation 1367/2006 any Community institution or body can be the defendant.

Meanwhile, Ms. Levi pointed out some questions which could have significant consequences. On the one hand, do the European Court of Justice and the CFI jurisdiction under Article 230 of the EC Treaty to declare acts of such bodies void (*idem* for the failure to act)?

On the other hand, as for institutions, can an analogy with the case law in actions for damages take place? « [a] *Community body established by the Treaty and authorized to act in [the Community's] name and on its behalf* » may be an « institution » of the Community for the purpose of article 288 of the EC Treaty (ECJ, case C-370/89, *SGEEM and EIB*, [1992] ECR I-6211, paras 15-16).

Accountability and transparency of EU environmental policy-making: an NGO perspective

Presentation by Mr. John Hontelez, Secretary General, European Environmental Bureau

Promoting environmental policy-making that takes the views of environmental organisations into account is the very reason for existence of the European Environmental Bureau. Its first members, in 1974 decided they needed a representative in Brussels to collect information about what the Commission and Council were cooking and a platform to discuss amongst themselves on how one, on the one hand, could influence decision making processes, and, on the other hand, see to it that decisions that were considered positive were actually applied. The agent, soon becoming a small bureau indeed, spent its time in collecting information and distributing it to the members, therewith providing transparency in practice. Much of this information was official, but not easily accessible both for financial reasons (subscription to the *Official Journal* was quite expensive) and for reasons of complexity of the legislation and policies.

But from the start, the EEB provided enhanced transparency with its special relationship with what later became DG Environment, meaning that we were informed at earlier stages, our opinion was sought, and we could also arrange direct contacts between the Commission and our members. And as our means have increased, we are now also able to organise capacity building activities and systematic involvement of our members in our work.

Since the end of the eighties, we can see some major improvements regarding accountability and transparency. First of all, the Single Market Treaty made a big difference. It clarified the mandate of the EU on environmental policies and it gave the European Parliament more power. And in particular this last development has meant a lot for accountability and transparency, in particular regards law-making. This power was further improved with the Maastricht Treaty. This meant that the Commission had to pay much more attention to the Parliament, defend its proposals better, answer to questions etc. This brought the decision making more in the public arena. And we as EEB have increasingly been successful in “assisting” the EP in its work.

Another important development was the adoption of the 5th Environmental Action Programme, in 1993. In the slipstream of the preparations for the Rio Summit, there was a wave of environmentalism in Europe and increased recognition that decision makers should not do their work in isolation, but in close cooperation with stakeholder. Business and Industry as well as local authorities were the stakeholders most officials were thinking of, but the environmental movement was not forgotten, in particular to help the Commission prevent that it could be accused of one-sided decision making. Although we were forgotten indeed, at some times. For example the later-on much hailed Auto-Oil stakeholder process was closed for environmental NGOs. Only the car producers and the oil industry had the privilege to discuss with the Commission how and how fast, cars and fuels had to become cleaner. Another process whereby it took us quite some time and effort to establish systematic involvement was in the EU standardisation process. Since the end of the eighties, setting EU standards to support the implementation of EU legislation was delegated to a private body, composed of national standardisation bodies. While in policy statements of all three EU institutions the importance of involvement of NGOs in this, relatively technical and particularly labour intensive, process was emphasized, it took us more than 10 years to

convince DG Environment that it should finance NGO involvement in this. This work is now coordinated through a special organisation called ECOS.

The privatisation of standardisation is part of a larger process to remove part of decision making again out of the public political arena. Framework legislation is less precise than traditional directives. This approach reduces the real influence of the European Parliament, and brings follow up decision making back behind closed doors, in comitology, as well as in bodies where we do have sometimes access, such as the working groups discussions on Best Available Technologies for industry sectors falling under the IPPC Directive, and working groups to draft guidance on the implementation of the Water Framework Directive. But if we are there, we are privileged. The environmental movement as a whole, or the general public, will find it much more difficult to follow or influence this.

Other DGs have followed on, be it incidentally and for different reasons. In 1997 Commissioner Fischler decided, against the will of many in DG Agriculture, to open up the advisory committees on different aspects of the EU agricultural policy, for environmental NGOs and animal protectors. So we got in, realising then that the real influential discussions with the Commission were no longer there, but in informal exchanges where we are not part. DG Trade set up a platform for consultation of NGOs after the defeat of the OECD coordinated initiative for a Multilateral Investments protection Agreement (MIA) and the strong lobbies of NGOs in trade negotiations. Here the objective clearly was to come to better terms with NGOs and to be better prepared for their criticism.

A big improvement for accountability and transparency obviously is the use of the internet by the EU Institutions, as well as by us of course. The possibility for any citizen in the world to have direct access to approved legislation and policies and even to official papers that support the decision making process between the 3 institutions is simply fantastic. However, making papers available does not guarantee that people understand the context, the potential impact, the choices that were made, the other options. Therefore, organisations such as the EEB still have an essential role to play. And, direct dialogue between environmental organisations and the EU Institutions remains essential.

To that extent something about the second pillar of the Aarhus Convention, and the way it is laid down in the new Regulation. The text there remains very general and is inspired by the "*general principles and minimum standards for consultation of interested parties by the Commission*", published on 11 December, 2002. The Commission makes commitments, but they are not laid down as rights of citizens, so Commission officials have a lot room for manoeuvring when it comes to the specific application. It also excludes "comitology" from its scope.

A main concern we have with the implementation is the reliance on internet consultation. We should not confuse this with public participation. While we believe internet consultation is very useful, it cannot replace a **discussion directly between interest groups and senior officials of the Commission**, in which views are exchanged, opinions are tested, creative solutions found. And sometimes one has the impression that officials consider the internet consultation as an easy alternative, whereby the results do not really matter. So they ask silly questions to the general public, such as, "*Do you think the sustainable development strategy and the Lisbon strategy complement each other in a satisfactory manner?*" How many citizens in Europe have a clue about what the Lisbon strategy is at all?

Moving to the first pillar, on access to information, I must say that most of the essential information that we need, we are getting. Either in the official way, often though in other

ways. But of course one cannot replace official procedures with relying on leaks, on officials that find it useful that we are informed at essential moments. First of all this is not reliable and secondly it provides information only to a privileged organisation that has invested for years in its networks within the decision making institutions. So the Access to Documents Regulation and the Aarhus Regulation are important.

As EEB we do use the Documents Regulation, several times a year. The implementation is cumbersome, and has not added very much to our tools yet. An example: In July it became clear to us that the Commission was soon going to decide whether the construction of a new harbour on Tenerife could be allowed in light of the EU biodiversity legislation. Our Spanish groups were concerned that such a decision would be taken on the basis of one-sided and incorrect information. So on 18 July I asked the Commission, by fax, to send me the information which they were using. The first response was just to say that my request was registered on 28 July, so 8 working days later. On 1st September, so again 26 working days later we received a substantive answer. Parts of the documents were refused, and for another part the Commission was waiting for the Spanish authorities to respond. The refusal was on the basis of article 4.3. (1) of the 2001 Access to Documents Regulation. Then I caused some delay myself, sending a “confirmatory request” on 15 September only. In it I asked to reconsider the refusal. Article 4.3 (1) says that refusal is precluded if “*disclosure of the document would seriously undermine the institution’s decision-making process, unless there is an overriding public interest in disclosure*”. But DG Environment had only said that there was no overriding public interest for disclosure. I protested against that fact that the Commission did not explain why disclosure “*would seriously undermine the institution’s decision-making process*”. Furthermore, I stated that “organisations that have a serious concern about the harbour project, in an open democracy, should be able to judge whether the Commission is working on the basis of correct and complete information before it takes decisions. That is the overriding public interest.” I said. This fax, sent on the 15th, was registered on the 19th, 2 working days later. On 10 October, exactly 15 working days later, I received a letter that the Commission needed more time to consider my request. The next deadline therefore is 3 November, according to the Commission, which means 17 working days instead of 15 in my counting. In the meantime I did not get any of the information that was dependent on the Spanish government approval either. So, more than 3 months after my request, I still have not seen anything. It is clear that the Commission tries to do everything in its power to keep us out.

This is not the only bad example. And it shows that a lot still has to change in the mentality of Commission officials. Many see transparency as an unwelcome obligation, or, at best, a tool you can use when it suits you.

The Aarhus Convention has started to make a difference already, also on the EU level. The new PRTR Regulation is a good example, based on the PRTR-Protocol. More in general, environmental officials now refer to the Aarhus Convention in many cases when it is organising consultations, so it gradually makes its way also regarding the second pillar. But the refusal of the Council and, in second reading the European Parliament, to guarantee access to the European courts is a major setback.

When one speaks about accountability and transparency in relation to the EU, one should not forget to Council. This is still the most secretive body, where most of the work goes on behind closed doors, by officials that are only accountable to their own government. It is progress that the experiment of video-broadcasting some last-phase discussions on legislation in the environment council has now become a standard. This reduces the possibility from ministers and government to blame Brussels as an amorphous entity for everything that goes

wrong, and to hide their own role in it. But this is only a fragment of the decision making process. While the European Parliament and national parliaments were in public in all stages of its legislative work, Coreper and its working groups work behind closed doors. And also the conciliation between EP and Council is not taking place in public. Making these processes public would make the decision making not only more transparent, but also more political, less driven by civil servants who are more likely to look for compromise. As EEB we manage to intervene more and more, also because of our increasingly effective networking with national members, who approach the environment ministries in the capitals, but this is not a sufficient proxy for real transparent and accountable lawmaking in the EU.

Thanks to the questions raised after the last 3 presentations, the following points have been highlighted:

- Regarding the cost issue, it has been reminded that if the plaintiff is successful the costs are reimbursed by the institution.
- As for the influence of the Aarhus Convention on articles 230 and 232, it has been recalled that an international treaty can not impact on the EC treaty.
- It has also been stated, regarding the *UAP* case, that lawyers wanted the right to a quality environment to be recognized as a right as such, and have not been satisfied by the ECJ's ruling.
- In response to interventions claiming that the European Commission does not respect the current time frames it has been pointed out that NGOs should collect proofs and submit them to the European Ombudsman.
- A question came about the US's strong opposition to the way the Convention Parties are working with Aarhus Convention's article 3.7.
"Art. 3
(...)
7. Each Party shall promote the application of the principles of this Convention in international environmental decision-making processes and within the framework of international organizations in matters relating to the environment."

The Parties adopted in 2005 the so-called Almaty Guidelines which are now being applied. The US considers this as unwelcome interference in the way other international forums are being run. What is currently happening is that the secretariat of the Convention is contacting more than 100 international forums with question about their public participation practices. The Aarhus Convention's website shows the responses as soon as they arrive.

* Indeed, the interest for the Aarhus framework is worldwide (Japan, Latin America ...). This "export" process is very careful

- The intense Chemical Industry Federation (CEFIC)'s lobbying together with the Council's opposition to grant the qualified entities access to justice to challenge an Institution or Body's administrative act considered not to respect EC law has been highlighted. Indeed, this access to justice was present within the European Commission's proposal but has been deleted.

Hence, to challenge an administrative act which would not respect EC environmental law, NGOs have to comply with articles 230 and 232 EC (conditions of direct and individual concern).

- Finally, in response to a participant's concern regarding the fact that bodies do not have a real power to adopt administrative acts, it has been answered that these bodies do have some delegated powers in some areas.