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## REVIEW

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## The Aarhus Convention in operation: EEB Survey Initial Results\*

Ralph Hallo

### 1 Introduction

The Aarhus Convention is generally recognised as the most important international legal instrument in the field of environmental rights.<sup>1</sup> All 27 EU Member States (with the exception of Slovakia) and the European Union have signed the Convention and all of these signatories (except Ireland) have now ratified the Convention.<sup>2</sup>

The Convention is generally described as having three pillars: access to information, public participation and access to justice. The EU prepared for ratification by adopting two directives and proposing a third, one for each of the three pillars (collectively, 'the EU's Aarhus Convention directives'). The deadline for implementation of the first directive, on public access to environmental information, fell early in 2005; the deadline for the second, on public participation, was in mid-2005. Progress on the proposed third directive, on access to justice, is stalled in the Environment Council.

The EEB (the European Environmental Bureau)<sup>3</sup> has been actively involved, over many years, in efforts to develop and use the Aarhus Convention. Earlier this year, two years after the deadline for transposition of the Information Directive and a year and a half after the deadline for transposition of the Public Participation Directive, the EEB determined that the time was right to launch an investigation into the initial experience with the implementation and use of the two directives. The EEB also wished to examine experiences with access to justice and the need for the currently stalled proposal.

### 2 How is the Aarhus Convention working?

To answer this question, the EEB recently conducted a Survey of the implementation of the EU's Aarhus Convention Directives in the Member States. The EEB invited its member organisations to participate in the Survey, either directly or via the participation of independent environmental institutes and researchers with expertise in Aarhus-related issues.

Interest in the Aarhus Convention among EEB organisations in the Member States is high and there was also widespread readiness to participate in the Survey.

The objective of the Survey was to provide a first assessment of the impact of the EU's Aarhus legislation in the Member States. The Survey investigated the transposition, implementation and enforcement of the EU directives implementing the first two pillars of the Aarhus Convention (access to environmental information and public participation in decision-making in environmental matters). The Survey also examined the potential impact of the proposed EU directive to implement the third pillar of the Aarhus Convention (access to justice in environmental matters).

### 3 The Survey questions:

The Survey asked the following questions about the first two pillars, access to information and public participation:

#### 3.1 Transposition

- Have the first and second pillar directives been introduced into national law on time (Directive 2003/4 and 2003/35)?
- If not, what is the current status of transposition? (Is, for instance, a proposed law currently under consideration by the national parliament?)
- Has the European Commission taken any action regarding late or incorrect transposition?
- Have environmental organisations been involved in preparing for transposition?
- Have other stakeholders been consulted? E.g. local governments, business interests, etc.

#### 3.2 Implementation

- Have the directives been properly implemented?
- Are there any studies analysing the implementation? (For instance, by the environment ministry itself or by someone working for an environmental group or at a university or research institute.)
- What efforts have been/are being made to inform the public of the new directives?
- What use is being made of the opportunities the new directives provide?

\* This article appeared in an earlier and shorter form in *Metamorphosis*, the Newsletter of the European Environmental Bureau (EEB)

1 The Convention's full title is the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. It was adopted in 1998 in the Danish city of Aarhus, hence its common name. For the text of the Convention, see <http://www.unece.org/env/pp/treatytext.htm>.

2 <http://www.unece.org/env/pp/ratification.htm>.

3 The EEB is a federation of more than 140 environmental organisations based in all EU Member States, candidate and neighbouring countries. The EEB works to inform and represent its members on a broad range of issues concerning European environmental policy.

- Is there an increase of environmental information requests?
- Does the public concerned participate in EIA and IPPC permitting proceedings?
- Is there any system in place to register information requests, for instance by national or local authorities?
- Is it possible to draw some preliminary conclusions about the use of the new directives?
- Is it possible to make an early assessment of the effect of the new provisions?
- Have studies been made of access to justice in environmental matters in your member state? Please list them.
- Do you consider your country to be in compliance with the 3<sup>rd</sup> pillar of the Aarhus Convention? If not, please state why not.

On 6 June 2007, the EEB organised a seminar on the Aarhus EU legislation. At this seminar, the initial results of the Survey were presented. By the time of the seminar, reports had been received on two-thirds (18 of 27) of the Member States. This article summarises the initial results of the EEB Survey.

### 3.3 Enforcement

- Have complaints been made to the European Commission about transposition?
- Have complaints been made to the European Commission about application?
- Have cases been brought before national administrative or judicial bodies concerning refusal of
  1. access to information; or
  2. problems with public participation?
- What have been the results of any cases brought?
- Do Access to Justice provisions provide for
  1. adequate, fair, and effective remedies;
  2. injunctive relief;
  3. equitable, timely and not prohibitively expensive legal redress?
- Do you consider your country to be in compliance with the
  - 1<sup>st</sup> pillar of the Aarhus Convention? If not, please state why not.
  - 2<sup>nd</sup> pillar of the Aarhus Convention? If not, please state why not.

The Survey asked the following questions about the third pillar and the proposed access to justice directive:

- Would the proposed directive, if adopted as proposed, improve access to justice?
- Or is there a risk the Directive could lead to a rollback of existing rights ?
- Would the proposed directive neither improve or worsen the existing situation?
- How, specifically, would the proposed directive improve or worsen the existing situation?
- Are there specific changes that should be made to improve the existing access to justice situation that are not currently part of the Commission's proposed directive? Please specify.

### 4 1<sup>st</sup> pillar: Access to information

The Survey revealed that, overall, the Member States have done a good job of transposing Directive 2003/4 on public access to environmental information into national law. There have been some delays, particularly at regional level in federal states. There are also a number of shortcomings in implementation in individual Member States, concerning different provisions of the Directive. The number of requests was reported to be stable, in the majority of Member States, or in some cases higher, although it is not always clear to what extent this can be attributed to the Information Directive (as opposed to the Aarhus Convention itself or existing national law). Consultation with environmental organisations and other stakeholders has taken place in a number of Member States and has contributed to effective implementation. Efforts to raise awareness of the Directive and the opportunities it provides have been limited, however. This includes efforts to inform the public of its access to information rights as well as efforts to inform and train officials in their public information duties. Systematic registration of requests is also apparently not taking place. This is an area that the Survey identifies as ripe for improvement. Problems continue to arise with the overly broad interpretation of the exceptions, high charges for documents, practical restrictions on accessibility (e.g. limited opening hours for inspection, inadequate photocopying facilities). Challenges to refusals are being made, usually with success, though in many cases, the information ultimately is obtained too late for it to be used.

### 5 2<sup>nd</sup> pillar: Public participation

The Survey showed however that the situation regarding Directive 2003/35 on public participation is much less positive. There have been numerous and significant delays in transposition of this Directive into national law. There have also been serious deficiencies and gaps in the way in which the Directive has been taken up into national law. Many reports identified the principal difficulty with the implementation of this Directive to be the restrictive way in which Member States are defining the criteria for

identifying ‘the public concerned’, namely the people permitted to participate in environmental processes such as licensing. Difficulties are also reported with inflexible, short time periods for submitting comments, particularly in technically complex matters such as industrial plant licensing, and with the high cost of participation. The cost of organising the necessary technical expertise can be beyond the capacity of environmental organisations or local citizens groups. There was also a strong sense that public comments were not being taken seriously and that public authorities often viewed and conducted the process of public participation as a formal obligation to be met rather than as a contribution to better decisions. Nevertheless, citizens and environmental organisations were reported to be making considerable use of the available opportunities for public participation, particularly with respect to environmental impact assessment (EIA).

## 6 Enforcement

The Survey reports that a number of complaints have been made to the European Commission about late transposition and non-compatibility of national law with the requirements of the Directives. The Commission has promptly launched a number of inquiries and in some cases infringement proceedings. This has produced the best results as far as transposition of the Directive 2003/4 is concerned; moving the Member States toward transposition and compliance with Directive 2003/35 has been more difficult.

Environmental organisations and citizens have also made use of national courts and proceedings to secure the rights granted by these two Directives. Again, the picture is more favourable as far as access to information is concerned. Cases brought to gain access to environmental information have been ‘successful’ more often than those brought to secure participation in permit and other proceedings, such as EIA reviews. It is worth noting, however, that success in the information cases is relative, since the court-ordered release of the information frequently comes too late for the information still to be of use. Many reports also described the lack of availability of interim relief (e.g. court-ordered suspension of work on a project such as roadbuilding); challenges to deficiencies in the licensing or EIA proceedings might be won but by then the project at issue would have already been built.

## 7 3<sup>rd</sup> pillar: Access to justice

The Survey also investigated attitudes toward the proposed Directive on access to justice in environ-

mental matters. The Commission’s proposal has been stalled in the Environment Council where most Member States have been claiming that the directive simply isn’t needed. The Survey shows that environmental groups have a different opinion.

The Survey shows strong support for a directive and a decided opinion that the proposed directive would improve access to justice. Numerous objections were made, however, to the criteria the directive proposes for access to justice for so-called ‘qualified entities’. The criteria include requirements not found in national law and there is the concern that Member States would adopt these requirements even though they are not required to do so.

The Survey also asked whether there was any concern that the directive could lead to a rollback of existing rights. Responses indicated that in some Member States this risk is present. This risk could be addressed by the terms of the directive itself.

Among the most frequently mentioned specific changes that the proposed directive could bring about in order to improve access to justice are: a reduction in the costs of legal proceedings and the recognition of the right of environmental groups to bring cases to challenge non-compliance with EU environmental law at national level. The proposed directive is not, however, expected to address other difficulties such as the length of time it frequently takes to obtain a court decision, even in administrative proceedings.

## 8 Compliance conclusions

The Survey comes to preliminary conclusions about EU legislation and compliance in the Member States with the three pillars of the Convention. As far as the 1<sup>st</sup> pillar is concerned, the answer to the question of compliance is a clear ‘Yes’. As for the 2d pillar, the answer is ‘No, not really’. For the 3d pillar, the view the Survey gives is that without the Directive on access to justice, the EU Member States cannot be considered to be in compliance with the Aarhus Convention’s third pillar requirements.

## 9 Further steps

The EEB intends to follow up this work in the coming months by publishing an review of the responses and by issuing a set of recommendations based on the Survey results in early fall in advance of the next meeting of the Parties to the Aarhus Convention.

For further information on the Survey and the EEB’s work on the Aarhus Convention, please contact: Mara Silina, mara.silina@eeb.org.

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

#### **The Environmental Law Division of the Öko-Institut:**

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:

- Undertaking projects in developing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

Main areas of research:

- **European environmental policy**
  - Research on implementation of European law
  - Effectiveness of legal and economic instruments
  - European governance
- **Environmental advice in developing countries**
  - Advice for legislation and institution development
  - Know-how-transfer
- **Companies and environment**
  - Environmental management
  - Risk management

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of *homo oeconomicus institutionalis*, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

- Product policy/REACH
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conservation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

sofia is working on behalf of the

- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Nature Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

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## elni

*In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.*

*Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.*

*Since 2005 elni is a registered non-profit association under German Law.*

*elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.*

### **Coordinating Bureau**

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

### **elni Review**

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

### **elni Conferences and Fora**

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brus-

sels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

### **Publications series**

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant, 2002.
- Voluntary Agreements - The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London, 1998.
- Environmental Impact Assessment - European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd., London, 1997.
- Environmental Rights: Law, Litigation and Access to Justice, Deimann / Dyssli (eds.), Cameron May Ltd., London, 1995.
- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
- Environmentally Sound Waste Management? Current Legal Situation and Practical Experience in Europe, Sander/ Küppers (eds.), P. Lang, 1993
- Licensing Procedures for Industrial Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wilmowsky/Roller, P. Lang, 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/ Roller (eds.), P. Lang, 1991.

### **ElNi Website: elni.org**

On the elni website [www.elni.org](http://www.elni.org) one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.